



RULE 88C OF CGST RULES, A CONTRAST TO RULE 86A

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A. Background

R. 86 A of the Central Goods and Services Tax Rules, 2017 (for brevity, 'CGST Rules') empowers the Commissioner or the officer not below the rank of Assistant Commissioner authorised by the Commissioner to block input tax credit (for brevity, 'ITC') available in the electronic credit ledger **when there is reason to believe that the ITC available in the electronic credit ledger has been fraudulently availed or is ineligible.**

Now the Government has equipped itself with yet another provision - 'R. 88C', which has come into effect from 26.12.2022, aiming to further curb revenue leakage. Broadly, this is understood to have been introduced to arrest issuing of tax invoice/s for supplies and disclosing the details in Form GSTR-1¹ while not remitting the taxes on the same (by not disclosing the corresponding outward supplies in Form GSTR-3B²).

This article is an attempt to discuss the nuances of R. 88C.

1 Details of Outward Supplies of Goods or Services
2 Summary Return of Outward and Inward Supplies

B. R. 88C

Where the difference in tax liability, on account tax liability disclosed in Form GSTR-1 and tax remitted in Form GSTR-3B, is more than a certain threshold (*amount and percentage for the same are yet to be prescribed*), registered person shall be intimated of such difference in Part A of Form GST DRC-01B to either:

- (i) pay the differential tax liability along with interest³; OR
- (ii) explain the aforesaid difference in tax payable, electronically on GST Portal in Part B of Form GST DRC-01B, within period of 7 days of intimation.

Accordingly, where the registered person remits the tax, the proceedings will be closed. However, in the event where (i) the amount remains unpaid or (ii) no explanation / reason is furnished by the registered person or (iii) the explanation or reason furnished by registered person is not acceptable to the Proper Officer (for brevity, 'PO'), the differential amount (i.e. tax difference between Form GSTR 1

3 Sec. 50 of CGST Act, 2017 – Interest on delayed payment of tax

an Form GSTR 3B) can be recovered under S. 79⁴ of the CGST Act.

While the intent of the introducing this Rule is much appreciated, the implementation of the same and the experience of the registered persons will be the key to its success. While we wait to see the implementation, the questions that are raised and await answers are (i) has this provided unreasonable powers to tax administrators (ii) does it uphold the principles of natural justice. Some of the moot questions which are ringing in the minds of taxpayers and tax experts are discussed in ensuing paragraphs:

C. Source to R. 88C

Is there a specific S. empowering the Government to make such Rules? S. 164⁵ of the Central Goods and Services Tax Act, 2017 (for brevity, 'CGST Act') seems to be leading the way.

Nonetheless, it can also be read as follows – that the differential tax (payable) arising on account of tax liability disclosed in Form GSTR-1 and tax remitted in Form GSTR-3B would fall within the

4 Sec. 79 of CGST Act, 2017 – Recovery of tax
5 Sec. 164 of CGST Act, 2017 – Power of Government to make rules

meaning of the expression “Self-Assessed Tax” which is provided in Explanation to S. 75(12)⁶ of CGST Act. Accordingly, Explanation to S. 75(12) of the CGST Act, would then be considered as the enabling provision under the GST Law, to support introduction of R. 88C.

S. 75(12) Notwithstanding anything contained in S. 73 or S. 74, where any amount of self-assessed tax in accordance with a return furnished under S. 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 S. 79.

Explanation⁷ - For the purposes of this sub-S., the expression “self-assessed tax” shall include the tax payable in respect of details of outward supplies furnished under S. 37, but not included in the return furnished under S. 39.”

D. To ponder:

1. Form GST DRC-01B – is it an Intimation or a Notice?

Part A of Form GST DRC-01B is an **intimation** issued from the common portal for difference in tax liability exceeding certain threshold. Taxpayer is required to furnish reply (i.e., details of payment of differential tax liability) or explanations for non-payment of differential tax liability in Part B of the said Form.

