

# Seminar Hosted by Agra branch of ICAI

Topic : How to reply Show cause notice under  
GST & Service Tax

Date – 28<sup>th</sup> November 2020  
Organised by CMP OF ICAI



**CA PP SINGH**

**B.SC(H), FCA, CS**

**Contact No. +91-9711521060, 9871229590**

**[cappsingh@gmail.com](mailto:cappsingh@gmail.com)**

**CA PP SINGH. B.SC(H), FCA, CS**  
**Contact No. +91-9711521060, 9871229590**  
[cappsingh@gmail.com](mailto:cappsingh@gmail.com)



- Post-qualification experience of around 20 years in the field of direct & indirect tax particularly income tax, service tax and VAT ,sales tax and GST.
- Experience of handling the litigation matters and advisory matters of Direct taxes particularly income tax and indirect tax like GST, service tax, DVAT, CST, Central Excise and other related matters.
- Authored the book **DNA of GST Audit and Annual return, The *DNA of TDS&TCS (including withholding tax, advance tax and equalisation levy)*** ,Background material on GST for empowerment of girl students ICAI, New Delhi
- Guest faculty for certification course on GST & Certification course on appeal and representation ICAI , New Delhi
- Corporate trainer and guest Faculty with **Indian Institute of Management(IIM)**, NIFMS, Faridabad(Institute of Minister Finance),ICAI New Delhi and ICSI, New Delhi and other trade association.

# Provisions related to demand under GST

3

Section 73 to 77

## NATURE OF DEMAND AND RELEVANT SECTIONS:

- As per rule 142 demand of following section could be raised in form GST DRC 01.
- Demand may be of tax, interest, penalty, fine.
- Section 51 related to tax deducted at source still missing in rule 142.
- Late fee u/s 47 or 51(4) is still missing from the list. What would happen if return not filed and demand to be created by PO? Whether late fee will be part of demand? Section 73, 74 and rule 142 missing in this regard.

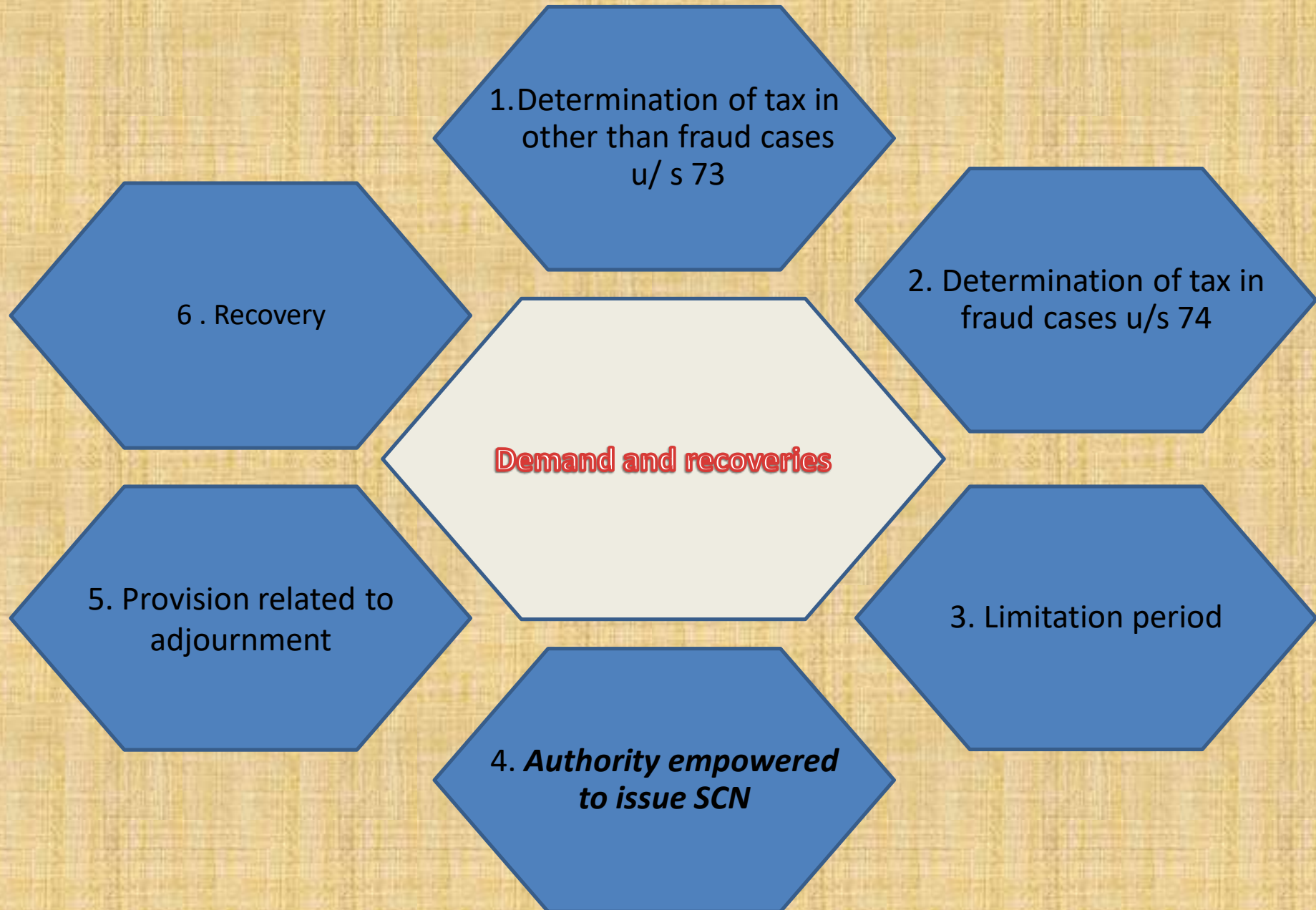
<i>section 52</i>	<b>Collection of tax at source</b>
<i>section 73</i>	<b>Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful misstatement or suppression of facts .</b>
<i>section 74</i>	<b>Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful-misstatement or suppression of facts.</b>
<i>section 76</i>	<b>Tax collected but not paid to Government.</b>
<i>section 122</i>	<b>Penalty for certain offences.</b>
<i>section 123</i>	<b>Penalty for failure to furnish information return.</b>
<i>section 124</i>	<b>Fine for failure to furnish statistics.</b>
<i>section 125</i>	<b>General penalty.</b>
<i>section 127</i>	<b>Power to impose penalty where proceedings is not covered in section 62, 64,73,74 129 130.</b>
<i>section 129</i>	<b>Detention, seizure and release of goods and conveyances in transit.</b>
<i>section 130,</i>	<b>Confiscation of goods or conveyances and levy of penalty.</b>

## CONTENTS:

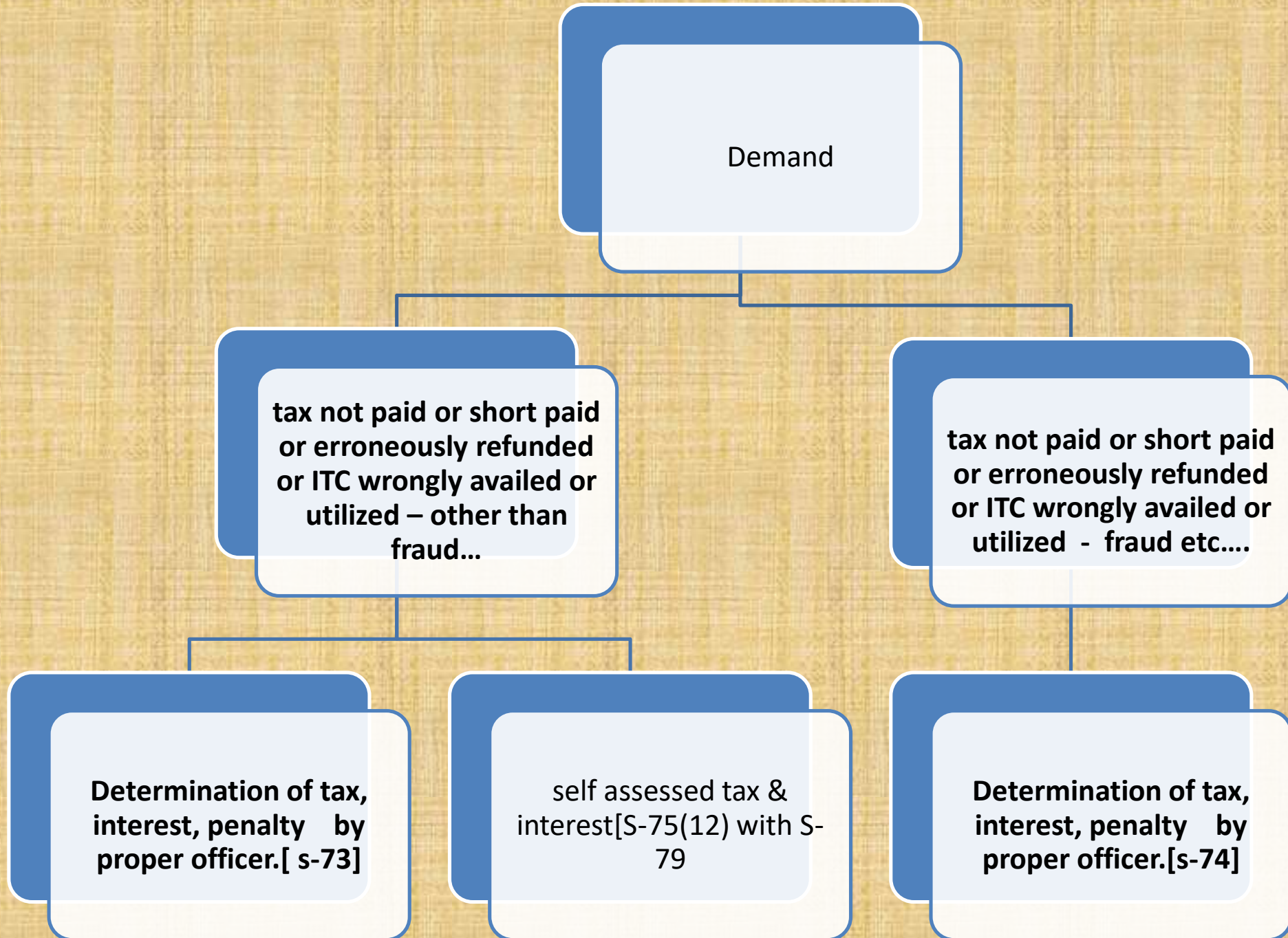
Demand of tax , interest ,  
penalty , fee etc.:

Issuance of show cause  
notice is *sine qua  
non*(=*essential condition*)  
to proceed with recovery  
of interest payable in  
accordance with section  
50(1) **Union of India. Vs.  
LC Infra Projects (P.)  
Ltd. [2020] 116  
taxmann.com 205  
(Karnataka)**

