Demands and Recovery

Sec. 73

DETERMINATION OF TAX NOT PAID OR SHORT PAID OR ERRONEOUSLY REFUNDED OR INPUT TAX CREDIT WRONGLY AVAILED OR UTILISED FOR ANY REASON OTHER THAN FRAUD OR ANY WILFUL MIS-STATEMENT OR SUPPRESSION OF FACTS

1. Section 73 deals with determination of tax
   - not paid; or
   - short paid; or
   - tax erroneously refunded; or
   - input tax credit wrongly availed or utilised.

   This section covers determination under circumstances of cases not involving fraud, wilful misstatement or suppression of facts;
2. This section also covers the time limit within which the proper officer shall issue the Notice and order can be issued for the determination/recovery of tax payment defaulted by the taxable person.
3. The time limit for issuance of Notice and order is provided herewith:

Particulars	Time limit for issuing show cause notice	Time limit for issuing order
Cases involving other than fraud, wilful misstatement or suppression of facts.	At least 3 months prior to the time limit specified under subsection (10) for issuance of order.	3 years from the due date of filing annual returns/3 years from the date of erroneous refund.

4. Section 73 also applies for recovery of interest payable which is not paid or partly paid or interest erroneously refunded.

5. Section 73 is applicable under the cases other than fraud, or wilful misstatement or suppression of facts with an intention to evade payment of tax.

6. The provision provides for -
   (a) Service of notice by proper officer;
   (b) Notice shall be served on the person who is chargeable with tax, who has -
      - Not paid or short paid the tax
      - Received the erroneous refund;
      - Wrongly availed or utilized input tax credit;

   (c) Such amounts as mentioned above shall be required to be determined along with the applicable interest as per Section 50 and penalty as specified.
   (d) The notice has to be issued at least three months prior to the time limit of three years for issuance of order.

7. **Where no notice is required to be issued for demand:** In case proper officer has already issued an notice on the person for the period specified under section 73(1), subsequently if such officer finds **similar issue** for any **subsequent period**, then in such case **instead of issuing a detailed notice** for such subsequent period, proper **officer may issue a statement** for recovering the amount from such person and such statement shall be deemed to be a notice as per Section 73(1) on the **condition** that the **grounds** relied upon are the **same**, for the earlier notice issued for previous period.

8. The **proper officer shall may communicate** the details of any tax, interest and penalty as ascertained by him, to the assessee, **before service of Show Cause Notice** u/s 73(1) or 74(1). [Rule 142(1A) inserted by NN 49/2019 - CT, w.e.f. 09.10.2019] [the word 'shall' has been substituted by the word 'may' by NN 79/2020-CT, w.e.f. 15.10.2020]

   Effect of amendment w.e.f. 15.10.2020: Now, it is optional (not compulsory) for the proper officer to serve pre- notice communication to the assessee.

9. **Voluntary payment of tax and interest before issue of notice/statement:** Voluntary payment of tax and interest before issue of notice/statement can be done on the basis of either –
   - own ascertainment of such tax by assessee himself, or
   - ascertainment of tax payable by the proper officer;

   and the same shall be intimated to the proper officer after receipt of which the officer shall not serve any notice/statement to the extent of such payment. There can be no further proceedings with regard to tax and penalty so paid.

10. Where the person referred to in Rule 142(1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission. [Rule 142(2A) inserted by NN 49/2019-CT, w.e.f. 09.10.2019]

11. After the aforesaid submission, if the proper officer is of the opinion that the justification given in the **submission is not acceptable fully/partially** and the amount **of tax, interest or penalty is still due** from the assessee, then, the proper officer shall proceed to **issue Show Cause Notice** to the assessee for the amount of tax, interest or penalty remaining due from the assessee.

12. Where the assessee makes the payment of tax along with interest within 30 days of issuance of Notice/Statement. then in such case no penalty shall be payable and it shall be deemed that all the proceedings have been concluded.

13. **Sec. 73(11):** Where any self-assessed tax / any amount collected as tax is not paid within 30 days from the due date of payment of tax, then, inter alia, option to pay such tax before or within 30 days of issuance of SCN to avoid penalty, is not available.

14. After considering the representations of the person, the proper officer shall issue an order consisting the amount of tax, interest and penalty. The amount of penalty of shall be 10% of tax or Rs. 10,000 (CGST), whichever higher.

15. The proper officer shall pass an order within a period of 3 years from the
    - due date for filing of Annual return for the year to which the short payment or non-payment or input tax credit wrongly availed or utilised relates
    - date of erroneous refund.

Penalty Implications, in Summary:

tax, interest and penalty (as indicated below is paid), it is provided that further proceedings should not be continued so that extent:

Pay Tax Plus Interest	Amount of Penalty
Before issuance of show cause notice	No penalty
Within 30 days after the issuance of show cause notice	No penalty
In any other case	10% of the tax or Rs. 10,000, whichever is higher

Whether penalty in accordance with section 73 (11) of the CGST Act should be levied in cases where the return in FORM GSTR-3B has been filed after the due date of filing such return? [Circular No. 76/50/2018-GST, dated 31.12.2018]

1. As per the provisions of section 73(11) of the CGST Act, penalty is payable in case self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

2. It may be noted that a show cause notice (SCN) is required to be issued to a person where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised for any reason under the provisions of section 73(1) of the CGST Act. The provisions of section 73(11) of the CGST Act can be invoked only when the provisions of section 73 are invoked.

3. The provisions of section 73 of the CGST Act **are generally not invoked in case of delayed filing of the return in FORM GSTR-3B** because tax along with applicable interest has already been paid but after the due date for payment of such tax. It is accordingly clarified that penalty under the provisions of section 73(11) of the CGST Act is not payable in such cases. It is further clarified that since the tax has been paid late in contravention of the provisions of the CGST Act, a general penalty under section 125 of the CGST Act (i.e. upto Rs. 25,000 under CGST) may be imposed after following the due process of law.

Illustration 1:Rajul has been issued a show cause notice (SCN) on 31.12.2021 under section 73(1) of the CGST Act, 2017 on account of short payment of tax during the period between 01.07.2017 and 31.12.2017. He has been given an opportunity of personal hearing on 15.01.2022. Advice Rajul as to what should be the written submissions in the reply to the show cause notice issued to him. ***[RTP-May 2018]***

Answer:

The written submissions in reply to SCN issued to Rajul are as follows:

(i) The show cause notice (SCN) issued after period of limitation under section 73(1) of the CGST Act, 2017 is not sustainable.

(ii) The SCN under section 73(1) of the CGST Act, 2017 can be issued at least 3 months prior to the time limit specified for issuance of order under section 73(10) of the CGST Act, 2017. The adjudication order under section 73(10) of the CGST Act, 2017 has to be issued within 3 years from the due date for furnishing of annual return for the financial year to which the short-paid tax relates to

The due date for furnishing annual return for a financial year is on or before the 31st day of December following the end of such financial year [Section 44 of the CGST Act, 2017]. Thus, SCN under section 73(1) of the CGST Act, 2017 can be issued within 2 years and 9 months from the due date for furnishing of annual return for the financial year to which the short-paid tax relates to.

(iii) The SCN has been issued for the period between 01.07.2017 to 31.12.2017 which falls in the financial year (FY) 2017. 18. Due date for furnishing annual return for the FY 2017-18 is 31.12.2018 and 3 years period from due date of filing annual return lapses on 31.12.2021. Thus, SCN under section 73(1) ought to have been issued latest by 30.09.2021.

Since the notice has been issued after 30.09.2021, the entire proceeding is barred by limitation and deemed to be concluded under section 75(10) of the CGST Act, 2017.

Illustration 2:

Everest Technologies Private Limited has been issued a show cause notice (SCN) on 31.01.2021 under section 73(1) of the CGST Act, 2017 on account of short payment of tax during the period between 01.07.2017 and 31.12.2017, Everest Technologies Private Limited contends that the show cause notice issued to it is time-barred in law.

You are required to examine the technical veracity of the contention of Everest Technologies Private Limited. ***[MTP-May 2018]***

Answer:

The contention of Everest Technologies Private Limited is not valid in law. The SCN under section 73(1) of the CGST Act can be issued at least 3 months prior to the time limit specified for issuance of order under section 73(10) of the CGST Act [Section 73(2) of the CGST Act]. The adjudication order under section 73(10) of the CGST Act has to be issued within 3 years

from the due date for furnishing of annual return for the financial year to which the short paid/not paid tax relates to.

The due date for furnishing annual return for a financial year is 31st day of December following the end of such financial year [Section 44 of the CGST Act]. Thus, SCN under section 73(1) of the CGST Act can be issued within 2 years and 9 months from the due date for furnishing of annual return for the financial year to which the short-paid/not paid tax relates to.

The SCN has been issued for the period between 01.07.2017 to 31.12.2017 which falls in the financial year (FY) 2017-18. Due date for furnishing annual return for the FY 2017-18 is 31.12.2018 and 3 years period from due date of filing annual return lapses on 31.12.2021. Thus, SCN under section 73(1) ought to have been issued latest by 30.09.2021. Since in the given case, the notice has been issued on 31.01.2021, notice is not time-barred.

Illustration 3:

Enlist the circumstances for which a show cause notice can be issued by the proper officer under section 73 of the CGST Act, 2017. Specify the time limit for issuance of such show cause notice as also the time period for issuance of order by the proper officer under section 73.

[RTP, May 2019]

Solution:

As per section 73 of the CGST Act, 2017, a show cause notice can be issued by the proper officer if it appears to him that:

- tax has not been paid; or
- tax has been short paid; or
- tax has been erroneously refunded; or
- input tax credit has been wrongly availed or utilized,

for any reason other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax.

The notice should be issued at least 3 months prior to the time limit specified for passing the order determining the amount of tax, interest and any penalty payable by defaulter [Sub-section (2) of section 73].

The order referred herein has to be passed within three years from the due date for furnishing the annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund [Sub-section (10) of section 73].

Thus, the time-limit for issuance of show cause notice is 2 years and 9 months from the due date of filing annual return for the financial year to which the demand pertains or from the date of erroneous refund. As per section 44(1) of the CGST Act, 2017, the due date of filing annual return for a financial year is 31st day of December following the end of such financial year.

Illustration 4:

Checkernot has self-assessed tax liability under IGST Act, 2017, as Rs. 80,000. He fails to pay the tax within 30 days from the due date of payment of such tax. the following particulars

Determine the interest and penalty payable by him explaining the provisions of law, with available from his records:

Date of collection of Tax: 18th December, 2017; Date of payment of Tax: 26th February, 2018

No Show Cause Notice (SCN) has been issued to him so far, while he intends to discharge his liability even before it is issued to him, on the assumption that no penalty is leviable on his as payment is made before issue of SCN.

[CA Final, May 2018 - Old) (Marks 4)

Solution:

Date of collection of Tax: 18th December, 2017

Due date of payment of Tax: 20th January, 2018

Date of payment of Tax: 26th February, 2018

Since, No SCN issued u/s 73, therefore, no penalty is payable. However interest u/s 50 is payable @ 18% p.a.

No. of days from 20th January, 2018 to 26th February, 2018 i.e. 37 days

Interest 80,000 × 18% x 37/365 = Rs 1460.

As per section 73(11) of CGST Act, 2017, where self-assessed tax/any amount collected as tax is not paid within 30 days from due date of payment of tax, then, inter alia, option to pay such tax before issuance of SCN to avoid penalty, is not available.

Consequently, penalty equivalent to
(i) 10% of tax, viz., Rs. 8,000 or
(ii) Rs. 10,000

whichever is higher, is payable in terms of section 73(9) of CGST Act, 2017. Therefore, penalty of Rs. 10,000 will have to be paid by Checkernot.

Sec. 74

DETERMINATION OF TAX NOT PAID OR SHORT PAID OR ERRONEOUSLY REFUNDED OR INPUT TAX CREDIT WRONGLY AVAILED OR UTILISED BY REASON OF FRAUD OR ANY WILFUL MISSTATEMENT OR SUPPRESSION OF FACTS

The section covers determination of tax in cases of fraud, or any kind of wilful mis-statement or suppression of facts to evade payment of tax.

1. Whenever the tax is
   - not paid or
   - short paid or
   - credit wrongly availed or utilized or
   - erroneously refunded

   On account of the following to evade tax
   - Fraud
   - Wilful misstatement.
   - Suppression of facts

   the proper officer shall issue a notice for such amount along with interest as per Section 50 and penalty which shall be equivalent to amount of tax specified in notice

2. This section covers the time limit within which the proper officer shall issue the Notice and order for the determination/recovery of tax payment defaulted by the taxable person. As per the table below, the time limit for issuance of Notice and Order is provided herewith:

Particulars	Time limit for issuing show cause notice	Time limit for issuing order
Cases involving fraud, wilful mis- statement or suppression of facts to evade tax	At least 6 months prior to the time limit specified under sub-section (10) for issuance of order.	5 years from the due date of filing annual returns/5 years from the date of erroneous refund.

3. **Where no notice is required to be issued for demand:** Similar to the provisions under 73 explained earlier, this section also provides that a statement of demand may be issued instead of a detailed notice for the period other than the ones covered in the notice issued as per Sec 74(1) on **similar issue** and shall be deemed to be a notice as per Section 74(1) on the condition that the **grounds** relied upon **are same** as the notice for previous period.

4. The **proper officer shall may communicate** the details of any tax, interest and penalty as ascertained by him, to the assessee, **before service of Show Cause Notice** u/s 73(1) or 74(1), [Rule 142(1A) inserted by NN 49/2019-CT, w.e.f. 09.10.2019] [the word 'shall has been substituted by the word 'may' by NN 79/2020-CT, w.e.f. 15.10.2020]

   Effect of amendment w.e.f. 15.10.2020: Now, it is optional (not compulsory) for the proper officer to serve pre- notice communication to the assessee.

5. **Voluntary payment of tax and interest before issue of notice/statement:** The proper officer shall not serve any notice on the assessee in case of voluntary payment of tax and interest along with penalty @ 15% of tax on the basis of either
   - Own ascertainment of such tax by the assessee himself; or
   - Ascertainment of tax payable by the proper officer

   Assessee shall intimate the same to the proper officer after receipt of which the officer shall not serve any notice/statement to the extent of such payment. There can be no further proceedings with regard to tax and penalty so paid.

6. Where the **person** referred to in Rule 142(1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he **may make** such **submission**. [Rule 142(2A) inserted by NN 49/2019-CT, w.e.f. 09.10.2019]

7. After the aforesaid submission, if the proper officer is of the opinion that the justification given in the **submission is not acceptable fully/partially** and the amount of **tax, interest or penalty is still due** from the assessee, then, the proper officer shall proceed to **issue Show Cause Notice** to the assessee for the amount of tax, interest or penalty **remaining due** from the assessee

8. Where the assessee makes the payment of tax and interest along with penalty @ 25% of tax 30 days of issuance of Notice/Statement, then, in such case, it shall be deemed that all the proceedings have been concluded.

9. After considering the representations of the person, the proper officer shall issue an order consisting the amount of tax, interest and penalty. The proper officer shall issue an order after considering the representation made by the person chargeable with tax and the amount determined shall comprise of tax along with interest and penalty as stated above.

10. The proper officer shall pass an order within a period of 5 years from the due date for filing of Annual return for the year to which the short payment or non-payment or input tax credit wrongly availed or utilised relates date of erroneous refund.

11. Where the assessee makes the payment of tax and interest along with penalty @ 50% of tax within 30 days of communication of Order, then, in such case, it shall be deemed that all the proceedings have been concluded.

12. For the purposes of section 73 and this section,-
    (i) the expression "all proceedings in respect of the said notice" shall not include proceeding under section 132;
    (ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable

to pay penalty under sections 122, 125, 129 and 130 sections 122 and 125 are deemed to be concluded (omitted words substituted by Finance Act, 2021, w.e.f. 01.01.2022).

For Reference: [Discussed in Chapter 23]
Section 122 - Penalty for certain offences
Section 125-General penalty
Section 129-Detention, seizure and release of goods and conveyances in transit
Section 130-Confiscation of goods or conveyances and levy of penalty
Section 132-Punishment for certain offences [Imprisonment or fine or both]

13. The term "**suppression**" is specifically explained to mean -
    - non-declaration of facts or information which a taxable person is statutorily required to declare in the return, statement, report or any other document furnished under the Act or the rules made thereunder, or
    - failure to furnish any information on being asked for, in writing, by the proper officer

Penalty Implications, in Summary:
If tax, interest and penalty (as indicated below is paid), it is Provided that further proceedings should not be continued to that extent.

Payment of Tax, Interest & Penalty	Amount of Penalty
Before issuance of show cause notice	15% of the tax amount
Within 30 days after the issuance of show cause notice	25% of the tax amount
Within 30 days from the communication of order	50% of the tax amount
In any other case	100% of the tax amount (equivalent to tax)

Illustration 5:
What is the time limit for issue of show cause notice as contained under sections 73 and 74 of the CCST Act, 2017? Briefly discuss. ***[MTP-May 2018]***
Answer:

The provisions relating to time limit for issue of show cause notice as contained under sections 73 and 74 of the CCST Act are as under:

(i) In case of section 73 (cases other than fraud/suppression of facts/willful misstatement), the time-limit for issuance of SCN is 2 years and 9 months from the due date of filing Annual Return for the Financial Year to which the demand pertains or from the date of erroneous refund.

(ii) In case of section 74 (cases involving fraud/suppression of facts/willful misstatement), the time-limit for issuance of SCN is 4 years and 6 months from the due date of filing of Annual Return for the Financial Year to which the demand pertains or from the date of erroneous refund.