⁶ Sec. 75(12) of CGST Act, 2017 – General Provisions relating to determination of tax

⁷ Inserted w.e.f 01.01.2022

2. Powers of the Proper Officers

Where no reply is furnished within 7 days of intimation OR if the explanation non-payment of differential tax liability is not satisfactory to the PO, R. 88C empowers the PO to directly invoke recovery (coercive) provisions under S. 79 of the CGST Act. Having said this, does the prescribed procedure require the PO to provide an opportunity of being heard to the taxpayer before invoking the recovery provisions; can additional time be sought to furnish the reply in Part B of Form GST DRC-01B; does the procedure require the PO to issue a speaking order or show cause notices before initiation of recovery proceedings? The answer appears to be a categorical NO.

NB: It would be interesting to refer to S. 75 of the CGST Act which provides for ‘General provisions relating to determination of tax’.

S. 75 (4) of the CGST Act provides that ‘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.’

In the context of this provision, it would be interesting to note that the revenue in the case of B.M. Patel Writ Petition No.13652 of 2020 dated 19.01.2021 took a contention that there was no request received from the petitioner seeking a personal

hearing and in response to the show cause notice, a reply was filed setting forth an explanation to the proposals on the notice. The Hon’ble Madras High Court held that *‘it is only in cases where the explanation offered by the assessee is accepted that there is no necessity for personal hearing. In all other cases, it is incumbent upon the revenue to extend an opportunity of personal hearing to the petitioner’.*

Having said that, the interplay of S. 75(4) with the provisions of R. 88C read with S. 79 will have to be tested.

3. Will the amount remitted be self-assessed tax?

Explanation to S. 75(12) of the CGST Act will give this amount the colour of “disputed tax” and must be subjected to adjudication proceedings. Accordingly, a possible rational approach by the PO (if reply furnished is not satisfactory) would be issuance of show cause notice under S. 73 or S. 74 of the CGST Act.

4. R. 88C – No Recourse to Appellate Mechanism

The procedure does not provide for issuance of any notice to show cause or even passing of a speaking order and hence, the question of appeal under S. 107⁸ of the CGST Act does not seem to be the next step, if aggrieved. What next? Knock the doors of High Court?

⁸ Sec. 107 of CGST Act, 2017 – Appeals to Appellate Authority



5. Double whammy for the Government!

S. 16(2)(c) provides that where the tax is not remitted by the supplier, the recipient of such goods / services is barred from claiming the same as input credit – resulting in (i) recovery of tax from the supplier under S. 79 AND (ii) disallow credit of ITC for the recipient under S. 16(2)(c). isn't this a case of unjust enrichment – recovery of tax from the supplier + disallowance of credit for the recipient? Apparently, NO; the Government is insulated from such provisions.

One should also read the proviso to S. 41(2) of the CGST Act – it provides for reavailability of credit by the recipient if the same is subsequently paid by the supplier. The question is, where the tax is recovered in terms of R. 88C read with S. 79, will it be deemed as

'paid by the supplier' to reavail in terms of S. 41(2)? While we believe the answer 'should' be YES, the question is how will the recipient become aware of the recovery.

As an extension to the above, what if the recovery of tax under S. 79 is challenged and is stayed? Will it still be treated as 'paid by the supplier'? While the principles of natural justice would say YES, in practice and till it is tested, the answer is most likely to be NO.

6. Shouldn't RECOVERY be an exception and not a rule

Not providing an opportunity of being heard; not required to be passing a speaking order and the next logical step not being the appeal mechanism, will put taxpayers to challenging times.

A clarificatory circular explaining the detailed documentation and

procedures to be followed and maintained by the proper officers would augur well for the taxpayer fraternity.

E. Note of caution to the taxpayers!

Any tax liability disclosed under Form GSTR-1 will be admitted tax liability by virtue of Explanation to S. 75(12) r/w R. 88C – therefore, taxpayers should ensure that the filing of GSTR 1s and 3Bs are only after due verification and that every difference between the two (if any) is clearly explained.

This article is written with a view to incite the thoughts of the readers. Different and disparate views and interpretation is not ruled out – it only makes the understanding better. Should you have a different view, please write to badrinath@sduca.com or karankumar@sduca.com.



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