

## RECOVERY UNDER GST



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### Introduction:-

In order to protect the interests of the revenue, GST like any other tax structure requires a mechanism for tracking and recovery of tax that escapes either inadvertently or by design, through malfeasance or with intent to defraud. Chapter XV of the CGST Act, 2017 contains the provisions for Demands and Recovery of Tax.

Section No.	Particulars
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 willful-misstatement or suppression of facts
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 willful- misstatement or suppression of facts
75	General provisions relating to determination of tax
76	Tax collected but not paid to Government
77	Tax wrongfully collected and paid to Central Government or State Government
78	Initiation of recovery proceedings
79	Recovery of tax
80	Payment of tax and other amount in instalments
81	Transfer of property to be void in certain cases
82	Tax to be first charge on property
83	Provisional attachment to protect revenue in certain cases
84	Continuation and validation of certain recovery proceedings

These are further enforced with the help of Chapter XVIII of the CGST Rules laying out various procedures to be followed by the tax authorities.

The proper officer is required to issue an order in Form DRC-07 containing the amount of tax, interest and penalty payable, on completion of adjudication proceedings. This shall also be treated as notice for recovery as per Rule 142(6) of CGST Rules, 2017. As per Section 78, the amount payable in pursuance of an order passed under the Act, shall be payable within a period of three months from the date of service of the order failing which recovery proceedings may be initiated by the proper officer.

Recovery proceedings under Section 79 can begin only when it is determined through adjudication under Section 73/74 that such amount is 'payable' by the assessee. Garnishee proceedings to be undertaken only after adjudication process is complete, even if default is for payment of interest only. – Mahadeo Construction Co. 2020 (4) TMI 666 – Jharkhand HC

#### Modes of Recovery:-

Section No.	Particular
79(1)(a)	Deduction of amount owed to the person by the proper officer or any specified officer
79(1)(b)	Sale of goods belonging to the person in control of the proper officer or any specified officer
79(1)(c)	Recover the money from a third person from whom money is due or may become due to the person
79(1)(d)	Sale of immovable/ movable property belonging to the person
79(1)(e)	Recovery through the Collector or application to Magistrate

#### Recovery by sale of goods:-

The proper officer shall prepare an inventory with an estimate of market value of such goods and can sell so much of the goods as required to recover any outstanding dues and administrative costs incurred in recovery process. The proper officer shall sell the goods through auction process, including e-auction by issuing notice in Form DRC-10.

#### Recovery from third person:-

The proper officer may issue a notice to any person who owes money to the defaulter in Form DRC-13 and such person if they owe some money to the defaulter would have to make payment of such sum to the government and to the extent to such payment, their liability towards such a defaulter would be considered sufficiently discharged.

If a person to whom such notice is issued fails to make payment to the government, they would be considered as defaulter and recovery proceeding would be initiated against them.

A person to whom such notice is issued may submit proofs to the proper officer substantiating that no money is owed to the defaulter on the date of the notice and in that case such a person may not be held liable to make any payment to the government.

Recovery from sale of immovable/ movable property:-

The proper officer may seize any immovable/ movable property belonging to the defaulter. They shall make a list of the property of the defaulter along with estimated market value and pass on order for attachment/distrain and notice for sale in Form DRC-16. The seized property shall be sold by way of auction.

Order of appropriation of Funds:-

As per Rule 154, the amounts realized from sale of goods, or sale of immovable or movable property shall be appropriated in the following order:-

1. Against the administrative cost of the recovery process
2. Against the amount to be recovered
3. Against any other amount due from the defaulter under any of the GST Acts.

Any balance amounts pending after the above appropriations shall be paid back to the defaulter.

Option of payment in instalments:-

The Commissioner may allow extension in time limit for payment, other than payments self-assessed as tax in any returns filed under the act, in monthly instalments not exceeding 24 months, subject to interest under Section 50. Default of payment of any instalment shall render the entire outstanding amount recoverable immediately without any further notice for payment of such amount.

Provisional Attachment:-

The Commissioner may issue an order in Form DRC-22 for provisional attachment of any property, including bank account belonging to defaulting person if during pendency of proceedings under Section 62,63,64,67, 73 or 74 of the Act, they are of the opinion that it is necessary to protect the interests of the revenue to do so.

It has been laid down in the Case of Kaish Impex Private Limited – 2020 (1) TMI 933 – Bombay High Court, provisional attachment cannot be resorted to, merely when summons under Section 70 have been issued

To determine what would constitute as essentials of forming “Opinion of the Commissioner” for purpose of provisional attachment, we may refer to the following judicial pronouncements –

1. Patran Steel Rolling Mill 2018 (12) TMI 1441 - Gujarat HC
2. Remark Flour Mills Pvt. Ltd. 2018 (4) TMI 1292 - Gujarat HC
3. Kaish Impex Private Limited - 2020 (1) TMI 933 - Bombay HC
4. Valerius Industries 2019 (9) TMI 618 - Gujarat HC

The following principles emanate out of an interpretation of the above judgements –

Power of attachment is an extraordinary and drastic power. Mere pendency of proceedings is not a valid reason for exercising such power. The Commissioner should form an opinion. Such an opinion must be formed on the basis of some tangible and objective facts like background, history, financial condition, flight risk or any other reliable information. Authority must try to ensure that balance between interest of revenue and interest of trade is maintained.

Another important question arising out of this set of provisions is whether authority for provisional attachment can be delegated by the Commissioner to any subordinate officer. It has been held in case of Valerius Industries 2019 (9) TMI 618 - Gujarat HC, the naming of a delegate to do an act involving a discretion indicates that the delegate was selected because of his peculiar skill and the confidence reposed in him and there is a presumption that he is required to do the act himself and cannot redelegate his authority. As a general rule, "if the statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited.

### Blocking of ITC

As per Rule 86A, the Commissioner or an officer not below the rank of Assistant Commissioner authorised by them in this regard, may block the input tax credit in the electronic credit ledger if they have reasons to believe that such input tax credit has been availed fraudulently by resorting to any of the following –

1. ITC availed for an invoice issued by non-existent supplier or for supply which has not been received;
2. ITC availed for an invoice on which tax has not been paid;
3. Person availing the ITC is non-existent;
4. Invoice on which ITC is availed is not available.

The reasons to believe have to be recorded in writing. Such a blocking of ITC shall be valid for one year from the date of debit in the electronic credit ledger.

A major issue arising out of this Rule is that there is a violation of the principles of natural justice considering that it does not provide an opportunity to be heard before blocking the ITC. The judgement of the Honourable Supreme Court in case of Kesar Enterprises Ltd. – 2012 clearly states that Principles of Natural Justice require that an opportunity of being heard is afforded to the assessee before passing an order irrespective of whether the requirement of hearing has been mandated in the law or not.