- SECTION 73 TO 84
- Rule 121
- Rule 142
- DRC -01
- DRC-02
- DRC-03
- DRC-04
- DRC-05
- DRC-06
- DRC-07
- DRC-08

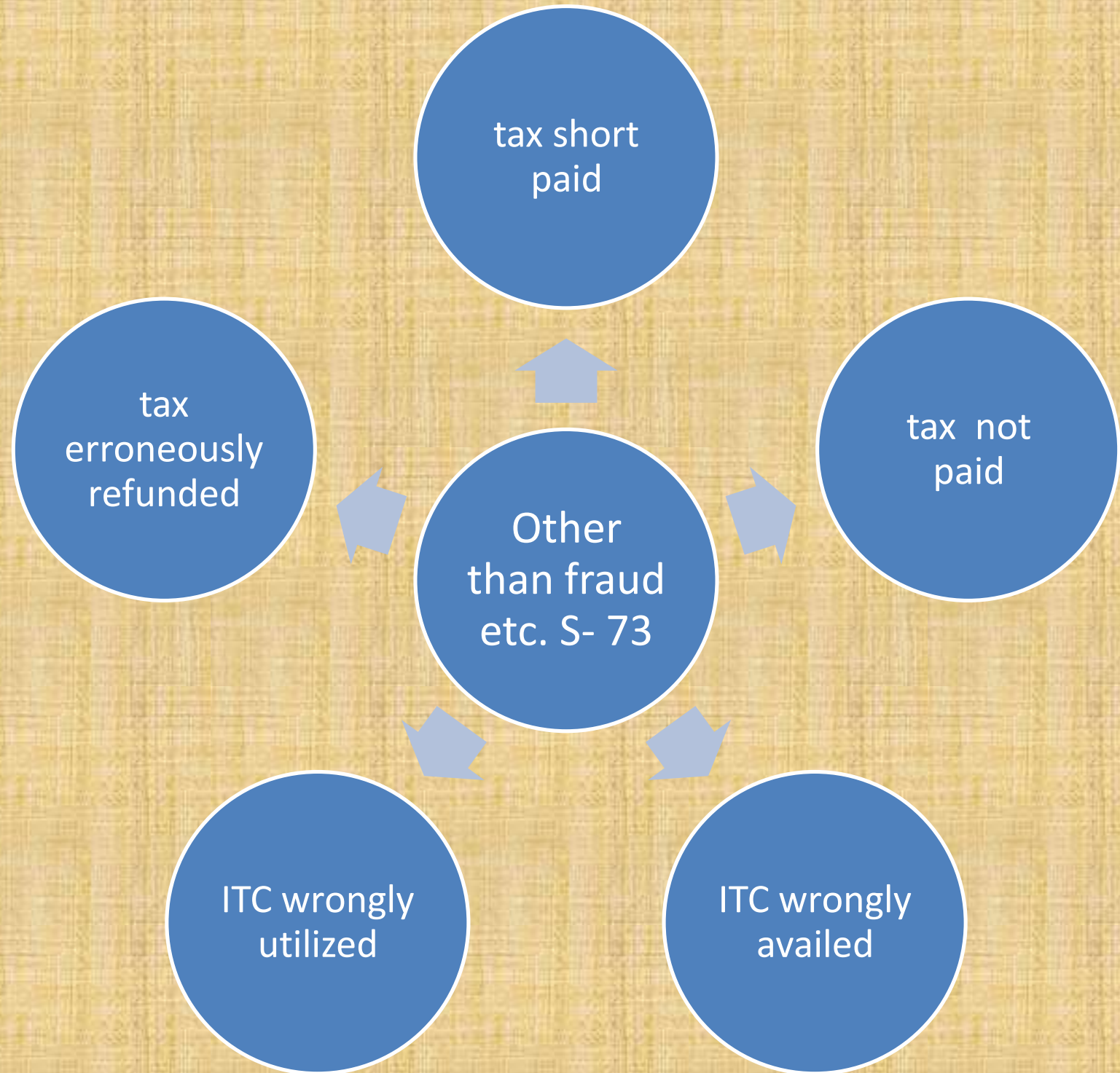


# Demand



Coverage under section 73 for demand of tax , interest , penalty- other than fraud etc.

**Recovery of credit wrongly availed**  
*:The amount credited under rule 117(3) may be verified and proceedings under section 73 or, as the case may be, section 74 shall be initiated in respect of any credit wrongly availed, whether wholly or partly. [R- 121. ]*





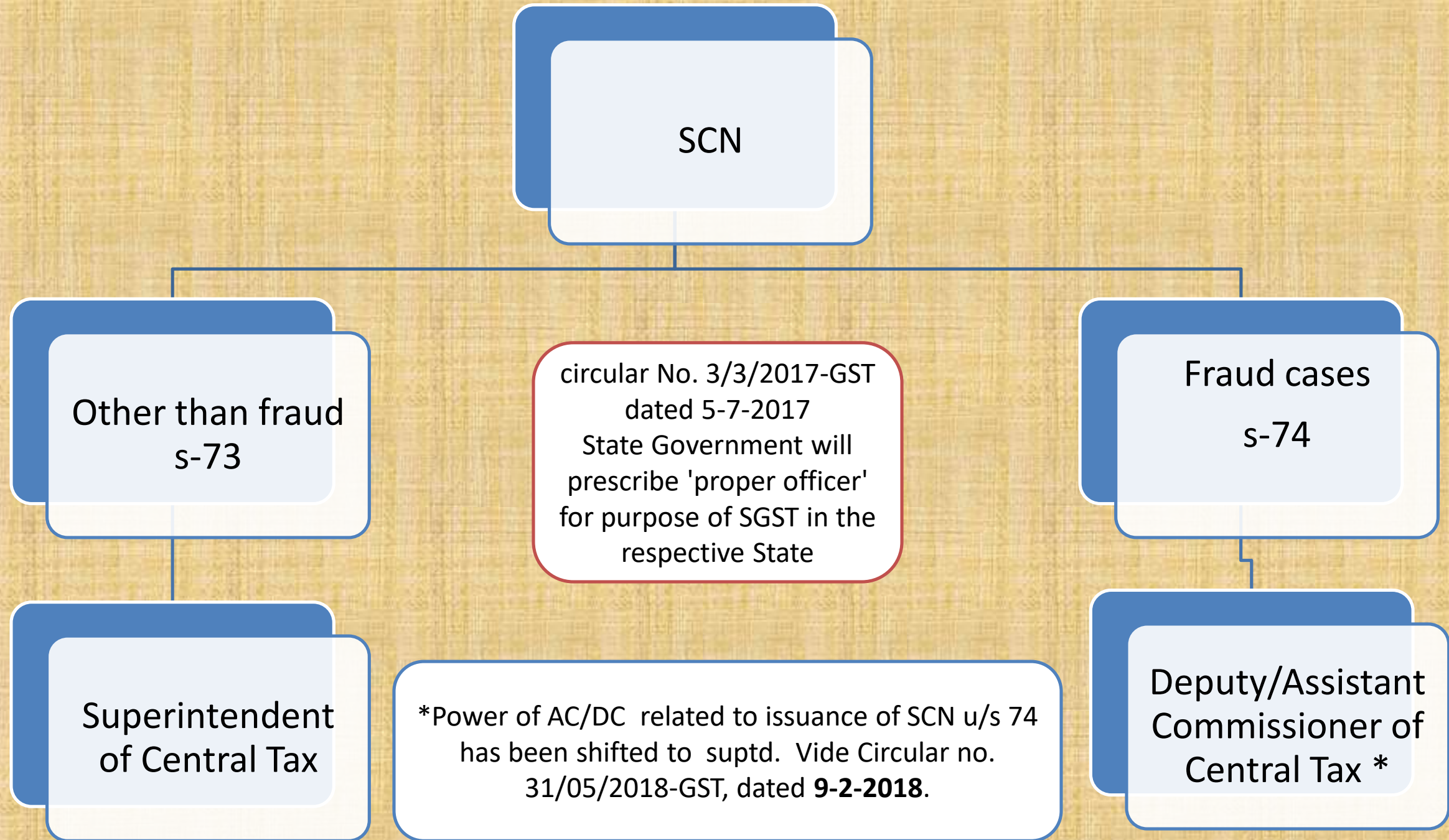
## What proper officer can do?

- All the facts of investigations and reason for determining the amount of tax, interest and penalty shall be in the show cause itself.
- SCN shall be base for adjudication order.
- SCN after opportunity to the taxable person before quantifying the amount of tax , interest and penalty.

Proper officer may issue **show cause notice(SCN)** as to why he should not pay the amount specified in the notice

- 1. tax** not paid /short paid/ erroneously refunded, ITC wrongly availed or utilized
- 2. interest** payable thereon under **section 50** and
- 3. penalty** leviable under the provisions of this Act or the rules made there under.

# *Authority empowered to issue SCN and confirm demand*



## Time Limitation for SCN and order

- Please note that due date of annual return for the FY 17-18 or 2018-19 has been extended, accordingly the date for issuing show cause notice and for passing order also extended automatically. So if extension of time for filing A/R automatically extend the time limit of SCN as well.
- Time gap between SCN and order must be at least 3 months.

### Time period for issuance of SCN u/s 73:

time limit as per section 73(2) for SCN is at least 3 months prior to the due date of passing adjudication order.

**Time limit for adjudication order:**As per section 73(10) adjudication order must be passed within

- ❑ 3 years from the **due date** for furnishing of 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
- ❑ 3 years from the **date of erroneous refund**.

For **example:** (1) order for short payment of tax for the FY 17-18 can be issued before 31<sup>st</sup> of December 2020+ 3 years= 31<sup>st</sup> December 2023. (2) suppose erroneous refund issued on 1st of July 2018, SCN can be issued on or before 30<sup>th</sup> of June 21 only.

## Exclusion from time period of limitation

- if there is **identical issue in litigations** where Appellate Authority or the Appellate Tribunal or the High Court has given **its decision which is prejudicial to the interest of revenue** in some other proceedings and an appeal fled before higher court, then period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in section 73(10) where proceedings are initiated by way of issue of a show cause notice under said sections. section 75(11) of CGST Act.[s-75(11)]
- Thus, if the Show Cause Notice was issued but kept pending as department had filed appeal against an order adverse to revenue in some other proceedings on same issue, and appeal of department is pending before Appellate Tribunal, High Court or Supreme Court, that time will not be counted for calculating 3 year/5 year limit.[s-75(11)]
- As per section 75(1) any order is stayed by an order of a court or Appellate Tribunal, the **period of such stay** shall be excluded in computing the period specified in sub-sections (2) and (10)of section 73 or sub-sections (2)and (10)of section 74.[s-75(1)]

**Identical issue in next period  
[S-73(3)]**

- If identical issue statement only, no need of SCN
- If different issue in the next tax period then SCN having reasoning and other details.

Either SCN or statement.

- proper officer may either issue another SCN for the next period of enquiry or he may simply issue statement containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under earlier SCN, on the person chargeable with tax for the remaining period if the issues are identical.
- Statement shall be deemed to be the service of SCN on such person if same ground in the next period.

# Option to the person to whom SCN issued or likely to be issued ?

## Comments:

- Before issuing of SCN either tax payer himself may determine the liability of tax & interest or may be directed by proper officer.
- After going through the SCN and seeking opinion of expert on the issue decision may be taken whether to contest or deposit the tax. Even if tax and interest deposited within 30 days no issue.
- Section 73(9) shall be applicable if tax, interest not paid within 30 days of SCN, Order after considering representation.
- 73(11) – penalty u/s 73(9) equal to 10% or ₹10000/- whichever is higher shall be payable, if amount of self-assessed tax or any amount collected as tax has not been paid within a period of 30 days from the due date of payment of such tax.
- Penalty u/s 73(9) shall be payable even in the cases of section 73(6) or 73(8) if self assessed tax or tax collected not paid within 30 days of due date of payment.

if tax, interest not paid within 30 days of SCN -  
proper officer shall after considering representation determine the tax etc.[73(9)]

- Pay tax
- pay interest
- pay penalty equal to 10% of tax or ₹10,000 whichever is higher

within 30 days of SCN 73(8)\*  
\*Refer section 73(9)/73(11)

- pay tax
- pay interest
- no penalty\* except u/s 73(9) read with 73(11)
- inquiry deemed to concluded

before issuance of SCN 73(6)\*  
\*Refer section 73(9)/73(11)

- Pay tax
- pay interest
- No penalty \* except u/s 73(9) read with 73(11)
- intimate to proper officer in writing, no SCN shall be issued, enquiry deemed to have been concluded

## Action point before issuance of SCN or statements ?

During the proceeding before issuance of SCN , evaluate the point raised by PO and if point of view of proper officer is convincing, take a decision to pay tax along with interest prior to issuance of SCN.

- The person chargeable with tax may, before service of SCN u/s 73(1) or, statement for subsequent period u/s 73(3), pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment. [S-73(5)]
- If tax and interest paid in full and informed to the proper officer , no SCN or statement shall be issued by proper officer. [S-73(6)]
- If amount paid falls short of amount actually payable, SCN/statement for short amount. [S-73(7)]

**Self assessed tax/Tax collected but not deposited  
within 30 days-subject to penalty u/s 73(9)]**

Penalty shall be payable equal to 10% of tax or ₹ 10000/- whichever is higher, in such cases where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of 30days from the due date of payment of such tax. [s-73(9) read with section 73(11)]

This penalty shall be payable even if tax along with interest paid either before issuance of SCN or after issuance of SCN but within 30 days.



