Demand of Central Goods and Services Tax

Goods and Services Tax, introduced on 1st July 2017 as one of most significant indirect tax reforms in India post-independence, brings together a large number of Central and State taxes and forms a single tax, paving the way for a common national market and adding transparency and effectiveness to the tax administration. To be levied by the Central Government, central goods and service tax, better known as CGST, is applicable on all taxable goods and services apart from those of inter-State nature. In this article, the author has attempted to interpret Section 73(1) of the Central Goods and Services Tax Act, 2017, which lays down the quasi-judicial power in the hands of adjudicating authority for determination of the 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. Read on…

CA. Ravi Holani
(The author is a member of the Institute who may be contacted at raviholani@yahoo.co.in.)

Section 73(1) of the Central Goods and Services Tax Act, 2017 lays down the quasi-judicial power in the hands of the adjudicating authority for 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].

The term "Suppression" as explained under Section 74 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.

Contextually, the term "Suppression" could be interpreted in the following independent parts:

(i) Non-declaration of facts or information which a taxable person is required to declare in the return furnished under the Central Goods and Services Tax Act or the rules made thereunder;
(ii) Non-declaration of any fact or information which a taxable person is required to furnish in a statement, report or any other document furnished under the Central Goods and Services Tax Act or the rules made thereunder; or,
(iii) Failure to furnish any information on being asked for, in writing, by the proper officer.

While perusing the language employed under Sections 73 and 74 of the Act, 2017, prior to the term "misstatement", the expression "wilful-" has been employed but such expression has not been employed for "suppression". In other words, for employment of extended period, any misstatement must be wilful but it is not required for suppression.

It means any information [even though not required to be filed] has not been furnished as being asked in writing by the proper officer, will amount to suppression. It is also relevant to point out that the term "intended to evade payment of tax" has not been intended in this Section. It means even if on an issue, even though the assessee has sufficient reason for not paying tax or taking or utilising the input tax credit or even if there is a question of interpretation, still in terms of not providing an information called by the Department of Central Goods and Services Tax, an extended period of limitation is applicable.

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Now to invoke an extended period of limitation, it is fundamentally different from the conditions under Section 11A of the Central Excise Act, 1944 and Section 73(1) under Chapter V of the Finance Act, 1994.

Under Section 73(1) read with Section 74(1) of the Act 2017, the expression employed are "...the reason of fraud, or any wilful misstatement or suppression of facts to evade tax..." (It is also relevant to point out that after the word "fraud" but before "or" the expression "," has been employed, but it is not there between "misstatement" and "or suppression", and therefore, there is great scope for interpretation. However, in Section 73(1) under Chapter V of the Finance Act, 1994, the language employed is "where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

(a) Fraud; or,
(b) Collusion; or,
(c) Wilful mis-statement; or,
(d) Suppression of facts; or,
(e) Contravention of any of the provisions of this chapter or of the rules made there under with intent to evade payment of service tax.

[Similar provisions have also been contained in Section 11A of the Central Excise Act, 1944].

In the Central Excise Act, 1944, the term "suppression" has not been defined, but it is intended contextually. As per the context, "with intent to evade payment of service tax or excise duty" is the required condition under the provisions of the Act, 1944 or, the Chapter V of the Finance Act, 1994, which has not been in Sections 73 and 74 of the Central Goods and Services Tax Act, 2017.

It is a well-settled law that if there is a mistake, the same could not be equalised with the misrepresentation- *BHARAT ELECTRONICS LTD. vs. CCE 2004 (165) ELT-485 (SC)* unless there is some positive act - *EASTLAND COMBINES COIMBATORE vs. THE COLLECTOR OF CENTRAL EXCISE, 2003(152) ELT 39(SC)*, which means mere failure to pay tax or take registration [which is not due to any fraud, collusion or wilful misstatement or suppression of fact or contravention of any provision] is not sufficient to attract the extended period of limitation. However, mistake of fact is different from misrepresentation– *ICHALKARANJI MACHINE CENTRE PVT. LTD. vs. CCC 2004 (174)*

ELT 417(SC); or where the violation was with the sole intention to evade tax- *SONY INDIA LTD. vs. EEC 2004(167) ELT 385 (SC)*. When there is a difference of opinion, extended period of limitation is not applicable– *UGAM CHAND BHANDARI vs. CCE 2004(167) ELT 491 (SC)*. Where on identical issue, there was a show-cause notice issued earlier which had been dropped an extended period is not applicable– *HYDERABAD POLYMERS (P) LTD. vs. CCE 2004(166) ELT – 151(SC)*.

