

GST Alert 08/2022-23

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Clarifications on Fake Invoices

Since the advent of GST, biggest issue that has captured the debate around GST in India is Fake Invoice. All the stakeholders, taxpayer, officials, GST Council, Government and Judiciary are besieged with this one issue. Board has now come out with a circular to clarify some relevant issues and to ensure uniformity in the implementation of the provisions of law across the field formations.

Circular no 171/03/2022-GST dated 6.07.2022 is issued under section 168 (1) of the CGST Act which makes it binding on all the officers.

Gist of these clarifications is as under:

I. Issue of Invoice without supply of Goods or Service

Facts:

Registered person "A" has issued tax invoice to another registered person "B" without any underlying supply of goods or services or both,

Question and clarification given:

a. Whether above transaction will be considered as "supply" of goods under GST law?

Since 'A' has merely issued a tax invoice to 'B' without the underlying supply of goods, therefore, such an activity does not satisfy the criteria of "supply", as defined under GST law.

b. Whether any demand and recovery can be made from 'A' in respect of the said transaction under the GST Law?



As there is no supply by 'A' to 'B' in respect of paper invoices, no tax liability arises against 'A' for the said transaction, and accordingly, no demand and recovery is required to be made against 'A' under the GST law.

c. Whether any penalty can be imposed against registered person 'A' in such cases?

Penalty cannot be imposed on 'A' under the provisions of section 73 or section 74 as the underlying transaction itself is not a Supply, penalty in these sections can be imposed only if there is a Supply and tax is unpaid. **'A' shall, however, be liable for penal action under section 122 (1)(ii) of the CGST Act for issuing tax invoices without actual supply of goods or services or both.**

II. Availment of ITC without receipt of Goods or Service

Facts:

"A" has issued tax invoice to another "B" **without** any underlying supply of goods or services. 'B' avails ITC on the basis of the said tax invoice. 'B' further issues invoice **along with** underlying supply of goods or services to his buyers and utilizes ITC availed on the basis of the invoices issued by 'A', for payment of his tax liability in respect of his said outward supplies.

Questions and Clarification:

a. Whether 'B' will be liable for the demand and recovery of the said ITC?

Since 'B' has availed and utilized fraudulent ITC on the basis of the said tax invoice, without receiving the goods or services, in contravention of the provisions of section 16(2)(b) of CGST Act, department can initiate proceedings for demand and recovery of the said ITC against B.

b. Whether penalty can be imposed on B under section 73 or 74?

Yes, penalty under section 74 can be imposed for fraudulent availment of ITC alongwith demand of Interest.



c. Whether penalty can also be imposed on B under section 122?

In terms of section 75(13), penalty under section 122 cannot be imposed as penalty u/s 74 has already been invoked.

Section 75(13) reads as under:

75 (13) Where any penalty is imposed under section 73 or section 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act.

III. Availing ITC on the basis of fake invoice and further passing it on

Facts:

'A' has issued tax invoice to 'B' without any underlying supply of goods or services. 'B' avails ITC on the basis of the said tax invoice and further passes on the said ITC to another person 'C' by issuing invoices without supply of goods or services.

Questions and Clarification:

a. Whether 'B' will be liable for the demand and recovery?

In this case, the ITC availed by 'B' on the basis of tax invoice issued by 'A', without actual receipt of goods or services, has been utilized by 'B' for passing on of ITC by issuing tax invoice to 'C' without any underlying supply of goods or services. As there was no supply of goods or services by 'B' to 'C' in respect of the said transaction, no tax was required to be paid by 'B' in respect of the same. The ITC availed by 'B' on the basis of tax invoice issued by 'A', without actual receipt of goods or services or both, is ineligible in terms of section 16 (2)(b) of the CGST Act. In this case, there was no supply of goods or services by 'B' to 'C' in respect of the said transaction and also no tax was required to be paid in respect of the said transaction. Therefore, in these specific cases, no demand and recovery of either ITC fraudulently availed by 'B' in such case or tax liability in respect of the said outward transaction by 'B' to 'C' is required to be made from 'B'.



b. Whether penalty can be imposed on B under section 73 or 74?

Penalty under section 74 cannot be imposed as there has been no supply at both the ends.

c. Whether penalty can also be imposed on B under section 122?

In such cases, 'B' shall be liable for penal action both under section 122(1)((ii) and section 122(1)(vii) of the CGST Act, for issuing invoices without any actual supply of goods or services as also for taking/ utilizing ITC without actual receipt of goods or services.

IV. Other issues

1. In addition to the penal actions discussed above, person involved in fake invoice shall also be liable for penal action under section 122(1A).
 - a. If he has retained the benefit of transactions.
 - b. If the fraud is conducted at his instance.
2. Persons involved in such cases may also be liable for action under section 132 of the CGST which provides for preventive arrest and prosecution.

V. What is the quantum of penalty which is payable under various sections discussed above

▪ **Section 73**

Penalty equivalent to 10% of tax or Rs. 10,000, whichever is higher, 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.

▪ **Section 74**

In cases where the demand of tax is based fraud, or any wilful-misstatement or suppression of facts to evade tax, penalty is payable as under:



- a. Person pays tax, interest and Penalty equivalent to 15% of the tax **before issuance of SCN**
- b. Person pays tax, interest and Penalty equivalent to 25% of the tax **within 30 days of issuance of SCN**
- c. Person pays tax, interest and Penalty equivalent to 25% of the tax **within 30 days of issuance of demand order (OIO)**
- d. If the person loses the case at any stage and does not prefer an appeal against the demand order or he loses it in Supreme Court, he is liable to pay a penalty equivalent to 100% of the tax.

■ Section 122(1)(ii)

A person who supplies any goods or services without issue of any invoice or issues an incorrect or false invoice, he shall be liable to pay a penalty of Rs. 10,000 or 100% of the amount of tax, whichever is higher.

■ Section 122(1)(vii)

A person who avails or utilises ITC without actual receipt of goods or services, he shall be liable to pay a penalty of Rs. 10,000 or 100% of the amount of tax, whichever is higher.

■ Section 122(1A)

Any person who retains the benefit of a fraudulent transactions discussed in 122(1)(ii) & (vii) above and at whose instance such transaction is conducted, shall be liable to a penalty equivalent to 100% of the tax evaded or ITC availed of or passed on.

VI. Conclusion

Menace of fake invoice has grown in proportions and is one issue that became the *raison d'être* for many amendments in law, rules and compliances. It has left the entire system hurt and



reeling, the burden of which will be carried by generations and the Executive as well as the Judiciary will be bogged down for years under it.

Misses of this circular

Many taxpayers have also suffered and continue to suffer due to unscrupulous vendors who supplied the goods but gave invoice from some other firms or supplied the goods and also gave a good invoice but either did not pay the tax or paid it by utilizing fake ITC. Logically speaking these transactions should not be seen as 'Fake' as the recipient followed the law entirely but the supplier defrauded him. We also need clarity as to how can one prove that goods were received by the recipient, what documents would suffice and where to draw the line.

Hope the next circular covers these 2 crucial aspects and the genuine taxpayers are saved the agony of running from pillar to post to prove the impossible.

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