

Guidelines for determination of GST liability under Section 73 and 74 of the CGST – Kerala GST Department

The guidelines summarize the provisions applicable for raising a tax demand under the Central Goods and Services Tax Act, 2017 ('CGST Act') and the Kerala Goods and Services Tax Act, 2017 ('KGST Act') (both are jointly referred to as 'the Act').

The guidelines explain the circumstances under which a demand should be raised under section 73 of the Act and how is it different from a demand raised under section 74 of the Act, both provisions within the chapter XV of the Act, concerning "demands and recovery".

This Dhruva Alert explains the chronology of the adjudication process in the table below:

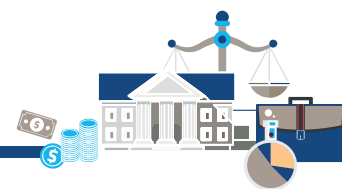
<i>Stage of proceeding</i>	<i>Section 73</i>	<i>Section 74</i>	<i>Relevant provisions and Forms</i>	<i>Comments</i>
Establishing mens rea to ascertain the applicability of section 73 or 74 of the Act for raising a tax demand	Establishing that there was no intent to evade tax	Establish that there was an intention to evade tax by way of fraud, wilful misstatement or suppression of facts	Sub-section (1) of section 73 and 74 of the Act	The intention to evade tax needs to be established by a positive act of concealment or evasion on part of the taxpayer. Where the Revenue authorities fail to so establish, the demand should be raised under Section 73 of the Act within the normal period of limitation of two years and nine months.
Pre - show cause notice ('SCN') Intimation	<ul style="list-style-type: none"> A notice can be issued intimating the person of the GST demand intended to be 	<ul style="list-style-type: none"> A notice can be issued intimating the person of the GST demand intended to be 	Form – GST DRC – 01A [Pre-consultation SCN format –	The revenue authorities in their discretion may issue a pre-SCN intimation.



Stage of proceeding	Section 73	Section 74	Relevant provisions and Forms	Comments
	<p>raised against that person.</p> <ul style="list-style-type: none"> Where liability is accepted and tax paid, no penalty would apply as tax and interest was paid prior to the issuance of SCN. 	<p>raised against that person.</p> <ul style="list-style-type: none"> Where liability is accepted, proceedings can be closed on the payment of tax, interest and penalty @ 15% [of tax due], prior to issuance of SCN. 	<p>Rule 142 (1A) of the Central Goods and Service Tax Rules ('CGST Rules)']</p>	<p>If the liability is accepted by the person, the details of tax, interest and penalty paid @15% (as may be applicable) before the issuance of SCN should be intimated to the officer, as a voluntary payment, in Form – GST DRC – 03. The revenue authorities should communicate his acceptance of the voluntary payment in Form – GST DRC - 04.</p>
<p>Issuance of SCN and the prescribed time limit to issue a SCN</p>	<p>SCN under section 73 of the Act to be issued on or before <u>two years nine months</u> from the date of filing of annual returns (in GSTR-9) for the financial year to which the demand pertains or the date of erroneous refund.</p>	<p>SCN under section 74 needs to be issued on or before <u>four years and six months</u> from the date of filing of annual returns (in GSTR-9) for the financial year to which the demand pertains or the date of erroneous refund.</p>	<p>Form - GST DRC-01. [SCN Format]</p> <p>Limitation provisions - section 73(2) read with section 73(10) of the Act; and section 74(2) read with 74(10) of the Act respectively.</p>	<p>The prescribed time limit for filing the GSTR-9 for a financial year is December 31st of the following year or such extended date as may be notified.</p>
<p>Issuance of a statement of demand for subsequent periods – Recurring demand</p>	<p>A statement can be issued raising a tax demand for an additional period by issuing a statement on the same grounds as the earlier notice.</p>	<p>A statement can be issued raising a tax demand for an additional period by issuing a statement on the same grounds as the earlier notice other than ground of fraud, or any wilful-misstatement or suppression of facts to evade tax.</p>	<p>Form - GST DRC-02.</p> <p>Section 73(3) read with section 73(4) of the Act; and section 74(3) read with section 74(14) of the Act respectively.</p>	<p>Service of a statement of demand is deemed to be a service of a Notice and all processes / procedures as applicable to a Notice are applicable on issuance of a statement of demand.</p>



