



Office of the Commissioner of State Tax
State Goods and Services Tax Department
Tax Towers, Karamana,
Thiruvananthapuram
Dated: 22/02/2021

Guidelines

Sub: Determination of tax under Section 73 and 74 of the KSGST/CGST Act, 2017 - guidelines issued - reg.

There may arise some instances where the tax under GST was either not paid or not paid correctly. The determination of tax by a proper officer may thus become necessary under the KSGST/CGST Act, 2017. Chapter 15 of the said Acts deals with "Demands and Recovery" and it is covered in section from 73 to 84. The incidence of short payment of tax or erroneous refund or wrong availing of Input Tax Credit may be because of an inadvertent *bonafide* mistake or it may be a deliberate attempt (Fraud Cases) to evade the tax. The determination of tax in all cases where there is an element of ***mens rea*** has to be done under Section 74 and in all other cases the determination has to be done under Section 73 of the Act. In order to distinguish whether ***mens rea*** is present, an intent to evade tax by way of fraud or through willful misstatement or through suppression of facts, has to be established. In this regard, the Explanation 2 given in section 74 may be given due attention. Explanation 2 is as follows:

"Explanation 2.-- For the purposes of this Act, the expression "suppression" shall mean 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 failure to furnish any information on being asked for, in writing, by the proper officer."

Determination of Tax under Section 73 of KSGST/CGST Act, 2017: In the following situations where the person chargeable with tax has **no intention** to evade tax, either by way of fraud or through willful misstatement or through suppression of facts, the determination of tax by the proper officer shall be done under Section 73 of KSGST/CGST Act, 2017.

- i. Tax is not paid or short paid
- ii. Any erroneous refund
- iii. Input Tax credit is wrongly availed or utilized

Time Limit: Sub-section 10 of Section 73 prescribes time limit for issuance of order under Section 73. It is required that the proper officer shall determine tax, interest and penalty if any, within 3 years from the due date for filing annual return for the financial year to which the amount relates and in the cases of erroneous refunds within 3 years from the date of such erroneous refund. Section 73 (2) further provides that notice under Section 73 (1) (SCN) shall be issued at least three months prior to limitation period for issuance of order u/s 73. Period of Stay, if any, shall be excluded in computing the above periods.

Intimation of tax ascertained as being Payable: Sec 73(5) read with Rule 142(1A) provides for a pre-notice opportunity, to a person chargeable with tax, to declare and pay tax deficiency either voluntarily or based on an intimation (in Form GST DRC 01A) issued by the proper officer and to avail the relief available under Section 73(5). Though the issuance of intimation in Form DRC 01A has been made optional through the Rule amendment Notification No. 79/2020 of Central Tax dated 15-10-2020, it is advisable that a pre-notice opportunity may be given to avoid further litigation on this count. Hence before service of notice u/s 73(1), the proper officer may communicate the details of tax, interest and penalty if any as ascertained by proper officer in Form GST DRC -01A.

A Person chargeable with tax, on receipt of intimation in Form GST DRC-01A, can use the second part of the said form i.e. Part B, to communicate to the officer if he has made part-payment of the ascertained liability, or if the liability is not acceptable by him. He can also thereto attach submissions against the proposed liability.

The person chargeable with tax, who either on his own ascertainment or on receipt of intimation (in Form DRC-01A) communicated by the proper officer can pay tax along with interest and a penalty in cases specified under Section 73 (11) and shall inform the proper officer of such payment in **FORM GST DRC-03**.

The proper officer, on receipt of such information, shall issue an acknowledgment, accepting the payment made by the said person in **FORM GST DRC-04** and thereafter shall not serve any Show Cause Notice under 73(1) or Statement under 73(3)

Show Cause Notice under 73 (1) or Statement Section 73(3):

Show Cause Notice under Section (1): If the person chargeable with tax has not made any payments as provided under Section 73(5) or if the amount paid falls short of the amount actually payable or had communicated that the liability is not acceptable to him, the proper officer shall proceed to issue notice under 73(1) (SCN) along with a summary thereof electronically in **Form GST DRC-01** in respect of such amount not paid or short paid.

Statement under Section 73(3): If proper officer wants to issue Show Cause Notice on the same grounds, as specified in an earlier issued Show Cause Notice, for additional periods than as specified in the said SCN, he may do so by serving a statement. Along with statement, he shall issue a summary thereof electronically in **Form DRC-02**.

Payment made against the show cause notice or statement: A person to whom notice under 73(1) or Statement under 73(3) has been issued (along with form DRC-01 or DRC-02) can make payments thereof and intimate it to proper officer in form **DRC-03** within 30 days from the issuance of such notice.