Whether self assessed tax shall be recovered under section 73/74?

- Notwithstanding anything contained in section 73 or section 74, where any amount of self-assessed tax in accordance with a return furnished under section 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.[ S-75(12)]
- It is just to recover the amount of self assessed tax along with interest
- No need to issue SCN for recovery of self assessed tax, it is recoverable .
- If self assessed tax not paid within 30 days of due date penalty equal to ₹10000/- or 10% of tax whichever is higher.[ section 73(9)&73(11)]

# Comparison of S-73(6)&73(8) with 73(11)

## SECTION 73(6) & 73(8)

The proper officer, on receipt of such information, shall not serve any SCN or, statement in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.[ S-73(6)

Where any person chargeable with tax u/s 73 (1) or u/s 73 (3) pays the said tax along with interest payable under section 50 within 30 days of issue of SCN, no penalty shall be payable and all proceedings in respect of the said notice shall be deemed to be concluded.[ S-73(8)

## Section 73(11)

- Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of 30 days from the due date of payment of such tax.[ section 73(11)]
- section 73(9) applicable if self assessed tax not paid or tax collected from customer but not paid within 30 days from due date of payment.
- penalty for late payment of tax beyond 30 days shall be 10% of tax or ₹10000/- which ever is higher.

**Penalty shall be payable equal to 10% of tax or ₹ 10000/- whichever is higher, in such cases where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of 30days from the due date of payment of such tax. [s-73(9)]**

**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?**

Although specific penalty under section 73(11) if self assessed tax not paid within 30 days of due date of payment, however if tax already paid and return filed no penalty u/s 73(11) irrespective of delay beyond 30 days because section 73 not applicable in such cases. Beneficial circular.

## **CIRCULAR NO. 76/50/2018-GST - CENTRAL TAX, 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 for short) 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 may be imposed after following the due process of law.

## Where GSTR-1 filed but GSTR-3B not filed

Can Petitioner, at time of recovery could take a plea that in absence of determination of tax u/s 73, no recovery could have been made if GSTR-1 return submitted, but GSTR-3B return had not been filed evidencing actual payment of tax?

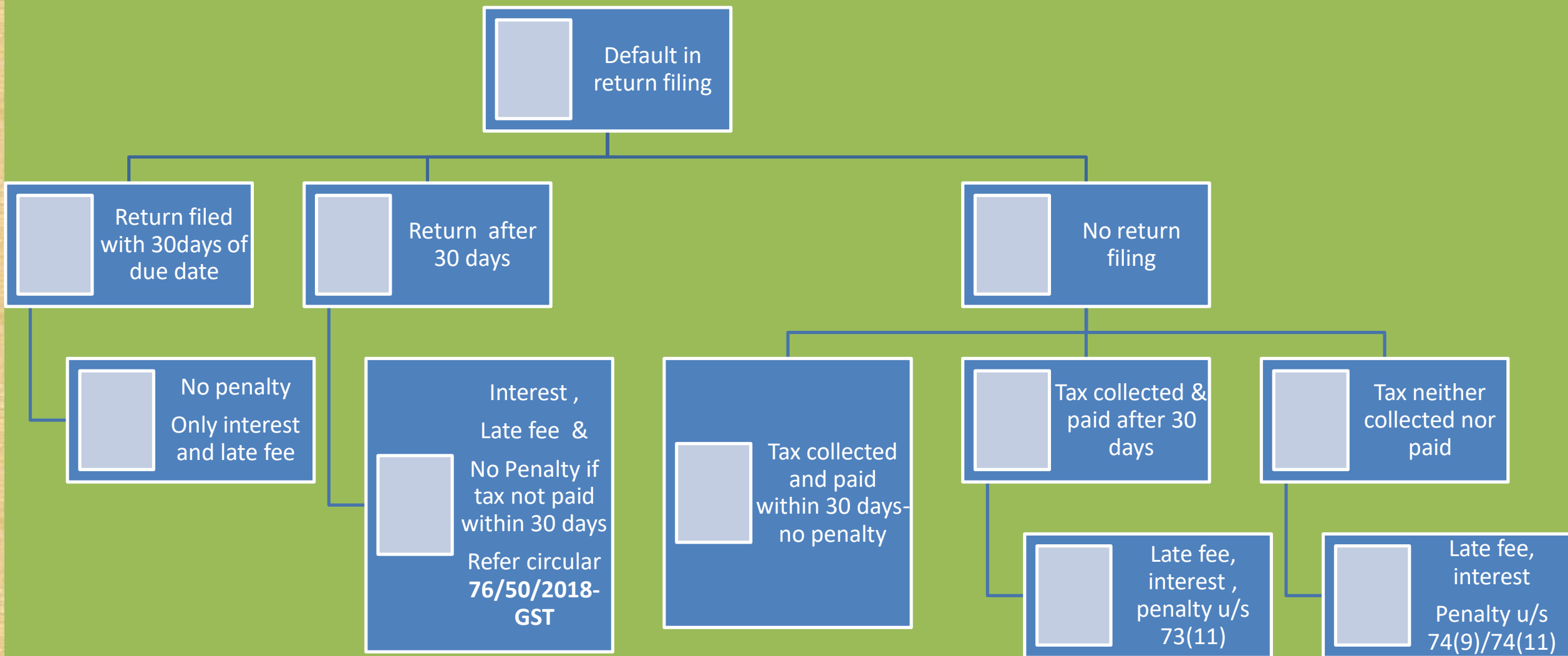
**Kabeer Reality (P.) Ltd Vs. Union of India [2019] 112 taxmann.com 80 (Madhya Pradesh HC)**

Note: this could lead a situation where output tax liability could be much higher because of no adjustment of ITC and ITC could be claimed only in self assessed return.

Further if such case is treated as determination of self assessed tax penalty under section 73(11) equal to 10% of tax or ₹10000/- whichever is higher.

- The petitioner's contention that in absence of determination of tax under section 73 no recovery can be made, is unfounded and in fact section 73 has got no application in the facts and circumstances of the instant case. [Para 33]
- The petitioner's contention is certainly erroneous, as there is no dispute about the quantum of tax liability, action is not being taken in furtherance of any order (adjudicating order). Revenue is simply pressing upon for actual payment as being declared by the petitioner itself under GSTR-1.
- The petitioner cannot escape his liability of payment of GST under Act of 2017, especially when he has filed GSTR-1 and has quantified the tax payable by him while submitting the GSTR-1. There is no reason to interfere with the action taken by the respondents/Department in the matter.

# Late return filing/ no return filing consequence [s-73(9)&(11)] read with circular **76/50/2018-GST**



# Procedures involved- R-142

details of tax, interest and penalty as ascertained by the said officer in **Part A of FORM GST DRC-01A**

such person shall inform the proper officer of payment of tax etc. in **FORM GST DRC-03, if he has accepted the view of PO**

Reply in part B of GST DRC-01A and Part payment of tax in DRC 03

If PO is satisfied acknowledgement in form DRC-04

intimation of payment to proper officer in DRC-03

payment of the tax + interest + penalty u/s 73(6)/73(8) or 74(6)/74(8)

statement and summary in DRC-02, if identical issue in next period

if PO not satisfied SCN & Summary in DRC-01

acknowledgement in form DRC-04. if payment made before issuance of SCN

ORDER in form DRC-05 where payment u/s 73(8)/74(8)/ within 30 days of SCN/ U/S 129 within 14 days

representation u/s 73(9)/74(9) /76(3) in form DRC-06.

summary of the order in form DRC-07, shall be treated as notice for recovery.

rectification of the order DRC-08.

## Important Forms

- ***Part A of FORM GST DRC-01A- details of tax, interest and penalty as ascertained by the said officer***
- ***DRC-03 - Voluntary payment of tax / if taxpayer has accepted the view of PO***
- ***intimation of payment of tax before SCN/statement -Part B of FORM GST DRC-01A along with payment in DRC-03***
- acknowledgement in form DRC-04 if PO satisfied about the tax dues payment
- SCN & Summery in DRC-01
- Statement & summery in DRC-02
- ORDER in form DRC-05
- summary of the order in form DRC-07
- Representation in DRC-06
- Rectification of the order DRC-08.

# ESSENTIALS OF SCN

- Issuance of SCN within time limit specified u/s 73 (2) read with section 73(10) in case other than fraud cases etc. and in the case of fraud etc. within time limit specified u/s the or 74(2) read with section 74(10)
- SCN after considering the representation, if any, made by the person chargeable with tax .
- SCN on the person chargeable with tax, interest or penalty
- If tax payer paid the tax interest and nil/15% penalty( fraud cases) before SCN and intimate to PO ,no need of issuance of SCN.
- SCN has description of investigation and reason/allegation for determining tax interest or penalty etc.

## Allegation in SCN to be specific not vague?

Show cause notice - is foundation on which Department has to build up the case - allegations have to be specific and not vague.[CCE, Bangalore Vs. Brindavan Beverages (P.) Ltd[2007] 213 ELT 487 (SC)



## Action point after SCN

- Go through the SCN
- Detect factual mistake in SCN
- Detect legal mistake in the SCN
- Research for supporting case laws in favour
- Distinguish the case laws applied in SCN on the basis of different facts of the tax payer
- Substantiate the intension with supporting evidences
- Check whether taxes paid has been Accounted for in SCN
- Suitable reply to SCN taking stand of tax payer, legal position in DRC-06.

# Adjudication Order

## ORDERS UNDER DIFFERENT SECTIONS OF GST

- *The order referred to in rule 142 (5) as mentioned here shall be treated as the notice for recovery;*
- As per rule 142 summary of order in different section in form GST DRC 07.
- Demand may be of tax, interest, penalty, fine.
- Section 51 related to tax deducted at source still missing in rule 142.
- Late fee u/s 47 or 51(4) is still missing from the list. What would happen if return not filed and demand to be created by PO? Whether late fee will be part of demand? Section 73, 74 and rule 142 missing in this regard.

<b>section 52</b>	<b>Collection of tax at source</b>
<i>section 62</i>	<b>Assessment of non-filers of returns</b>
<i>section 63</i>	<b>Assessment of unregistered persons</b>
<i>section 64</i>	<b>Summary assessment in certain special cases</b>
<i>section 73</i>	<b>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 misstatement or suppression of facts .</b>
<i>section 74</i>	<b>Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful-misstatement or suppression of facts.</b>
<i>section 76</i>	<b>Tax collected but not paid to Government.</b>
<i>section 122</i>	<b>Penalty for certain offences.</b>
<i>section 123</i>	<b>Penalty for failure to furnish information return.</b>
<i>section 124</i>	<b>Fine for failure to furnish statistics.</b>
<i>section 125</i>	<b>General penalty.</b>
<i>section 127</i>	<b>Power to impose penalty in certain cases.</b>
<i>section 129</i>	<b>Detention, seizure and release of goods and conveyances in transit.</b>
<i>section 130,</i>	<b>Confiscation of goods or conveyances and levy of penalty.</b>

Order after SCN  
or  
Statement

- The proper officer shall, **after considering the representation, if any, made by person chargeable with tax,**
- determine the amount of **tax, interest and a penalty** equivalent to 10% of tax or ₹10000/-, whichever is higher, due from such person; and
- issue an order. [ section 73(9)]

## Time for hearing & Adjournment related provisions

- ❑ The proper officer shall **grant time to the said person and adjourn the hearing for reasons to be recorded in writing**, if sufficient cause is shown by the person chargeable with tax.
- ❑ **Maximum 3 adjournments :Provided** that no such adjournment shall be granted for more than three times to a person during the proceedings. [ S-75(5)]

## Law of limitation for issuing order [ S-73(10)]

- The proper officer shall issue the order u/s 73(9) within 3 years from the **due date for furnishing of 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 3 years from the date of erroneous refund.
- **Time limit for issuing order not for serving order.**
- What would happen if differential due date for filing annual return?
- In certain case no need to file annual return which date shall be taken for issuing order?

**Law of limitation –  
period of stay shall be  
excluded [ S-75(2)]**

- Where the service of notice or issuance of order is stayed by an order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74, as the case may be.