Stage of proceeding	Section 73	Section 74	Relevant provisions and Forms	Comments
Acceptance of tax liability by the taxpayer within 30 days of issuance of the SCN	Payment of tax and interest to be intimated to the concerned officer in Form – GST DRC – 03 .	Payment of tax, interest and penalty (@25%) to be intimated to the concerned officer in Form – GST DRC – 03 .	-	The proceedings are completed on issuance of Form GST DRC -05 by the concerned officer recording that the proceedings are concluded. The first <i>explanation</i> to section 74 of the Act clarifies that on payment of tax, interest and penalty due, under both section 73 and 74, criminal proceedings initiated under section 132 of the Act, against that person will continue but will not automatically stand concluded.
Where the taxpayer contests the demand raised or a refund is sought to be rejected	Reply to SCN should be filed and a representation should be made by way of a virtual / personal hearing.	Reply to SCN should be filed and a representation should be made by way of a virtual / personal hearing.	Form - GST DRC-06 .	Section 73 and 74 have no reference to a reply to SCN. Only Rule 142 of the CGST Rules, specifies the Form- GST DRC - 06 as the prescribed format to file a reply to SCN. No time limit is prescribed for filing a reply to SCN in the Act, except in cases of refund, a reply has to be filed within 15 days from receipt of the Notice in Form - GST RFD - 09 . Ordinarily, the SCN calls for a reply to be submitted within 30 days of receipt of the SCN.
Determination of liability (order)	<ul style="list-style-type: none"> • Issuance of an order along with a summary of the order • Order to be treated as a Notice for recovery. • Penalty @10% of the tax demand or 	<ul style="list-style-type: none"> • Issuance of an order along with a summary of the order • Order to be treated as a Notice for recovery. • Penalty @100% of tax demand 	Form – GST DRC-07 [Rule – 142(6) of CGST Rules]	There is no specific format prescribed for an order to be issued by the Revenue Authorities. The Rules prescribe the format only for the summary of the order in DRC-07. In recent instances, no orders are issued, and the summary of the order is



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	INR 10,000/- whichever is higher			uploaded in the Form - GST DRC-07 .

Dhruva Comments:

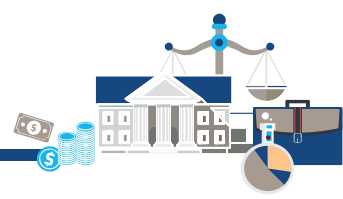
The guidelines will ensure consistency and standardisation of form and method in the process of raising demands or return of refund granted. Since the guidelines is issued by Kerala State's GST Department it will not be followed by field formations of other States / Union Territories however it can be looked upon as a guide.

Assessment and adjudication process prescribed under GST Law is an agglomeration of the processes prescribed under the erstwhile tax regime, both under Value Added Tax and the Central Excise / Finance Act.

GST demand can germinate from either scrutiny of returns, summary assessments, audit, investigation etc. At the same time, there is no bar to conduct of parallel audit and assessment proceedings, besides which taxpayers will witness proceedings simultaneously in various States (where they hold registration).

Although the GST Law postulates demands under two circumstances, i.e. with and without the intention to evade tax, demands are often raised by the Revenue Authorities under the provisions of section 74 of the Act since it enables the Revenue Authorities to impose a higher penalty on the taxpayer-defaulter.

Unlike in the erstwhile tax regime, where terms like fraud, suppression, misstatement were not defined, the GST law defines the term *suppression* in the explanation to section 74 of the Act as: "*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. This definition is very wide and leaves no room for error on the part of the taxpayer. The other two terms, *fraud* and *wilful misstatement* remain undefined.





ADDRESSES

Mumbai

One World Center, 11th floor,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahlanagar, Corporate Road,
Ahmedabad - 380015
Tel: +91-79-6134 3434

Bengaluru

Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560001
Tel: +91-80-4660 2500

Delhi / NCR

101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana - 122002
Tel: +91-124-668 7000

Pune

305, Pride Gateway, Near D-Mart, Baner,
Pune - 411045
Tel: +91-20-6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal – 700016
Tel: +91-33-66371000

Singapore

Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai

WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

KEY CONTACTS

Dinesh Kanabar

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia

ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani

ranjeet.mahtani@dhruvaadvisors.com

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