

Section 142, CGST Act, 2017 *Misread / Misunderstood / Misapplied?*

Mr. R. K. Singh
Senior Partner TLC Legal
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Section 142 – CGST Act, 2017

- Section 142 provides for situations of finalization of matters relating to the existing law post 01/07/2017.
- It deals with various situations of transition from the previous indirect tax regime to the GST regime including cases of refund claim for duty /tax paid under the previous indirect tax regime, proceeding of appeal, review or reference relating to CENVAT credit or duty / tax under earlier indirect tax regime, assessment or adjudication proceedings under earlier indirect tax regime, etc.
- Where the matter is decided in favor of the taxpayer, [sub-sections 6(a), 7(b), 8(b), 9(b)] and any amount becomes refundable to the taxpayer, the same shall be refunded to him in cash.
- Where matter is decided against the taxpayer and amounts are found admissible [sub-sections 6(b), 7(a), 8(a), 9(a)], it is provided that
 - if any amount of credit/ tax / etc. **becomes recoverable** as a result of such finalization, the same shall, unless recovered under the existing law, be **recovered as an arrear of tax under this Act** and
 - the amount so recovered shall **not be admissible as input tax credit** under this Act
- The tax authorities have been interpreting transitional provisions of Section 142 of the CGST Act, 2017 to deny credit of any duty/ tax becoming “payable” / “paid” by the taxpayer after 01 July 2017 in various situations provided therein.
- If such amount had been paid before 01/07/2017, the taxpayer would have been entitled to avail credit of such amount.

Denial of credit of "amount so recovered" (1/2)

Section	Particulars
142 (6)(b)	every proceeding of appeal, review or reference relating to recovery of CENVAT credit initiated whether before, on or after the appointed day under the existing law shall be disposed of in accordance with the provisions of existing law and <i>if any amount of credit becomes recoverable</i> as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act.
142 (7)(a)	every proceeding of appeal, review or reference relating to any output duty or tax liability initiated whether before, on or after the appointed day under the existing law, shall be disposed of in accordance with the provisions of the existing law, and <i>if any amount becomes recoverable</i> as a result of such appeal, review or reference, the same shall, unless recovered under the existing law, be recovered as an arrear of duty or tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act

Denial of credit of "amount so recovered" (2/2)

Section	Particulars
142 (8)(a)	where in pursuance of an assessment or adjudication proceedings instituted, whether before, on or after the appointed day, under the existing law, any amount of tax, interest, fine or penalty becomes recoverable from the person , the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act
142 (9)(a)	where any return, furnished under the existing law , is revised after the appointed day and if, pursuant to such revision, any amount is found to be recoverable or any amount of CENVAT credit is found to be inadmissible, the same shall, unless recovered under the existing law, be recovered as an arrear of tax under this Act and the amount so recovered shall not be admissible as input tax credit under this Act;

Interpretation of Section 142 - Analysis

- The term "amount so recovered" has to be interpreted to mean amount paid towards tax liability under earlier indirect tax regime which has been recovered as an arrear of tax under the CGST Act.
- The provisions of Section 142 cannot be interpreted to include denial of credit of amounts paid pursuant to finalization of adjudication/ assessment proceedings for which recovery proceedings have not been invoked.
- The CGST Act has well defined and specific provisions relating to recovery of tax
 - *Section 78 – Initiation of Recovery Proceedings – Any amount payable by a taxable person in pursuance of an order passed under this Act shall be paid by such person within a period of three months from the date of service of such order failing which recovery proceedings shall be initiated.*

.....
 - *Section 79 – Recovery of tax - (1) Where any amount payable by a person to the Government under any of the provisions of this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely :

.....*

Interpretation of Section 142 - Analysis

- With a specific recovery procedure enshrined in the CGST Act; the term “amount so recovered” cannot be interpreted to mean amount paid subsequent to finalization of adjudication/ assessment proceedings
- Section 73 and 74 of the CGST Act contain provisions in relation to issuance of show-cause notice requiring why the assessee should not pay the tax not paid and the proper officer shall determine the amount due from that person. The scope of the section is restricted to ‘tax not paid’ and does not stretch to include ‘tax recoverable’.

SECTION 74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts. –

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, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

Interpretation of Section 142 - Analysis

- The GST law provides for the initiation of adjudication proceedings for determination of tax liability vide Section 73/74. After the conclusion of the adjudication proceedings, if the assessee fails to pay the tax so determined within the specified period, then the recovery proceedings can be initiated.
- However, if the assessee makes payment of the tax so determined or adjudicated within the specified period then the recovery proceedings are not initiated.
- The GST law itself recognizes the difference between “payment of tax” and “recovery of tax”.
- For instance, Section 75(12) of the CGST Act provides that *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.*
- Thus, in case of self-assessed tax declared in any return but not paid, there is no need of determination of tax liability under section 73/74 and recovery proceedings under section 79 can be initiated

Existing Law – Difference between payment & recovery of tax

The Central Excise Act, 1944

Section 11A. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded.

