

Rule 88C OF CGST RULES, 2017- A case of Excessive Delegation ??

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INTRODUCTION

Since the very roll out of the Goods and Services tax Acts in on 1st of July 2017, the law has seen multitude of amendments. Most of such amendments are aimed towards enhancing the easement of doing business by the tax payer by reducing the intervention of tax officials in the day to day business and compliances by the tax payer. One such Amendment with a similar motive precipitated as a result of the 48th GST Council Meeting held on 17th of December 2022. As a measure of streamlining compliances in GST it was suggested to introduce new Rule 88C for the auto reconciliation of the tax liability as disclosed by the tax payers in the statements of outward supply GSTR 1 and that disclosed through returns GSTR 3B. It also provided for a window to the tax payer for either paying or specifying the reasons for difference, in Form of GST DRC-01 B. The said amendment is validated through Notification No. 26/2022- Central Tax Dated. 26th December 2022.

The current article would help us to understand the nuisances of the newly introduced rule 88C.

OVERVIEW OF THE NEW RULE 88C:

The New Rule 88C is divided into 3 sub rules as under;

- The **first sub rule** speaks about the **initiation process**, wherein if in a given tax period, there exists a difference in the liabilities as disclosed in GSTR 1 and GSTR 3b and such Difference exceeds a certain amount or percentage as may be notified by the council, the tax payer will be intimated about the same in **Part A** of Form GST DRC-01B and through an E-Mail sent on the E-Mail ID provided at the time of registration or as amended from time to time, highlighting the said difference and directing him to

(a) pay the differential tax liability, along with interest under section 50, through FORM GST DRC-03; or

(b) explain the aforesaid difference in tax payable on the common portal, In a limited time frame of Seven days.

- The **second sub rule** speaks about the **assessee' s course of action** upon receipt of such

intimation. The assessee upon the receipt of such intimation will either

(a) pay the amount of the differential tax liability, as specified in Part A of FORM GST DRC-01B, fully or partially, along with interest under section 50, through FORM GST DRC-03 and furnish the details thereof in Part B of FORM GST DRC-01B electronically on the common portal; or

(b) furnish a reply electronically on the common portal, incorporating reasons in respect of that part of the differential tax liability that has remained unpaid, if any, in Part B of FORM GST DRC-01B within the specified period of seven days.

- The **third and the most important Sub rule** is about the **direct recovery** of the differential liability by the proper officer. It states that in the event where the differential liability is neither paid, nor the assessee has specified any reason for Such difference within seven days, or even if the assessee has specified the reason of difference in tax liability, but the same is not acceptable to the proper officer, the said differential liability will stand recoverable as per the provisions of recovery proceedings under Section 79 of the Act.

It is also to be noted that, in order to make the GSTR-1 and GSTR-3B reconciliation an indispensable time-sensitive exercise with the help of a limited window of 7 days, and take a call either to pay or to explain the differences, in **Rule 59 (6) a new sub clause (d) is added** to provide that in case where intimation is received by registered person under Rule 88C, such person shall **not be allowed to furnish GSTR-1** for a subsequent tax period, unless he has either deposited the amount specified in intimation or has furnished a reply explaining the reasons for any amount remaining unpaid. Now since there is mandate of sequel filing of GSTR-1 and GSTR-3B under Section 39, effectively, GSTR-3B can also not be filed for subsequent periods unless this difference is sorted. In case, default in filing GSTR-1 or GSTR-3B continues for one more tax-period, generation of E-way bill will also be restricted under Rule 138E rendering the businesses completely helpless for movement of any goods under the cover of E-way bill and thereby, disrupting the entire business chain.

Before moving on to the detail analysis of the new rule 88C, let us first understand whether the rule, and specifically Sub rule (3) which provides for the direct recovery of differential liability, has got any statutory backing or it is just one of the cases of statutory over reach? The answer to this question is “yes”, the rule has got its statutory backing. One very important provision is given under section 75(12) of the CGST Act, 2017 to which an explanation was inserted by Finance Act, 2021 and made effective from 01.01.2022. The section and proviso provide as under:

“75(12) - Notwithstanding anything contained in section 73 or section 74, 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.

Proviso- 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.”

The above section provides for direct recovery of unpaid or short-paid “self-assessed” tax as per GSTR-3B without following the demand procedures laid down under the CGST Act. Here the expression “self-assessed tax” as provided for in the proviso, shall include the tax payable in respect of details of outward supplies furnished in form GSTR-1, but not included in the return furnished in form GSTR-3B.

This explanation extended statutory power to department for direct recovery of tax in a situation of difference between the output liability reported in GSTR-1 and actual tax discharged in GSTR-3B for the relevant period.