Illustration 6:

Discuss briefly the procedure for issue of Adjudication order under Section 74(9) & (11) and the time limit for passing Adjudication order under Section 74(10) of the CGST Act, 2017. (Marks 4)

Solution:

As per section 74(9) the proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

Section 74(11) where any person with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and penalty equivalent to fifty percent of such tax within thirty days of communication of the order, all proceeding in respect of the said notice shall be deemed to be concluded.

Time limit for passing Adjudication order under section 74(10) the proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or input tax credit wrongly availed or utilized relates to or within five year from the date of erroneous refund.

Sec. 75: General Provisions Relating to Determination of Tax

These provisions are general provisions for determination of tax and are applicable irrespective of whether the notice invokes the extended period or not:

1. If an order of **court** or Appellate Tribunal **stays** the service of notice or issuance of order then, the period of such stay will get **excluded from the period** of issuance of order i.e. 3 years or 5 years as the case may be.
2. When a notice has been issued considering the case to be for **fraud** or for wilful representation or for **suppression** of facts, and whereas the charges of fraud, suppression and misstatement of facts were not sustainable or **not established** by an order of Appellate Authority or Appellate Tribunal, then in such case the officer shall determine the tax as if the notice is issued for the **normal period of 3 years**.
3. **An order** required to be issued in pursuance of the **direction** of the **Tribunal or a Court** shall be issued within two years from the date of communication of the **said direction**.
4. Opportunity of **personal hearing** has to be granted when requested for in writing by the person chargeable with tax or where any **adverse decision** is proposed to be taken against the person.
5. Personal hearing can be **adjourned** when sufficient cause is shown in writing. However, such adjournment can be granted for a maximum of **3 times**.
6. The relevant facts and basis of the decision shall be set out in the order, which means a **speaking order** needs to be placed.

7. The **amount** of tax along with interest and penalty should not exceed the amount mentioned in the **notice** and the **grounds** shall **not** go **beyond** what is mentioned in the **notice**.
8. When the decision of Tribunal/ Court/ **Appellate** authority **modifies** the **amount of tax**, correspondingly interest **and penalty** shall **also be modified** to that extent by the proper officer.
9. **Interest** shall be **payable** in **all cases** whether specifically mentioned or not.
10. If the **order is not issued within the time limits** as prescribed in sub-section (10) of section 73 or (10) of section 74, i.e., 5 years in case of fraud, misstatement or suppression and 3 years in any other case, the adjudication proceedings shall be **deemed to be concluded.**
11. An issue on which a first appellate authority or Tribunal or High Court has given its decision which is **prejudicial** to the **interest of the revenue** and an **appeal** to the Appellate Tribunal or High Court or Supreme Court respectively **against such decision is pending**, then the **period** spent between the two dates of decision shall be **excluded** in computing the period of **3 years or 5 years** respectively, **for issue of order**.
12. Notwithstanding anything contained in section 73 or section 74, where any amount of **self-assessed tax** in accordance with a return furnished u/s 39 remains unpaid, either wholly or partly, or any amount of interest payable on such tax remains unpaid, the same shall be recovered under the provisions of section 79.

    Explanation - For the purposes of this sub-section, the expression "self-assessed tax shall include the tax payable in respect of details of outward supplies furnished under section 37, but not included in the return furnished under section 39. [Explanation inserted by Finance Act, 2021, w.e.f. 01.01.2022]
13. Where **any penalty is imposed** under section 73 or section **74, no penalty** for the same act or omission shall be imposed on the same person **under any other provision** of this Act.

Sec. 161: Rectification of Errors Apparent on The Face of Record

- While the authority to issue any decision, order, summons, notice, certificate or other document is expected to be free from errors, it is the duty of the authority issuing the same to correct any errors that do not convey the outcome of the process of law resulting in its issuance. This Section provides for an opportunity to make such rectification with some caution and due process being prescribed.
- This Section begins with caution in stating that:
  - No prejudice will be caused to the validity of proceedings listed in Section 160 from the defects that may be present in the documents concerned;
  - But overrides all other provisions of the Act.

- This Section provides for rectification of error or mistake apparent by the authority who has issued the document or on being brought to attention by CGST/SGST authority or the affected person.
- So there are three ways in which action can be taken under this Section. No person is entitled to take advantage of such errors or mistakes.
- The action permitted to be taken is to rectify an error or mistake apparent. Errors or mistakes apparent can cause difficulty in executing the directions contained in the document. This may require seeking the authority's intervention to rectify.
- The power/jurisdiction to rectify is for **any error or mistake which is apparent from record**.
- The error must be **self-evident** and should **not** be discoverable by a **long process of reasoning.**
- The error may be **(a) factual, (b) legal or (c) clerical**. All of them are rectifiable once it is shown that they are **apparent on face of the record.**
- A time limit of **3 months** is allowed for the affected person **to bring to attention** any such error or mistake. This time limit does **not apply** to a CCST/SGST **officer** from bringing it to the attention to the issuing authority or for making voluntarily rectification. However, **no such rectification is permitted after 6 months** from the date of its issuance.
- If any such rectification adversely affects any person, it is required that principles of natural justice should be complied with.

Illustration 7:

Explain the provisions relating to rectification of errors apparent on the face of record under section 161 of the CGST Act, 2017?

Solution:

Section 161 lays down that any authority, who has passed or issued any decision or order or notice or certificate or any other document, may rectify any error which is apparent on the face of record in such decision or order or notice or certificate or any other document, either on its own motion or where such error is brought to its notice by any GST officer or by the affected person within a period of three months from the date of issue of such decision or order or notice or certificate or any other document, as the case may be.

However, no such rectification shall be done after a period of six months from the date of issue of such decision or order or notice or certificate or any other document. Further, the said period of six months shall not apply in such cases where the rectification is purely in the nature of correction of a clerical or arithmetical error, arising from any accidental slip or omission.

Principles of natural justice should be followed by the authority carrying out such rectification, if it adversely affects any person.

Sec. 76: Tax Collected But Not Paid to Government

(i) This provision deals with payment of any amount collected as tax but not remitted to the Central/State Government or Union Territory. This section requires him to make the payment forthwith regardless of whether the related supplies are taxable or not.

(ii) This section makes it obligatory on every person who has collected from any other person any amount representing "tax under this Act", to pay the said amount to the credit of the Central or a State Government regardless of whether the supplies in respect of which the amount was collected are taxable or not.

(iii) Before effecting recovery the Proper Officer has to serve a notice on to any person who has collected any amount representing as tax requiring to show cause as to why-

- the said amount should not be paid by him to the Government;
- penalty equivalent to such amount specified in the notice should not be imposed on him.

(iv) The person is permitted to make representation against the notice served on to him. The person ought to be given an opportunity of being heard where a request is made by the Notice in writing.

(v) After considering such representation made by the person, the Proper Officer shall determine the amount due from the person and pass an order within one year from the date of issue of notice. Where the service of notice is stayed by order of the Court or Tribunal, the period covered by the stay shall stand excluded for the purpose of computing the time limit.

(vi) The Proper Officer must pass a speaking order.

(vii) Upon such determination, the Person has to pay such amount determined.

(viii) Interest at the rate specified under section 50 (i.e. 18% p.a.) shall be paid on the amount collected as representing tax (either paid voluntarily or on determination by the Proper Officer). Interest shall be calculated from the date of collection of amount till the date of deposit of amount.

(ix) The amount paid by such person to the credit of the Central Government or a State Government shall be adjusted against the tax payable by the person.
If any surplus is left after adjustment against the tax liability, it will be

- Credited to consumer welfare fund; or
- Refunded to the person who has borne the incidence of such amount.

(x) The person claiming such refund shall follow the conditions and procedure contained in section 54 of CGST Act.

(xi) There appears to be no time limit to commence proceedings under this section.

Illustration 8:

Subharti Enterprises collected GST on the goods supplied by it from its customers on the belief that said supply is taxable. However, later it discovered that goods supplied by it are exempt from GST.

The accountant of Subharti Enterprises advised it that the amount mistakenly collected by Subharti Enterprises representing as tax was not required to be deposited with Government.

Subharti Enterprises has approached you for seeking the advice on the same. You are required to advise it elaborating the relevant provisions.

Answer:

The provisions of section 76 of the CGST Act, 2017 make it mandatory on Subharti Enterprises to pay amount collected from other person representing tax under this Act, to the Government.

Section 76 of the CGST Act, 2017 stipulates that notwithstanding anything to the contrary contained in any order or direction of any Appellate Authority or Appellate Tribunal or Court or in any other provisions of the CGST Act or the rules made thereunder or any other law for the time being in force, every person who has collected from any other person any amount as representing the tax under this Act, and has not paid the said amount to the Government, shall forthwith pay the said amount to the Government, irrespective of whether the supplies in respect of which such amount was collected are taxable or not.

Where any amount is required to be paid to the Government as mentioned above, and which has not been so paid, the proper officer may serve on the person liable to pay such amount a notice requiring him to show cause as to why the said amount as specified in the notice, should not be paid by him to the Government and why a penalty equivalent to the amount specified in the notice should not be imposed on him under the provisions of this Act.

The proper officer shall, after considering the representation, if any, made by the person on whom show cause notice (SCN) is served, determine the amount due from such person and thereupon such person shall pay the amount so determined.

The person who has collected any amount as representing the tax, but not deposited the same with the Government shall in addition to paying the said amount determined by the proper officer shall also be liable to pay interest thereon. Interest is payable at the rate specified under section 50. Interest is payable from the date such amount was collected by him to the date such amount is paid by him to the Government.

The proper officer shall issue an order within 1 year (excluding the period of stay order] from the date of issue of the notice. The proper officer, in his order, shall set out the relevant facts and the basis of his decision.

Sec. 77: Tax Wrongfully Government or State Government Collected and Paid To Central Government

(i) If a taxable person wrongly pays CGST/SGST or CGST/UTCST on the transaction treating it as intra-state supply, but which is subsequently held to be inter-state supply, then, upon payment of IGST on such transaction, the CGST/SGST or CGST/UTGST will to be refunded in such manner and subject to prescribed conditions:

(ii) If a taxable person wrongly pays IGST by treating a supply as inter-state supply, which is subsequently held to be intra-state supply, interest is not required to be paid on the CCST/SGST or CGST/UTGST payable

Sec. 78: Initiation of Recovery Proceedings

(a) This provision empowers the proper officer to collect any amount which is payable by a taxable person in pursuance of an order passed under the Act

(b) This section enables initiation of proceedings for recovery of amount from taxable person.

(c) The amount shall be paid by taxable person within a period of **3 months** of the service of order, failing which the proper officer shall initiate the recovery proceedings,

(d) If it is in the **interest of revenue**, the proper officer after recording the reasons in writing, may initiate the recovery proceedings even before the completion of the said period of 3 months. However it empowers the proper officer in the interest of revenue after recording the reasons to initiate recovery proceedings even before the said completion of 3 months.

Sec. 79: Recovery of Tax

The section empowers the departmental officers to collect/recover any amount which is payable under GST Act. Section 79 provides for the manner in which the recovery proceedings can be carried out.

(i) When **any amount** that is payable by any person (hereinafter referred to as defaulter) to Government is not paid, the officer can adopt one or more of the methods set out in section 79 for recovery of amounts payable. The methods are:

(a) Deduction out of any money owing to defaulter:

- There should be some money which is being owed by the Government to defaulter:
- The amount payable can be deducted out of the said amount due to defaulter;
- The deduction can be done by the proper officer himself or he may ask any other specified officer to do

(b) By detaining and selling the goods belonging to defaulter:

- There should be goods which are under the control of the proper officer or other specified officer;
- Such goods should belong to the person who is liable to pay any amount.
- The goods may be detained and sold by the proper officer or such other specified officer on the proper officer;
- Out of the realisation, the amount payable by defaulter shall be recovered.

(c) Recovery from any other person who owes money to defaulter [Garnishee Proceeding]:

- This applies when any other person-
  - has become due to pay money to the defaulter,
  - is likely to become due to pay money to the defaulter,

- holds money for or on account of the defaulter,
- may subsequently hold money for or on account of the defaulter.

- In such cases the proper officer may issue notice to such other person to pay to the credit of the Government forthwith
- upon the money becoming due or being held, or within the time specified in the notice not being before the money becomes due or is held.
- The amount directed to be paid in the notice shall be
  - Where the amount due/held by such other person is more than amount due by the defaulter-to the extent of amount due by the defaulter,
  - Where the amount due/held by such other person is equal to or less than amount due by defaulter- whole of money due/held.
- Such other person to whom such notice is issued is bound to comply with the same.
- In cases where such notice is issued to a post office, banking company or an insurer, they are required to comply with the same without insisting on production of any passbook, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like, though that might be the normal practice.
- If such person to whom such notice is issued, fails to comply, he shall be treated as defaulter to the extent of the amount mentioned in the notice and all other consequences under the law shall follow;
- The notice so issued may be amended or revoked or time may be extended for making any payment;
- The payment made by such other person in accordance with the notice issued, shall be deemed to have made the payment on behalf of such defaulter and the amount credited to the government shall be deemed to constitute the discharge of liability of such defaulter to the extent of the payment made. Consequently no civil suit or other proceedings could be filed or initiated by the defaulter on the notice who has complied with this provision.
- Instead of crediting the amount to the government, if such person makes the payment to defaulter, then such other person shall be personally liable to the Government to the extent of the amount due by the defaulter or amount discharged to the defaulter whichever is lower.
- However such person shall not be personally liable, if he proves to the officer issuing the notice that
  - the money demanded or any part thereof was not due to the person in default or
  - at the time of service of the notice he did not hold any money for or on account of the person in default,
  - the money was not demanded from him; or
  - any part of the money demanded is not likely to become due to such other person or
  - any part of the money will not likely be held for or on account of such person.

(d) Collection by detention of any movable or immovable property:

- On authorisation by competent authority, proper officer in accordance with the rules framed for this purpose,
  - Detain any movable or immovable property belonging to defaulter;
  - After which detain such property till the amount payable is paid.
- If any part of the amount payable or cost of distress or keeping the property is not paid within 30 days If from such distress, the proper officer may sell the property and with the proceeds he may adjust towards,
  - amount payable,
  - costs including the cost of sale remaining unpaid;
- After such adjustment, the remaining surplus shall be returned to the defaulter.

(e) Recovery through District Collector:

- Proper officer may prepare a certificate signed by him specifying the amount due from the defaulter.
- Such certificate will be sent to the Collector of the District (DC) in which the defaulter
  - owns any property; or resides; or
  - carries on his business.
- The DC on receipt of such certificate shall proceed to recover from such defaulter the amount specified in the certificate as if such amount is arrears of land revenue.

(f) Recovery through Magistrate:

- This provision has overriding effect over Code of Criminal Procedure;
- In this case the proper officer may file an application to the appropriate Magistrate;
- The Magistrate to whom application is made shall proceed to recover from the defaulter the amount specified in the application as if it is fine imposed by such Magistrate.

(g) Recovery through execution of a decree, etc. [Rule 146]

Where any amount is payable to the defaulter in the execution of a decree of a Civil Court for the payment of money or for sale in the enforcement of a mortgage or charge, the proper officer shall send a request to the said court and the court shall, subject to the provisions of the Code of Civil Procedure, 1908, execute the attached decree, and credit the net proceeds for settlement of the amount recoverable.

(h) Recovery through surety [Rule 157]

Where any person has become surety for the amount due by the defaulter, he may be proceeded against under this chapter as if he was the defaulter.

(i) Recovery from company in liquidation [Rule 160]

Where the company is under liquidation as specified in section 88, the Commissioner shall notify the liquidator for the recovery of any amount representing tax, interest, penalty or any other amount due under the Act in prescribed form.

(ii) Under the GST Act, rules or regulations there would be requirement to execute bond or other instruments. If such bond/instrument provides that the amount becoming due shall be recovered in terms of Section 79(1), then the recovery shall be effected as discussed above irrespective of whether other mode of recovery exists or not.

(iii) Further it is also Provided that if either SGST Officer/ UTGST Officer while recovering SGST/UTGST arrears may also recover any amount due from the defaulter the amount due by him under CGST Act as if it is SGST/UTGST and later pass it on to the Central Government.

(iv) Similar provision also exists in SCST/UTGST Act for recovery of any amount due under GST Act/UTGST Act to be recovered by CGST officers while recovering arrears of CGST as though the amount due was CGST and later pass it on to the concerned State Government/Union Territory.

(v) It is also Provided that in case where the SCST officer/UTGST officer also collects CGST in the course of collection of SGST/UTGST or vice-versa, where the amount recovered is not fully covering both the liabilities, the amount collected has to be **apportioned** between Centre and State/Union Territory in the same proportion of the amounts due.

(vi) **Explanation** - For the purposes of this section, the word person shall include "distinct persons" as referred to in sub-section (4) or, as the case may be, sub-section (5) of section 25.

Deposit of Tax during the course of Search, Inspection or investigation [Instruction No. 01/2022-23 (GST Investigation), dated 25.05.2022]

- ***During the course of search, inspection or investigation, sometimes the taxpayers opt for deposit of their partial or full GST liability arising out of the issue pointed out by the department during the course of such search, inspection or investigation by furnishing DRC-03, Instances have been noticed where some of the taxpayers after voluntarily depositing GST liability through DRC-03 have alleged use of force and coercion by the officers for making 'recovery' during the course of search or inspection or investigation. Some of the taxpayers have also approached Hon'ble High Courts in this regard.***

- ***It is observed that recovery of taxes not paid or short paid, can be made under the provisions of Section 79 of CGST Act, 2017 only after following due legal process of issuance of notice and subsequent confirmation of demand by issuance of adjudication order. No recovery can be made unless the amount becomes payable in pursuance of an***

order passed by the adjudicating authority or otherwise becomes payable under the provisions of CGST Act and rules made therein.

