

Is Waiver under S. 128A applicable for interest on delayed filing of returns?

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Circular No. 238/32/2024-GST dated 15th October, 2024 has been issued for Clarification of various doubts related to Section 128A of the CGST Act, 2017. In the said Circular, there is a clarification regarding applicability of Section 128A to cases where the tax due has already been paid and the notice or orders under Section 73 only pertains to interest and/or penalty.

The clarification *per se* may not be, but the reasoning behind the clarification is an interesting read, hence reproduced below:

S.No.	Issue	Clarification
4	Whether the benefit provided under Section 128A will be applicable in cases, where the tax due has already been paid and the notice or demand orders under Section 73 only pertains to interest and/or penalty involved?	<p>Where the tax due has already been paid and the notice or demand orders under Section 73 only pertains to interest and/or penalty involved, the same shall be considered for availing the benefit of section 128A.</p> <p>However, the benefit of waiver of interest and penalty shall not be applicable in the cases where the interest has been demanded on account of delayed filing of returns, or delayed reporting of any supply in the return, as such interest is related to demand of interest on self-assessed liability and does not pertain to any demand of tax dues and is directly recoverable under sub-section (12) of section 75.</p>

Now, Section 73 must be read for context here:

CHAPTER XV

DEMANDS AND RECOVERY

SECTION 73. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any willful-misstatement or suppression of facts. — (1) 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 utilized for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

Thus, the initiation of proceedings under Section 73 must be back by a reasoned understanding of the proper officer that any **tax has not been paid or short paid**. If proper officer has made any observation from which it appears that **any non-payment or short payment of tax exists on a given date**, then (*and only then*) Demand and Recovery proceedings can be initiated by issue of a Show Cause Notice under Section 73.

Hence, where proper officer makes some observation in which non-payment or short payment of tax does not exist on given date, issue of Show Cause Notice by invocation of Section 73 or 74 is unauthorised.

The Circular has laid out a view of the Board that demand of interest on account of delayed filing of returns, or delayed reporting of any supply in the return is related to demand of interest on self-assessed liability and does not pertain to any demand of tax dues and is directly

recoverable under Section 75(12). On such reasoning, the Circular has clarified that the benefit of waiver of interest and penalty shall not be applicable in such cases because in the light of this view, Section 73 is not applicable and interest is directly recoverable by an order for recovery under Section 75(12). Even the GST portal has an option issue DRC-07 u/s 75(12). Board has not indicated any restriction in Section 128A for such notices or orders specifically but has rather highlighted non-applicability of Section 73 itself in such cases for demand and recovery.

Thus, if such interest does not relate to any demand of tax dues, can it be recovered by issue of Show Cause Notice under Section 73? The answer clearly appears to be a **No**. Hence, issue of a Show Cause Notice under Section 73 for demand of interest on delayed filing of returns or delayed reporting of invoices in return is illegal and must be quashed.

However, if proper officers have issued a Show Cause Notice under Section 73 for demand of interest on delayed filing of return or delayed reporting of invoices in returns, is there a scope of benefit of waiver of interest and penalty? Now for that, let's read the governing provision for the waiver under Section 128A.

Notwithstanding anything to the contrary contained in this Act, where any amount of tax is payable by a person chargeable with tax in accordance with,

- a. ***a notice*** issued under sub-section (1) of section 73 or a statement issued under sub-section (3) of section 73, and where no order under sub-section (9) of section 73 has been issued; or
- b. ***an order*** passed under sub-section (9) of section 73, and where no order under sub-section (11) of section 107 or sub-section (1) of section 108 has been passed; or
- c. ***an order*** passed under sub-section (11) of section 107 or sub-section (1) of section 108, and where no order under sub-section (1) of section 113 has been passed,

pertaining to the period from 1st July, 2017 to 31st March, 2020, or a part thereof, and the said person pays the full amount of tax payable as per the notice or statement or the order referred to in clause (a), clause (b) or clause (c), as the case may be, on or before the date, as may be notified by the Government on the recommendations of the Council, no interest under section 50 and penalty under this Act, shall be payable and all the proceedings in respect of the said notice or order or statement, as the case may be, shall be deemed to be concluded, subject to such conditions as may be prescribed:

If by literal interpretation of the above provision, there is an ambiguity regarding notices or orders where no tax is demanded, the Board has made a clarification that **where the tax due has already been paid and the notice or demand orders under Section 73 only pertains to interest and/or penalty involved, the same shall be considered for availing the benefit of section 128A**. Thus, there remains no ambiguity in interpretation of Section 128A, and it is clear that notices or orders for interest and/or penalty only can also be covered for the benefit of waiver.

Thus, if proper officers, in their wisdom, have chosen to issue a Show Cause Notice and Order under Section 73 (and not an Order under S. 75(12) directly) for demand of interest on account of delayed filing of return or delayed reporting of invoices in returns, and the registered person intends to opt, there cannot be any restriction on benefit of waiver of interest and penalty under Section 128A, because due to issuance of such notices or orders under Section 73, all the conditions of benefit of waiver under Section 128A stand complied.