Now while perusing the expression employed under Sections 73 and 74 of the Central Goods & Services Tax Act, 2017, the above settled maxim could not be applied blindly.

In case where an extended period of limitation is applicable, in terms of Section 78 under Chapter V of the Finance Act, 1994 and in terms of Section 11AC of the Central Excise Act, 1994, the penalty was equal to hundred per cent of the amount of such tax or duty. However, in all other cases, in terms of Section 76 under Chapter V of the Finance Act, 1994, the penalty was not exceeding ten per cent of the amount of such tax. It means, it was maximum penalty which could otherwise be nil *ZUNJARRAO BHIKAJI NAGARKAR Vs. UNION OF INDIA 1999 (112) E.L.T. 772 (S.C.)*.

Under Section 77, the term employed is "may extend to ten thousand". Now under existing provision, the language postulates contextually different intention.

While perusing the language employed under Sections 73 and 74, it expresses "… a penalty equivalent to …", which means contextually in all such cases, the penalty is specific, there is no discretion and the quantification is also specific, there is no discretion at all.

Under Section 73(10) of the Act, 2017, the proper officer (i.e. adjudicating authority) shall issue the order within three years from the date of furnishing annual return for the financial year, to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within three years from the date of erroneous refund.

In terms of Section 73(2), the adjudicating authority shall issue the notice under sub-Section (1) at least three months prior to the time limit as specified in sub-Section (10) for the issuance of order. Now at maximum, in terms of Section 73, after filing of the annual return, maximum time limit available in the hands of Department of Central Goods and Services Tax is 33 months and in case of extended period of limitation, it will be 54 months from the due date of furnishing the annual return. Now, the assessee will have the time to file the reply and to attend the P.M., which will be less than three months if the show-cause notice will be issued on the last day of 33 months in terms of Section 73 or less than 6 months if the case is falling under Section 74. Now, the time limit has been fixed, which is not given under the Central Excise Act, 1944 or under Chapter V of the Finance Act, 1994. Under the Central Excise Act, 1944, the limit has been given to issue show-cause notice, but no strict time limit to pass the order has been given because, under Section 11A of the Central Excise Act, 1944 and Section 73 under Chapter V of the Finance Act, 1994, the terms employed are "…where it is possible to do so…".

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So far as the procedure to issue show-cause notice and demand is concerned, Rule 142 under Chapter XVIII of the Central Goods and Services Tax Rules, 2017 lays down:

> 142. Notice and order for demand of amounts payable under the Act.- (1) The proper officer shall serve, along with the
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> (a) notice under sub-Section (1) of Section 73 or sub-Section (1) of Section 74 or sub-Section (2) of Section 76, a summary thereof electronically in FORM GST DRC-01,
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> (b) statement under sub-Section (3) of Section 73 or sub-Section (3) of Section 74, a summary thereof electronically in FORM GST DRC-02,
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> specifying therein the details of the amount payable.
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> (2) Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-Section (5) of Section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-Section (5) of Section 74, he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement,

accepting the payment made by the said person in FORM GST DRC–04.

(3) Where the person chargeable with tax makes payment of tax and interest under sub-Section (8) of Section 73 or, as the case may be, tax, interest and penalty under sub-Section (8) of Section 74 within thirty days of the service of a notice under sub-rule (1), he shall intimate the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an order in FORM GST DRC-05 concluding the proceedings in respect of the said notice.

(4) The representation referred to in sub-Section (9) of Section 73 or sub-Section (9) of Section 74 or sub-Section (3) of Section 76 shall be in FORM GST DRC-06.

(5) A summary of the order issued under sub-Section (9) of Section 73 or sub-Section (9) of Section 74 or sub-Section (3) of Section 76 shall be uploaded electronically in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.

(6) The order referred to in sub-rule (5) shall be treated as the notice for recovery.

(7) Any rectification of the order, in accordance with the provisions of Section 161, shall be made by the proper officer in FORM GST DRC-08.

So far as the other principles and practices in issuing show-cause notice and its adjudication are concerned, the situation is the same as prevailing under the Central Excise Act, 1944, Customs Act, 1962 and Chapter V of the Finance Act, 1994, so in such practices, there is no comment which is required to be offered at this stage.

Since the pattern of the law will be changed significantly within a very short duration, the pattern of present practice will be required to be changed accordingly, otherwise, for any reason, if there is casual approach or negligence on the part of the professional, legal representative of the assessee, the consequences will be suffered by the assessee. Now, the bona-fide belief or conduct will not be sufficient on various corners. ■

What seems to us as bitter trials are often blessings in disguise. - Oscar Wilde