

GST शास्त्र : The ASMT 10 Tsunami – How to tackle ?

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◆ **Introduction:**

One can possibly predict that the future of GST will be full of assessments, show cause notices and consequential penalties. Reason being, ASMT 10 notices are issued by Department which probably could be the beginning of tug of war between taxpayer and Government. One must understand the scope, legal validity of notices issued under specific section. This article talks about section 61, issues raised by the Department and possible solution.

Let's first have a walk through the legislative provision under GST Act.

◆ **Section 61 : Scrutiny of returns**

Section 61(1) :

√ *The proper officer may scrutinize the return and related particulars*

√ ***furnished by the registered person***

√ ***to verify the correctness of the return and inform him of the discrepancies noticed, if any, in such manner as may be prescribed and seek his explanation thereto.***

Analysis :

√ Proper officer may scrutinize **return and related particulars furnished by the registered person.**

√ If he finds any discrepancies, he shall inform in manner prescribed.

√ It is observed that Department is issuing Notices in relation to discrepancies found between GSTR-3B/GSTR 9 and GSTR-1, GSTR-3B and GSTR 2A issued under this section.

√ It is pertinent to note that notices cannot be issued for a reason, beyond the scope of the provision, which does not amount to discrepancy in return and other particulars furnished by the registered person.

√ Notice seeking explanation to such discrepancy shall be issued in Form GST ASMT – 10 and explanation to such notice shall be furnished by registered person in Form GST ASMT – 11.

√ As per section 61(2) and section 61(3) read with rule 99 of **CGST Rules, 2017**, if explanation furnished by the registered person is found to be acceptable, registered person shall be informed in FORM GST ASMT – 12.

√ If no satisfactory explanation is furnished within **time limit of thirty days**, or after accepting the discrepancies, registered person fails to take the corrective measures, proper officer may initiate action under section 65 (Audit by authorities) or section 66 (special audit) or section 67 (inspection, search, seizure and arrest) or may proceed to determine the tax and other dues under section 73 or section 74 (show cause notices). It is pertinent to note that no action except abovementioned sections can be initiated which is beyond the scope of the provision.

Legal issues :

1) Section 61 vs rule 99 : Time limit to furnish reply

Section 61(3) prescribes time period of 30 days or within such time as permitted by proper officer for furnishing reply. Whereas rule 99(1) of CGST Rules, 2017 prescribes that proper officer shall issue ASMT 10 to registered person in case of discrepancies and seeking his explanation thereto within such time, **not exceeding thirty days** from the date of service of the notice or such further period as permitted by him.

Issue here is whether time period of less than 30 days can be given for reply to notice u/s 61 when section 61 provides time period of 30 days but rule empowers proper officer to allow time period which may be less than 30 days.

In such scenario, rule goes beyond the provision of **CGST Act, 2017**. In the authors' opinion, rule 99 cannot override section 61.

2) Section 61 vs section 39 :

As per section 61(3) of CGST Act, 2017, after accepting the discrepancies, where registered person **fails to take corrective measure in his return for the month in which the discrepancy is accepted**, the proper officer may initiate further actions.

However, as per section 39(9) of CGST Act, 2017, if registered person after furnishing his return (GSTR 3/3B), discovers any omission or incorrect particulars therein **other than as a result of scrutiny, audit, inspection or enforcement activity by the tax authorities**, he shall rectify such omission or incorrect particulars in the manner prescribed. It means, if

omission or incorrect particulars are discovered as a result of scrutiny or any other action by tax authorities, no rectification can be done through return prescribed u/s 39 of CGST Act, 2017.

Hence, as there is no machinery available to implement proceeding u/s 61(3), in coming days, legal battles can be predicted contending that proceedings u/s 61(3) are void.

◆ **How to reply ASMT 10 notices ? – Practical aspects**

It is observed that there are approximately 12 parameters on the basis of which notices are issued to taxpayers.

On the basis of replies to be submitted, these parameters can be categorised as follows –

√ **Category 1** : Fact based replies to be given involving various reconciliations viz. GSTR 1 vs GSTR 3B, GSTR 2A vs GSTR 3B etc.

(parameter no. 70, 73, 77, 78, 79, 81, 82, 83)

√ **Category 2** : Legal replies in case of ITC claimed from RC cancelled suppliers or GSTR 3B non- filers

(Parameter no. 69, 72, 74)

√ **Category 3** : Legal and fact based reply to demand of interest in delayed payments made with GSTR 3B

(parameter no. 80)

Let's discuss what can be the possible replies based on above categorization :

√ **Category 1 : Fact based replies to be given involving various reconciliations viz. GSTR 1 vs GSTR 3B, GSTR 2A vs GSTR 3B etc.**

- In case of notices issued with respect to GSTR 1 vs GSTR 3B/GSTR 9 differences, taxpayers need to reconcile GSTR 1, GSTR 3B/GSTR 9 and books of accounts. If any liability was missed, then accept and pay liability. If no liability arises, taxpayers need to submit reconciliations. One must bear in mind that onus will be on taxpayers.
- In case of notices issued with respect to GSTR 1 vs GSTR 2A differences, invoice wise reconciliation is to be submitted. Where invoices are not appearing in GSTR 2A, in the opinion of authors, ITC can be availed on the strength of invoices subject to other conditions specified in section 16(2) of CGST Act, 2017. Hence, copies of such invoices shall be submitted.

- Similar modus operandi is to be followed for IGST on imports vs ICEGATE differences, ISD ITC availed vs GSTR 2A ISD differences, RCM liability disclosed vs RCM supplies reflected in GSTR 1 by supplier differences and RCM liability vs RCM ITC availed differences.

