

## Practical Challenges in Applying Non-Obstante Nature of Section 75(12)

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## **The Non-Obstante Nature of Section 75(12): Practical Challenges and Concerns**

*Section 75(12) of the CGST Act, 2017 allows tax authorities to bypass standard adjudication and directly recover self-assessed tax using Section 75, overriding the usual procedures in Sections 73 and 74. While intended to protect government revenue and prevent tax evasion, this provision has raised concerns due to a lack of clear procedural safeguards for taxpayers.*

*This article critically evaluates the objectives, implications and challenges associated with Section 75(12), examines the current legal and administrative safeguards and highlights the urgent need for legislative amendment to incorporate the principles of natural justice within the provision.*

### **Overview of Section 75(12)**

Section 75(12)[\[1\]](#) of the CGST Act operates as a non-obstante clause, overriding the standard adjudication and recovery mechanisms under Sections 73 and 74. It empowers tax authorities to directly initiate recovery proceedings under Section 79 for "self-assessed tax" that has been declared by a taxpayer in Form GSTR-1 (filed under Section 37) but remains unpaid or underpaid in Form GSTR-3B (filed under Section 39). The provision also extends to the recovery of interest on such unpaid tax.

The Finance Act, 2021, effective from January 1, 2022, introduced an explanation<sup>[2]</sup> to Section 75(12), clarifying that "self-assessed tax" includes tax payable on outward supplies reported in GSTR-1 but not paid through GSTR-3B. This clarification aims to address potential loopholes and ensure that all declared tax liabilities are duly discharged.

The primary objectives of Section 75(12) are as follows:

- **Protection of Government Revenue:** Enables immediate recovery of admitted tax liabilities, bypassing the need for adjudication under Sections 73 and 74.
- **Promotion of Payment Discipline:** Ensures that taxpayers promptly pay taxes they have already acknowledged as due, treating declarations in GSTR-1 as self-assessed and recoverable.
- **Facilitation of Timely Input Tax Credit (ITC):** Addresses the concerns of recipients who are unable to claim ITC if the supplier fails to pay the tax on declared supplies.
- **Prevention of Fake Billing and Revenue Leakage:** Targets practices where vendors declare higher sales in GSTR-1 to facilitate ITC claims by purchasers but report lower sales in GSTR-3B to evade tax payment.

Section 75(12) is thus regarded as a robust instrument for enhancing tax compliance, preventing revenue leakage and upholding the integrity of the GST system.

### Practical Challenges for Taxpayers

Despite its intended benefits, the implementation of Section 75(12) has resulted in several practical difficulties for taxpayers:

- **Inadvertent Reporting Errors:** Taxpayers may unintentionally report higher values in GSTR-1 compared to GSTR-3B due to clerical mistakes, system errors, or timing differences. Such mismatches, even if unintentional, can trigger direct recovery actions.
- **Lack of Statutory Safeguards:** The provision does not explicitly require the issuance of show cause notice or provide an opportunity for taxpayers to explain discrepancies before recovery is initiated. This can result in coercive recovery actions without affording taxpayers a chance to clarify or rectify genuine errors.
- **Risk of Arbitrary Action:** The absence of mandatory hearing increases the potential for arbitrary or premature recovery, particularly in cases where the taxpayer disputes the liability or has a valid explanation for the mismatch.

### Non-Statutory Safeguards: Administrative and Judicial Interventions

Although Section 75(12) permits direct recovery of self-assessed tax, administrative instructions and judicial decisions have emphasized the necessity of adhering to principles of natural justice before initiating recovery proceedings.

- **CBIC Instructions:** The Central Board of Indirect Taxes and Customs (CBIC), through Instruction No. 01/2022-GST dated January 7, 2022, has advised that before initiating recovery under Section 79, taxpayers should be given an opportunity to pay the shortfall or explain the reasons for the discrepancy. If the taxpayer satisfactorily addresses the issue, recovery proceedings may be withheld.

- Judicial Precedents:
  - *Karnataka High Court (M/s. LC Infra Projects Pvt. Ltd. v. Union of India*<sup>[3]</sup>: The court held that issuing a show cause notice is essential for the recovery of interest under Section 50 and recovery without such notice violates principles of natural justice. The court clarified that Section 75(12) applies only to self-assessment by the assessee, not to quantification or determination by authorities.
  - *Jharkhand High Court (Mahadeo Construction Co. v. Union of India*<sup>[4]</sup>: The court ruled that garnishee proceedings for recovery of interest cannot be initiated without adjudicating the liability if it is disputed by the assessee. Adjudication under Section 73 or 74 is required in such cases.
  - *Delhi High Court (Grapes Digital vs. Principal Commissioner*<sup>[5]</sup>: The court reaffirmed the necessity of procedural fairness, emphasizing that even when

Section 75(12) is invoked, taxpayers must be given an opportunity to explain discrepancies or contest liability before coercive recovery measures are taken.

These decisions collectively underscore that, despite the direct recovery mechanism under Section 75(12), the principles of natural justice, particularly the right to be heard, must be observed, especially where liability is contested.

## The Case for Statutory Amendment

While administrative instructions and judicial pronouncements have sought to ensure procedural fairness in the operation of Section 75(12), the statutory provision itself does not expressly mandate the issuance of a show cause notice or the granting of an opportunity to be heard prior to recovery proceedings under Section 79. This reliance on non-statutory safeguards creates uncertainty for both taxpayers and tax authorities, potentially leading to inconsistent practices and increasing the risk of arbitrary or premature recovery actions, particularly in cases involving genuine errors or inadvertent reporting.

Given these concerns, there is an urgent and compelling need for legislative amendment to Section 75(12). Incorporating explicit provisions that mandate the issuance of a show cause notice and provide taxpayers with a reasonable opportunity to be heard before the initiation of recovery proceedings would align the provision with the principles of natural justice. Such an amendment would enhance procedural fairness, reduce the risk of arbitrary or premature recovery and foster greater trust and compliance within the GST system.

In summary, while Section 75(12) serves important objectives in the GST framework, its effective and equitable implementation requires a statutory balance between revenue protection and taxpayer rights. Legislative intervention to embed procedural safeguards within the provision is essential to ensure that the pursuit of revenue does not come at the cost of justice and fairness.

<sup>[1]</sup> Notwithstanding anything contained in section 73 or section 74 6(or section 74A), 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.

<sup>[2]</sup> [Explanation - For the purposes of this sub-section, the expression "self-assessed tax" shall include the tax payable in respect of details of outward supplies furnished under section 37 but not included in

the return furnished under section 39.]

[3] [\*\*\[TS-776-HC-2019\(KAR\)-NT\]\*\*](#),

[4] [\*\*\[TS-229-HC-2020\(JHAR\)-NT\]\*\*](#)

[5] WRIT PETITION (C) No.2918/2021 : [\*\*\[TS-618-HC\(DEL\)-2023-GST\]\*\*](#)