**Law of limitation –order  
in pursuance to  
direction of court or  
tribunal [ S-75(3)]**

- Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a court, such order shall be issued within two years from the date of communication of the said direction.



**Extension of time  
period if identical  
matters is  
pending before  
appellate forum**

- An issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in sub-section (10) of section 73 or sub-section (10) of section 74 where proceedings are initiated by way of issue of a show cause notice under the said sections.[ S-75(11)]

**Deemed conclusion  
of proceedings after  
expiry of 3/5 years  
[S-75(10)]**

The adjudication proceedings shall be deemed to be concluded, if the order is not issued within three years as provided for in sub-section (10) of section 73 or within five years as provided for in sub-section (10) of section 74. [ S-75(10)]

# **Applicability of doctrine of natural justice**

## Principal of natural justice – Opportunity of being heard- provision in GST Law.

- Request in writing to grant some more time for furnishing reply or personal attendance with suitable reasons.
- Where Competent Authority had passed order under section 73 on assessee without granting time to file reply to show cause notice and without giving an opportunity of personal hearing, impugned order had been passed in violation of statutory requirements as indicated in section 75(4). It was decided in writ petition filed against the order seeking relief in this regard [Serajuddin & Co. Vs. Union of India [2020] 114 taxmann.com 480 (Orissa)]

Whether opportunity shall be allowed before passing the order?

Yes,

- Proper officer shall determine the amount of tax, interest and a penalty and issue an order, **after considering the representation**, if any, made by person chargeable with tax. [S-73(9)]
- An **opportunity of hearing shall be granted** where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person. [ S-75(4)]

## ESSENTIALS OF ORDER:

The proper officer, in his order, shall set out the relevant facts and the basis of his decision. [S-75(6)]

- **Amount as per order < or = the amount as per SCN:** The amount of tax, interest and penalty demanded in the order **shall not be in excess** of the amount specified in the SCN and no demand shall be confirmed on the grounds other than the grounds specified in the notice. [S-75(7)]
- Summary of order in GST DRC-07
- If Appellate Authority or Appellate Tribunal or court modifies the amount of tax determined by the proper officer, the **amount of interest and penalty shall stand modified** accordingly. [S-75(8)]
- **Order within specified time otherwise SCN null & void and time barred:** Order within 3 years as provided for in section 73(10) or 5 years as provided for in section 74(10), otherwise adjudication proceedings shall be deemed to be concluded. [s-75(10)]

Q. Without SCN whether demand of tax etc. as per order is valid or invalid if something missed out in SCN but in order?

A. Yes, the penalty imposed is set aside as show cause notice did not contain any proposal for imposition of penalty. [**Prabhat Forgings Works Vs. CCE, Chandigarh. 139 ELT 720 (CEGAT- NEW DELHI)(2002)**]

## Rectification of order passed – section 161

*Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be uploaded electronically by the proper officer in FORM GST DRC-08.]*

**NOTE:** if any mistake in order approach to authority passing order for rectification such order.

Time period for moving petition for rectification  
**3 months**

## Rectification of errors apparent on the face of record.

- Without prejudice to the provisions of section 160, and notwithstanding anything contained in any other provisions of this Act, **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 officer appointed under this Act or an officer appointed under the SGST Act or an officer appointed under the UTGST Act or by the affected person within a period of **3 months from the date of issue of such decision or order** or notice or certificate or any other document, as the case may be:
- **Provided** that no such rectification shall be done after a period of 6 months from the date of issue of such decision or order or notice or certificate or any other document:
- **Provided further** that the said period of **6 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:
- **Provided also** that where such rectification adversely affects any person, the **principles of natural justice shall be followed by the authority carrying out such rectification.**

## Analysis of rectification provisions : section 161

Error which is apparent on the face of record:

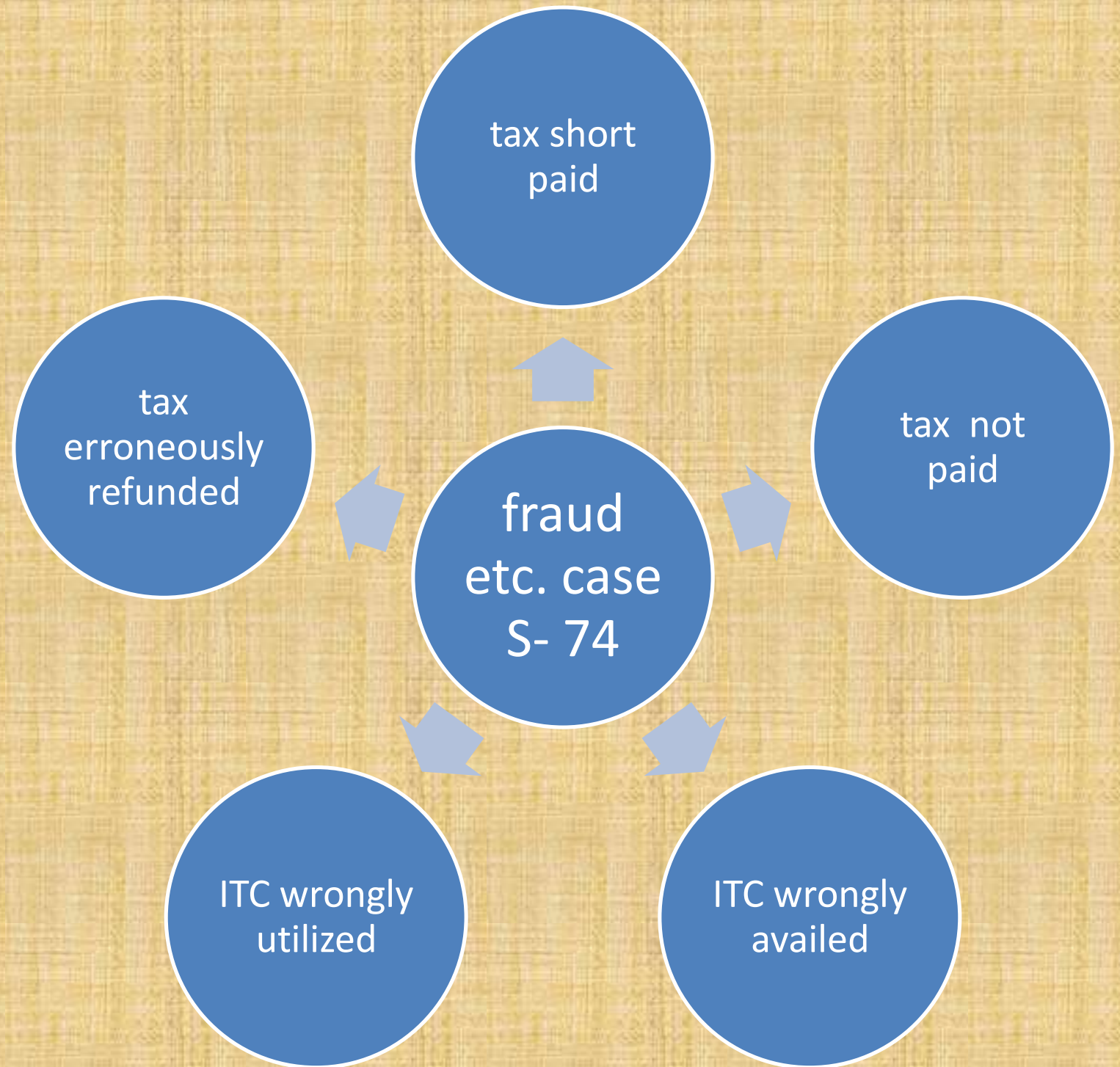
- Rectification of decision or order or notice or certificate or any other document
- What could be rectified: any error which is apparent on the face of record in such decision or order or notice or certificate or any other document,
- Who can brought mistake: any officer of state or central GST or officer appointed under the UTGST Act or by the affected person
- Time limit for bringing the mistake: within a period of 3 months from the date of issue of such decision or order or notice or certificate or any other document;
- Time limit for passing rectification :
  - (1)no time limit for correction of purely a clerical or arithmetical error, arising from any accidental slip or omission;
  - (2) 6 months in other cases
- Rectification order by authority on his own or requested by GST officer or affected person

Determination of tax in the  
case of fraud or  
wilful-misstatement  
or suppression of facts



## Coverage under section 74

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 by reason of **fraud**, or any **wilful-misstatement** or **suppression of facts to evade tax.**[S-74(1)]



## Reason for non applicability of extended period

Tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax,

Not a case where non payment, short payment , ITC wrongly availed or utilized or erroneous refund with intention to evade tax.

# Meaning of fraud

- false representation
- Suppression of a material information( e.g. supply w/o invoice)
- Concealment of relevant and material facts- ( e.g. to claim exemption/ less tax rate by mis- classification or applying wrong HSN Code deliberately)
- breach of legal or equitable duty, trust or confidence( e.g not issuing E-way bill)
- deliberate deception for taking unfair advantage (e.g not obtaining registration even if, turnover above threshold limit)
- Misrepresentation- removing and transporting goods on GST no and details of other person without consent.
- Fraud is an act lead to injustice.

- Fraud is proved when it is shown that a **false representation** has been made (i) knowingly or (ii) without belief in its truth or (iii) recklessly, careless whether it be true or false. Suppression of a material document would also amount to a fraud on the Court - *Ashok Leyland Ltd. v. State of Tamil Nadu* 2004 AIR SCW 1001 = 2004(3) SCC 1 (SC 3 member bench)
- **Suppression of a material document** would also amount to fraud on Court - *Gowrishankar v. Joshi Amba Shankar Family Trust* 1996(3) SCC 310 = 1996 AIR SCW 2684 = AIR 1996 SC 2202
- **Concealment of relevant and material facts**, which should have been declared before Arbitrator, is an act of fraud and is against public policy of India.
- Fraud being of '**infinite variety**' may take many forms .Fraud, in the contemplation of a civil court of justice, may be said to include properly all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and are **injurious to another**, or by which an **undue or unconscientious advantage is taken of another** - *Venture Global Engineering v. Satyam Computer Services* (2010) 8 SCC 660.
- Fraud is an act of **deliberate deception** with the design of **securing something by taking unfair advantage** of another. It is a deception in order to gain by another's loss. It is **cheating intended to get an advantage** - *S P Chengalvaraya Naidu v. Jagannath* AIR 1994 SC 853 = (1994) 1 SCC 1 = 1994 AIR SCW 243.
- **Misrepresentation itself amounts to fraud** - *Devendra Kumar v. State of Uttaranchal* (2009) 9 SCC 363.
- **Fraud and justice never dwell together** - *Meghmala v. G Narasimha Reddy* (2010) 8 SCC 383

# Meaning of Wilful Misstatement

- false statement to reduce tax liabilities
- Deliberate reduction of taxable turnover
- Claiming deduction deliberately without any supporting evidence
- Claiming ITC without backing of invoice
- Not reporting waste, loss etc
- Non reversal of credit of ITC even if non business use.

- A false statement becomes 'wilful' if it is **deliberate or intentional**. It is not wilful if the statement is accidental or inadvertent.
- A statement will not be misstatement only because full facts were not disclosed. **'Wilful' means 'with intent to evade duty'** - *Cosmic Dye Chemical v. CCE* 95 STC 604 = 75 ELT 721 = (1995) 6 SCC 117(SC 3 member bench) - quoted with approval in *UOI v. Rajasthan Spinning & Weaving Mills* (2009) 238 ELT 3 (SC).
- **Misstatement must be wilful to invoke extended period of limitation of 5 years.** - *Continental Foundation Jt Venture v. CCE* (2007) 10 SCC 337 = 216 ELT 177 (SC) - quoted with approval in *UOI v. Rajasthan Spinning & Weaving Mills* (2009) 20 STT 481 = 180 Taxman 609 = 238 ELT 3 (SC).

# Meaning of suppression

## EXAMPLE:

- No reporting in return , statement, report, statements shall lead to suppression.
- Non reporting of series of invoice deliberately to manipulate the turnover or supply
- Non maintenance of stock record for manipulation of goods manufactured and supply
- Short reporting of turnover to reduce tax payment
- Under reporting of supply
- Non reporting of wastage, free supply etc. to avoid reversal of ITC.