- ***Therefore, it is clarified that there may not be any circumstance necessitating recovery' of tax dues during the of search or inspection or investigation proceedings. However, there is also no bar on the taxpayers for voluntarily making the payments on the basis of ascertainment of their liability on non-payment/ short takes payment of takes before or at any stage of such proceedings to avoid burden of more interest as well as penalty w/s 73 or 74.***

Illustration 9:

Briefly discuss the modes of recovery of tax available to the proper officer.

[MTP-CA Final, Nov. 2019]

Answer:

As per Sec. 79 of the CGST Act, 2017, the proper officer may recover the dues in following manner.

(a) Deduction of dues from the amount owned by the tax authorities payable to such person.

(b) Recovery by way of detaining and selling any goods belonging to such person

(c) Recovery from other person, from whom money is due or may become due to such person or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central or a State Government:

(d) Distrain any movable or immovable property belonging to such person, until the amount payable is paid. If the dues not paid within 30 days, the said property is to be sold and with the proceeds of such sale the amount payable and cost of sale shall be recovered.

(e) Through the Collector of the district in which such person owns any property or resides or carries on his business, as if it was an arrear of land revenue.

(f) By way of an application to the appropriate Magistrate who in turn shall proceed to recover the amount as it were a fine imposed by him.

(g) By enforcing the bond/instrument executed under this Act or any rules or regulations made thereunder.

(h) CGST arrears can be recovered as an arrear of SGST and vice versa.

[Note Any of the above five points may be mentioned.]

Sec. 80: Payment of Tax and Other Amount in Installments

This section permits a taxable person to make payment of an amount due on instalment basis, other than the amount due as per self-assessed return. The term 'instalments' in general parlance would mean equated periodical payments (money due) spread over an agreed period of time. This provision happens to be beneficial piece of law to the tax payers to pay the demand in instalments along with interest.

(i) This section empowers the Commissioner to grant permission only to the taxable person to make payment of any amount due on installment basis, on an application in writing

(ii) The Commissioner would either extend the time or allow payment of any amount due under the Act on installment basis for reasons to be recorded in writing.

(iii) This section applies to amounts due other than the self-assessed liability shown in any return.

(iv) The installment period shall not exceed 24 months.

(v) The taxable person shall also be liable to pay prescribed interest on the amount due from the first day such tax was due to be payable till the date tax is paid.

(vi) If default occurs in payment of any one installment the taxable person would be required to pay the outstanding balance payable on such date of default itself without further notice. whole

Sec. 81: Transfer of Property to be Void in Certain Cases

This provision is for protecting the Government revenue by avoiding transfer of property by a taxable person to another person. This would prevent any attempt to defraud the revenue by alienating the properties

(i) The said provision would be applicable only when any tax has become due.

(ii) The following acts done by a person, in favour of any another person, after the tax becomes due, would be void

Situations/Cases - Void	Situations/Cases - Valid
• Creates a charge on; or • Parts with the property • Belonging to him; or • In his possession By way of sale, mortgage, exchange, or any other mode of transfer whatsoever of any of his properties.	Made for adequate consideration and • without notice of the pendency of proceeding • without notice of such tax or other sum payable by the said person, • With previous permission of the proper officer.

(iii) The transfer will be void, when it is or was with an intention of defrauding the Government revenue.

Illustration 10:

Mr. Defrauder was served with a notice of demand for Rs. 20 lakhs on 10th June 2018. He filed a reply for the said notice on 20th June 2018, stating that he was unable to deposit tax dues as he was financially stressed. On 15th June 2018, Mr. Defrauder transferred all the property

worth Rs. 35 lakhs under his name to the name of his wife for a consideration of Rs 10,000/- Is this act of Mr. Defrauder valid?

Answer:

As per section 81, the said transfer would be void and the property worth Rs. 35 lakhs would be considered still to be in the hands of Mr. Defrauders.

Illustration 11:

In the above illustration, if transfer of property was for a consideration of Rs. 42 lakhs to Mr. X who is unaware of the pending proceedings of Mr. Defrauder. The transfer took place on 15th June 2018. Is the act of Mr. Defrauder valid?

Answer:

In this case the transaction would be a valid act, since the transfer was made for adequate consideration and also without notice of the pendency of proceeding.

Illustration 12:

On Mr. Perfect, notice was issued on 10th June 2018; however the same was received by Mr. Perfect on 20th June, 2018 Meanwhile the property of Mr. Perfect was sold to Mr. Perfectionist for Rs 35 crore. Is the sale void or valid?

Answer:

The sale is valid since on the date of sale there was no pending proceeding on Mr. Perfect.

Sec. 82: Tax To Be First Charge on Property

Other than as provided under Insolvency and Bankruptcy Code, 2016, this provision shall have an overriding effect over the other provisions contained in any law for the time being in force.

(i) This provision provides that if any dues are payable by a taxable person or any other person to the government, then it would have first charge on the property of such taxable or other person. The provisions of this section would apply to a taxable person or any other person who is liable to pay tax, interest or penalty to Government.

(ii) Any liability to be paid to the Government would be given priority in the matter of effecting recovery by placing a first charge on the property of the taxable person or any other person.

(iii) This provision also covers any other person since there are many provisions in the Act, which provide for creating a liability or recovery from a person other than the taxable person like a legal representative, member of partitioned HUF, etc.

Sec. 83: Provisional Attachment to Protect Revenue in Certain Cases

(1) Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1A) of section 122, in such manner as may be prescribed. [sub-section (1) substituted by Finance Act, 2021, w.e.f. 01.01.2022]

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of 1 year from the date of the order made under sub-section (1).

For Reference:
Chapter XII-Assessment
Chapter XIV-Inspection, Search, Seizure and Arrest
Chapter XV-Demands and Recovery

Analysis of amendment:

1. Earlier this section was applicable only during the pendency of any proceedings under section 62, 63, 64, 67, 73.or 74. But, now applicability of this section is enhanced.
2. Further, now this section also empowers commissioner to attach properties belonging to the actual offender of Bogus invoicing transactions specified in section 122(1A) apart from Taxable Person

Sec. 84: Continuation and Validation of Certain Recovery Proceedings

This section deals with continuation of proceedings, where a notice is already served for recovery of government dues upon a taxable person and upon any appeal, revision application there is reduction or enhancement of such Government dues.

(i) The section refers to -

- any notice of demand in respect of Government dues (tax, interest and penalty) served on taxable person or any other person; and
- any appeal, revision application is filed or other proceedings are initiated in respect of such Government dues. Further:
  (a) such Government dues may be enhanced; or
  (b) reduced in such appeal, revision or in other proceedings

(ii) In such cases, the Commissioner shall -

- serve another notice on the taxable person, in respect of the enhanced amount.
- if notice of demand is already served on taxable person before such appeal, revision or any other proceedings, then recovery of enhanced amount would be continued from the stage at which the initial proceedings stood. There is no need to issue a fresh notice of demand to the extent already covered by earlier notice.

- In case the Government dues are reduced in such appeal, revision or in other proceedings - the Commissioner.
  - is not required to serve fresh notice of demand upon the taxable person:
  - shall intimate such reduction to taxable person and also to appropriate authority with whom recovery proceedings are pending

Any recovery proceedings which are initiated prior to the disposal of such appeal, revision application or other proceeding may be continued in relation to the amount so reduced from the stage at which such proceedings stood immediately before such disposal.

Advance Ruling

Sec. 95: Definitions

In this Chapter, unless the context otherwise requires,-

(a) "**Advance ruling**" means a decision provided by the Authority or the Appellate Authority to an applicant on matters or on questions specified in sub-section (2) of section 97 or sub-section (1) of section 100, in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the applicant;

(b) "**Appellate Authority**" means the Appellate Authority for Advance Ruling referred to in section 99;

(c) "**Applicant**" means any person registered or desirous of obtaining registration under this Act;

(d) "**Application**" means an application made to the Authority under sub-section (1) of section 97;

(e) "**Authority**" means the Authority for Advance Ruling referred to in section 96.

ANALYTICAL VIEW OF THE TOPIC

1. The expression "Appellate Authority" refers to the Appellate Authority for Advance Ruling constituted under section 99 in each State or Union territory.

2. Advance ruling decision can only be in respect of matters or questions specified in section 97(2) or section 100(1) of 2.the Act in relation to the supply of goods and/or services, which is either proposed to be undertaken or is being undertaken by the applicant and cannot travel beyond that. Thus, an application can be made even before the applicant has undertaken an activity of supplying goods and/or services.

3. Applicant under the GST law may be a person who is already registered under the CST Act or who wishes to obtain a registration. Therefore, registration at the time of making the application is not necessary. One can make an application to the authority under section 97(1) stating the question on which he seeks advance ruling. The term 'Person' has been defined in section 2(84) of the Act.

4. Under customs laws, advance ruling can be sought by an applicant on an activity of import or export of goods proposed to be undertaken or a service proposed to be provided by him. However, under the GST laws, advance ruling can also be sought on a present activity of supply of goods and or services being undertaken by the applicant.

5. Prescribed or jurisdictional CCST/SGST officer or an applicant can appeal to the appellate authority. If aggrieved by the advance ruling pronouncement of the authority.

Sec. 96: Authority for Advance Ruling

1. The AAR shall be located in each State/Union Territory (UT). The authority for advance ruling constituted under the provisions of SCST Act or UTGST Act shall be deemed to be

the authority for advance ruling in respect of that State or Union Territory under CCST Act, 2017 also.

2. The Government shall appoint officers not below the rank of Joint Commissioner as member of the authority for advance ruling (AAR). [Rule 103 of CGST Rules, 2017]

3. Thus, it can be seen that the AAR is constituted under the respective State/Union Territory Act and not the Central Act. This would mean that the ruling given by the AAR will be applicable only within the jurisdiction of the concerned State/Union Territory.

Sec. 97: Application for Advance Ruling Procedure

ANALYTICAL VIEW OF THE TOPIC

1. An applicant who seeks an advance ruling should make an application in the prescribed FORM GST ARA-1 together with a fee of Rs. 5000/- and should state the question on which such a ruling is sought.

2. The question on which the advance ruling is sought under this Act, shall be in respect of,
   (a) **classification** of any goods or services or both:
   (b) applicability of a **notification** issued under the provisions of this Act;
   (c) determination of **time and value** of supply of goods or services or both;
   (d) admissibility of **input tax credit** of tax paid or deemed to have been paid;
   (e) determination of the **liability** to pay tax on any goods or services or both;
   (f) whether applicant is required to be **registered**;
   (g) whether any particular thing done by the applicant with respect to any goods or services or both amounts to or results in a **supply** of goods or services or both, within the meaning of that term.

3. It is to be noted that questions on determination of place of supply cannot be raised with the AAR.

Illustration 1:

Discuss briefly provisions of CCST Act, 2017 regarding questions for which advance ruling can be sought. ***[CA Final, May 2018 - Old] (Marks 4)***

Solution:

As per Sec. 97(2) of CGST Act, 2017 the question on which the advance ruling is sought under this Act, shall be in respect of -
(a) classification of any goods or services or both;
(b) of a notification issued under the provision of this Act;
(c) determination of time and value of supply of goods or service or both;
(d) admissibility of input tax credit of tax paid or deemed to have been paid;
(e) determination of the liability to pay tax on any goods or services or both;
(f) whether applicant is required to be registered;

(g) whether any particular thing done by the applicant with respect to any goods or services or both amount to or results in a supply of goods or services or both, within the meaning of that term.

Sec. 98: Procedure on Receipt of Application

Receipt of Application:

(i) On receipt of an application in FORM GST ARA-1, the AAR shall forward a **copy to the concerned officer** and, if necessary, direct him to furnish the **relevant records**.

(ii) The **records** so called for by the AAR should be returned as soon as possible to the concerned officer.

(iii) The AAR, at its discretion, would examine the application and the records called for, and after hearing the applicant or his authorized representative and concerned officer or his authorised representative pass an **order, either admitting or rejecting** the application

(iv) The AAR shall not admit the application where the question raised in the application is **already pending or decided** in any proceedings in the case of **an applicant** under any of the provisions of this Act.

(v) Before **rejecting** the application, the applicant ought to be given an **opportunity** of being heard.

(vi) Where the application is finally rejected, the **reasons for such rejection** shall be stated in the order.

(vii) A copy of every order made shall be sent to the applicant and to the concerned officer.

Pronouncement of Advance Ruling:

Where the application is admitted, the AAR shall proceed as follows:

- Examine such further material as may be placed before it by the applicant or obtained by the AAR.
- Provide opportunity of being heard to the applicant or his authorized representatives authorized representative.
- Pronounce its advance ruling on the question specified in the application.

Reference to Appellate Authority:

(i) Where the members of the AAR differ on any question on which the advance ruling is sought, they shall state the point/s of difference and refer it to the Appellate Authority for advance ruling for final decision.

(ii) The AAR shall pronounce its advance ruling in writing within 90 days of the receipt of application.

(iii) The Appellate Authority to whom a reference is made due to difference of opinion is required to pronounce the ruling within 90 days of such reference.

Submission of Advance Ruling Pronounced:

A copy of the advance ruling pronounced by the concerned AAR/Appellate Authority, duly signed by the Members and certified, shall be sent to the applicant and to the concerned officerafter pronouncement.

Sec. 99: Appellate Authority for Advance Ruling

1. The appellate authority for advance ruling shall be constituted in each state/UT.
2. The appellate authority constituted in each state under SGST Act, or UTGST Act shall be deemed to be the appellate authority in respect of that state/UT for CGST Act also.

Sec. 100: Appeal to Appellate Authority

(i) An appeal can be filed by the concerned or jurisdictional officer or the applicant, who is aggrieved by the ruling

(ii) The appeal should be filed within **30 days** from the date of receipt of the ruling. This period can further be **extended** for another **30 days**, if there is sufficient cause for not filing the appeal within the first 30 days.

(iii) The appeal shall be in the prescribed FORM CST ARA-2 together with a fee of Rs. 10,000/-

(iv) The appeal shall be verified in the prescribed manner.

Sec. 101: Orders of Appellate Authority

(i) The appellate authority must afford a reasonable opportunity of being heard to the parties before passing the order.

(ii) The said authority can either pass such order as it deems fit, or confirm or modify the ruling appealed against

(iii) The order should be passed within **90 days** from the date of filing appeal.

(iv) If there is a **difference** of opinion between members on the question covered under the appeal, then it would be **considered that no advance ruling** is issued in the matter.

(v) A copy of the appellate order should be signed by the members and communicated to the concerned officer and applicant, as soon as possible after such pronouncement.

Sec. 102: Rectification of Advance Ruling

1. The advance ruling can be rectified by the authorities if there are any mistakes apparent on the record.
2. The AAR or Appellate authority may amend the order to rectify any mistake apparent from the record, if such mistake:
   (a) is noticed by it on its own accord, or
   (b) is brought to its notice by the concerned or the jurisdictional officer or
   (c) is brought to its notice by the applicant.
3. The application for rectification can be made within 6 months, and cannot result in substantial amendment of the order.

4. If the rectification results in increase in tax liability or reducing of input credit then a hearing has to be given to the applicant/appellant.

Sec. 103: Applicability of Advance Ruling

(i) The advance ruling pronounced by the Authority under this chapter shall be binding only on the applicant and on the jurisdictional officer in respect of the applicant.

(ii) The advance ruling shall be binding on the said persons/authorities unless there is a change in law or facts or circumstances, on the basis of which the advance ruling has been pronounced. When any change occurs in such laws, facts or circumstances, the advance ruling shall no longer remain binding on such person.

Sec. 104: Advance Ruling to be Void in Certain Circumstances:

(i) If the Authorities (AAR and appellate authority) find that the advance ruling order has been obtained by the applicant/appellant by fraud or suppression of material facts or misrepresentation of facts, it may, by order, declare such ruling to be void ab initio.

(ii) Consequently, all the provisions of the Act shall apply to the applicant as if such advance ruling had never been made.

(iii) Before passing the order, an opportunity of being heard should be given to the applicant/appellant.

(iv) The **period beginning** with the date of advance ruling and **ending** with the date of order under this sub-section shall be **excluded** in computing the **period** for issuance of Show cause notice and adjudication order under sub- section (2) and (10) of **both Section 73 and 74** respectively.

(v) A copy of the order so made shall be sent to the applicant and the concerned/jurisdictional officer.

Sec. 105: Powers of Authority and Appellate Authority

1. The Authority or the Appellate Authority shall, for the purpose of exercising its powers regarding –
   (a) discovery and inspection:
   (b) enforcing the attendance of any person and examining him on oath,
   (c) issuing commissions and compelling production of books of account and other records, have all the powers of a civil court under the Code of Civil Procedure, 1908.

2. The Authority or the Appellate Authority shall be deemed to be a **civil court** for the purposes of section 195, but not for the purposes of Chapter XXVI of the Code of Criminal Procedure, 1973, and every proceeding before the Authority or the Appellate Authority shall be deemed to be a **judicial proceedings** within the meaning of sections 193 and 228, and for the purpose of section 196 of the **Indian Penal Code**.

Sec. 106: Procedure of Authority and Appellate Authority

The Authority or the Appellate Authority shall, subject to the provisions of this Chapter, have power to regulate **its own procedure**.

Illustration 2:

Ranjan intends to start selling certain goods in Delhi. However, he is not able to determine (i) the classification of the goods proposed to be supplied by him [as the classification of said goods has been contentious] and (ii) the place of supply if he supplies said goods from Delhi to buyers in U.S. Ranjan's tax advisor has advised him to apply for the advance ruling in respect of these issues. He told Ranjan that the advance ruling would bring him certainty and transparency in respect of the said issues and would avoid litigation later. Ranjan agreed with his view, but has some apprehensions.

