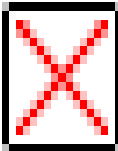


Is penalty compulsorily attracted on late payment of GST?

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By S Sivakumar, B.Sc., LLB, FCA, FCS, ACSI, Advocate



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the prevailing Covid situation, many suppliers/taxable persons are facing huge delays in realising their dues from their customers including large corporates. In many cases, payments are not released for months together, resulting in consequent delays on payment of GST by the taxable persons. From the GST perspective, while interest under Section 50(1) would be unavoidable, the question would still remain on the leviability of penalty for such delays. Many fellow professionals and the Departmental Officers seem to have the view that any delay beyond 3 months from the due date of payment of GST, would automatically attract penalty under Section 122(1)(iii) of the CGST Act.

Let us take a look at this Section 122(1)(iii) which reads as under :

122. (1) Where a taxable person who--

(iii) collects any amount as tax but fails to pay the same to the Government beyond a period of three months from the date on which such payment becomes due;

he shall be liable to pay a penalty of ten thousand rupees or an amount equivalent to the tax evaded, whichever is higher

A study of this Section makes it clear that penalty under this Section is attracted only in a case where the taxable person has not paid the tax 'collected' and not the tax that is due from him on the basis of the invoices raised by him. The word 'collected' would need to be strictly interpreted to mean the actual collection of tax by the taxable person and not the billing of tax, to the customer. Thus, while the taxable person would continue to be liable to discharge his tax liability on the basis of his billings, this penal provision would get attracted only in a case when the taxable person does not remit or pay the tax, so collected, to the Government, within a period of 3 months from the due date of payment of such tax **"collected"**.

This penal provision seems to have been very loosely worded. As we know, the liability to pay tax is based on the supplies effected and the invoices raised by the taxable person and has nothing to do with the collection of the tax charged by the taxable person on his customer and as such, the time frame prescribed under the CGST law is with reference to the tax liability arising out of his billings and is not based on the tax actually collected by him.

Taking this discussion forward, the penalty under Section 122(1)(iii) is fixed at the higher of Rs 10,000/- or the amount of tax evaded, whichever is higher. We must carefully notice that the words used are 'tax evaded' and not 'tax collected'. This would mean that, there should have been a deliberate attempt on the part of the taxable person, not to have paid the tax collected by him, within the said period of 3 months.

There are several practical issues that could arise, vis-à-vis Section 122(1)(iii), especially under the current circumstances. The customer might delay effecting payments to the taxable person, for a fairly long period of time, say, 6 months. In these cases, can this Section be invoked to burden the taxable person with 100% penalty, even when he is liable to pay interest at the hefty rate of 18% per annum for the delay. My answer is a clear and loud NO, as the taxable person has not 'collected' the tax that he has charged to his customer.

Let's assume that the taxable person has collected the tax that he has charged to his customer but due to his financial problems he has delayed the payment of tax to the Government for a period of more than 3 months and has subsequently discharged his tax liability with the

applicable interest. Even in this case, in my view, penalty provisions contained in Section 122(1)(iii) cannot be invoked, as there is no ***mens rea*** on the part of the taxable person, not to have paid the tax within 3 months.

There could be cases where the taxable person could have failed to consider some billings by oversight, while computing his output tax liability. Even in these cases, without the establishment of ***mens rea*** on the part of the taxable person, penalty under Section 122(1)(iii) cannot be invoked, even if the delay in discharge of the tax liability is more than 3 months.

It is a well settled legal principle that a penal statute should be strictly interpreted. It would do us good to go through Para 21 of the recent judgment of the Apex Court rendered in COMMISSIONER OF CUSTOMS (IMPORT) MUMBAI Vs M/s DILIP KUMAR AND COMPANY AND ORS reported in [2018-TIOL-302-SC-CUS-CB](#), which reads as under:

Quote

21. In construing penal statutes and taxation statutes, the Court has to apply strict rule of interpretation. The penal statute which tends to deprive a person of right to life and liberty has to be given strict interpretation or else many innocent might become victims of discretionary decision making. Insofar as taxation statutes are concerned, Article 265 of the Constitution prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature.

Unquote

Thus, unless there has been attempt on the part of the taxable person to evade tax, penalty under Section 122(1)(iii) cannot be levied. While talking of penal provisions related to non-payment of tax collected, by taxable persons, we should also bear in mind, the provisions contained in Section 73(11) of the CGST Act, which reads as under:

(11) Notwithstanding anything contained in sub-section (6) or sub-section (8), penalty under sub-section (9) shall be payable where any amount of self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.

While clarifying the issue related to levy of penalty for late filing of the monthly returns in Form GSTR-3B, the Board has clarified vide its Circular No. [76/50/2018-GST](#) dated December 21, 2018, as under

Question: Whether penalty in accordance with section 73 (11) of the CGST Act should be levied in cases where the return in FORM GSTR-3B has been filed after the due date of filing such return?

Answer:

1. As per the provisions of section 73(11) of the CGST Act, penalty is payable in case self-assessed tax or any amount collected as tax has not been paid within a period of thirty days from the due date of payment of such tax.
2. It may be noted that a show cause notice (SCN) is required to be issued to a person 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 for any reason under the provisions of section 73(1) of the CGST Act. The provisions of section 73(11) of the CGST Act can be invoked only when the provisions of section 73 are invoked.
3. The provisions of section 73 of the CGST Act are generally not invoked in case of delayed filing of the return in **FORM GSTR-3B**
Because tax along with applicable interest has already been paid but after the due date for payment of such tax. It is accordingly clarified that penalty under the provisions of section 73(11) of the CGST Act is not payable in such cases. It is further clarified that since the tax has been paid late in contravention of the provisions of the CGST Act, a general penalty under section 125 of the CGST Act may be imposed after following the due process of law.

A combined reading of Sections 122(1)(iii) and 73(11) seem to suggest that while penalty proceedings under the former Section can be invoked on an independent basis, penalty proceedings under the latter can be invoked only when there is an outstanding tax liability. Thus, the

intention of the law seems to be clear that, when the taxable person has voluntarily paid the outstanding tax liability with interest in cases involving delay, proceedings under Section 122(1)(iii) cannot be initiated.

Before concludingâ€¦

The wordings used in Section 122(1)(iii) seem to clearly suggest that, this Section is to be applied on a transaction to transaction basis. However, since the taxable person's net tax liability under the GST law is to be computed after deducting input tax credit as a single line item, I would wonder as to how it is possible to have an invoice wise net tax liability. Thus, from a practical perspective, it would seem that it would be very difficult to implement this penal provision.

[The views expressed are strictly personal.]

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