If the person chargeable with tax who has been issued with SCN pays the tax along with interest payable within 30 days of issue of SCN, the proper officer, on receipt of such information in form **DRC-03**, shall issue an acknowledgment, accepting the payment made by the said person in **FORM GST DRC-05** and thereafter all proceedings in respect of the said SCN shall deemed to be concluded subject to Section 73(11).

Issuance of Order u/s 73 Determining Tax, Interest and Penalty: The person to whom the show cause notice (SCN) has been issued along with form DRC-01 or form DRC-02, can make representation against such notice in form **GST DRC -06** to the proper officer.

If the person chargeable with tax who has been issued with a SCN has not paid any tax along with interest payable or has made any short payment or has not given any satisfactory explanation within 30 days of issue of SCN, the proper officer, after considering the representation, if any, filed by the said person in **GST DRC -06**, and after providing an opportunity for personal hearing as provided u/s 75(4) shall determine;

- i. the tax
- ii. interest under Section 50 of the Act due from such person and
- iii. a penalty equivalent to 10% of the said tax or Rs. 10000/-, whichever is higher;

And shall issue an Order along with a summary of such order to be uploaded electronically in Form **GST DRC - 07** stating the amount of demand and due date for making the payment of said taxes along with interest and penalty.

Determination of Tax under Section 74 of KSGST/CGST Act, 2017: In the following situations where the person chargeable with tax has **intention** to evade tax, either by way of fraud or through willful misstatement or through suppression of facts, the determination of tax, by the proper officer, shall be done under Section 74 of KSGST/CGST Act, 2017.

- i. Tax is not paid or short paid
- ii. Any erroneous refund
- iii. Input Tax Credit is wrongly availed or utilized

Time Limit: Sub-section 10 of Section 74 prescribes time limit for issuance of order under Section 74. It is required that the proper officer shall determine tax, interest and penalty if any, within 5 years from the due date for filing annual return for the financial year to which the amount relates and in the cases of erroneous refunds within 5 years from the date of such erroneous refund. Section 74 (2) further provides that notice under Section 74 (1) (SCN) shall be issued at least six months prior to limitation period for issuance of order u/s 74. Period of Stay, if any, shall be excluded in computing the above periods.

There may be instances where the appellate authorities decides not to sustain the notice issued u/s 74 for the reason that the charges of fraud or any willful misstatement or suppression of facts to evade tax has not been established and in such circumstances, by virtue of Section 75(2), the proper officer shall determine the tax payable deeming the notice issued as a notice issued under 73(1). Where any order is required to be issued in pursuance of the direction of the appellate authority or tribunal or a court, such order shall be issued within two years from the communication of the said direction. Hence any orders issued pursuant to Section 75(2) can be issued within two years from the date of receipt of the said appellate or court order.

Intimation of tax ascertained as being Payable: Sec 74(5) read with Rule 142(1A) provides for a pre-notice opportunity, to a Person chargeable with tax, to

declare and pay tax deficiency either by him voluntarily or based on an intimation (in Form GST DRC 01A) issued by the proper officer and to avail the relief available under Section 74(5). Though the issuance of intimation in Form DRC 01A has been made optional through the Rule amendment Notification No. 79/2020 of Central Tax dated 15-10-2020, it is advisable that a pre-notice opportunity may be given to avoid further litigation on this count, especially since there is penal consequences under Section 74. Hence before service of notice u/s 74(1), the proper officer may communicate the details of tax, interest and penalty if any as ascertained by proper officer in Form GST DRC -01A.

A Person chargeable with tax, on receipt of intimation in Form GST DRC-01A, can use the second part of the said form i.e. Part B, to communicate to the officer if he has made part-payment of the ascertained liability, or if the liability is not acceptable by him. He can also thereto attach submissions against the proposed liability.

The person chargeable with tax, who either on his own ascertainment or on receipt of intimation (in Form DRC-01A) communicated by the proper officer can pay tax along with interest and a Penalty equivalent to 15% of such tax and shall inform the proper officer of such payment in **FORM GST DRC-03**.

The proper officer, on receipt of such information, shall issue an acknowledgment, accepting the payment made by the said person in **FORM GST DRC-04** and thereafter shall not serve any Show Cause Notice under 74(1) or Statement under 74(3)

Show Cause Notice under 74 (1) or Statement Section 74(3):

Show Cause Notice under Section (1): If the person chargeable with tax has not made any payments as provided under Section 74(5) or if the amount paid falls short of the amount actually payable or had communicated that the liability is not acceptable to him, the proper officer shall proceed to issue notice under 74(1) (SCN) along with a summary thereof electronically in **Form GST DRC-01** in respect of such amount not paid or short paid.