In view of the information given above, you are required to advise Ranjan with respect to following:

(i) The tax advisor asks Ranjan to get registered under GST law before applying for the advance ruling as only a registered person can apply for the same. Whether Ranjan needs to get registered?

(ii) Can Ranjan seek advance ruling to determine
(a) the classification of the goods proposed to be supplied by him and
(b) the place of supply, if he supplies said goods from Delhi to buyers in U.S?

(iii) Ranjan is apprehensive that if at all advance ruling is permitted to be sought, he has to seek it every year. Whether Ranjan's apprehension is correct?

(iv) The tax advisor is of the view that the order of Authority for Advance Ruling (AAR) is final and is not appealable. Whether the tax advisor's view is correct?

(v) Sambhav - Ranjan's friend - is a supplier registered in Delhi. He is engaged in supply of the goods, which Ranjan proposes to supply at the same commercial level that Ranjan proposes to adopt. He intends to apply the classification of the goods as decided in the advance ruling order to be obtained by Ranjan, to the goods supplied by him in Delhi. Whether Sambhav can do so?

Answer:

(i) Advance ruling under GST can be sought by a registered person or a person desirous of obtaining registration under GST law [Section 95(c) of the CGST Act, 2017]. Therefore, it is not mandatory for a person seeking advance ruling to be registered.

(ii) Section 97(2) of the CGST Act, 2017 stipulates the questions/matters on which advance ruling can be sought. It provides that advance ruling can be sought for, inter alia, determining the classification of any goods or services or both. Therefore, Ranjan can seek the advance ruling for determining the classification of the goods proposed to be supplied by him.

Determination of place of supply is not one of the specified questions/matters on which advance ruling can be sought under section 97(2). Further, section 96 of the CGST Act, 2017 provides that AAR constituted under the provisions of an SGST Act/UTGST Act shall be deemed to be the AAR in respect of that State/Union territory under CGST Act also.

Thus, AAR is constituted under the respective State/Union Territory Act and not the central Act. This implies that ruling given by AAR will be applicable only within the jurisdiction of the concerned State/Union territory.

It is also for this reason that the questions on determination of place of supply cannot be raised with the AAR. Hence, Ranjan cannot seek the advance ruling for determining the place of supply of the goods proposed to be supplied by him.

Note: The above answer is based on the view taken by the CBEC in its e-flier issued on the subject of advance ruling. The e-flier is available on the CBEC's website. However, it can be also be argued that the question relating to determination of the liability to pay tax on goods and/or services as provided under section 96(2)(e) of the CGST Act, 2017 encompasses within its ambit the question relating to place of supply. This is so because place of supply is one of the factor to determine as to whether the supply is leviable to CGST & SGST or IGST.

(iii) Section 103(2) of the CGST Act, 2017 stipulates that the advance ruling shall be binding unless the law, facts or circumstances supporting the original advance ruling have changed. Therefore, once Ranjan has sought the advance ruling with respect to an eligible matter/question, it will be binding till the time the law, facts and circumstances supporting the original advance ruling remain same.

(iv) No, the tax advisor's view is not correct. As per section 100 of the CGST Act, 2017, if the applicant is aggrieved with the finding of the AAR, he can file an appeal with Appellate Authority for Advance Ruling (AAAR). Similarly, if the concerned/jurisdictional officer of CGST/SGST does not agree with the findings of AAR, he can also file an appeal with AAAR.

Such appeal must be filed within 30 days from the receipt of the advance ruling. The Appellate Authority may allow additional 30 days for filing the appeal, if it is satisfied that there was a sufficient cause for delay in presenting the appeal.

(v) Section 103 of the CGST Act provides that an advance ruling pronounced by AAR is binding only on the applicant who had sought it and on the concerned officer or the jurisdictional officer in respect of the applicant. This implies that an advance ruling is not applicable to similarly placed other taxable persons in the State. It is only limited to the person who has applied for an advance ruling.

Thus, Sambhav will not be able to apply the classification of the goods that will be decided in the advance ruling order to be obtained by Ranjan, to the goods supplied by him in Delhi.

Appeals and Revision

Sec. 107: Appeals to Appellate Authority

Introduction:

(a) This section pertains to appeals to appellate authority by any person who is aggrieve against decision or order passed by adjudicating authority.

(b) This section also provides for appeal by revenue against decision or order passed by adjudicating authority.

Analysis:

(i) The appeal is to be filed by the assessee within a period of 3 months from the date of communication of decision or order in Form GST APL 01 electronically or otherwise as notified by the Commissioner against a provisional acknowledgement. The grounds of appeal and form of verification must be duly signed and a hard copy of the appeal in triplicate together with a certified copy of the decision is to be filed before the Appellate Authority within 7 days of filing the appeal electronically. Thereafter, a final acknowledgement indicating the appeal number shall be issued in Form GST APL 02 by the said authority In such a situation the appeal shall be deemed to be filed on the date on which the provisional acknowledgement stands issued. In case the hard copy is filed after a period of 7 days the date of filing of appeal shall be the date of issue of final acknowledgement.

(ii) The Commissioner of Central / State or any Union territory with a view to satisfying himself about the legality or propriety of any order or decision direct a subordinate officer to file an application before the Appellate Authority within 6 months from the date of communication of decision or order in Form APL GST 03 electronically or otherwise as notified against issue of an acknowledgement. A hard copy of the appeal in triplicate together with a certified copy of the decision is to be filed before the Appellate Authority within 7 days of filing the appeal electronically and an appeal number shall be generated accordingly.

(iii) The appellate authority in **either of the above cases** is empowered to **condone the delay upto a period of 1 month.**

(iv) **Rule 109A** - Appointment of Appellate Authority:
The appellate authority in both the above cases shall be

(a) the **Commissioner (Appeals)** where the decision or order is passed by the Additional or Joint Commissioner,

(b) **any officer not below the rank of Joint Commissioner (Appeals)** where the decision or order is passed by the Deputy or Assistant Commissioner or Superintendent.

(v) Appeal to be filed in prescribed form duly verified in prescribed manner along with:
- Amount of tax, interest, fine, fee and penalty, as is admitted, in full;
- **pre-deposit** of sum equal to **10%** of remaining amount of **tax in dispute** arising from the said order, **subject to a maximum of Rs. 25 crores** (under CCST); and
- **pre-deposit** of a sum equal to **25% of the penalty** imposed, in case of appeal to be filed against an order passed u/s 129(3). [proviso inserted by Finance Act, 2021, w.e.f. 01.01.2022] [Sec. 129 - Detention, seizure and release of goods and conveyances in transit]

(vi) On payment of above amount, the **recovery** proceedings for balance amount are stayed.

(vii) Maximum **3 adjournments** shall be granted to a party on showing reasonable cause to be recorded in writing,

(viii) Appellate authority may **allow** any **additional grounds** not specified in the grounds of appeal on being satisfied that the omission was not wilful or unreasonable.

(ix) Appellate authority to pass the order confirming, modifying or annulling the decision or order appellate against but **shall not remand the case back** to the adjudicating authority. [But in customs, appellate authority can remand the case back).

(x) **Opportunity** of being heard to be granted in case of order for enhancing fees or penalty or fine in lieu of confiscation of goods or reducing amount of refund/input tax credit after **issuing show cause notice.**

(xi) The **appellate authority has power to issue show cause notice** in case it is of the opinion that any tax has not been paid or **short paid** or erroneously refunded or input tax credit is wrongly availed or utilised.

(xii) Appellate authority to hear and decide the appeal, **wherever possible**, within a **period of 1 year** from the date of filing.

(xiii) Appellate authority to communicate the copy of order to the appellant, the respondent, the adjudicating authority, jurisdictional Commissioner of CGST, SGST and UTGST.

(xiv) The Appellate Authority shall, along with its order under sub-section (11) of section 107 of the Act, issue a **summary** of the order in **FORM GST APL-04** clearly indicating the final amount of demand confirmed.

Illustration 1:

Pursuant to audit conducted by the tax authorities under section 65 of the CGST Act, 2017, a show cause notice was issued to Home Furnishers, Surat, a registered supplier, alleging that it had wrongly availed the input tax credit without actual receipt of goods for the month of July,

20XX. In the absence of a satisfactory reply from Home Furnishers, Joint Commissioner of Central Tax passed an adjudication order dated 20.08.20XX (received by Home Furnishers on 22.08.20XX) confirming a tax demand of Rs. 50,00,000 and imposing a penalty of equal amount under section 122 of the CGST Act, 2017.

(1) Home Furnishers does not agree with the order passed by the Joint Commissioner. It decides to file an appeal with the Appellate Authority against the said adjudication order. It has approached you for seeking advice on the following issues in this regard: Can Home Furnishers file an appeal to Appellate Authority against the adjudication order passed by the Joint Commissioner of Central Tax? If yes, till what date can the appeal be filed?

(2) Does Home Furnishers need to approach both the Central and State Appellate Authorities for exercising its right of appeal?

(3) Home Furnishers is of the view that there is no requirement of paying pre-deposit of any kind before filing an appeal with the Appellate Authority. Give your opinion on the issue.

[MTP-May 2018]

Answer:

(1) An appeal against a decision/order passed by any adjudicating authority under the CGST Act or SGST Act/ UTGST Act is appealable before the Appellate Authority [Section 107(1) of the CGST Act]. Thus, Home Furnishers can file an appeal to Appellate Authority against the adjudication order passed by the Joint Commissioner of Central Tax.

Further, such appeal can be filed within 3 months from the date of communication of such decision/order Section 107(1) of the CGST Act). Thus, Home Furnishers can file the appeal to Appellate Authority on or before 22.11.20XX.

Further, the Appellate Authority can also condone the delay in filing of appeal by 1 month if it is satisfied that there was sufficient cause for such delay [Section 107(4)].

(2) GST law makes provisions for cross empowerment between CGST and SGST/UTGST officers so as to ensure that if a proper officer of one Act (say CGST) passes an order with respect to a transaction, he will also act as the proper officer of SCST for the same transaction and issue the order with respect to the CGST as well as the SGST/UTCST component of the same transaction.

The law further provides that where a proper officer under one Act (say CGST) has passed an order, any appeal/ review/revision/rectification against the said order will lie only with the proper officers of that Act only (CCST Act). Similarly, if any order is passed by the proper officer of SCST, any appeal/review/revision/rectification will lie with the proper officer of SGST only. Thus, Home Furnishers is required to file an appeal only with the Central Tax Appellate Authority [Section 6 of CGST Act].

(3) Home Furnishers' view is not correct in law, Section 107(6) of the CGST Act provides that no appeal shall be filed before the Appellate Authority, unless the appellant has paid-

(a) full amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and

(b) a sum equal to 10% of the remaining amount of tax in dispute arising from the impugned order, subject to a maximum of Rs. 25 Crores

Provided that no appeal shall be filed against an order u/s 129(3), unless a sum equal to 25% of the penalty has been paid by the appellant.

Since in the given case, Home Furnishers disagrees with the entire tax demanded, it has to make a pre-deposit of 10% of the amount of tax in dispute arising from the impugned order, i.e., 10% of Rs. 50,00,000 which is Rs. 5,00,000.

Illustration 2:

XY Company received an adjudication order passed by the Assistant Commissioner of Central Tax on 01-11-2017 under section 73 of the CGST Act, 2017 wherein it was decided as follows:

Particulars

CGST and SGST due (Total) - Rs. 6,00,000

Interest @ 18% p.a. for number of delayed days

Penalty-Rs. 60,000

The assessee filed an appeal before the Appellate Authority on 26-11-2017.

Case 1:

How much the company has to pay as pre-deposit of duty under section 107 (6) of the CGST Act, 2017?

Case II:

Whether your answer would be different if the assessee appeals only against part of the demanded amount say Rs. 4,00,000 and admits the balance liability of tax amounting to Rs. 2,00,000 arising from the said order. ***[CA Final, May 2018 - New] (5 Marks)***

Solution:

Since order is passed by assistant commissioner, appeal would lie to appellate authority. Since it is a case of first appeal, 553 pre-deposit = 100% of admitted dues (with interest and penalty) + 10% of disputed tax, subject to a maximum of Rs. 25 Crores for CGST.

Case I: Pre-deposit = 10% of disputed tax = 10% of 6,00,000 = 60,000.

Case II: Pre-deposit - Admitted Dues (2,00,000+ 18%, interest for period of delay + Proportionate penalty of 20,000) + 10% of disputed tax of Rs. 4,00,000 viz. 40,000.

Sec. 108: Powers of Revisional Authority

(i) Appointment of Revisional Authority [NN 05/2020-CT, dated 13.01.2020): The CBIC has authorised –

(a) the Principal Commissioner or Commissioner of Central Tax for decisions or orders passed by the Additional or Joint Commissioner of Central Tax; and

(b) the Additional or Joint Commissioner of Central Tax for decisions or orders passed by the Deputy Commissioner or Assistant Commissioner or Superintendent of Central Tax, as the Revisional Authority under section 108 of the said Act

(ii) The Revisional Authority may, on his own motion, or upon information received by him or on request from the Commissioner, call for and examine the record of any proceedings, and if he considers that any decision or order passed by any officer subordinate to him is erroneous in so far as it is prejudicial to the interest of revenue and is illegal or improper or has not taken into account certain material facts, or in consequence of an observation by the Comptroller and Auditor General of India, the Revisional Authority may stay the operation of any decision or order if he considers that such decision or order passed by any officer subordinate to him is erroneous in so far as it is prejudicial to the interest of the revenue.

(iii) After giving the concerned person an opportunity of being heard and after making further necessary inquiry, the Revisional Authority may pass such order within 3 years of passing of the said order sought to be revised including enhancing or modifying or annulling the said decision or order.

(iv) The Revisional Authority shall not exercise such revisionary powers if:

(a) appeal is filed against the order to-

- appellate authority u/s 107
- Appellate Tribunal u/s 112
- High Court u/s 117
- Supreme Court u/s 118

(b) period of 6 months as specified in section 107(2) has not expired or

(c) more than 3 years have expired after passing the decision or order

(d) the order has already been taken for revision at any earlier stage

(e) revisionary order has already been passed once.

(v) However, the Revisional Authority may pass an order on any point which has not been raised & decided in an appeal, referred to herein above, **within 1** year from the date of **order passed in such appeal or within 3 years** from the date of such **order** sought to be **revised, whichever is later**.

Rule 109B: Notice to person and order of revisional authority in case of revision

(1) Where the Revisional Authority decides to pass an order in revision under section 108 which is likely to affect the **person adversely**, the Revisional Authority shall serve on him a notice in FORM GST RVN-01 and shall give him a **reasonable opportunity** of being heard.

(2) The Revisional Authority shall, along with its order under sub-section (1) of section 108, issue a summary of the order in FORM GST APL-04 clearly indicating the final amount of demand confirmed.

Illustration 3:

With reference to section 108 of the CGST Act, 2017, elaborate whether a CGST/SGST authority can revise an order passed by his subordinates.

Answer:

Section 2(99) of the CGST Act, 2017 defines "revisional Authority" as an authority appointed or authorised under the CGST Act for revision of decision or orders referred to in section 108 of the CGST Act, 2017. Section 108 of the CGST Act, 2017 authorizes such "revisional authority" to call for and examine any order passed by his subordinates and in case he considers the order of the lower authority to be erroneous in so far as it is prejudicial to revenue and is illegal or improper or has not taken into account certain material facts, whether available at the time of issuance of the said order or not or in consequence of an observation by the Comptroller and Auditor General of India, he may, if necessary, can revise the order after giving opportunity of being heard to the notice. The "revisional authority" can also stay the operation of any order passed by his subordinates pending such revision.

The "revisional authority" shall not revise any order if-

(a) the order has been subject to an appeal under section 107 or under section 112 or under section 117 or under section 118; or

(b) the period specified under section 107(2) has not yet expired or more than three years have expired after the passing of the decision or order sought to be revised.

(c) the order has already been taken up for revision under this section at any earlier stage.

(d) the order is a revisional order.

Appellate Tribunal under GST Law [Sec. 109 - Sec. 111]

The tribunal is the second level of appeal, where appeal can be filed against the order-in-appeal passed by the appellate authority or order-in-revision passed by revisionary authority, by any person aggrieved by such an order-in-appeal or order-in-revision.

Constitution and Structure of Appellate Tribunal and appointment of members of Appellate Tribunal [Section 109 & Section 110]:

1. Upon recommendation of Council, Central Government to constitute two tier Goods & Service Tax Appellate Tribunal. National Bench/Regional Benches and State Bench/Area Benches,

2. The National Bench or Regional Benches to hear the appeals where one of the issues involved relates to the place of supply.
3. The State Bench or Area Benches to hear the appeals involving matters other than matters covering place of supply.
4. An appeal against the order passed by the National Bench will lie directly to the Supreme Court and an appeal against the order passed by the State Bench will lie to the jurisdictional High Court on substantial question of law.
5. The appointments to the Tribunal shall be in the manner prescribed u/s 110 of the CGST Act, 2017. On ceasing to hold the office of the Tribunal, the appointees to the appellate tribunal shall not be entitled to appear, act or plead before the appellate tribunal.
6. In the absence of any of a member of the tribunal in any Bench due to vacancy or otherwise, any appeal may, with the approval of the President or as the case may be, the State President, be heard by a Bench of Two members.
7. However, **any matter** (other than matter involving question of law) involving tax, input tax credit, fine, fee or penalty **not exceeding Rs. 5 Lacs** may, with the approval of the President, be heard by a single member bench.

Sec. 111: Procedure Before Appellate Tribunal

Introduction:

This section deals with the procedure to be followed by Appellate Tribunal while disposing of any proceedings before it.