(1) Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason, other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,-

(a) the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of-

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.

....

*(10) The Central Excise Officer shall, after allowing the concerned person an opportunity of being heard, and after considering the representation, if any, made by such person, **determine the amount of duty of excise** due from such person not being in excess of the amount specified in the notice.*

Existing Law – Difference between payment & recovery of tax

The Finance Act, 1994

Section 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded. - (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within eighteen months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not **pay the amount** specified in the notice:

(1B) Notwithstanding anything contained in sub-section (1), in a case where the amount of service tax payable has been self-assessed in the return furnished under sub-section (1) of section 70, but not paid either in full or in part, the same shall be **recovered** along with interest thereon in any of the modes specified in section 87, without service of notice under sub-section (1)

(2) The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), **determine the amount** of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon **pay the amount** so determined.

Existing Law – Difference between payment & recovery of tax

The Customs Act, 1962

Section 28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. (1) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful misstatement or suppression of facts,-

(a) the proper officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not **pay the amount** specified in the notice;

... ..

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, **determine the amount** of duty or interest due from such person not being in excess of the amount specified in the notice.

Existing Law – Difference between payment & recovery of tax

The Customs Act, 1962

Section 28AAA. Recovery of duties in certain cases. - (1) Where an instrument issued to a person has been obtained by him by means of-

(a) collusion; or

(b) wilful misstatement; or

(c) suppression of facts,

for the purposes of this Act or the Foreign Trade (Development and Regulation) Act, 1992, or any other law, or any scheme of the Central Government, for the time being in force, by such person or his agent or employee and such instrument is utilised under the provisions of this Act or the rules or regulations made or notifications issued thereunder, by a person other than the person to whom the instrument was issued, the duty relatable to such utilisation of instrument shall be deemed never to have been exempted or debited and **such duty shall be recovered** from the person to whom the said instrument was issued

Section 142. Recovery of sums due to Government. - (1) Where any sum payable by any person under this Act including the amount required to be paid to the credit of the Central Government under section 28B **is not paid**, -

... ..

- Various circulars have been issued from time to time regarding the recovery proceedings during pendency of matter in adjudication. The latest is Circular No. 984/8/2014-CX., dated 16-9-2014 specifically provides that *“Recovery action, if any, after the disposal of the case by the Commissioner (Appeals)/Tribunal in favour of the Department. For example, if the Tribunal decides a case in favour of the Department, recovery action for the amount over and above the amount deposited under the provisions of Section 35F/129E may be initiated unless the order of the Tribunal is stayed by the High Court/Supreme Court.”*
- Thus, the CBIC itself recognizes the difference between adjudication proceedings and recovery proceedings in circulars issued under the previous indirect tax regime.
- CBIC Circular No. 42/16/2018-GST dated 13th April, 2018 has been issued to prescribe the procedure for recovery/ payment of amounts which become due after 01 July 2017, on account of situations as envisaged in various clauses under Section 142. The circular uses the terms payment and recovery interchangeably and does not refer to provisions of section 79 for recovery of amounts due.
- However, this circular does not contradict, in any way, the interpretation of law brought out in this presentation.

Conclusion

- However, a strict interpretation of various sub-clauses of Section 142 leads to the conclusion that what is sought to be denied is the credit of the amount recovered towards duty or tax under the provisions of the CGST Act, 2017 and not the amount paid by the tax payer after 01 July 2017 subsequent to the conclusion of adjudication or assessment proceedings pertaining to the erstwhile indirect tax regime.
- The difference between determination of tax liability, payment of tax and recovery of tax is well enshrined in the various indirect tax legislations. The law recognizes the difference between “tax paid” and “tax recovered”.
- The CBIC itself has recognized the difference between payment of tax after adjudication and recovery of tax in its various circulars under the earlier indirect tax laws.

Conclusion

- While recovery of tax is a coercive measure but payment of tax, whether during the various stages or after the adjudication process, is welcomed and encouraged.
- Denial of credit of tax recovered (as arrears of revenue) is a deterrent to ensure that tax payer make timely payment of her tax liability.
- The credit of amounts paid pursuant to adjudication / assessment proceedings is not denied under any of the erstwhile indirect tax legislations.
- For the sake of argument, even if the interpretation of Section 142 is widened to include amounts recovered after 01 July 2017 under the existing law, even then such an interpretation would not support denial of credit of amounts paid upon finalization of adjudication/assessment proceedings without initiation of and consequent to recovery proceedings under the existing laws.
- Thus, there is no legal bar to tax payers from availment of credit on tax paid (after 01 July 2017) subsequent to adjudication or assessment proceedings relating to the existing laws which reach conclusion or finalization after 01 July 2017.

Thank You