√ **Category 2 : Legal replies in case of ITC claimed from RC cancelled suppliers or GSTR 3B non-filers**

- Notices are issued to taxpayers for denial of ITC where ITC is claimed from suppliers whose RC is either cancelled ab-initio or subsequently and where ITC is claimed from GSTR 3B non- filers.
- In the opinion of authors, ITC shall not be denied to genuine taxpayers who have paid tax to their suppliers and also availed ITC within time limit prescribed by law. Following provisions shall also be analysed in this regard –

Section 32 : Prohibition of unauthorised collection of tax.—

(1) A person who is not a registered person shall not collect in respect of any supply of goods or services or both any amount by way of tax under this Act.

(2) No registered person shall collect tax except in accordance with the provisions of this Act or the rules made thereunder.

Section 76 : Tax collected but not paid to Government. —

*(1) Notwithstanding anything to the contrary contained in any order or direction of any Appellate Authority or Appellate Tribunal or court or in any other provisions of this Act or the rules made thereunder or any other law for the time being in force, **every person who has collected from any other person any amount as representing the tax under this Act, and has not paid the said amount to the Government, shall forthwith pay the said amount to the Government, irrespective of whether the supplies in respect of which such amount was collected are taxable or not.***

*(2) Where any amount is required to be paid to the Government under sub-section (1), and which has not been so paid, **the proper officer may serve on the person liable to pay such amount a notice requiring him to show cause as to why the said amount as specified in the notice, should not be paid by him to the Government and why a penalty equivalent to the amount specified in the notice should not be imposed on him under the provisions of this Act.***

- As prescribed under GST Act, as per section 32 of CGST Act, 2017, any unregistered person shall not collect any amount by way of tax under this Act. Hence, if supplier, whose RC is cancelled ab-initio / RC cancelled subsequently, has collected taxes, then such collection of tax is unauthorised in the eyes of law.

- Further, as prescribed under section 76(1) of CGST Act, 2017, where any amount representing tax has been collected but not paid to the Government, such amount shall be paid to the Government irrespective of whether the supplies in respect of which such amount was collected are taxable or not.
- As per section 76(2) of CGST Act, 2017, in such cases, proper officer may serve notice requiring him to show cause as to why the said amount should not be paid to Government alongwith penalty. It states that such non-payment attracts penalty and hence is severe offence under GST Act. Hence, if supplier, whose RC is cancelled ab-initio / RC cancelled subsequently/ who has not filed GSTR 3B returns after collection of taxes but not paid to the Government attracts penalised action u/s 76 of CGST Act, 2017.
- Department shall adjudicate suppliers at the first instance rather than adjudicating genuine recipients who has paid taxes to the suppliers is against the principles of natural justice. Hence, tax authorities shall confront sellers first before initiating action against recipients.
- As per point (iv) of press release dated 4th May, 2018, ***“there shall not be any automatic reversal of input tax credit from buyer on non-payment of tax by the seller. In case of default in payment of tax by the seller, recovery shall be made from the seller however reversal of credit from buyer shall also be an option available with the revenue authorities to address exceptional situations like missing dealer, closure of business by supplier or supplier not having adequate assets etc.”***
- Hence, as stated above, in case of non-payment of tax by seller, recovery shall be made from the recipient only in exceptional circumstances like missing dealer, closure of business by supplier or supplier not having adequate assets etc. There is no mechanism available, especially in the financial year 2017-18, by which recipient can verify closure of business or inadequate assets or any other information about sellers and their status etc.
- Also, in case of **M/s D.Y. Beathel Enterprises Vs The State Tax Officer (Data Cell)**, The Hon’ble Madras High Court has quashed the order for non-examination of seller in the enquiry especially, when buyers have insisted and non-initiation of recovery action against seller in the first place.

√ **Category 3 : Legal and fact based reply to demand of interest in delayed payments made with GSTR 3B**

With respect to this parameter, we need to understand provision of section 50(1) of CGST Act, 2017, which is reproduced below –

Every person who is liable to pay tax in accordance with the provisions of this Act or the rules made thereunder, but fails to pay the tax or any part thereof to the Government within the period prescribed, shall for the period for which the tax or any part thereof remains unpaid, pay, on his own, interest at such rate, not exceeding eighteen per cent., as may be notified by the Government on the recommendations of the Council:

*Provided that the **interest on tax payable** in respect of supplies **made during a tax period and declared in the return for the said period** furnished after the due date in accordance with the provisions of section 39, except where such return is furnished after commencement of any proceedings under section 73 or section 74 in respect of the said period, **shall be levied on that portion of the tax that is paid by debiting the electronic cash ledger.***

- As per proviso to section 50(1), which is made effective vide **notification no. 16/2021 – CT dated 1st June, 2021** and which has retrospective effect according to Finance Act, 2021, interest is payable **on that portion of the tax that is paid by debiting the electronic cash ledger.**
- Hence, taxpayers shall confirm, in case of delayed return filing, whether tax was paid by debiting the electronic cash ledger or electronic credit ledger. If complete tax was paid through utilisation of ITC, question of interest does not arise.
- **Additional point :**

However, if tax payable let say for the month of August, is declared and paid in the return for the month of December, interest shall be payable on such entire amount even if it is paid through utilization of ITC. This is because, proviso is applicable where tax payable in respect of supplies **made during a tax period and declared in the return for the said period only.**

◆ Conclusion:

Taxpayers need to understand the queries raised by the Department. According to above categorization, fact based and legal replies shall be provided within prescribed time to avoid further proceedings which can be initiated by the Department.

(Above article was written on 31st August, 2021 & jointly authored by CA. Yogesh Ingale, CA. Tushar Ajmera and CMA. Anuj Chordiya. Views expressed are strictly personal. For any queries & feedback, reach us at yogesh.ingale@talentax.in)

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