Analysis:

(i) The Appellate Tribunal is **not bound by the procedure** laid down under the Code of Civil Procedure except in respect of certain matters such as summoning and enforcing attendance of person, receiving evidence on affidavits, requiring production of documents etc.

(ii) The Appellate Tribunal shall, for the purposes of discharging its functions under this Act, have the same powers as are vested in a **civil court** under the Code of Civil Procedure, 1908.

(iii) All the proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of Section 193, 228 & 196 of IPC.

Sec. 112: Appeals to Appellate Tribunal

Introduction:

(a) This section pertains to appeals to Appellate Tribunal by any person who is aggrieved against decision or order passed by appellate authority or revisional authority.

(b) This section also provides for appeal by revenue against decision or order passed by appellate authority or revisional authority.

Analysis:

The Appellate Tribunal has discretion to refuse to admit such appeal in case the tax amountor input tax credit or the difference in tax or input tax credit involved or amount of fine, fees or penalty ordered against does not exceed Rs. 50,000/-.

(a) The Commissioner may issue directions to any subordinate officer to file appeal to Appellate Tribunal against the order passed by the Appellate Authority or Revisional Authority.

(b) Every appeal by **assessee** to Appellate Tribunal to be filed **within 3 months** from the date of communication of order or decision appealed against.

(c) The appeal to the Appellate Tribunal by **Revenue** can be filed **within 6 months** from the date of order or decision appealed against.

(d) Memorandum of Cross objection **[MOCO]** to be filed **within 45 days** from the receipt of notice of filing of such appeal.

(e) Appellate Tribunal is empowered to condone the delay in filing appeal by assessee for a **further period of 3 months** or memorandum of cross objection **[MOCO]** for a further period of **45 days**.

(f) **No** powers to Appellate Tribunal to **condone** the delay in filing appeal by **revenue**.

(g) Appeal to be filed in prescribed form duly verified in prescribed manner along with prescribed fees and
- Amount of tax, interest, fine, fee & penalty, as is admitted, in full; and
- pre-deposit of sum equal to 20% of remaining amount of tax in dispute in addition to amount deposited while filling appeal before Appellate Authority, subject to a maximum of Rs. 50 crores (under CGST).

(h) On payment of above amount, the recovery proceedings for balance amount are stayed till the disposal of appeal.

(i) No pre-deposit shall be payable in case of appeal filed by department.

(j) Every miscellaneous application shall be filed along with prescribed fees.

Relevant Rules:

1. An appeal to the Appellate Tribunal is to be filed electronically, in FORM GST APL-05 and a provisional acknowledgement shall be issued immediately.

2. A memorandum of cross-objections to the Appellate Tribunal shall be filed in quintuplicate to the Registrar in **FORM GST APL-06**.

3. The appeal and the memorandum of cross objections shall be signed and verified.

4. A hard copy of the appeal in **FORM GST APL-05** shall be submitted to the Registrar in quintuplicate and with a certified copy of the decision or order appealed against within seven days of filing of the appeal and a final acknowledgement, indicating the appeal number shall be issued thereafter in **FORM GST APL-02:**

5. If the hard copy of the appeal and documents are submitted within seven days from the date of filing the **FORM GST APL-05**, the date of filing of the appeal shall be the date of issue of provisional acknowledgement and where the hard copy of the appeal and documents are submitted after seven days, the date of filing of the appeal shall be the date of submission of documents. An appeal shall be deemed to be filed only on generation of the final acknowledgement number.

6. The fees for filing and restoration of appeal shall be one thousand rupees for every one lakh rupees of tax or input tax credit involved or the difference in tax or input tax credit involved or the amount of fine, fee or penalty determined in the order appealed against, subject to maximum of twenty-five thousand rupees.

7. There shall be no fee for application made before the Appellate Tribunal for rectification of errors.

Application to the Appellate Tribunal:

(a) A cross appeal or appeal by Revenue to the Appellate Tribunal shall be made electronically, in FORM GST APL- 07.
(b) A hard copy of the application in FORM GST APL-07 shall be submitted to the Registrar in quintuplicate and shall be accompanied by a certified copy of the decision or order appealed against within seven days of filing the application under sub-rule (1) and an appeal number shall be generated.

CGST (Ninth Removal of Difficulties) Order, 2019, dated 03.12.2019

For the purpose of filing the appeal or application as referred to in sub-section (1) or sub-section (3) of section 112 of the said Act, as the case may be, the Appellate Tribunal and its Benches are yet to be constituted in many States and Union territories under section 109 of the said Act as a result whereof, the said appeal or application could not be filed within the time limit specified in the said sub-sections, and because of that, certain difficulties have arisen in giving effect to the provisions of the said section.

Therefore, for the removal of difficulties, it is hereby clarified that for the purpose of calculating-

(a) the "three months from the date on which the order sought to be appealed against is communicated to the person preferring the appeal" in sub-section (1) of section 112, the start of the three months period shall be considered to be the later of the following dates:-

(i) date of communication of order; or
(ii) the date on which the President or the State President, as the case may be, of the Appellate Tribunal after its constitution under section 109, enters office;

(b) the "six months from the be considered to be the later of the posed in sub-section (3) of section 112, the start of the six months period shall be considered to be the later of the following dates:-
(i) date of communication of order; or
(ii) the date on which the President or the State President, as the case may be, of the Appellate Tribunal after its constitution under section 109, enters office.

Illustration 4:

Specify the amount of mandatory pre-deposit which should be made along with every appeal before the Appellate Authority and the Appellate Tribunal. Does making the pre-deposit have any impact on recovery proceedings? Explain. ***[MTP-May 2018]***

Answer:

Section 107(6) of the CGST Act provides that no appeal shall be filed before the Appellate Authority, unless the appellant has paid-
(i) full amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and
(ii) a sum equal to 10% of the remaining amount of tax in dispute arising from the impugned order, subject to a maximum of Rs.25 Crores (under CGST); and
(iii) pre-deposit of a sum equal to 25% of the penalty imposed, in case of appeal to be filed against an order passed u/s 129(3).

Section 112(8) of the CGST Act lays down that no appeal can be filed before the Tribunal, unless the appellant deposits-
(i) full amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and
(ii) 20% of the remaining amount of tax in dispute, in addition to the amount deposited before the Appellate Authority, arising from the said order, in relation to which appeal has been filed, subject to a maximum of Rs.50 Crores (under CGST).

Where the appellant has made the pre-deposit, the recovery proceedings for the balance amount shall be deemed to be stayed till the disposal of the appeal.

PRODUCTION OF ADDITIONAL EVIDENCE BEFORE THE APPELLATE AUTHORITY OR THE APPELLATE TRIBUNAL

1. The appellant shall not be allowed to produce before the Appellate Authority or the Appellate Tribunal any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority or, as the case may be, the Appellate Authority except in the following circumstances, namely –

(a) where the adjudicating authority or, as the case may be, the Appellate Authority has refused to admit evidence which ought to have been admitted; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the adjudicating authority or, as the case may be, the Appellate Authority; or

(c) where the appellant was prevented by sufficient cause from producing before the adjudicating authority or, as the case may be, the Appellate Authority any evidence which is relevant to any ground of appeal; or

(d) where the adjudicating authority or, as the case may be, the Appellate Authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

2. No evidence shall be admitted under sub-rule (1) unless the Appellate Authority or the Appellate Tribunal records in writing the reasons for its admission.

3. The Appellate Authority or the Appellate Tribunal shall not take any evidence produced under sub-rule (1) unless the adjudicating authority or an officer authorised in this behalf by the said authority has been allowed a reasonable opportunity-

(a) to examine the evidence or document or to cross-examine any witness produced by the appellant; or

(b) to produce any evidence or any witness in rebuttal of the evidence produced by the appellant under sub-rule (1).

4. Nothing contained in this rule shall affect the power of the Appellate Authority or the Appellate Tribunal to direct the production of any document, or the examination of any witness, to enable it to dispose of the appeal.

Sec. 113: Orders of Appellate Tribunal

(i) Appellate Tribunal to pass the order confirming, modifying or annulling the decision or order appealed against.

(ii) The Appellate Tribunal also has power to remand the case back to the appellate authority or the Revisional authority or the original adjudicating authority.

(iii) Maximum 3 adjournments shall be granted to a party on showing reasonable cause to be recorded in writing.

(iv) The Appellate Tribunal is empowered to amend its order to rectify any mistake apparent from record, However tribunal may rectify it's order if the mistake is brought to it's notice by commissioner or other party to appeal within period of 3 months of date of such order. Opportunity of being heard to be granted in case such rectification results into enhancing an assessment or reducing a refund or input tax credit or otherwise increasing the liability.

(v) The Appellate Tribunal to hear and decide the appeal, as far as possible, within a period of 1 year from the date of filing.

(vi) The Appellate Tribunal to communicate the copy of order to appellate authority/Revisional authority / original adjudicating authority, the appellant, the jurisdictional Commissioner, Commissioner of State Tax or Union Territory Tax.

(vii) The jurisdictional officer shall issue a statement in FORM GST APL-04 clearly indicating the final amount of demand confirmed by the Appellate Tribunal.

Sec. 115: Interest on Refund of Amount Paid for Admission of Appeal

Where an amount paid by the appellant under sub-section (6) of section 107 or sub-section (8) of section 112 is required to be refunded consequent to any order of the Appellate Authority or of the Appellate Tribunal, interest at the rate specified under section 56 shall be payable in respect of such refund from the date of payment of the amount till the date of refund of such amount.

ANALYTICAL VIEW OF THE TOPIC

(i) Interest at the rates specified in Section 56 shall be payable on refund of pre-deposit.

(ii) Such interest to be calculated from the date of payment of such pre-deposit till the date of refund.

Sec. 116: Appearance by Authorised Representative

Introduction:

This section provides for appearance by authorised representative in proceedings or appeals except in circumstances where personal appearance is required for examination or oath or affirmation.

Analysis:

(i) "Authorised representative" means-

- Relative or regular employee
- Practising Advocate
- Practising CA, CMA or CS
- A retired government officer who had worked for not less than 2 years in a post not lower in rank than Group- B gazetted officer
- Goods and Services Tax Practitioner

(ii) Any person, who has retired or resigned after serving more than 2 years in the indirect tax departments of Government of India or any State Government as a gazetted officer, shall not be entitled to appear as authorised representative for a period of 1 year from the date of retirement or resignation.

(iii) Any person,
- who has been dismissed or removed from government service
- who is convicted of an offence under CGST Act, SGST Act, IGST Act, UTGST Act or under existing laws
- who is found guilty of misconduct by the prescribed authority,
- shall not be qualified as authorised representative.

(iv) Any person, who has become insolvent, shall not be qualified as authorized representative during the period of insolvency.

(v) Any disqualification under SGST Act or UTGST Act shall be construed as disqualification under CGST Act.

Sec. 117: Appeal to High Court

Introduction:

This section provides for appeal to High Court by any person aggrieved by an order passed by State Bench or Area Benches.

Analysis:

(i) High Court may admit an appeal if it is satisfied that the case involves a substantial question of law.

(ii) No appeal shall lie to High Court if such order is passed by National Bench or Regional Benches.

(iii) Appeal to be filed in the form of appeal memorandum, precisely stating the substantial question of law involved, **within 180 days** from the date of receipt of order appealed against accompanied by prescribed fee.

(iv) High Court is to condone the delay in filing appeal.

(v) On being satisfied, High Court shall formulate a substantial question of law.

(vi) Appeal to be heard only on the question so formulated and the respondent shall be allowed to argue that the case does not involve such question.

(vii) The High Court may hear the appeal on any other substantial question of law not by it after satisfying, for reasons to be recorded, of involvement of such question in the case.

(viii) The High Court may determine any issue which has not been determined or has been wrongly determined by the Appellate Tribunal.

(ix) Appeal to be heard by a Bench of not less than 2 Judges of High Court and shall be decided in accordance with the majority of opinion of such Judges,

(x) Difference of opinion on any point shall be referred to one or more of the other Judges of High Court and such point shall be decided according to the opinion of majority of Judges who have heard the case including those who first heard it.

(xi) The effect of judgment of High Court shall be given on the basis of a certified copy of the judgment.

(xii) The provisions of Code of Civil Procedure relating to appeals to High Court shall apply to appeals under this section.

Illustration 5:

Mr. A had filed an appeal before the Appellate Tribunal against an order of the Appellate Authority where the issue involved related to place of supply. The order of Appellate Tribunal is also in favour of the Department. Mr. A now wants to file an appeal against the decision of the Appellate Authority as he feels the stand taken by him is correct.

You are required to advise him suitably with regard to filing of an appeal before the appellate forum higher than the Appellate Tribunal. ***[RTP-May 2018]***

Answer:

As per section 117(1) of the CGST Act, 2017, an appeal against orders passed by the State Bench or Area Benches of the Tribunal lies to the High Court, if the High Court is satisfied that such an appeal involves a substantial question of law.

However, appeal against orders passed by the National Bench or Regional Benches of the Tribunal lies to the Supreme Court and not High Court. As per section 109(5) of the Act, only the National Bench or Regional Benches of the Tribunal can decide appeals where one of the issues involved relates to the place of supply.

Since the issue involved in Mr. A's case relates to place of supply, the appeal in his case would have been decided by the National Bench or Regional Bench of the Tribunal.

Thus, Mr. A will have to file an appeal with the Supreme Court and not with the High Court.

Sec. 118: Appeal to Supreme Court

An appeal can lie with the Supreme Court in case of:

(i) Any judgement or order passed by National Bench, Regional Benches of Appellate Tribunal or High Court.

(ii) When an appeal is reversed, or varied, the effect shall be given to the order of the Supreme Court on the question of law so formulated and delivered.

(iii) The said judgement shall clearly indicate the grounds on which the decision is founded.

(iv) Apart from this, the Supreme Court is empowered to frame any substantial question of law not formulated by any lower authority if it is satisfied that the case before it involves such question of law.

Sec. 119: Sums Due to be Paid Notwithstanding Appeal, etc.

The sums due to the Government as a result of an order passed by the Appellate Tribunal or High Court shall be paid notwithstanding that an appeal has been preferred to High Court or Supreme Court, as the case may be.

Sec. 120: Appeal Not to be Filed in Certain Cases

1. **Board's power to issue instructions regulating filing of appeal/revision by Department:** The Board may, on the recommendations of the Council, from time to time, issue orders or instructions or directions fixing such monetary limits, as it may deem fit, for the purposes of regulating the filing of appeal or application by the officer of the central tax under the provisions of this Chapter.
2. **Non filing of appeal, etc. as per aforesaid instructions, No bar on department to file appeal in future:** Where, in pursuance of the orders or instructions or directions issued under sub-section (1), the officer of the central tax has not filed an appeal or application against any decision or order passed under the provisions of this Act, it shall not preclude such officer of the central tax from filing appeal or application in any other case involving the same or similar issues or questions of law.
3. **Non filing of appeal, etc. as per aforesaid instruction, Assessee cannot contend that matter was accepted by the department:** Notwithstanding the fact that no appeal or application has been filed by the officer of the central tax pursuant to the orders or instructions or directions issued under sub-section (1), no person, being a party in appeal or application shall contend that the officer of the central tax has acquiesced in the decision on the disputed issue by not filing an appeal or application.
4. **The Commissioner (Appeals) or Appellate Tribunal or court to have regard to this section when appeal, etc. not filed:** The Appellate Tribunal or court hearing such appeal or application shall have regard to the circumstances under which appeal or application was not filed by the officer of the central tax in pursuance of the orders or instructions or directions issued under sub-section (1).

ANALYTICAL VIEW OF THE TOPIC

(i) On recommendation of Council, the Board may issue order or instructions or directions fixing monetary limits for the purpose of regulating the filing of appeal or application by Officer of central tax.

(ii) In case the Officer has not filed an appeal/application against any decision/order in view of such order/ instruction/directions, it shall not preclude him from filing appeal/application in any other cases involving same/similar issue or question of law.

(iii) No party in appeal/application shall contend that the Officer has acquiesced (agreed /consented) in the decision on the disputed issue by not filing an appeal/application.

(iv) The Appellate Tribunal or court hearing such appeal/application shall have regard to the circumstances under which appeal/application was not filed by the Officer in pursuance of such order/instructions/ directions.

Sec. 121: Non-Appealable Decisions and Orders

Notwithstanding anything to the contrary in any provisions of this Act, no appeal shall lie against any decision taken or order passed by an officer of central tax if such decision taken or order passed relates to any one or more of the following matters, namely:-

(a) an order of the Commissioner or other authority empowered to direct transfer of proceedings from one officer to another officer; or

(b) an order pertaining to the seizure or retention of books of account, register and other documents; or

(c) an sanctioning under this Act; or

(d) an order passed under section 80 (i.e., payment in EMI).

