

The Ghost of virtual check-post

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One of the major benefit of GST as canvassed by the Government was the abolition of Check-posts across the country, which was touted to be a big logistical boost, cutting down the transit time of goods. But the experience proves that it was only a mirage. Contrary to the sporadic check-posts then functioning at the border of the States, now the check-posts are as ubiquitous as there are officers on the roads.

Section 129 of the CGST Act deals with "Detention, Seizure and release of goods and conveyances in transit" and Chapter XVI of the CGST Rules, comprising of Rules 138 to 138D deals with E-way Bill, and other connected issues. Various circulars have been issued from time to time purportedly to clarify various doubts in this regard, viz., Circular Nos. 41/15/2018 Dt. 13.04.2018, 49/23/2018 Dt. 21.06.2018, 64/38/2018 Dt. 14.09.2018, etc.

While the effectiveness of Road check of goods carriage vehicles and E-way bill concept, in detecting and preventing clandestine clearances of goods without payment of GST is not being disputed, the experience over the past several months show that the above provisions have become a nightmare for honest assesses.

The root cause for all practical difficulties lies in the fact that all the above provisions have been framed with a flawed mindset that any goods detained in transit represent only clearances without payment of GST. If a clandestine clearance is caught in transit and if the above provisions are applied to such case, there would not be much of a difficulty. For example, demand of tax along with penalties, release of the goods and conveyance on payment of the above, quantum of penalty in case where the owner comes forward to pay the same and in cases where the owner is not coming forward to pay the same, confiscation of goods and conveyances, prohibition of availment of input tax credit if any tax is paid under Section 129, etc. would operate well, if the goods are detained for non payment of GST.

But, day in and day out, throughout the length and breadth of the Country, vehicles are being detained for a variety of reasons, which are merely procedural in nature (disputing the classification and rate of duty, clerical omissions or mistakes in invoices or E Way Bills, etc.) and the officers detaining the goods insist on immediate payment of tax and equal amount of penalty. Several times the detaining officers dispute the classification and rate of tax and what will happen if in several States such proceedings are initiated and different orders are passed. We are aware of the detention made for omission of a zero in mentioning the distance between Kerala to Chhattisgarh, where the Hon'ble High Court of Kerala has to intervene!

In order to meet the delivery schedules, the parties have no other option to but to pay the tax demand and penalties, in order to get the goods released, though the clearances are genuine clearances under the cover of valid invoices.

Various practical difficulties are being faced by honest tax payers, merely for certain procedural infractions and clerical mistakes as explained below.

- In cases, where the Seller's obligation as to delivery is over and if the buyer needs the goods immediately, they (the buyers) come forward to pay the tax and penalty, so as to get release of the goods early. But, the goods are covered properly by a valid invoice issued by the supplier, which the supplier would include in his GSTR 3B / GSTR 1 returns and pay the tax in due course. So, effectively, tax stands paid twice for the same supply and how to go about claiming refund of either of them, defies any proper answer.
- Whether it is for the buyer to claim refund, by proving that the supplier has paid the tax or it is for the supplier not to include such invoice in his return, as tax on the same stands paid by the buyer?
- If the supplier opts to pay the tax and penalty at the time of detention, how can he avoid payment of tax once again on the basis of the invoice raised by him, which has to be declared by him in the GSTR 3 B / GSTR 1?
- As per Section 17 (5) (i) of the CGST Act, any tax paid under Section 129 or 130 is not entitled for Input Tax credit. When tax is thus paid only for such procedural and clerical mistakes, why input tax credit of the same shall be barred?
- What is the difference between detention and seizure, under section 129 of the Act?
- Can an appeal be filed against detention orders / seizure orders?
- What is the time limit for issuing notice for demand of tax and passing of order demanding tax and penalty? In many cases, both are done simultaneously!
- To whom notices have to be issued – the supplier or recipient or transporter? In one case tax demand has been raised and confirmed on the transporter!
- Can an appeal be filed against the order confirming the demand of tax and imposing penalty under Section 129 (3)?
- If the goods originating from State A are detained in State B, where appeal proceedings have to be initiated? If the supplier wishes to challenge such orders in Appeal, can he file appeals in State A where he is registered or in State B where the orders are passed? If a supplier is supplying countries throughout the country, he has to contest appeals against such detention / seizure orders in all the States?

As explained above, the provisions relating to detention, seizure and Eway bill prove to be a nightmare, due to improper framing of the legal provisions, based

on a flawed mindset. The whole provisions have to be re-written and it has to be ensured that

- Proceedings for demand of tax and imposition of penalties shall be resorted to only when the goods are cleared by the supplier without accounting for the same and without payment of tax. In all other cases involving procedural / clerical mistakes, based on the nature of such mistakes, only penalties could be imposed in deserving cases and no tax demand could be made.
- The jurisdiction and powers of the officers and appellate jurisdictions have to be properly codified.
- The manner in which the tax paid in pursuance of a detention would be matched with the supplier's liability vis-à-vis the person who is coming forward to pay the same shall be properly codified.
- The restriction for availment of input tax credit shall apply only in case of clandestine clearances, where tax is paid in pursuance of a detention.
- The officers detaining the goods should only refer the case to the jurisdictional officer of the supplier who alone should be made competent to deal with the issue and pass orders. The detaining officers should not be permitted to pass any orders.

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