ANALYSIS OF RULE 88C READ WITH SECTION 75(12):

Now, let us try and understand the new rule 88C in light of a few questions which arises from the reading of the rule when read with Section 75 (12):

- **Firstly**, the very first sub rule speaks about the intimation of Difference in liability between GSTR 1 and GSTR 3b to the tax payer through part A of Form DRC-01B. there itself it is mentioned that the same difference will be intimated to the tax payer only when it exceeds a certain amount or percentage. However, neither the amount nor the percentage is yet specified by the department. Thus, making the new rule 88C not yet effective since the amount/percentage of differences must be specified to bring it in force. Nevertheless, this rule is set to result in flood of system generated DRC-1B thrown on taxpayers in the coming months.
- **Secondly**, the second sub rule of the new rule 88C provides an assessee in default, with a window in the form of FORM DRC-01B, through which the assessee can either pay fully or part of the differential liability and state the reasons if any, for non-payment of any part liability against a pre-specified criterion namely;
 1. *Excess Liability paid in earlier tax periods in FORM GSTR-3B.*
 2. *Some transactions of earlier tax period which could not be declared in the FORM GSTR-1/IFF of the said tax period but in respect of which tax has already been paid in FORM GSTR-3B of the said tax period and which have now been declared in FORM GSTR-1/IFF of the tax period under consideration.*
 3. *FORM GSTR-1/IFF filed with incorrect details and will be amended in next tax period (including typographical errors, wrong tax rates, etc.).*
 4. *Mistake in reporting of advances received and adjusted against invoices.*
 5. *Any other reasons.*

It is also mentioned in the third Sub rule that It is mentioned in the rule that **“if the explanation is not acceptable by proper officer”**, the unpaid amount of liability will stand recoverable under rule 79. Recovery proceedings mentioned in section 79 is subject to provision of section 78 (though it is not specifically mentioned in section 79 it is very well clear from the headings of the sections). The new Rule 88C has ignored this principle of natural justice, by not mentioning about any such notice or order, or providing any opportunity of being heard to the assessee in default. In our understanding and interpretation of statute, If the explanation is not acceptable, the officer has to pass a speaking order as to why the explanation is not acceptable. The officer cannot simply start recovery as the same would be violative of principles of natural justice.

Now, if we assume the Intimation of Payment / Non-Payment window provided in form of FORM DRC-01B to be the Notice for demand under Section 75, the rigors of that section should be made applicable to this intimation as well which would include opportunity of being heard, grant of time/adjournments and requirement of passing speaking order by the proper officer whereas Rule 88C does not provide for any of these.

It may also be possible that explanation furnished by registered person for few of the items is acceptable whereas for other items, it is not acceptable to proper office which would require determination and passing of order by the proper officer for the amount payable by the registered person. However, from the perusal of Rule 88C or the form DRC-1B, it appears that the proper officer would directly initiate recovery proceedings without passing any order. If so, where is the scope of challenging the order of proper officer regarding differential tax liability before appellate forums. This poses a serious question whether the only remedy with the registered person would be to rush to High Courts for stay of recovery action.

- **Lastly**, upon a careful reading of section 75 (12) along with the explanation thereto, it is known that, difference in the liability as disclosed in statement of outward supply and that in the returns shall be treated to be “self-assessed” tax, and such Self assessed tax or any interest thereto is if unpaid, shall be recoverable by the department under Section 79. Now, when a person replies to DRC-01B and provides an explanation for difference between liability as per GSTR-1 and 3B, it is not a case of proviso to section 75(12). Once the liability is disputed, it doesn’t remain “self-assessed”. The moment the liability is disputed by a person, it becomes a matter of adjudication and must be subjected to quasi-judicial proceeding. Once a person disputes the liability, it cannot be called “self-assessed”. As provided for in the recent judgement of **JHARKHAND HIGH COURT** ;

“In the petition, primarily challenge is to interest payable on delayed payment of taxes can be recovered

under the provisions of Section 79 read with Section 75(12) of CGST Act. Page 3 Revenue has taken a plea that interest can be recovered on delayed payment of tax under section 50 read with section 75(12) of JGST Act. The conjoint reading of Section 50 and Section 75(12) of JGST Act, 2017 makes it clear that Interest is to be calculated by the Assessee 'on its own' and interest is automatically payable at the time of filing return in Form GSTR-3B. Applicability of section 73 and 74 of the Act are specifically excluded.

Held-if an Assessee disputes the liability of interest i.e. either disputes its calculation or even the livability of interest, then the only option left for the Assessing Officer is to initiate proceeding either under Section 73 or 74 of the Act for adjudication of the liability of interest."

This again calls for appropriate clarifications, as to what other remedies are available to an assessee other than to knock the doors of the high court which may not be a very suitable and pocket friendly options for small assesseees.

Conclusion

The purpose of introduction of Rule 88C is to stream line compliances by all the assesseees, but in the absence of proper clarifications about the above-mentioned questions, it seems the very purpose of introduction of Rule 88C will be defeated. The two very harsh amendments in form of Rule 88C(iii) and 59 (6)(d) will hamper the smooth functioning of the day-to-day business of the assesseees compelling them to rush to high courts for differences in liabilities disclosed in GSTR 1 and GSTR 3b having valid reasons which are not acceptable to the department. This again will have a two-way cost burden on the assessee, firstly the cost of litigation which will come up from the undue recovery of tax by the department, and secondly the by the amount of late fees and interest which has to be paid for delay in filing of GST returns as an impact of rule 59(6)(d), as the process will be a time consuming one. In short change is not always an easy process, but there is always a scope to mitigate the resistances generated in the path of change, in the present scenario the scope lies in the clarifications from the d`epartment.