Offences and Penalties

Sec. 122: Penalty for Certain Offences

1. Where a taxable person who- (1)
   - (i) supplies any goods or services or both without issue of any invoice or issues an incorrect or false with regard to any such supply;
   - (ii) issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder;
   - (iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
   - (iv) collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;
   - (v) fails to deduct the tax in accordance with the provisions of sub-section (1) of section 51, or deducts an amount which is less than the amount required to be deducted under the said sub-section, or where he fails to pay to the Government under sub-section (2) thereof, the amount deducted as tax;
   - (vi) fails to collect tax in accordance with the provisions of sub-section (1) of section 52, or collects an amount which is less than the amount required to be collected under the said sub-section or where he fails to pay to the Government the amount collected as tax under sub-section (3) of section 52;
   - (vii) takes or utilises input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;
   - (viii) fraudulently obtains refund of tax under this Act;
   - (ix) takes or distributes input tax credit in contravention of section 20, or the rules made thereunder;
   - (x) falsifies or substitutes financial records or produces fake accounts or documents or furnishes any false information or return with an intention to evade payment of tax due under this Act;
   - (xi) is liable to be registered under this Act but fails to obtain registration;
   - (xii) furnishes any false information with regard to registration particulars, either at the time of applying for registration, or subsequently;
   - (xiii) obstructs or prevents any officer in discharge of his duties under this Act;
   - (xiv) transports any taxable goods without the cover of documents as may be specified in this behalf,
   - (xv) suppresses his turnover leading to evasion of tax under this Act;
   - (xvi) fails to keep, maintain or retain books of account and other documents in accordance with the provisions of this Act or the rules made thereunder;
   - (xvii) fails to furnish information or documents called for by an officer in accordance with the provisions of this Act or the rules made thereunder or furnishes false information or documents during any proceedings under this Act:

(xviii) supplies, transports or stores any goods which he has reasons to believe are liable to confiscation under this Act;

(xix) issues any invoice or document by using the registration number of another registered person;

(xx) tampers with, or destroys any material evidence or document;

(xxi) disposes off or tampers with any goods that have been detained, seized, or attached under this Act, he shall be liable to pay a penalty of thousand rupees or an amount equivalent to the tax evaded or the tax not deducted under section 51 or short deducted or deducted but not paid to the Government or tax not collected under section 52 or short collected or collected but not paid to the Government or input tax credit availed of or passed on or distributed irregularly, or the refund claimed fraudulently, whichever is higher.

(1A) Any person who retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub- section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on.

(2) Any registered person who supplies any goods or services or both on which any tax has not been paid or short- paid or erroneously refunded, or where the input tax credit has been wrongly availed or utilised,

(a) for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty of ten thousand rupees or ten per cent of the tax due from such person, whichever is higher;

(b) for reason of fraud or any wilful misstatement or suppression of facts to evade tax, shall be liable to a penalty equal to ten thousand rupees or the tax due from such person, whichever is higher.

(3) Any person who -

(a) aids or abets any of the offences specified in clauses (i) to (xxi) of sub-section (1):

(b) acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping concealing, supplying, or purchasing or in any other manner deals with any goods which he knows or has reasons to believe are liable to confiscation under this Act or the rules made thereunder;

(c) receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reasons to believe are in contravention of any provisions of this Act or the rules made thereunder;

(d) fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry;

(e) fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder or fails to account for an invoice in his books of account, shall be liable to a which may extend to twenty-five thousand rupees.

ANALYTICAL VIEW OF THE TOPIC

At the outset, the section declares the offences that attract penalty as a consequence, apart from the requirement to pay the tax and applicable interest. Some of the offences under this section may also attract prosecution under section 132 but that depends on the gravity of the offence defined in that section.

The Section is divided in four main parts:

(i) The first sub-section prescribes 21 types of offences, any one of which if committed, can attract penalty equal to amount of tax involved or Rs. 10,000 (under CGST), whichever is higher.

(ii) **Section 122(1A):** Any person who retains the benefit of a transaction covered under clauses (i), (ii), (vii) or clause (ix) of sub-section (1) and at whose instance such transaction is conducted, shall be liable to a penalty of an amount equivalent to the tax evaded or input tax credit availed of or passed on [Section 122(1A) inserted by Finance Act, 2020, w.e.f. 01.01.2021].

Analysis of Amendment: This sub-section is introduced to penalize the actual offender who used to retain the benefit of the transaction conducted by someone else. Prior to this amendment, the penal provisions were for a person who commits an offence but the amended provision has expanded the scope to include a person who causes to commit and retains the benefits arising out of offences covered under clauses (1), (5), (vii) or clause (ix) of sub- section (1).

(iii) The second sub-section deals with two situations, first is where certain offences committed are not due to either fraud or wilful misstatement or suppression of facts. In such a case, penalty will get reduced to 10% of tax involved subject to a minimum of Rs. 10,000 (under CGST). And then, where the offence committed is due to either fraud or any wilful misstatement or suppression of facts to evade tax will result in a penalty equal to tax involved subject to a minimum of Rs. 10,000 (under CGST).

(iv) The third sub-section deals with offences where the person is not directly involved in any evasion but may be a party to evasion or if he does not attend summons or produce documents. Penalty in such a case would be upto Rs 25,000 (under CGST)

Illustration 1:

Answer the following questions:

(i) Shagun started supply of goods in Vasai, Maharashtra from 01.01.20XX. Her turnover exceeded Rs. 20 lakh on 25.01.20XX. However, she didn't apply for registration. Determine the amount of penalty, if any, that may be imposed on Shagun on 31.03.20XX, if the tax evaded by her, as on said date, on account of failure to obtain registration is Rs. 1,26,000.

(ii) Sagar, managing director of Telecom Solutions Ltd., is issued a summon to appear before the central tax officer to produce the books of accounts of Telecom Solutions Ltd. in an inquiry conducted on said company. Determine the amount of penalty, if any, that may be imposed on Sagar, if he fails to appear before the central tax officer [RTP May 2018]

Answer:

(i) Where the aggregate turnover of a supplier making supplies from a State/UT exceeds Rs. 20 lakh in a financial year, he is liable to be registered in the said State/UT. The said supplier must apply for registration within 30 days from the date on which he becomes liable to registration. However, in the given case, although Shagun became liable to registration on 25.01.20XX, she didn't apply for registration within 30 days of becoming liable to registration.

Section 122(1)(xi) of the CGST Act, 2017 stipulates that a taxable person who is liable to be registered under the CGST Act, 2017 but fails to obtain registration shall be liable to pay a penalty of:

(a) Rs. 10,000

Or

(b) an amount equivalent to the tax evaded [Rs. 1,26,000 in the given case], whichever is higher.

Thus, the amount of penalty that can be imposed on Shagun is Rs. 1,26,000.

(ii) Section 122(3)(d) of the CGST Act, 2017 stipulates that any person who fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an inquiry is liable to a penalty which may extend to Rs. 25,000. Therefore, penalty upto Rs. 25,000 can be imposed on Sagar, in the given case.

Sec. 125: General Penalty

Any person, who contravenes any of the provisions of this Act or any rules made thereunder for which no penalty is separately provided for in this Act, shall be liable to a penalty which may extend to Rs. 25,000 (under CGST).

Sec. 126: General Disciplines Related to Penalty

The following guiding disciplines in certain circumstances apply to substantial penalties:

(a) No penalty can be imposed where the tax involved is less than Rs. 5,000/- (minor breach) or in case of documentation errors apparent on the face of record.

(b) When penalty is still liable to be imposed, the next safety as laid down is to inquire into the degree and severity of the breach to proceed with imposition of penalty. In these cases, if the facts do not demand imposition of penalty. restraint is advised. However, no such discretion is provided in the section while providing for amount of penalty.

(c) Person liable to penalty must be given an opportunity of being heard. Further a speaking order is passed for imposing such penalty.

(d) Voluntary disclosure by a person to an officer (not merely in his own books and records) about the circumstances of the breach may be considered as a mitigating factor for the quantifying of penalty.

(e) Cases involving fixed sum or fixed percentage of penalty are excluded.

Illustration 2:

Tripathi, registered under the CGST Act, 2017 has made a breach in payment of tax amounting to Rs. 6,100. Assessing Authority has imposed a penalty as per law applicable to the breach. Invoking the provisions of section 126, Tripathi argues that it is a minor breach and therefore, no penalty is imposable. In another instance. Tripathi has omitted certain details in documentation that is not easily rectifiable. This has occurred due to the gross negligence of his accountant and he makes a plea that he was unaware of it and therefore no penalty should be levied. Tripathi voluntarily writes accepting a major procedural lapse from his side and requests the officer to condone the lapse as the loss caused to the revenue was not significant. Also a lapse on the part of Tripathi has no specific penalty provision under the CGST Act, 2017. He is very confident that no penalty should be levied without a specific provision under the Act.

Discuss, what action may be taken by the Assessing Authority under law for each of the above breaches. ***[MTP – Nov. 2018]***

Answer:

As per section 126(1) of the CGST Act, 2017, no penalty shall be leviable under the Act for minor breaches of tax regulations. In terms of Explanation (a) to section 126(1), a breach shall be considered as "minor breach", if tax involved is less than Rs. 5,000. Breach made by Tripathi is not a 'minor breach' since the amount involved is not less than Rs. 5,000. So, penalty is imposable. Any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent/gross negligence is not liable for penalty in terms of section 126(1) of the CGST Act, 2017. Thus, penalty is imposable in the present case, since the omission in the documentation is not easily rectifiable and has occurred due to gross negligence. As per section 126(5) of the CGST Act, 2017, where there is a voluntary disclosure of breach, prior to its discovery by the officer, the proper officer may consider this fact as a mitigating factor when quantifying the penalty. Since Tripathi has voluntarily disclosed the breach of procedural requirement to the officer, the proper officer may consider this fact as a mitigating factor when quantifying the penalty. Therefore, the quantum of penalty will depend on the facts and circumstances of the case. As per section 125 of the CGST Act, 2017, when no specific penalty has been specified for contravention of any of the provisions of the Act or any rules made there under, it shall be liable to a penalty which may extend to Rs 25,000. Therefore, general penalty upto Rs. 25,000 may be imposed on Tripathi as when no specific penalty is provided for any contravention, a general penalty may be imposed.

Illustration 3:

Raghuraman is a registered supplier in Madhya Pradesh. He failed to pay the GST amounting to Rs. 7,400 for the month of January, 20XX. The proper officer imposed a penalty on

Raghuraman for failure to pay tax. Raghuraman believes that it is a minor breach and in accordance with the provisions of section 126 of the CGST Act, 2017, no penalty is imposable for minor breaches of tax regulations. Examine the correctness of Raghuraman's claim.

Answer:

No, Raghuraman's claim is not tenable in law. Section 126(1) of the CGST Act, 2017 provides that no officer shall impose any penalty under CGST Act, 2017, inter alia, for minor breaches of tax regulations or procedural requirements. Further, explanation to section 126(1) of the CGST Act, 2017 stipulates that a breach shall be considered a 'minor breach' if the amount of tax involved is less than Rs. 5,000.

In the given case, breach made by Raghuraman is not a 'minor breach' since the amount involved is not less than Rs. 5,000. So, penalty is imposable under the CGST Act, 2017.

Sec. 127: Power to Impose Penalty in Certain Cases

Where the proper officer is of the view that a person is liable to a penalty and the same is not covered under any proceedings under section 62 or section 63 or section 64 or section 73 or section 74 or section 129 or section 130, he may issue an order levying such penalty after giving a reasonable opportunity of being heard to such person.

ANALYTICAL VIEW OF THE TOPIC

This section empowers to the proper officer to initiate separate penalty proceedings even if the penalty is not covered under any proceedings under any other sections.

Penalty proceedings can be initiated under this Section even if the same are not covered under the following sections

Section 62 : Assessment of non-filers of returns
Section 63 : Assessment of unregistered persons
Section 64 : Summary assessment
Section 73 and 74 : Determination of tax by proper officer
Section 129 : Detention, seizure and release of goods and conveyances in transit
Section 130 : Confiscation of goods or conveyances and levy of penalty

In other words, penalties can be imposed by proper officer after giving due opportunity even in cases where there are no proceedings open with regard to assessment, adjudication, detention or confiscation. This may involve situations where there is no evasion of tax directly by the person concerned but he may be involved in offences mentioned in sub- section (3) of Section 122. Section 122(3) encompasses the following situations:

(1) Aids or abets any of the offences specified in section 122(1):
(2) Acquires possession of, or in any way concerns himself in transporting, removing, depositing, keeping, concealing supplying, or purchasing or in any other manner deals with any goods which he knows or has reason to believe are liable to confiscation;

(3) Receives or is in any way concerned with the supply of, or in any other manner deals with any supply of services which he knows or has reason to believe are in contravention of any provisions of this Act or the rules made thereunder;

(4) Fails to appear before the officer of central tax, when issued with a summon for appearance to give evidence or produce a document in an enquiry:

(5) Fails to issue invoice in accordance with the provisions of this Act or the rules made thereunder, or fails to account for an invoice in his books of account.

Sec. 128: Power to Waive Penalty or Fee or Both

The Government may, by notification, waive in part or full, any penalty referred to in section 122 or section 123 or section 125 or any late fee referred to in section 47 for such class of taxpayers and under such mitigating circumstances as may be specified therein on the recommendations of the Council.

Sec. 129 Detention, Seizure and Release of Goods and Conveyances in Transit

This section provides for the provisions relating to detention of goods or conveyances or both in case of certain defaults under the law.

(1) Notwithstanding anything contained in this Act, where any person transports any goods or stores any goods while they are in transit in contravention of the provisions of this Act or the rules made thereunder, all such goods and conveyance used as a means of transport for carrying the said goods and documents relating to such goods and conveyance shall be liable to detention or seizure and after detention or seizure, shall be released,-

(a) **Where owner comes forward:** on payment of penalty equal to 200% of the tax payable on such goods and, in case of exempted goods, on payment of an amount equal to 2% of the value of goods or Rs. 25,000/-, whichever is less;

(b) **Where owner does not come forward:** on payment of penalty equal to 50% of the value of the goods or 200% of the tax payable on such goods, whichever is higher, and in case of exempted goods, on payment of an amount equal to 5% of the value of goods or Rs. 25,000/-, whichever is less;
[clauses (a) & (b) substituted by Finance Act, 2021, wef 01.01.2022]

(c) upon furnishing a security equivalent to the amount payable under clause (a) or clause (b) in such form and manner as may be prescribed.

Provided that no such goods or conveyance shall be detained or seized without serving an order of detention or seizure on the person transporting the goods.

(2) Sub-Section (2) Omitted by Finance Act, 2021, w.e.f. 01.01.2022

(3) The proper officer detaining or seizing goods or conveyance shall issue a notice within 7 days of such detention or seizure, specifying the penalty payable, and thereafter, pass an

order within a period of 7 days from the date of service of such notice, for payment of penalty under clause (a) or clause (b) of sub-section (1). [Sub-Section (3) substituted by Finance Act, 2021, w.e.f. 01.01.2022]

As per Rule 142(3), where the person concerned makes payment of the amount referred to in section 129(1) within 7 days of the notice issued u/s 129(3) but before the issuance of order under the said sub-section (3), he shall intimate the proper officer of such payment and the proper officer shall issue an order concluding the proceedings in respect of the said Notice. [Bold & Italic words substituted by NN 40/2021 - CT, w.e.f. 01.01.2022]

(4) No tax, interest or penalty shall be determined under sub-section (3) without giving the person concerned an opportunity of being heard. [Omitted words omitted by Finance Act, 2021, w.e.f. 01.01.2022]

(5) On payment of amount referred in sub-section (1), all proceedings in respect of the notice specified in sub-section (3) shall be deemed to be concluded...

(6) Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty under sub- section (1) within 15 days from the date of receipt of the copy of the order passed under sub-section (3), the goods or conveyance so detained or seized shall be liable to be sold or disposed of otherwise, in such manner and within such time as may be prescribed, to recover the penalty payable under sub-section (3):

Provided that the conveyance shall be released on payment by the transporter of penalty under sub-section (3) or Rs. 1,00,000/-, whichever is less:

Provided further that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of 15 days may be reduced by the proper officer.

[Sub-Section (6) substituted by Finance Act, 2021, w.e.f. 01.01.2022]

Who will be considered as the "owner of the goods" for the purposes of section 129(1) of the CGST Act? [Circular No. 76/50/2018-GST, dated 31.12.2018]

It is hereby clarified that if the invoice or any other specified document is accompanying the consignment of goods, then either the consignor or the consignee should be deemed to be the owner. If the invoice or any other specified document is not accompanying the consignment of goods, then in such cases, the proper officer should determine who should be declared as the owner of the goods.

Rule 144A - Recovery of Penalty by Sale of Goods or Conveyance Detained or Seized in Transit [inserted by NN 40/2021-CT, w.e.f. 01.01.2022]

(1) Where the person transporting any goods or the owner of such goods fails to pay the amount of penalty u/s 129(1) within 15 days from the date of receipt of the copy of the order passed u/s 129(3), the proper officer shall proceed for sale or disposal of the goods or conveyance so detained or seized by preparing an inventory and estimating the market value of such goods or conveyance:

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of 15 days may be reduced by the proper officer.

(2) The said goods or conveyance shall be sold through a process of auction, including e-auction, for which a notice shall be issued clearly indicating the goods or conveyance to be sold and the purpose of sale.

Provided that where the person transporting said goods or the owner of such goods pays the amount of penalty u/s 129(1), including any expenses incurred in safe custody and handling of such goods or conveyance, after the time period mentioned in sub-rule (1) but before the issuance of notice under this sub-rule, the proper officer shall cancel the process of auction and release such goods or conveyance.

(3) The last day for submission of bid or the date of auction shall not be earlier than 15 days from the date of issue of the notice referred to in sub-rule (2):

Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of 15 days may be reduced by the proper officer.

(4) The proper officer may specify the amount of pre-bid deposit to be furnished in the manner specified by such officer, to make the bidders eligible to participate in the auction, which may be returned to the unsuccessful bidders, forfeited in case the successful bidder fails to make the payment of the full amount, as the case may be

(5) The proper officer shall issue a notice to the successful bidder requiring him to make the payment within a period of 15 days from the date of auction: Provided that where the detained or seized goods are perishable or hazardous in nature or are likely to depreciate in value with passage of time, the said period of 15 days may be reduced by the proper officer.

(6) On payment of the full bid amount, the proper officer shall transfer the possession and ownership of the said goods or conveyance to the successful bidder and issue a certificate.

(7) The proper officer shall cancel the process and proceed for re-auction where no bid is received or the auction is considered to be non-competitive due to lack of adequate participation or due to low bids.