- expression "suppression" shall mean

- (1) **non-declaration of facts or information** which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or
- (2) failure to furnish any information on being asked for, in writing, by the proper officer[*Explanation 2*]

*Note: non furnishing of information asked by GST officer tantamount to suppression , so must reply the notices with information.*

- There can be no suppression of facts, if facts which are not required to be disclosed are not disclosed - ***Smt. Shirisht Dhawan v. Shaw Brothers - 1992 (1) SCC 534 = 1992 AIR SCW 1649 = AIR 1992 SC 1555\* CCE v. Ranka Wires (2015) 322 ELT 410 (SC).*** Example in GST return no need to disclose the exemption notification reference. If later on divergent view of PO and taxed by PO not a case of fraud.

## Meaning of intent

There are two elements for any offence-

1. mens rea which is pertaining to the intention and
2. actus rea which is pertaining to the conduct of the alleged offender.

Conjoint reading of these two only help us to determine the act done in good faith or act done with malafide intention.

If no regular defaulter from the history of conduct of the noticee it may be concluded that there was no intention to evade any tax payment whether GST or any other tax.

# Intention to evade tax

- Short payment of tax does not necessarily mean a case of fraud.
- There must be intention to evade payment of tax behind the short payment of tax
- If no tax payment due to claiming exemption based on expert opinion and others of the trade are following the same, no intention to evade tax
- No clarity on taxability/ rate of tax etc. and taxpayer has approached for advance ruling/ provisional assessment - no intention to evade tax

- **Intention to evade payment of tax is not mere failure to pay duty. It must be something more, i.e. that assessee must be aware that duty was leviable and he must deliberately avoid payment of duty.**
- **'Evade' means defeating the provision of law of paying duty.** It is made more stringent by the use of word 'intent'. In other words, the assessee must deliberately avoid payment of duty payable under the law.
- **Where there was scope of doubt whether duty was payable or not, it is not 'intention to evade duty'. - Tamilnadu Housing Board v. CCE 1995 [1994] 1994 taxmann.com 267 (SC)**
- **If there was confusion prevalent in industry** as to charge of service tax on particular service and Departmental authorities themselves gave two different conclusions, There was no intention to evade payment of service tax on part of assessee. Similar benefits may be available under GST **also. Sharp Metal Industries Vs.CCE 36 STT 368 (New Delhi - CESTAT)(2012).**
- **Where short-payment of service tax was due to non-understanding of law** while entire value of taxable service had been correctly shown in balance sheet, since entire value of taxable services for relevant period had been correctly shown in balance sheet, delay in payment of service tax would not be attributed to suppression, or mis-declaration and therefore, no penalty.[ **Gemini Veterans Security & Vigilance Vs. Comm of service tax kolkatta )/[2012] 36 STT 46 (Kolkata - CESTAT)(MAG.)**]

## Fraud explained:

In one of the leading judgements, in the case of **CCE vs Chemphar Drugs & Liniments(1989) 40 ELT 276 (SC)** where Hon'ble Supreme Court has held that fraud etc is essentially a question of fact and has to be established if there is a positive act. Non-declaration of something in the return is not suppression of facts if there is no deliberate withholding of information. In this case, the noticee has not declared the value of clearance of exempted goods which he thought was not necessary and therefore Supreme Court clearly held that extended period is not evocable.



## **Suppression of facts:**

- **Cosmic Dye Chemicals vs CCE, Bombay (1995) 75 ELT 721 (SC)** Hon'ble Supreme Court while dealing with the scope and meaning of word Fraud, suppression, etc. and the relevance of intent to evade payment of tax observed that:
- Fraud and Collusion are concerned, it is evident that the intent to evade duty is built into these very words.
- For misstatement or suppression of facts, the important word is willful and that too with intent to evade tax/duty.

## **Contravention of any provision of Act or rules:**

- Contravention of any provision of the act or rules are again qualified by the immediately following words with intent to evade payment of duty.
- Therefore, there can not be any suppression or misstatement of facts unless it is willful. Therefore, merely non-disclosure of value of exempted goods there was no intention to evade payment of duty so extended period not applicable.

## **Suppression of facts:**

## **Contravention of any provision of Act or rules:**

## intention to evade payment of tax

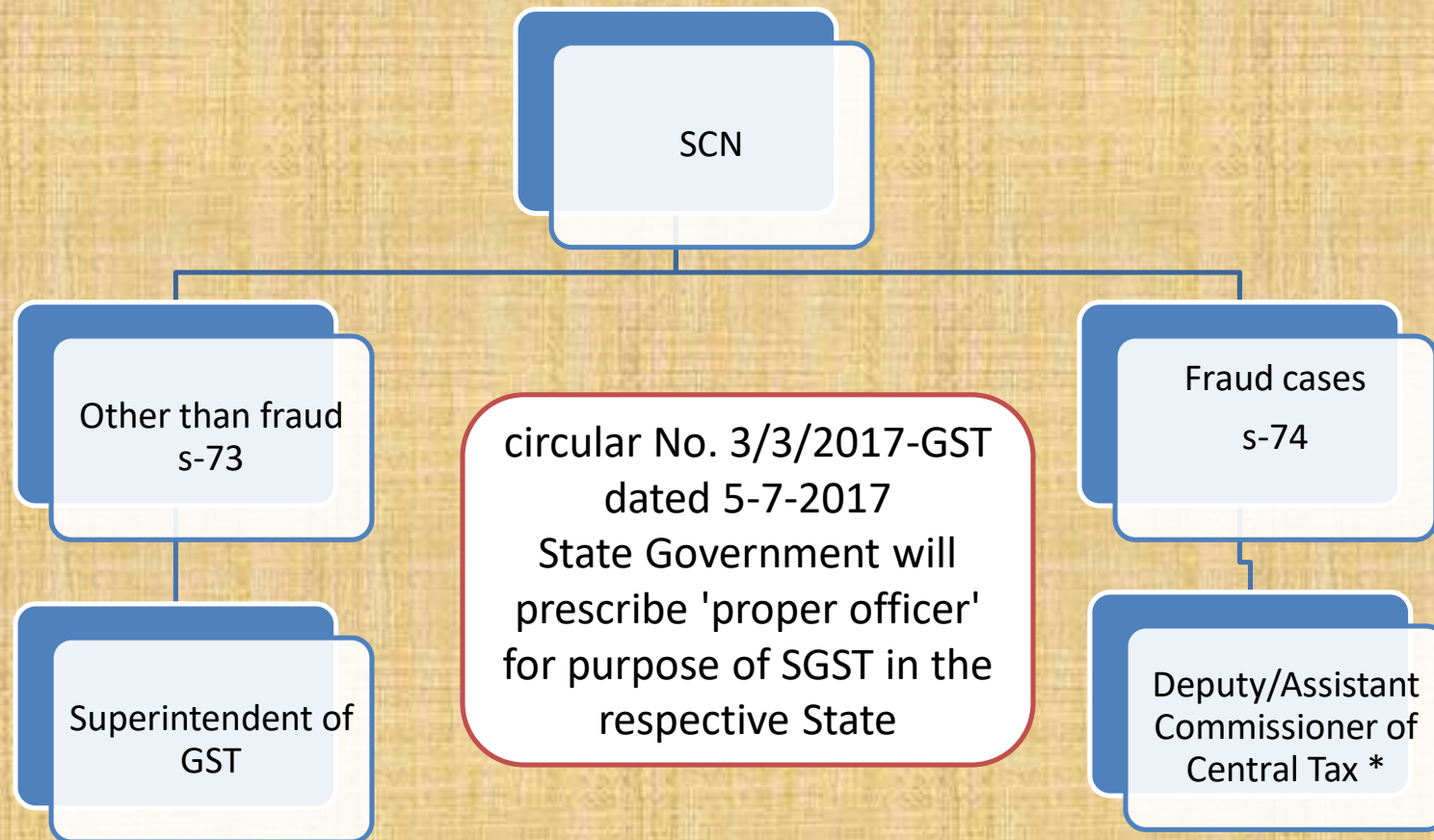
- landmark judgement of the Apex Court in the case of **Tamil Nadu Housing Board vs Collector of Central Excise, Madras (1994) 74 ELT 9 (SC)** observed that intent to evade require proof of intention to evade payment of duty. Merely failure to pay duty could not suffice and there has to be something more. the assessee must be aware of that duty was leviable and must deliberately avoid paying it. The word evade means defeating the provisions of law of paying duty.

## What proper officer can do?

Proper officer may issue show cause notice(SCN) as to why he should not pay the amount specified in the notice

- tax not paid /short paid/ erroneously refunded, ITC wrongly availed or utilized) along with
- interest payable thereon under section 50 and
- penalty equivalent to the tax specified in the notice

## ***Authority empowered to issue SCN and confirm demand***



Power of AC/DC related to issuance of SCN u/s 74 has been shifted to suptd. Vide Circular no. 31/05/2018-GST, dated **9-2-2018**.

## Time period for issuance of SCN & order.

- please note the time period excluded as per section 75(11)
- Extension of due date for furnishing of annual return automatically increase the time limit for issuance of SCN and order u/s74(10)

- ❑ *SCN to be issued at least 6 months before time limit* for passing adjudication order specified in section 74(10) [S-74(2)]
- ❑ **Time limit for passing adjudication order is 5 years** from the **due date** for furnishing of 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 5 years from the **date of erroneous refund**. [section 74(10)].

## Exclusion from time period of limitation

- Delay in the issuance of SCN leads to more interest if there is short payment of tax.
- Better to approach for provisional assessment or advance ruling.
- Pay tax under protest to avoid interest cost.

- if there is **identical issue in litigations** where Appellate Authority or the Appellate Tribunal or the High Court has given **its decision which is prejudicial to the interest of revenue** in some other proceedings and an appeal filed before higher court, then period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in section 73(10) where proceedings are initiated by way of issue of a show cause notice under said sections. section 75(11) of CGST Act.[s-75(11)]
- Thus, if the Show Cause Notice was issued but kept pending as department had filed appeal against an order adverse to revenue in some other proceedings on same issue, and appeal of department is pending before Appellate Tribunal, High Court or Supreme Court, that time will not be counted for calculating 3 year/5 year limit.[s-75(11)]
- As per section 75(1) any order is stayed by an order of a court or Appellate Tribunal, the **period of such stay** shall be excluded in computing the period specified in sub-sections (2) and (10)of section 73 or sub-sections (2)and (10)of section 74.[s-75(1)]

## Identical issue in next period[s-74(3)]

- Either SCN or statement.

proper officer may either issue another SCN for the next period of enquiry or he may simply issue statement containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under earlier SCN, on the person chargeable with tax for the remaining period if the issues are identical.

**Principal of Natural  
justice  
opportunity of being  
heard**

- **Whether opportunity shall be allowed before passing the order?**
- Yes, as per section 74(9) the proper officer shall, after considering the representation, if any, made by person chargeable with tax, determine the amount of tax, interest and a penalty due from such person and issue an order.



# Option to the person to whom SCN issued or likely to be issued?

after 30 days of communication of order sec74(11)

- Pay tax
- pay interest
- pay penalty equivalent to 100% of such tax after 30 days of communication of the order.

after 30 days of SCN 74(9) but within 30 days of communication of order

- Pay tax
- pay interest
- pay penalty equivalent to 50% of such tax within 30 days of communication of the order.

within 30 days of communication of SCN 74(8)

- pay tax
- pay interest
- penalty @ 25 % of such tax
- inquiry **deemed to concluded**

before issuance of SCN 74(5)

- Pay tax
- pay interest
- penalty @ 15% of such tax
- intimate proper officer in writing, no SCN shall be issued,

## Meaning of deemed to be concluded

Proceeding against main person liable to pay tax concluded, proceeding against other persons deemed to be concluded.

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 are deemed to be concluded.

[ Explanation -1 (ii)]

**Q. Whether after payment of tax before SCN or within 30 days of show cause notice can be treated as stoppage of prosecution proceeding and grant relief from prosecution?**

A. No, as per explanation 1(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132. section 132 is related to prosecution so no relief from prosecution even after deposit of tax , interest and penalty. for waiver from prosecution separate provision where if compounding application approved in the case of compoundable offence , then on payment of compounding fee only waiver from punishment.