Statement under Section 74(3): If proper officer wants to issue Show Cause Notice on the same grounds, as specified in an earlier Show Cause Notice, for additional periods than as specified in the said SCN, he may do so by serving a statement. Along with statement, he shall issue a summary thereof electronically in **Form DRC-02**.

Payment made against the show cause notice or statement: A person to whom notice under 74(1) or Statement under 74(3) has been issued (along with form DRC-01 or DRC-02) can make payments thereof and intimate it to proper officer in form **DRC-03** within 30 days from the issuance of such notice.

If the person chargeable with tax who has been issued with SCN pays the tax along with interest payable and a Penalty equivalent to 25% of such tax within 30 days of issue of SCN, the proper officer, on receipt of such information in form **DRC-03**, shall issue an acknowledgment, accepting the payment made by the said person in **FORM GST DRC-05** and thereafter all proceedings in respect of the said SCN shall deemed to be concluded subject to Section 74(11).

Issuance of Order u/s 74 Determining Tax, Interest and Penalty: The person to whom the show cause notice (SCN) has been issued along with form DRC-01 or form DRC-02, can make representation against such notice in form **GST DRC -06** to the proper officer.

If the person chargeable with tax who has been issued with a SCN has not paid any tax along with interest payable or has made any short payment or has not given any satisfactory explanation within 30 days of issue of SCN, the proper officer, after considering the representation, if any, filed by the said person in **GST DRC -06**, and after providing an opportunity for personal hearing as provided u/s 75(4) shall determine;

- i. the tax
- ii. interest under Section 50 of the Act due from such person and
- iii. a penalty equivalent to said tax;

And shall issue an Order along with a summary of such order to be uploaded electronically in Form **GST DRC - 07** stating the amount of demand and due date for making the payment of said taxes along with interest and penalty.

Personal Hearing and Adjournments: Section 75(4) mandates that an opportunity of hearing shall be granted to the person chargeable with tax where a request is received or where any adverse decision is contemplated under Section 74(9). Personal hearing can be adjourned for reasons to be recorded in writing, when sufficient cause is shown by the person chargeable with tax. However, such adjournments can be granted for a maximum of 3 times.

It is mandatory that the proper officer shall issue a speaking order and shall set out all relevant facts and basis of his decision in the Order issued u/s 73(9) / 74(9). The proper officer cannot determine an amount of tax, interest and penalty in excess of the amount specified in the SCN and also the grounds shall not go beyond what is mentioned in the SCN. It has to be borne in mind that an adjudication proceedings u/s 73(9) shall be deemed to be concluded, if the order is not issued within three years and in the case of proceedings u/s 74(9) shall be deemed to be concluded, if the order is not issued within five years.

By virtue of Rule 142(6) of the GST Rules, 2017 the order issued by the proper officer will be treated as the notice for recovery.

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 provisions of this Act.