(8) Where an appeal has been filed by the person under the provisions of sub-section (1) read with sub-section (6) of section 107, the proceedings for recovery of penalty by sale of goods or conveyance detained or seized in transit under this rule shall be deemed to be stayed:

Provided that this sub-rule shall not be applicable in respect of goods of perishable or hazardous nature.

Rule 154 - Disposal of Proceeds of Sale of Goods or Conveyance and Movable or Immovable Property [substituted by NN 40/2021 - CT, w.e.f. 01.01.2022]

(1) The amounts so realised from the sale of goods or conveyance, movable or immovable property, for the recovery of dues from a defaulter or for recovery of penalty payable u/s 129(3) shall,-
   (a) first, be appropriated against the administrative cost of the recovery process;
   (b) next, be appropriated against the amount to be recovered or to the payment of the penalty payable u/s 129(3), as the case may be
   (c) next, be appropriated against any other amount due from the defaulter under the Act or the IGST Act, 2017 or the UTGST Act, 2017 or any of the SGST Act, 2017 and the rules made thereunder; and
   (d) the balance, if any, shall be credited to the electronic cash ledger of the owner of the goods or conveyance as the case may be, in case the person is registered under the Act, and where the said person is not required to be registered under the Act, the said amount shall be credited to the bank account of the person concerned;

(2) where it is not possible to pay the balance of sale proceeds, as per clause (d) of sub-rule (1), to the person concerned within a period of 6 months from the date of sale of such goods or conveyance or such further period as the proper officer may allow, such balance of sale proceeds shall be deposited with the Consumer Welfare Fund.

Illustration 4:

Whether action can be taken for transportation of goods without valid documents or if goods are attempted to be removed without proper record in books? If yes, explain the related provisions under the CGST Act, 2017. ***[MTP – May 2018]***

Answer:

Yes, action can be taken for transportation of goods without valid documents or if goods are attempted to be removed without proper record in books. If any person transports any goods or stores any such goods while in transit without the documents prescribed under the Act (i.e. invoice and a declaration) or supplies or stores any goods that have not been recorded in the books or accounts maintained by him, then such goods shall be liable for detention along with any vehicle on which they are being transported [Section 129 of CGST Act].

Where owner comes forward: Such goods shall be released on payment of penalty equal to 200% of the tax payable on such goods or upon furnishing of security equivalent to the said amount.

In case of exempted goods, penalty is 2% of the value of goods or Rs. 25,000/-, whichever is less.

Where owner does not come forward: Such goods shall be released on payment of penalty equal to 50% of the value of the goods or 200% of the tax payable on such goods, whichever is higher or upon furnishing of security equivalent to the said amount.

In case of exempted goods, penalty is 5% of value of goods or Rs. 25,000/-, whichever is less.

Sec. 130: Confiscation of Goods or Conveyances and Levy of Penalty

This section provides for 5 precise causes leading to confiscation of goods/conveyances. The nature of authorization to confiscate and opportunity to release goods/conveyances liable for such confiscation are detailed in this section.

(1) ~~Notwithstanding anything contained in this Act, if~~ Where any person [Omitted words substituted by Finance Act, 2021, w.e.f. 01.01.2022]-

(i) supplies or receives any goods in contravention of any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(ii) does not account for any goods on which he is liable to pay tax under this Act; or

(iii) supplies any goods liable to tax under this Act without having applied for registration; or

(iv) contravenes any of the provisions of this Act or the rules made thereunder with intent to evade payment of tax; or

(v) uses any conveyance as a means of transport for carriage of goods in contravention of the provisions of this Act or the rules made thereunder unless the owner of the conveyance proves that it was so used without the knowledge or connivance of the owner himself, his agent, if any, and the person in charge of the conveyance,

then, all such goods or conveyances shall be liable to confiscation and the person shall be liable to penalty under section 122

(2) Whenever confiscation of any goods or conveyance is authorised by this Act, the officer adjudging it shall give to the owner of the goods an **option to pay in lieu of confiscation**, such fine as the said officer thinks fit.

However, the amount of **fine shall not exceed the market value** of the goods confiscated, less the tax chargeable thereon. Further, at the same time, the aggregate of such fine and penalty leviable shall not be less than the ~~amount of penalty leviable under sub-section (1) of section 129~~ penalty equal to 100% of the tax payable on such goods [Omitted words substituted by Finance Act, 2021, w.e.f. 01.01.2022].

Further, where any such conveyance is used for the carriage of the goods or passengers for hire, the owner of the **conveyance** shall be given an option to **pay in lieu of the confiscation** of the conveyance a fine equal to the tax payable on the goods being transported thereon.

(3) ~~Where any fine in lieu of confiscation of goods or conveyance is imposed under sub-section (2), the owner of such goods or conveyance or the person referred to in sub-section (1), shall, in addition, be liable to any tax penalty and charges payable in respect of such goods or conveyance.~~ [Omitted by Finance Act, 2021, w.e.f. 01.01.2022]

(4) No order for confiscation of goods or conveyance or for imposition of penalty shall be issued without giving the person an **opportunity of being heard**.

(5) Where any goods or conveyance are **confiscated** under this Act, the title of such goods or conveyance shall thereupon **vest in the Government**.

(6) The proper officer adjudging confiscation shall take and hold possession of the things confiscated and every officer of Police, on the requisition of such proper officer, shall assist him in taking and holding such possession.

(7) The proper officer may, after satisfying himself that the confiscated goods or conveyance are not required in any other proceedings under this Act and after giving reasonable time not exceeding 3 months to pay fine in lieu of confiscation, dispose of such goods or conveyance and deposit the sale proceeds thereof with the Government.

Illustration 5:

From the details given below determine the maximum amount of fine in lieu of confiscation leviable under section 130 of CGST Act, 2017 on:

(1) The goods liable for confiscation.

(2) On the conveyance used for carriage of such goods. Details are as follows:

Cost of the goods for owner before GST	15,00,000
Market Value of Goods	20,00,000
GST on such goods	3,60,000

You are also required to explain relevant legal provisions in brief.

[CA Final, May 2018] (5 Marks) [MTP-Nov. 2018]

Answer:

(1) As per section 130(2) of the CGST Act, 2017, in case of goods liable for confiscation, the maximum amount of fine leviable in lieu of confiscation is the market value of the goods confiscated, less the tax chargeable thereon.

Therefore, the maximum fine leviable Rs. 20,00,000 Rs. 3,60,000 Rs. 16,40,000. Further, the aggregate of fine and penalty shall not be less than the penalty equal to 100% of the tax payable on such goods.

(2) In case of conveyance used for carriage of such goods liable for confiscation, the maximum amount of fine leviable in lieu of confiscation is equal to tax payable on the goods being transported thereon [3rd proviso to section 130(2) of the CGST Act, 2017].

Therefore, the fine leviable Rs. 3,60,000

Sec. 131: Confiscation or Penalty Not to Interfere With Other Punishments

This Section provides that in addition to confiscation of goods or penalty already imposed, all /any other proceedings may also be initiated or continued under the GST law or any other law, as applicable. This could be prosecution, arrest. cancellation of registration etc., as applicable and provided for the relevant non-compliances.

Sec. 132: Punishment for Certain Offences

This section talks about cases of tax evasion and penal actions applicable on specific events subject to amount of tax sought to be evaded. This provision speaks of prosecution of offenders and the punishment initiated on them.

A. In this section the law makers have identified 12 situations whereby there can be a leakage or revision of government revenue. This section enables institution of prosecution proceedings against all those persons whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences (as amended by Finance Act, 2020, w.e.f. 01.01.2021]:
   (a) Supply of goods or services or both without the cover of invoice with an intent to evade tax;
   (b) If any person issues any invoice or bill without actual supply of goods or services or both leading to wrongful input tax credit or refund of tax;
   (c) Avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill (as amended by Finance Act, 2020, w.e.f. 01.01.2021]:
   (d) Collection of taxes without payment to the government for a period beyond 3 months of due date:
   (e) Evasion of tax, fraudulently availment of input tax credit or obtaining refund with an intent of fraud where such offence is not covered in clause (a) to (d) above [Omitted words omitted by Finance Act, 2020, w.e.f. 01.01.2021].
   (f) Falsifying records or production of false records/accounts/documents/information tax;
   (g) Obstructs or prevents any officer from doing his duties under the act; with an intent to evade
   (h) Acquires or transports or in any manner or deals with any goods which he knows are liable for confiscation under this Act;
   (i) Receives or in any way, deals with any services or has reason to believe are in contravention of any provisions of this law;

(j) Tampers with or destroys any material evidence or documents;
(k) Fails to supply any information which he is required to supply under this law or supply false information;
(l) Attempts or abets the commission of any of the offences mention above.

This section enables institution of prosecution proceedings against the persons who are involved in these offences and the period of imprisonment and quantum of fine varies depending on the amount of tax evaded or seriousness of the offence listed below.

Amount of Tax evaded/ erroneous refund/ wrong ITC availed or utilized	Fine	Imprisonment
Exceeding Rs. 5 Crores	Yes	Upto 5 years
Exceeding Rs. 2 Crores - Upto 5 Crores	Yes	Upto 3 years
Exceeding Rs. 1 Crores - Upto 2 Crores	Yes	Upto 1 years

*The imprisonment referred to shall be for a term not less than 6 months in the absence of special and adequate reasons to the contrary to be recorded in the judgement of the court

B. If any person commits any offence specified in clause (f), (g) or () above, he shall be punishable with imprisonment for a term which may extend to **6 months** or with fine or with both.

C. Where any person convicted of an offence under this section is **again convicted** of an offence under this section, then, he shall be punishable for the second and for every subsequent offence with imprisonment for a term which may extend to **5 years** and with fine.

D. All offences mentioned in this section are **non-cognizable and bailable** except the following cases: Instances covered by **(a) to (d) where the amount exceeds Rs. 5 Crores**

E. Every prosecution proceeding initiated requires **prior sanction of the Commissioner**.

Illustration 6:

Examine the implications as regards the bailability and quantum of punishment on prosecution, in respect of the following cases pertaining to the period December, 2017 under CGST Act, 2017:

(i) 'X' collects Rs. 245 as tax from its clients and deposits Rs. 241 lakh with the Central Government. It is, found that he has falsified financial records and has not maintained proper records.
(ii) 'Y' collects Rs. 550 lakh as tax from its clients but deposits only Rs. 30 lakh with the Central Government.

What will be the implications with regard to punishment on prosecution, of "X" and "Y" for the offences? What would be the position, if 'X' and 'Y' repeat the offences?

It may be assumed that offences are proved in the court.

[CA Final, May 2018 - New] (5 Marks)

Solution:

The position is as follows-

Offence	Amount involved	Bailability	Punishment	Punishment for offence repeat
Falsifying financial records	4 lakh	Bailable & Non-cognizable	Imprisonment for upto 6 months or with fine or both	Imprisonment for a term which may extend to 5 years and with fine
Non-payment of collected tax	520 lakh i.e. > 5 crore	Non-Bailable & cognizable assuming dues are pending for more than 3 months	Imprisonment for upto 5 years and with fine	Imprisonment for a term which may extend to 5 years and with fine

Illustration 7:

What are cognizable and non-cognizable offences under Section 132 of CGST Act, 2017?

[CA Final, May 2018 - Old] (Marks 4)

Solution:

As per section 132(4) notwithstanding anything contained in the Code of Criminal Procedure, 1973, all offences under this Act, except the offences referred to in sub-section (5) shall be non-cognizable and bailable.

Under section 132(5) the offences specified in clause (a) or clause (b) or clause (c) or clause (a) of sub-section (1) and punishable under clause (1) of that sub-section shall be cognizable and non-bailable.

Sec. 69: Power to Arrest

Introduction:

This section deals with power of arrest persons whoever commits, or causes to commit and retain the benefits arising out of, any of the following offences which is punishable under clause (i) or (ii) of sub-section (1), or under sub-section (2) of sec 132 of CGST Act.

(a) Supplies any goods or services or both without issue of invoice with the intention to evade tax;

(b) Issues any invoice or bill without supplies leading to wrongful availment or utilisation of input tax credit of tax; or refund

(c) Avails input tax credit using the invoice or bill referred to in clause (b) or fraudulently avails input tax credit without any invoice or bill [as amended by Finance Act, 2020, w.e.f. 01.01.2021];

(d) Collects any amount as tax but fails to pay the same beyond the period of 3 months from the due date.

Analysis:

- The **Commissioner** is vested with the power to authorise, by an order, any Officer to arrest a person, where there is a reason to believe that such person has committed the specified offences.
- The person committing any offence under clauses (a) or (b) or (c) or (d) u/s 132(1) cited supra and punishable under Section 132(1)(i) or 132(1)(ii) or 132(2) can be arrested by the authorized officer.
- Section 132(1) clause (1) tax evasion above Rs. 500 Lakhs attracting imprisonment for a term upto 5 years and fine. or clause (ii) tax evasion above Rs. 200 Lakhs attracting imprisonment upto 3 years and fine or offence or section 132(2) [repeated offence - second and subsequent offence attracting imprisonment upto 5 years with fine]
- **Such person** is required to be **informed** about the **grounds of arrest** and be produced before the **Magistrate within 24 hours in case of cognizable offences** and in case of **non-cognizable and bailable offences** the **Assistant/Deputy Commissioner can grant the bail and is conferred powers of an officer-in-charge of a police station** subject to the provisions of Code of Criminal Procedure, 1973.
- All arrests should be made as per the provisions of **Code of Criminal Procedure, 1973**.

List of Related provisions of Section 132 for ready reference for which person can be arrested:

Section	Description
132(1)(a)	Whoever supplies any goods or services or both without issue of invoice with the intention to evade tax
132(1)(b)	Whoever issues any invoice or bill without supplies leading to wrongful availment or utilisation of input tax credit or refund of tax.
132(1)(c)	Whoever avails input tax credit using invoice or bill referred to in (b) above or fraudulently avails input tax credit without any invoice or bill (as amended by Finance Act, 2020, w.e.f. 01.01.2021]
132(1)(d)	Whoever collects any amount as tax but fails to pay the same beyond the period of 3 months from the due date.
132(1)(i)	Prosecution where tax evaded exceeds Rs. 500 lakhs. Imprisonment upto 5 years with fine.
132(1)(ii)	Prosecution where tax evaded exceeds Rs. 200 lakhs. Imprisonment upto 3 years with fine.
132(1)(iii)	Prosecution where tax evaded exceeds Rs. 100 lakhs. Imprisonment upto 1 year with fine.

The term 'arrest has not been defined in the GST Act. However, as per judicial pronouncements, it denotes the taking into custody of a person under some lawful command or authority. In other words, a person is said to be arrested when he is taken and restrained of his liberty by power or colour of lawful warrant. Arrests can be carried out only where the person is accused of offences specified for this purpose and the tax amount involved is more than specified limit. Further, the arrests under GST Act can be made only under authorisation from the Commissioner. Whenever the Commissioner has reason to believe that any person has

committed any such offence, he can authorize any other officer subordinate to him, to arrest such person.

Various offences committed in connection with evasion of tax are also punishable with imprisonment for which purpose, the offender has to be prosecuted before appropriate Court. The nature of offences which are thus punishable with imprisonment are prescribed in Section 132 of the Act.

Safeguards for a person who is placed under arrest

There are certain safeguards provided under section 69 for a person who is placed under arrest. These are

- If a person is arrested for a **cognizable offence**, he must be informed in writing of the **grounds of arrest** and he must be produced before a **magistrate within 24 hours of his arrest**;
- If a person is arrested for a **non-cognizable and bailable offence**, the **Deputy/ Assistant Commissioner** can release him on bail and he will be subject to the same provisions as an **officer in-charge** of a police station under section 436 of the Code of Criminal Procedure, 1973;
- All arrest must be in accordance with the provisions of the **Code of Criminal Procedure, 1973** relating to arrest.
- Section 132 of the Act also prescribes which types of offences are cognizable and non-bailable and which types of offences are non-cognizable and bailable.

Meaning of cognizable offence

Generally, cognizable offence means **serious category** of offences in respect of which a police officer has the authority to make an **arrest without a warrant** and to start an investigation with or without the permission of a court.

Meaning of non-cognizable offence

Non-cognizable offence means relatively **less serious offences** in respect of which a police officer does not have the authority to make an **arrest without a warrant** and an investigation cannot be initiated without a court order.

Cognizable and non-cognizable offences under CGST Act

In section 132 of CGST Act, it is provided that the offences relating to taxable goods and/or services where the amount of tax evaded or the amount of input tax credit wrongly availed or the amount of refund wrongly taken exceeds Rs. 5 crore, it shall be cognizable and non-bailable and in such cases the bail can be considered by a Judicial Magistrate only.

Other offences under the Act are non-cognizable and bailable and all arrested persons shall be released on bail Deputy/ Assistant Commissioner.

Precaution taken during arrest

The provisions of the Code of Criminal Procedure, 1973 relating to arrest and the procedure thereof must be adhered to in all situations amounting to arrest. It is therefore necessary that all field officers of CGST be fully familiar with the provisions of the Code of Criminal Procedure, 1973

One important provision to be taken note of is Section 57 of Cr. PC. 1973 which provides that a person arrested without warrant shall not be detained for a longer period than, under the circumstances of the case, is reasonable but this shall not exceed 24 hours (excluding the journey time from place of arrest to the Magistrate's court). Within this period, as provided under section 56 of Cr. P.C., the person making the arrest shall send the person arrested without warrant before a Magistrate having jurisdiction in the case.

Sec. 134: Cognizance of Offences

No court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the **Commissioner,** and no court inferior to that of a **Magistrate of the First Class**, shall try any such offence.