This explanation is applicable not only to section 74 but section 73 also.

## **Compounding of offence[ 138]**

- Any offence under this Act may, either before or after the institution of prosecution, be compounded by the Commissioner on payment, by the person accused of the offence, to the Central Government or the State Government, as the case be, of such compounding amount in such manner as may be prescribed
- compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences
- compounding allowed under the provisions of this section shall not affect the proceedings, if any, instituted under any other law
- 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.

## **Compounding fee[s-138(2)]**

amount for compounding of offences under this section shall be such as may be prescribed, subject to the **minimum amount** not being less than Rs. 10,000/- or 50 % of the tax involved, **whichever is higher,**

and

the maximum amount not being less than Rs. 30,000/- or 150%. of the tax, **whichever is higher.**

## **Non compoundable offence**

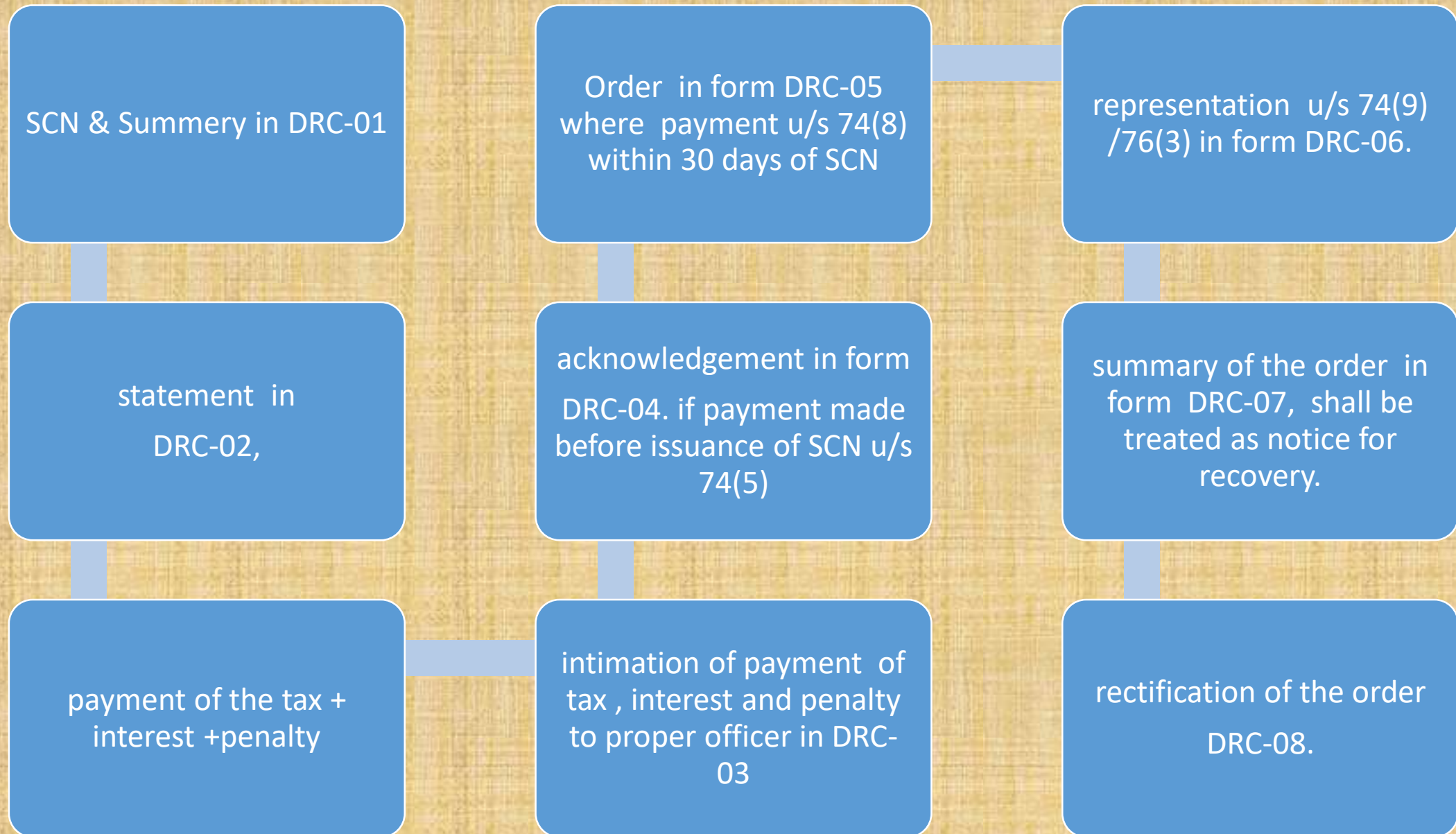
[ proviso to sec 138(1)]

- a) a person who has been **allowed to compound once** in respect of any of the offences specified in clauses (a) to (f) of sub-section (1) of section 132 and the offences specified in clause (l) which are relatable to offences specified in clauses (a) to (f) of the said sub-section
- b) a person who has been **allowed to compound once** in respect of any offence, other than those in clause (a), under this Act or under the provisions of any State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act or the Integrated Goods and Services Tax Act in respect of **supplies of value** exceeding **Rs. 1 crore** ;
- c) 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.**
- d) a person who has been convicted for an offence under this Act by a court;
- e) 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
- f) any other class of persons or offences as may be prescribed.

***Procedure for representation***

Rule 142(4)

# Procedures involved in this case are explained as under



## GENERAL PROVISIONS RELATING TO DEMAND OF TAX – SEC 75

These provisions are applicable irrespective of whether or not the **notice has invoked the normal period or extended period** while issuing the notice and are in the nature of general provisions for demand of tax.



**Period of stay shall be excluded while computing limit for issuance of SCN and order  
[SEC75[1]**

Where the service of notice or an issue of the order has been stayed by an order of a Court or Tribunal

- such period of stay shall be excluded in computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74, as the case may be.[S-75(1)]

**If tax department failed to substantiate charge of fraud etc. what would be fate of proceeding u/s 74?[SEC 75(3)]**

When a notice has been issued under clause (1) of section 74 but the charges of fraud, not sustainable or not established,

- proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73. in other words it will automatically convert into other than fraud case

Period of demand will reduce from 3 years to 5 years.

**Time limit for passing order on the direction of appellate authority/  
tribunal /court– [SEC 75(3)]**

- ✓ Where any order is required to be issued in pursuance of the direction of the order of the Appellate Authority, Appellate Tribunal or a Court such order shall be issued **within 2 years** from the date of communication of the said direction.
- ✓ Opportunity of personal hearing has to be granted when requested in writing by the person chargeable with tax or where any adverse decision is proposed to be taken against the person.[S-75(4)]

## Provision related to adjournment [S-75(5)]

The proper officer shall, if **sufficient cause** is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing.

### **Maximum adjournment:**

**Provided** that no such adjournment shall be granted for more than **3 times** to a person during the proceedings.

## Contents of order

- The proper officer, in his order, shall set out the **relevant facts** and the **basis of his decision**[ s-75(6)]
- The amount of **tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice.**[S-75(7)]
- **no demand shall be confirmed on the grounds other than the grounds specified in the notice.**[S-75(7)]
- Where the Appellate Authority or Appellate Tribunal or court **modifies** the amount of tax determined by the proper officer, the amount **of interest and penalty shall stand modified** accordingly, taking into account the amount of tax so modified.[S-75(8)]
- The **interest** on the tax short paid or not paid **shall be payable whether or not specified in the order determining the tax liability.**[S-75(9)]

assessment" means **determination of tax liability** under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment;[ s-2(11)]

Deemed conclusion of adjudication, if no order with 3 years  
(other than fraud etc.)/5 years( fraud etc.) of SCN

The adjudication proceedings shall be deemed to be concluded, if the order is not issued within 3 years as provided for in sub-section (10) of section 73 or within 5 years as provided for in sub-section (10) of section 74. [S-75(10)]

Note: exclusion from above time limit of period during which appeal is pending before higher appellate authority / tribunal/court if department has approached as appellant against the favourable order of taxpayer in next appeal [S-75(11)]

## Exclusion from time limit calculation of 3/5 years for passing order– [SEC 75(11)]

### An issue on which

- The first appellate authority has given its decision which is prejudicial to the interest of the Revenue and an appeal to the Appellate Tribunal 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.**
- The Appellate Tribunal has given its decision which is prejudicial to the interest of the Revenue and an appeal to the High Court 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.
- The High Court has given its decision which is prejudicial to the interest of the revenue and an appeal to the Supreme Court 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.

Is there any time limit for collection of self assessed tax or interest?[ s-75(12)] - no

Notwithstanding anything contained in section 73 or section 74, where any amount of **self-assessed tax** in accordance with a **return furnished under section 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.

Note: Under present system of return filing first set off of liability of taxes then only will return filing therefore there is no question of unpaid self-assessed tax except where GSTR-1 filed but tax not paid.



# Whether two penalty for same offence?

No, only single penalty for signal offence. 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.[ S-75(13)]

A person can't be punished more than once in respect of same offence. If penalty imposed on firm and for the same offence penalty can't be imposed on partners otherwise leads to double punishment. **[CA Abraham Vs, ITO (1961) 41 ITR 425 (SC)]**

Only immunity from double penalty for same offence but no immunity from prosecution even if penalty paid.

Amount collected as tax from parties  
but not paid to the government

# **Prohibition of unauthorized collection of tax[S-32]**

## **Unregistered person can't collect tax**

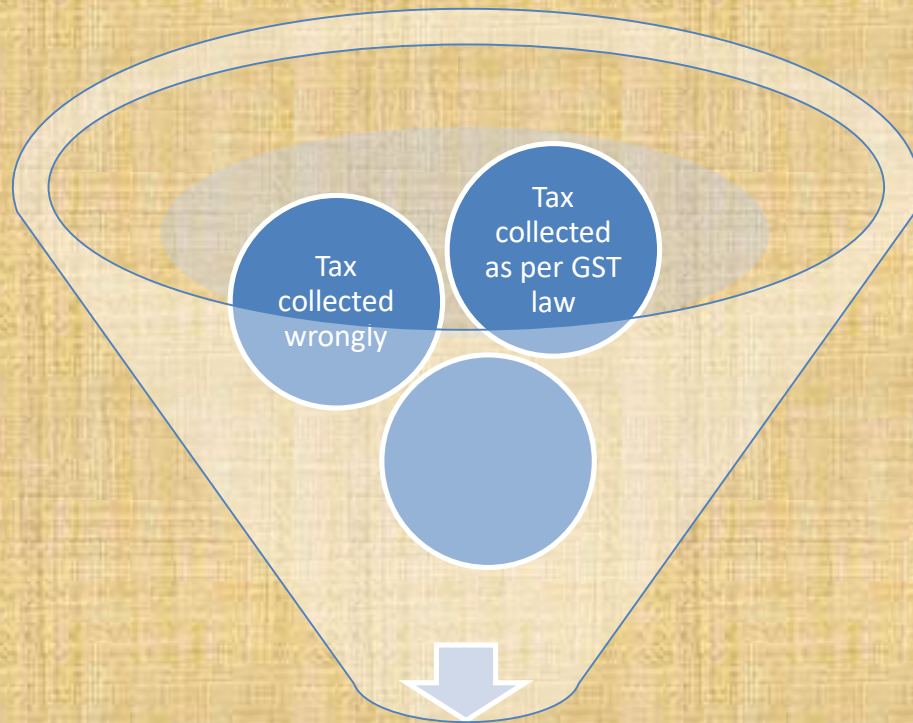
- (1) A person who is not a registered person shall not collect in respect of any supply of goods or services or both any amount by way of tax under this Act.

## **Registered person shall collect GST according to GST law**

- (2) No registered person shall collect tax except in accordance with the provisions of this Act or the rules made thereunder.

Note: if amount collected in violation of section 32, it would be deposited to government in accordance with provisions of section 76.

# What would happen if tax collected wrongly from customers but not deposited to the respective government?



Pay to respective government  
if not paid earlier

Wrong tax collection may be –

- Collection of tax on exempt supply/non GST supply
- Collection of tax by unregistered person
- Collection of tax at higher rate than notified rate

Note: Refer section 76 of CGST/SGST.