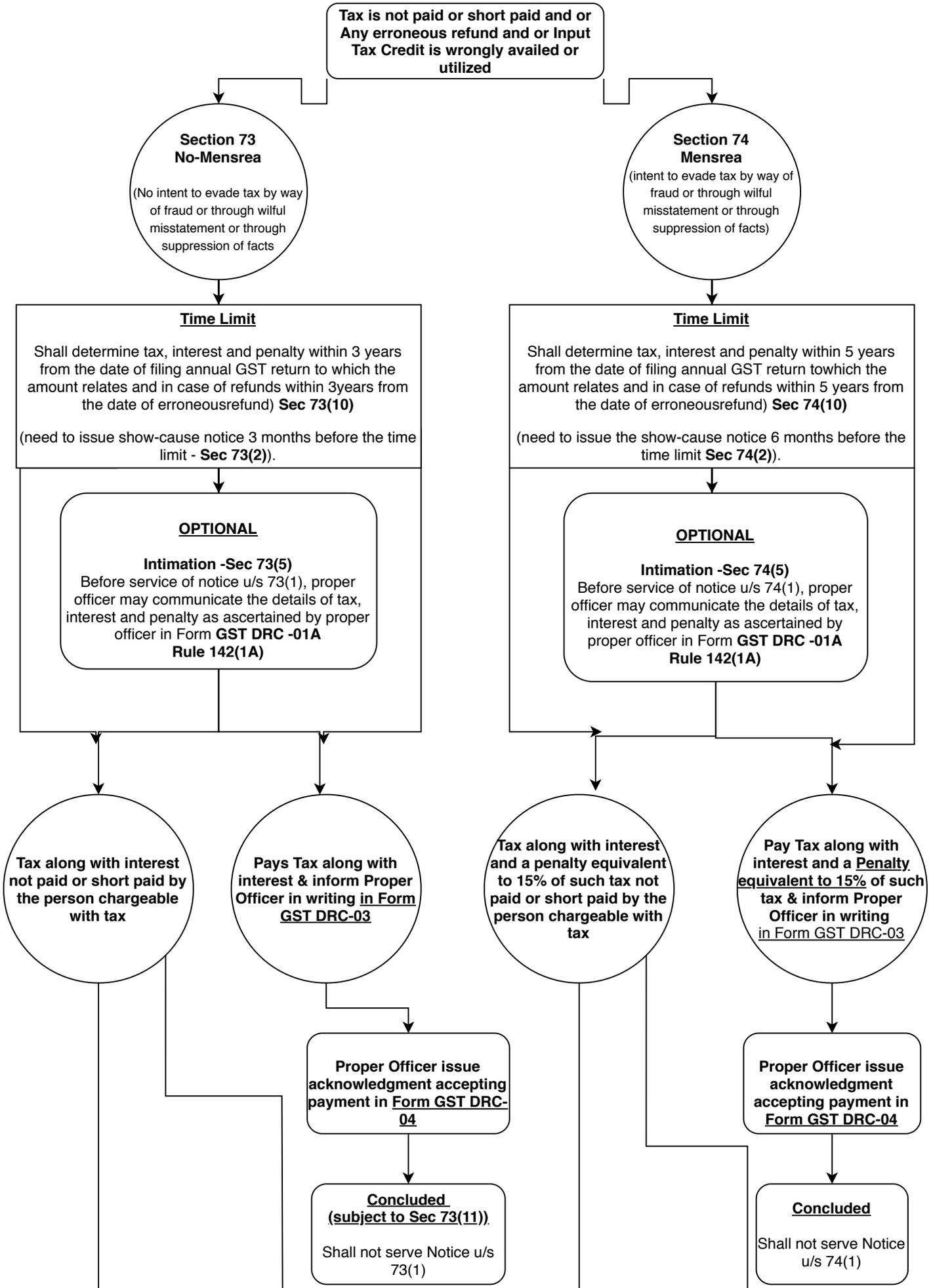
Section 83 of the Act authorises provisional attachment to protect revenue in certain cases. Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest 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.

Sd/-
COMMISSIONER

(Section 73 to 84)

Determination of tax under Section 73 and 74 of the KSGST/CGST Act, 2017

Trigger: Section 10, Section 21, Section 35, Section 51, Section 61, Section 64, Section 65, Section 66, Rule 117 (3) read with Rule 121



Issue Show Cause Notice u/s 73(1) in respect of such amount not paid or short paid along with a summary thereof electronically in Form GST DRC-01 (Rule 142(a))

Issue Show Cause Notice u/s 74(1) in respect of such amount not paid or short paid along with a summary thereof electronically in Form GST DRC-01 (Rule 142(a))

Periodical Demand Sec 73 (3) & (4)

If proper officer under GST wants to issue SCN on the same grounds, as specified in earlier issued DRC-01, for additional periods than as specified , he may do so by serving a statement under DRC-02 (Rule 142(b))

Periodical Demand Sec 74 (3) & (4)

If proper officer under GST wants to issue SCN on the same grounds, as specified in earlier issued DRC-01, for additional periods than as specified , he may do so by serving a statement under DRC-02 (Rule 142(b))

Within 30 Days Tax not paid

Consider representation, if any filed in GST DRC -06, and
Determine Tax, Interest and Penalty equivalent to 10% of tax or Rs. 10000/-, whichever is higher and
Issue an Order along with a summary of such order to be uploaded electronically in Form GST DRC - 07
(The Order shall be treated as Notice for Recovery) (Rule 142(6))

Within 30 Days
Pays Tax along with interest & inform Proper Officer in writing in Form GST DRC-03

Concluded
(subject to Sec 73(11))
Proper Officer issue an Order in Form GST DRC-05 concluding the proceedings

Within 30 Days
Pay Tax along with interest and a Penalty equivalent to 25% of such tax & inform Proper Officer in writing in Form GST DRC-03

Concluded
Proper Officer issue an Order in Form GST DRC-05 concluding the proceedings

Within 30 Days Tax not paid

Consider representation, if any filed in GST DRC -06, and
Determine Tax, Interest and Penalty equivalent to tax so determined and
Issue an Order along with a summary of such order to be uploaded electronically in Form GST DRC - 07
(The Order shall be treated as Notice for Recovery) (Rule 142(6))

Where the person served with order u/s 74(9) pays Tax along with interest and a Penalty equivalent to 50% of tax determined within 30 days of communication of Order, all proceedings in respect of the said notice shall be deemed to be concluded