Sec. 135: Presumption of Culpable Mental State

In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution

Explanation: For the purposes of this section, -

(i) the expression "culpable mental state" includes intention, motive, knowledge of a fact, and belief in, or reason to believe, a fact;

(ii) a fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.

Illustration 8:

Explain the meaning of "mensrea". Is 'mensrea' or culpable mental state necessary for prosecution under CGST Act?

Answer:

"Mensrea" means guilty mind, or criminal intent in committing the act. It is the mental element of a person's intention to commit a crime or knowledge that one's action or lack of action would cause a crime to be committed.

Yes, 'mensten' or culpable mental state is necessary for prosecution under CGST Act. However, Section 135 of CGST Act, 2017 presumes the existence of a state of mind (i.e. "culpable mental state" or mensrea) required to commit an offence if it cannot be committed without such a state of mind.

Sec. 136 Relevancy of Statements Under Certain Circumstances

A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -

(a) when the person who made the statement is **dead or cannot be found, or is incapable** of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

Sec. 137: Offences by Companies

(1) Where an offence committed by a person under this Act is a company, every person who, at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any negligence on the part of, any director, manager, secretary or other officer of the company. such director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly,

(3) Where an offence under this Act has been committed by a taxable person being a partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or karta or managing trustee shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly and the provisions of sub-section (2) shall, mutatis mutandis, apply to such persons

(4) Nothing contained in this section shall render any such person liable to any punishment provided in this Act, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

Explanation: For the purposes of this section.-

(i) "company" means a body corporate and includes a firm or other association of individuals; and

(ii) "director", in relation to a firm, means a partner in the firm.

ANALYTICAL VIEW OF THE TOPIC

This section states that where an offence is committed by companies, every person/director/manager/secretary or any other officer who at the time of commitment of the

offence, was in charge of and was responsible to the company for the conduct of business of the company, as well as the company shall be deemed to be guilty of such offence and proceeded against and punished accordingly.

Where such offences are committed by the person being Partnership Firm, LLP, HUF or trust, AOP or BOI, then, the partner or Karta or Managing Trustee (as the case may be) shall be deemed to be guilty and liable to be proceeded against and punished.

Further if the accused person proves that he was in no way related to the offence being committed or he had exercised all possible measures to prevent commission of such offences, then he is not punishable under this section.

Sec. 138: Compounding of Offences

(1) As per the provisions of Section 138(1), Any offence may be compounded by the **Commissioner, either before or after the institution of prosecution**, upon payment of such compounding amount in such manner as may be prescribed, by the person accused of the offence, to the Central Government or the State Government, as the case be

(2) However, the compounding of offence is **not permissible** in case of the following offences:

(i) Offence specified in clauses (a) to (f) of sub-section (1) of section 132. if the person charged with offence had been **allowed to compound earlier** in respect of any of the said offences;

(ii) **Attempting or Aiding or abetting the commission** of any of the offences specified in clauses (a) to (f) of sub-section (1) of section 132, if the person charged with offence had been allowed to compound earlier in respect of any of the said offences;

(iii) Any offence (other than the above offences) under this Act or under the provisions Act/UTGST Act/IGST Act, in respect of supplies of value > Rs. 1 Crore, if the person charged with offence of any SGST had been allowed to compound earlier in respect of any of the said offences;

(iv) a person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force:

(v) a person who has been convicted for an offence under this Act by a court;

(vi) a person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (1) of section 132: and

(vii) any other class of persons or offences as may be prescribed.

(3) Compounding shall be allowed only **after making payment of tax, interest and penalty** involved in such offences. Further, any compounding allowed under the provisions of this section shall **not affect** the **proceedings,** if any, instituted under any **other law**.

(4) The compounding amount for compounding of offences under this section shall be such as may be prescribed, subject to –

- The **minimum limit** for compounding amount is to be the **higher** of the following amounts:-

(i) 50% of tax involved, or

(ii) Rs. 10,000

- The upper limit for compounding amount is to be higher of the following amounts: -
  (i) 150% of tax involved or
  (ii) Rs. 30,000.

(5) On payment of such compounding amount as may be determined by the Commissioner, no further proceedings shall be initiated under this Act against the accused person in respect of the same offence and any criminal proceedings, if already initiated in respect of the said offence, shall stand abated.

Clarification on various issues relating to applicability of demand and penalty provisions under the CGST Act, 2017 in respect of transactions involving fake invoices [Circular No. 171/03/2022 - GST, dated 06.07.2022]

A number of cases have come to notice where the registered persons are found to be involved in issuing tax invoice, without actual supply of goods or services or both (hereinafter referred to as "fake invoices"), in order to enable the recipients of such invoices to avail and utilize input tax credit fraudulently. This circular is issued for clarification on the issues relating to applicability of demand and penalty provisions under the CGST Act, in respect of such transactions involving fake invoices.

S.N.	Issue	Clarification
1.	***In case where a registered person "A" has issued tax invoice to another registered person "B" without any underlying supply of goods or services or both, whether such transaction will be covered as "supply" under section 7 of CGST Act and whether any demand and recovery can be made from 'A' in respect of the said transaction under the provisions of section 73 or section 74 of CGST Act.*** ***Also, whether any penal action can be taken against registered person 'A' in The registered person 'A' shall, however, be liable for penal action such cases.***	***Since there is only been an issuance of tax invoice by the registered person 'A' to registered person 'B' without the underlying supply of goods or services or both, therefore, such an activity does not satisfy the criteria of "supply", as defined under section 7 of the CGST Act. As there is no supply by 'A' to 'B' in respect of such tax invoice in terms of the provisions of section 7 of CGST Act, no tax liability arises against 'A' for the said transaction, and accordingly, no demand and recovery is required to be made against 'A' under the provisions of section 73 or section 74 of CGST Act in respect of the same. Besides, no penal action under the provisions of section 73 or section 74 is required to be taken against 'A' in respect of the said transaction.*** ***The registered person 'A' shall, however, be liable for penal action under section 122(1)(ii) of the CGST Act for issuing tax invoices without actual supply of goods or services or both.***

2.	*A registered person "A" has issued tax invoice to another registered person "B" without any underlying supply of goods or services or both. 'B' avails input tax credit on the basis of the said tax invoice. B further issues invoice along with underlying supply of goods or services or both to his buyers and utilizes ITC availed on the basis of the above mentioned invoices issued by 'A', for payment of his tax liability in respect of his said outward supplies. Whether 'B' will be liable for the demand and recovery of the said ITC, along with penal action, under the provisions of section 73 or section 74 or any other provisions of the CGST Act.*	*Since the registered person 'B' has availed and utilized fraudulent ITC on the basis of the said tax invoice, without receiving the goods or services or both, in contravention of the provisions of section 16(2)(b) of CGST Act, he shall be liable for the demand and recovery of the said ITC, along with penal action, under the provisions of section 74 of the CGST Act, along with applicable interest under provisions of section 50 of the said Act. Further, as per provisions of section 75(13) of CGST Act, if penal action for fraudulent availment or utilization of ITC is taken against 'B' under section 74 of CGST Act, no penalty for the same act, Le for the said fraudulent availment or utilization of ITC, can be imposed on 'B' under any other provisions of CGST Act, including under section 122.*
3.	*A registered person 'A' has issued tax invoice to another registered person 'B' without any underlying supply of goods or services or both. 'B' avails input tax credit on the basis of the said tax invoice and further passes on the said input tax credit to another registered person 'C' by issuing invoices without underlying supply of goods or services or both. Whether 'B' will be liable for the demand and recovery and penal action, under the provisions of section 73 or section 74 or any other provisions of the CGST Act.*	*In this case, the ITC availed by 'B' in his electronic credit ledger on the basis of tax invoice issued by 'A', without actual receipt of goods or services or both, has been utilised by 'B' for passing on of ITC by issuing tax invoice to 'C' without any underlying supply of goods or services or both. As there was no supply of goods or services or both by 'B' to 'C' in respect of the said transaction, no tax was required to be paid by 'B' in respect of the same. The input tax credit availed by 'B' in his electronic credit ledger on the basis of tax invoice issued by 'A', without actual receipt of goods or services or both, is ineligible in terms of section 16 (2)(b) of the CGST Act. In this case, there was no supply of goods or services or both by 'B' to 'C' in respect of the said transaction and also no tax was required to be paid in respect of the said transaction. Therefore, in these specific cases, no demand and recovery of either input tax credit wrongly fraudulently availed by 'B' in such case or tax liability in respect of the said outward transaction by 'B' to 'C'*

		is required to be made from 'B' under the provisions of section 73 or section 74 of CGST Act. However, in such cases, 'B' shall be liable for penal action both under section 122(1)(ii) and section 122(1)(vii) of the CGST Act, for issuing invoices without any actual supply of goods and/or services as also for taking/ utilizing input tax credit without actual receipt of goods and/or services.

Actual action to be taken against a person will depend upon the specific facts and circumstances of the case which may complex mixture of above scenarios or even may not be covered by any of the above scenarios. Any person who has retained the benefit of transactions specified u/s 122(1A) of CGST Act, and at whose instance such transactions are conducted, shall also be liable for penal action under the provisions of the said sub-section. It may also be noted that in such cases of wrongful/ fraudulent availment or utilization of input tax credit, or in cases of issuance of invoices without supply of goods or services or both, leading to wrongful availment or utilization of input tax credit or refund of tax, provisions of section 132 of the CGST Act may also be invokable, subject to conditions specified therein, based on facts and circumstances of each case.

Sec. 171: Anti-Profiteering Measure

The burden of indirect taxation ultimately falls on the consumers. It is expected that the GST regime will result in an increased flow of input tax credit. In such a scenario, the concern that benefit of such increased input tax credit may not be passed on by certain entities to the consumers is not unreasonable.

Section 171 makes it mandatory that any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed to the recipient by way of commensurate reduction in prices.

NATIONAL ANTI-PROFITEERING AUTHORITY [AUTHORITY]

Constitution

National Anti-profiteering is therefore being constituted by the Central Government to examinewhether input tax credits availed by any registered person or the reduction in the tax rate haveactually resulted in a commensurate reduction in the price of the goods and/or services suppliedby him.

Chapter XV: Anti-profiteering of CGST Rules, 2017 prescribe the provisions relating to constitution of such authority, duties of the authority, orders of the authority, etc. The same are discussed hereunder.

The National Authority shall be a 5 members committee consisting of a Chairman who holds or has held a post equivalent in rank to a Secretary to the Government of India; and four Technical Members who are or have been Commissioners of State tax or central tax for at least one year or have held an equivalent post under earlier laws

The Authority shall cease to exist after the expiry of ~~*2 years 4 years*~~ ***5 years ['4 years' substituted by '5 years' by NN. 37/2021 CT, w.e.f. 01.12.2021]*** from the date on which the Chairman enters upon his office unless the GST Council recommends otherwise.

Duties of the Authority [Rule 127]

It shall be the duty of the authority-

(i) to determine whether the reduction in tax rate or the benefit of input tax credit has been passed on by the seller to the buyer (hereinafter collectively referred to as "benefit") by reducing the prices

(ii) to identify the taxpayer who has not passed on the benefit

(iii) to order

  (a) reduction in prices

  (b) return to the recipient, an amount equivalent to the amount not passed on by way of commensurate reduction in prices along with interest at the rate of 18% from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount not returned, as the case may be.

If the eligible person does not claim return of the amount or is not identifiable, the amount must be deposited in the Consumer Welfare Fund;

(c) imposition of penalty

(d) cancellation of registration

(iv) to furnish a performance report to the GST Council by the 10% of the month succeeding each quarter.

Process followed by the Authority

Examination of application by the Standing Committee and Screening Committee

(1) The Standing Committee shall, within a period of **two months** from the date of the receipt of a written application or within such **extended** period not exceeding a further period of **one month** for reasons to be recorded in writing as may be allowed by the Authority, in such form and manner as may be specified by it, from an interested party or from a Commissioner or any other person, **examine the accuracy and adequacy** of the evidence provided in the application to determine whether there is prima-facie evidence to support the claim of the applicant that the benefit of reduction in the rate of tax on any supply of goods or services or the benefit of input tax credit has not been passed on to the recipient by way of commensurate reduction in prices. [as amended by NN 31/2019-CT, w.e.f. 28.06.2019]

(2) All applications from interested parties on issues of **local nature or those forwarded by the standing Committee** shall first be **examined by the State Level Screening Committee**. On being satisfied that the supplier has not passed on the benefit, the Screening Committee will forward the application with its recommendations to the Standing Committee on Anti-profiteering within a period of **two months** from the date of the receipt of a written application or within such extended period not exceeding a further period of **one month** for reasons to be recorded in writing as may be allowed by the Authority [as amended by NN 31/2019-CT, w.e.f. 28.06.2019]

Initiation and conduct of proceedings

If the Standing Committee is satisfied that there is a prima facie evidence to show that the supplier has not passed on the benefit, it shall refer the matter to the **Directorate General of Anti-profiteering for a detailed investigation.**

Investigation: Directorate General of Anti-profiteering shall conduct investigation and collect evidence necessary to determine undue profiteering and before initiation of the investigation, issue a notice to the interested parties (and to such other persons as deemed fit for a fair enquiry into the matter).

The evidence or information presented to the Directorate General of Anti-profiteering by one interested party can be made available to the other interested parties, participating in the proceedings. The evidence provided will be kept confidential and the provisions of section 11 of the Right to Information Act, 2005, shall apply mutatis mutandis to the disclosure of any information which is provided on a confidential basis.

The Directorate General of Anti-profiteering can seek opinion of any other agency or statutory authorities in the discharge of his duties.

The Authority, ["Authority" word inserted by NN 31/2019-CT.w.ef. 28.06.2019] Directorate General of Anti- profiteering or an officer authorized by him will have the power to **summon** any person either to give evidence or to produce a document or any other thing. He will also have same powers as that of a civil court and every such inquiry will be deemed to be a **judicial proceeding.**

The Directorate General of Anti-profiteering **will complete the investigation within a period of ~~3 months~~ 6 months** [3 months' substituted by '6 months' by NN 31/2019-CT, w.e.f. 28.06.2019] or within such extended period not exceeding a further period of 3 months for reasons to be recorded in writing as allowed by the Standing Committee. Upon completion of the investigation, Directorate General of Anti-profiteering will furnish to the Authority, a report of its findings along with the relevant records.

Order of the Authority

Where the Authority determines that a registered person has not passed on the benefit, the Authority may order-

(a) reduction in prices;

(b) return to the recipient, the benefit amount not passed on along with interest @ 18% from the date of collection of the higher amount till the date of the return of such amount or recovery of the amount including interest not returned, as the case may be

(c) deposition of amount along with interest @ 18% from the date of collection of the higher amount till the date of the deposit of such amount to consumer welfare funds as constituted under Section 57 of CGST & SGST ACT (50% each), where the eligible person is does not claim return of amount or is not identifiable (as amended by NN 31/2019-CT, w.e.f. 28.06.2019];

(d) imposition of penalty as specified under the Act, and

(e) cancellation of registration under the Act.

The following are noteworthy in this regard:

- The Authority may, during the process of determination, seek the clarification from the Director General of Anti Profiteering on the report submitted by it. [inserted by NN 31/2019-CT, w.e.f. 28.06.2019]
- Any order passed by the Authority shall be immediately complied with by the registered person failing which action shall be initiated to recover the amount.
- The Authority will pass order within **6 months** [3 months substituted by '6 months' by NN 31/2019-CT, w.e.f. 28.06.2019] from the date of the receipt of the report from the Director General of Anti-Profiteering.
- An opportunity of being heard will be given, if the interested parties request for it in writing.

- If the eligible person (i.e., the buyer) does not claim the return or the person is unidentifiable then the amount must be deposited to the Consumer Welfare Fund along with applicable interest.
- If the report of the Director General of Anti-profiteering recommends that there is contravention or even non-contravention of the provisions of section 171 or these rules, but the Authority is of the opinion that further investigation or inquiry is called for in the matter, it may, for reasons to be recorded in writing, refer the matter to the Director General of Anti-profiteering to cause further investigation or inquiry in accordance with the provisions of the Act and these rules\

Rule 133(5):

(a) Further, where upon receipt of the report of the Director General of Anti-profiteering, the Authority has reasons to believe that there has been contravention of the provisions of section 171 in respect of goods or services or both other than those covered in the said report, it may, for reasons to be recorded in writing within 6 months, direct the Director General of Anti-profiteering to cause investigation or inquiry with regard to such other goods or services or both, in accordance with the provisions of the Act and these rules.

(b) The investigation or enquiry under clause (a) shall be deemed to be a new investigation or enquiry and all the provisions of rule 129 (initiation and conduct of proceedings) shall mutatis mutandis apply to such investigation or enquiry.

Section 171(3A): Where the Authority, after holding examination, comes to the conclusion that any registered person has profiteered, then, such person shall be liable to pay **penalty equivalent to 10% of the amount so profiteered.**

However, no penalty shall be leviable if the profiteered amount is deposited within 30 days of the date of passing of the order by the Authority.

Explanation: -For the purposes of this section, the expression "**profiteered**" shall mean the amount determined on account of not passing the benefit of reduction in rate of tax on supply of goods or services or both or the benefit of input tax credit to the recipient by way of commensurate reduction in the price of the goods or services or both.

Illustration: 2 What is Anti-profiteering measure?

Solution: As per section 171 of the CGST Act, any reduction in rate of tax on any supply of goods or services or the benefit of input tax credit shall be passed on to the recipient by way of commensurate reduction in prices. National Anti- profiteering Authority may examine whether input tax credits availed by any registered person or the reduction in the tax rate have actually resulted in a commensurate reduction in the price of the goods or services or both supplied by him.