# Tax collected but not paid to government

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 this 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. [ S-76]

## Penalty if not paid within 3 months:

Collects any tax in contravention of the provisions of this Act but fails to pay the same to the Government beyond a period of **3 months** from the date on which such payment becomes due. [ S-122(1)(iv)]

Quantum of penalty equal to amount of tax.

## SCN for deposit of amount collected along with penalty of equivalent amount[ S-76(2)]

Where any amount is required to be paid to the Government under sub-section (1), 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 [SCN]** 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.[ S-76(2)]

### ✓ How will SCN statement Served ?

Proper office shall along with the SCNs serve a summary electronically in **FORM GST DRC-01** and summary of same in FORM GST DRC-02 served electronically.

### ✓ No time Limit for issuance of show cause notice?

Act is silent on this matter. There is no time limit under the law for issuance of show cause notice but there is time limit for passing the order. There is no time limit because this is a case where tax collected but not paid so covered in the **doctrine of unjust enrichment** which is not permissible so any way this amount must be deposited to the government because it is collection on behalf of government so must be paid to the government.

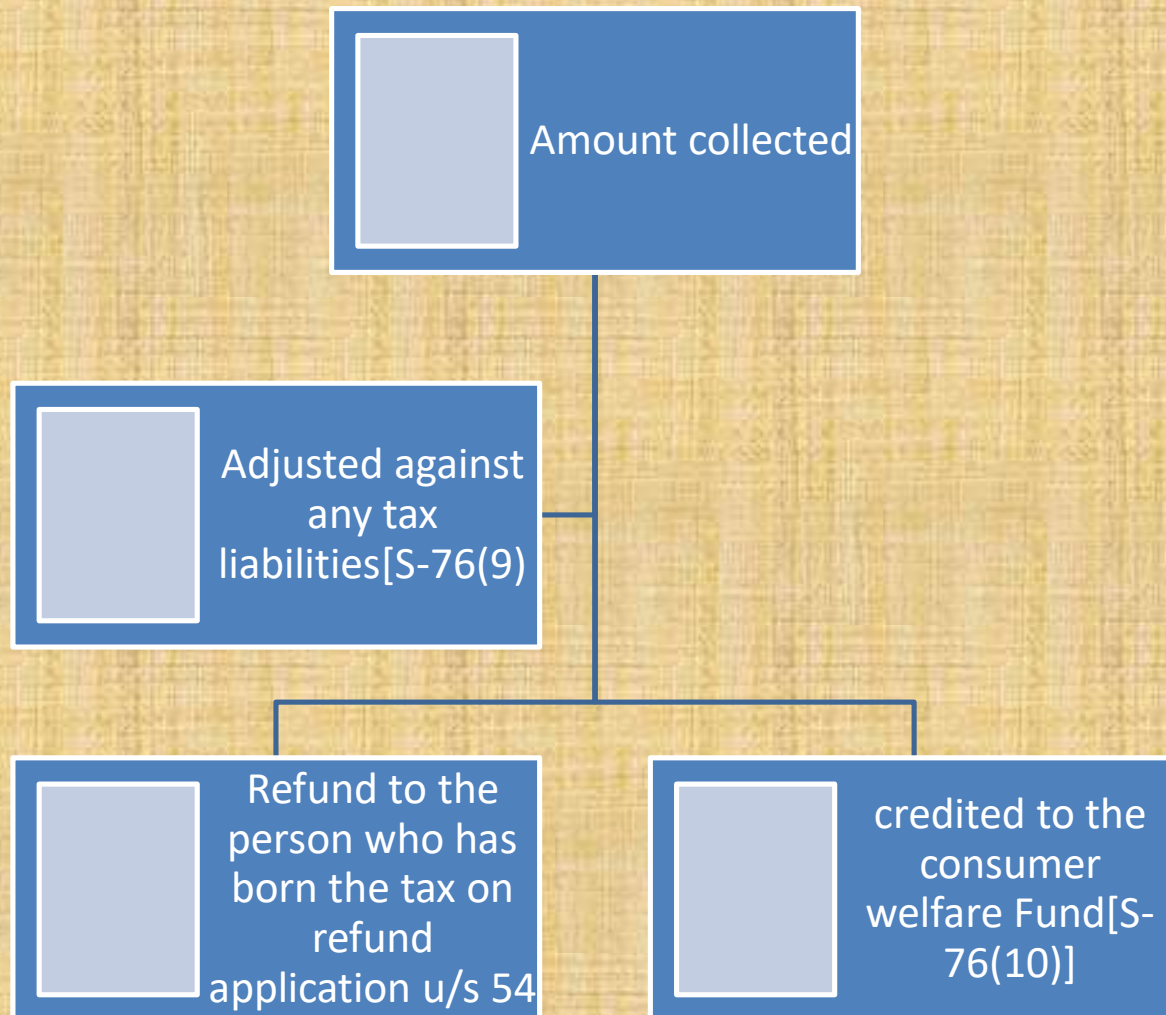
### ✓ Time limit for passing the order

- The proper officer shall issue an **order within one year from the date of issue of the notice.**[76(6)]
- Where the issuance of order is stayed by an order of the court or Appellate Tribunal, the period of such stay shall be excluded in computing the period of 1 year.

## Principal of natural justice- opportunity of being heard

- An opportunity of hearing shall be granted where a request is received in writing from the person to whom the notice was issued to show cause.[S-76(5)]
- Reply in FORM GST DRC-06
- personal hearing be granted on written request from assesses.

# Action for government after collection of amount which is not tax in accordance with law[S-76



- The amount paid to the Government under sub-section (1) or sub-section (3) shall be adjusted against the tax payable, if any, by the person in relation to the supplies referred to in sub-section (1). [S-76(9)]
- Where any surplus is left after the adjustment under sub-section (9), the amount of such surplus shall either be credited to the Fund or refunded to the person who has borne the incidence of such amount. [S-76(10)]
- The person who has borne the incidence of the amount, may apply for the refund of the same in accordance with the provisions of section 54. [S-76(11)]



## TAX WRONGFULLY COLLECTED AND DEPOSITED WITH CENTRAL OR STATE GOVERNMENT – SEC 77

A registered person who has paid the Central tax and State tax or, as the case may be, the central tax and the Union territory tax on a transaction considered by him to be an intra-State supply, but which is subsequently held to be an inter-State supply, shall be refunded the amount of taxes so paid in such manner and subject to such conditions as may be prescribed<sup>2</sup>.

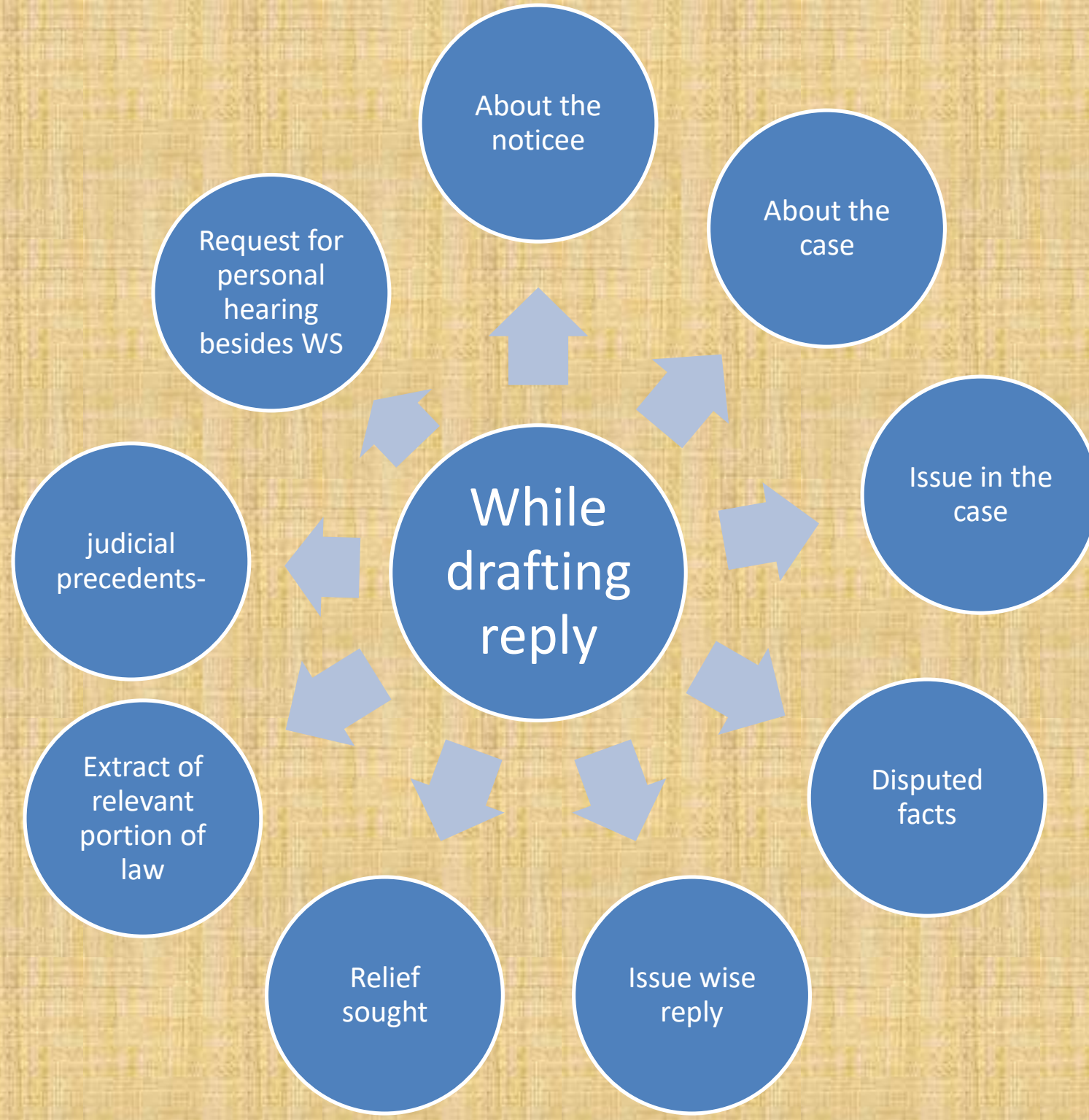
A registered person who has paid integrated tax on a transaction considered by him to be an inter-State supply, but which is subsequently held to be an intra-State supply, shall not be required to pay any interest on the amount of Central tax and State tax or, as the case may be, the Central tax and the Union territory tax payable.

Now PMT -09 for transfer of tax from one head to other head so no need of applying refund of wrong tax and paying the correct tax . Now rule 87(13) notified from 21-04-2020.

**POINTS –**  
**While drafting reply to SCN**

## **ANALYSIS OF SCN**

- Understanding of the business of the noticee with reference to issue in SCN
- Understanding of the applicable legal provision like supply, nature of supply , classification of supply, rate of tax, exemption, valuation , ITC etc.
- Understanding of the SCN
- Factual mistake in SCN
- Mistake in application of GST law/ misapplication
- Review the submission made earlier or lacking in submission/no submission
- Submission made but not considered or missing while drafting the SCN
- Procedural lapses
- Calculation mistakes/ mistake apparent from record in SCN
- Whether principle of natural justice followed?
- Whether judicial precedents misapplied or not considered
- Speaking SCN/ Without proper reasoning
- Reply by expert of subject / avoid to submit general reply/ submission
- discussion with management and decision of Issue to be contested with due pros and cons.



## About the noticee

- About the registration and return filing history
- Nature of business or profession
- Nature of transaction having bearing with the issue –step by step
- full facts having bearing on taxation , exemption, valuation, nature of supply , classification of supply, rate of tax, ITC etc.
- Case history and references of correspondence like letter no, notice no etc.
- Other previous case history whether under GST or pre-GST era tax laws
- Good track record of noticee under other statute like income tax , labour laws, pre-GST era enquiry/order
- About the case: full sequence of happening of events
- Undisputed facts mention in SCN
- Mistake of facts mention in the SCN

## About the case of the noticee

- Background of the case , how it was initiated?
- About the Proceedings and submissions reference including personal hearing.
- Nature of proceedings
- Nature of demand( tax , interest , penalty, fee , fine etc) and quantification thereof
- various Issues in the case like exemption denied , transaction/activity taxed, ITC denied, classification matter, valuation issue etc.
- Reference of the particular section , notification, circular etc.
- View of GST officer and contrary view / agreed view of the taxpayer on some of the issue
- whether same matter/ identical matter is pending before any authority? If yes, details thereof
- Reference to earlier concluded proceedings/ proceedings going on with other authority

## Issue involved in the case

- Issue in the case to be narrated with clarity – heading wise
- Issue of short levy / non levy/ short paid/ non paid/wrongly refunded – fraud etc. cases
- Issue of short levy / non levy/ short paid/ non paid/wrongly refunded – other than fraud etc. cases
- Issue of output tax like exemption , rate of tax, classification, zero rated supply, non- GST supply etc.
- Issue of input tax ( credit availment or utilization)
- Non-compliances- non return filing or no reply or non personal attendance case though required
- Non submission of documents
- Penalty
- Interest
- Late fee/fine etc.

## Disputed facts

- High light the mistake of facts mention in the SCN with reference to Para of the SCN
- Table /chart of wrong facts mentioned in the SCN and correct facts of the noticee
- How wrong facts in SCN causes demand of tax, interest , penalty etc. ?
- wrong facts not having bearing on quantification of tax, interest or penalty but it is absolutely wrong like nature of business or model of business wrongly mentioned, wrong classification but same tax rate etc, the same should also be highlighted.
- Wrong facts having bearing with the case must be highlighted and how it result into demand ?
- Reporting of figure elsewhere under different laws taken for quantification of demand under GST by misapplication of GST law, like 26AS or turnover reported in ITR taken for quantification of tax under GST without appreciating the different system of both the tax law provisions.
- Figures of other books of account / record taken for quantification of tax without cross examination of record/person.



## Issue wise reply

Issue wise reply consisting of

- 1) facts in brief pertaining to the issue
- 2) applicable provisions of law, preferably quote the relevant portion of law like extract of section/rules/notification/circular/order etc.
- 3) mistake in SCN while appreciating facts at the time of SCN
- 4) Mistakes in principle of law while applying law
- 5) Judicial precedence in favour of the issue
- 6) Relief sought for

**judicial precedents- Mis-quoted in the SCN**

- ❑ Why judicial precedents not applicable in the case of noticee?
- ❑ Mistake in applicability of ratio decidendi (the principle that the case establishes)
- ❑ Mistake of facts or change of facts / differentiation of facts of the case quoted and facts of noticee with reasons why the quoted judicial precedents is not applicable
- ❑ If precedence of pre-GST law taken , difference between both laws ( pre- GST and post GST law) and reason for non applicability of judicial precedence quoted
- ❑ highlight recent judicial precedence nullifying the earlier precedence
- ❑ highlight judgment of GST era in place of pre-GST era
- ❑ Order of higher court in favour of noticee
- ❑ Contrary view of different tribunal or high court , reason why the case laws quoted is not applicable
- ❑ Case laws quoted is against the spirit and expressed wording of law and review /appeal petition is pending for disposal before higher court .

**If judicial precedents-  
relied upon in  
submission**

- Only relevant case law having similar facts or ratio decidendi (the principle that the case establishes) should be incorporated in the reply
- Avoid to give too much case laws/ irrelevant case laws
- Preferably quote case of jurisdictional high court/SC/ tribunal having territorial jurisdiction if available
- Case laws with citation and para no of the citation
- Relevant para must be reproduced as it is without any modification
- How facts of case quoted match with facts of the case or ratio of the case quoted is applicable ?
- Contrary view of different tribunal of high court , reason why the case laws quoted in the reply is applicable in case of noticee

**Request for  
personal hearing  
besides detailed  
written submissions**

- Detail written submissions with request for personal hearing
- Always ask for physical personal hearing of the taxpayer or representative
- physical hearing develop the understanding of facts and legal propositions
- Submit synopsis after attending hearing
- Personal hearing must be taken on record, if order sheet is not properly recorded by the officer, it is always advisable to mention the brief of discussion in personal hearing in the next submission.
- It is always better to handover submission after hearing and explaining to the officer
- Personal hearing with proper jurisdictional officer who is issuing notices
- Prayer for personal hearing to avoid any confusion in the mind of officers

## Written submissions – essentials

- Properly addressed to the officer issuing notices
- Page no is must
- All annexure forming part of the reply
- Page no range of the annexure in the body of reply
- Proper binding required to avoid detachment of papers.
- Signing by the person who has drafted the submission, preferably the legal counsel
- Review by the other legal counsel if possible
- Don't submit in DAK – without discussion with officer
- Have a proper receiving of submission
- Always mention the reference of earlier submission to remind the officer of earlier submission as well
- Power of attorney / vakaltnama must be there .

**Some basic principles  
applicable**

## Principle of Natural Justice:

- **Nemo debet Esse judex in propria causa** meaning thereby while deciding anything the approach of the deciding authority must be impartial and without bias. From the show cause notice if it appears that the explanations, information, documents submitted during the investigation proceedings was totally ignored and not considered. It appears that the SCN was drafted with a preset mind of imposing tax and not to deal with the relaxation provided under the statute by exemption, concessional rate of tax, rebate in valuation, beneficial notification or circulars etc. therefore, it appears to be gross violation of principles of natural justice.
- **Audi Alteram Partem** meaning thereby it is mandated to hear or no man should be condemned unheard. From the SCN, it appears that no proper opportunity was given or if given but not taken on record because SCN is silent about the written submissions or personal hearing of the noticee or any other authorized representative, it is gross violation of principle of natural justice.
- **Speaking order/reasoned order:** Reason to be recorded in any SCN/order and not only that those reasons & material must be shared before decision and response of taxpayer must be considered while disposing the matter. **Siemen Engineering & Mfg Co. (P) Ltd. vs Union of India AIR (1976) (SC) 1785.**

**while issuing SCN/  
passing order there must  
be absence of bias,  
vested interest of  
creating huge demand  
and without prejudice of  
the GST officers.**

- The proper officer must be impartial neutral and unbiased.
- Justice should not only be done but must be seen to be done from the order/so-called notice
- action of proper officer while drafting the show cause notice or order should be above suspicion and without any partiality.
- Biasness maybe pecuniary to achieve the tax target or sometimes many personal biases as well for in genuine demand or there may be official biasness where tax officials are working and following merely the instruction of superior officer and not taking into account the relevant facts and provisions of law.



## Reasonable opportunity of being heard.

Proper notice

Proper hearing : immediately of receiving any notice immediately request for opportunity of hearing – S-75(4)

- A) Where no specific provision in the GST law for issuing notices before taking any decision or order :** Even if there is no provision in the tax law about giving notice, in the order adversely affect the right of taxpayer notice must be given. In the other words in demand cases notice must be given. Further notice must be clear a specific and unambiguous and the charges or allegations should not be vague or uncertain.[Management of Northern Rly. coop. credit society Vs. Industrial tribunal (AIR) 1967 (SC) 1182]
- B) Where specific provision in the GST law for issuing notices before taking any decision or order :** Notice according to the provisions of relevant provisions. Section 75(4) opportunity of hearing granted where request in writing from person chargeable to tax.

**Reasonable time to comply  
notice:**

If unreasonably short period immediately request for some more time with reasons for taking more time

- Notice must provide a reasonable time to comply the requirement mentioned therein. Giving unreasonably less time to comply the requirement of notice is not a proper and valid notice . Only 24 hours was allowed to comply the notice pertaining to demolishing a structure [ **State of J and K versus Haji Wali Mohammad (1972)(SC)**]

**Compare the charges in the show cause notice and order & Quantification of tax, interest, penalty in Order < tax, interest and penalty in SCN.**

The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice ;and

no demand shall be confirmed on the grounds other than the grounds specified in the notice. [S-75(7)]

- If in the show cause notice one charge is mentioned which is not sustainable in adjudication proceedings on the taxable person, he cannot be punished for other charges not mentioned in the notice for which no notice or opportunity of being heard granted and therefore against the principle of natural justice. [LT COL K D GUPTA Vs. UOI (1989)(SC)]
- Applicable in GST law as well . Refer section 75(7)
- Further note that in GST law amount of tax, interest and penalty demanded in SCN can't exceed in the order in any case . Refer section 75(7)

**Determination of demand of tax , interest , or penalty without notice mentioned in tax law.**

Under the GST law self assessed tax in accordance with the return furnished under section 39 but amounts unrepaired and interest thereon could be recovered without any compliance of provision of section 73 or 74 as specifically mentioned in section 75(12).

Olga Tellis versus Bombay municipal Corporation (1985)(SC)

Even if a statute empowered Commissioner to remove unauthorized construction without notice, Court has held that discretion to be exercised in consonance with the principle of natural justice and therefore demolition without notice is against the principle of natural justice.

Although such amount could be recovered directly according to provision of recovery of tax under section 79 but considering the doctrine of principle of natural justice notice must be issued to the taxpayer.

**Sharing of material and evidences by the adjudicating authority before use thereof in any order adversely affecting the taxpayer**

Adjudicating authority must disclose all evidences and materials placed before it in the course of proceedings and must afford an opportunity to the taxpayer against whom it is sought to be utilised to enable the taxpayer to prepare his defence, rebut the Evidences relied upon and put forward his case before the authority.

Case laws:

Dhakeshwari Cotton Mills limited versus CIT AIR 1955 (SC): Honourable Supreme Court had set aside the order of Tribunal on the ground that it is not disclose some evidences produced before it by the Department and used against the taxpayer without reasonable opportunity of being heard.

**One who decide  
must hear**

- This is the basic principle of law as determined by Hon'ble Supreme Court in the case of **Gullapalli Nageshwar Rao vs State of AP AIR 1959 (SC) 1376 (1960)** where it was decided by Honble Supreme Court that the hearing authority and deciding authority must be same otherwise there may be chance that the order passing authority has not passed the order considering the explanation given to the previous hearing authority that is why in the tax statute, there is a provision where there is a change in the officer hearing the case, there is a requirement to issue a fresh notice by the new officer.

One of the basic principle while finalizing anything, whether by administrative authority or quasi-judicial authority must have to note the precedents and decisions propound by higher court.

Mandate to Consider the different judgments of jurisdictional high court / supreme court

If different view of different high courts , preference to jurisdictional high court order, if not

Exemption – strict interpretation , levy – liberal interpretation

**principle of stair decisis**

## Cross examination related matter

- **If tax law a permit cross-examination of witnesses** examined at the enquiry or a adjudication proceedings- opposite party can claim right to cross-examination
- **If tax law is silent about cross-examination-** if other party is unable to defend due to lacking of information about the alleged charges- cross-examination must be allowed to the taxpayer so that reply could be made about allegations based on their statement of third-party.

Case laws: **State of Kerla Vs. shaduli grocery dealer (1977)(SC) - Addition** to the turnover and additional tax liability determined rejecting the books of accounts of the taxpayer and the return filed by the taxpyer based on the statements and the records of third-party being a wholesaler but no cross examination of those persons and their statements were not shared with the taxpayer by the STO, therefore it is a case of denial of principle of natural justice and addition quashed.



## Allowing legal or tax counsel in proceedings

case law: C.L Subramaniam versus collector of custom (1972)(SC)

If oral evidence produced at the enquiry required services of tax expert for for cross examination of witness or legal complexity is involved therein or where complicated question of fact and law arise or voluminous evidences and the party concerned is not in a position to meet the situation effectively or where he is pitted against trained Prosecutor, he should be allowed to engage legal practitioner or tax practitioner to present the case

**Order on the direction or  
instruction of superior  
authority**

case law: MahaDayal Premchandra versus  
CTO 1958 Supreme Court

CTO assessed to the appellant merely on the instruction received from senior Asst Commissioner without giving an opportunity to the party to meet the opinion of the superior authority, it was held that procedure was quite unfair and calculated to undermine the confidence of public in the impartial Administration of the sales tax Department



**Thank You**

THANK YOU  
CA PP SINGH

Contact details 9711521060,9871229590  
cappsingh@gmail.com