

Offences and Penalty provisions under GST

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One full year has been passed after implementation of GST. But for effective compliance and implementation of any law, it is necessary to provide for consequences of non-compliance of that Act. Provisions related to penalties and prosecutions under GST Act are covered for deterrence so that deliberate tax evasion can be avoided and due tax revenue can be obtained to compensate the Government from loss due to non-compliance. To be proactive in preventing fraudulent activities and to avoid serious pecuniary liability for non-observance of law, it is necessary to understand such provisions.

Offences under GST Act:

Provisions related to offences and penalties are covered in Chapter XIX (section 122 to section 138) under CGST Act. Section 132 of the CGST Act provides for certain offences. These offences are liable for penalty and some offences are liable for prosecution.

List of offences specified under CGST Act are as under:

Offences related to	Nature of offence
Registration	<ul style="list-style-type: none">• Failure to register despite being liable to pay tax.• Furnishing false information regarding registration particulars either at the time of applying for registration or subsequently.
Invoice	<ul style="list-style-type: none">• Making a supply without invoice or with false/ incorrect invoice.• Issuing an invoice without making supply.• Issuing invoice or document using GSTIN of another person.

Tax payment	<ul style="list-style-type: none"> • Not paying tax collected for a period exceeding three months; • Not paying tax collected in contravention of the CGST/SGST Act for a period exceeding 3 months; • Non-deduction or lower deduction of tax deducted at source or not depositing tax deducted at source under section 51; • Non-collection or lower collection of or non -payment of tax collectible at source under section 52. • Suppressing turnover leading to tax evasion.
Input Tax Credit	<ul style="list-style-type: none"> • Availing/utilizing input tax credit without actual receipt of goods and/or services; • Availing/distributing of input tax credit in contravention of provisions of the Act.
Refund	<ul style="list-style-type: none"> • Fraudulently obtaining any refund.
Accounts and documents	<ul style="list-style-type: none"> • Furnishing false information or falsification of financial records or furnishing of fake accounts/ documents with intent to evade payment of tax. • Failure to maintain accounts/documents in the manner specified in the Act or failure to retain accounts/documents for the period specified in the Act. • Failure to furnish information/documents required by an officer in terms of the Act/Rules or furnishing false information/documents during the course of any proceeding. • Transporting goods without prescribed documents.
Other matters	<ul style="list-style-type: none"> • Obstructing or preventing any official in discharge of his duty; • Supplying/transporting/storing any goods liable to confiscation. • Tampering/destroying any material evidence. • Disposing of /tampering with goods detained/seized/attached under the Act.

Cognizable and non-bailable offences:

Offences under GST are further classified into cognizable and non-bailable offences as well as non-cognizable and bailable offences. General meaning of these terms are as under:

- **Cognizable offences:** A case in which specially empowered officer has the authority to arrest without warrant
- **Non-cognizable offences:** A case in which specially empowered officer has no authority to arrest without warrant.

- **Bailable offences:** Offences for which bail can be granted.
- **Non-bailable Offences:** Offences for which accused does not have right to be released on bail, but the bail can be granted at the discretion of court.

Following offences are cognizable and non-bailable offences under GST, if amount of tax evaded, amount of input tax credit availed or amount of refund taken is more than Rs.5 Crore:

- (1) Supply of goods or services or both without issuance of bill;
- (2) Issuance of bill or invoice without supply of goods or services.
- (3) Avail wrong input tax credit on bills without supply;
- (4) Tax collected but not deposited to the Government.

All other offences are non-cognizable and bailable.

Moreover, as per section 69 of the CGST Act, where the Commissioner has reason to believe that a person has committed offence specified in clause (a) to (d) of section 132(1) which is punishable under clause (i) or (ii) of sub-section (1) or (2) of section 132, he may authorize any officer of central tax to arrest such person.

Penalty provisions under GST:

Penalty proceedings are quasi criminal proceedings. They are based on prevalence of probability. Section 122 of the CGST Act specifies penalty provisions for offences committed under GST. Sub-section (1) of section 122 provides that any taxable person who has committed any of the offences mentioned in section 122 shall be liable to a penalty that shall be higher of:

- (1) Amount equivalent to tax evaded, fraudulently obtained as refund, availed as credit or not deducted or collected or short deducted or short collected; or
- (2) Amount of Rs.10000/-.

Reduction and waiver of penalty in some cases:

As per section 73 of the CGST Act, where any tax has not paid, short paid or erroneously refunded or where input tax credit has been wrongly availed or utilized for any reason other than reason of fraud or willful misstatement or suppression of facts to evade tax and a notice has been issued to such person, if the person has paid tax, interest and penalty within specified time from issuance of show cause notice, no penalty shall be payable. Similarly, section 74 of the CGST Act provides for reduction of penalty in case of fraud or willful misstatement. Details of these provisions are as under:

Date of payment of dues along with interest under section 50	Amount of penalty applicable	
	In case of fraud, willful misstatement etc.	In other cases
Before issuance of show cause notice	15% of tax	Nil
Within 30 days from issuance of show cause notice	25% of tax	Nil, except where self assessment tax or tax collected and not paid within 30 days from due date (rule 73(11))
Within 30 days from communication of order	50% of tax	Nil
After 30 days	Higher of Rs.10000/- or 100% of tax due (Sec. 122(2)(b))	Higher of Rs.10000/- or 10% of tax due. (Sec. 122(2)(a) and sec. 74(a))

General disciplines related to penalty:

Section 126 of the CGST Act specifies for general disciplines to be followed while imposing penalty. Such disciplines are as under:

- (1) No penalty to be imposed without issuance of Show Cause Notice and proper hearing in the matter, opportunity of being heard to the person proceeded against to rebut allegations leveled against him.
- (2) The penalty is dependent upon totality of facts and circumstances of the case.
- (3) The penalty imposed is to be commensurate with the degree and severity of breach of the provisions of the law or the rules alleged.
- (4) The nature of the breach is to be specified clearly in the order imposing the penalty.
- (5) The provision of the law under which the penalty has been imposed is to be specified.

Moreover, no substantial penalty is to be imposed for any minor breach (where amount of tax involved is less than Rs.5000/-) of tax regulation or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence.

Further, as prescribed under section 126(5), where a person voluntarily discloses the circumstances of breach of the tax law, regulation or procedural requirements to an officer prior to discovery of the breach, the proper officer may consider the fact as mitigating factor when qualifying penalty for that person.

The provisions of this section are not applicable in case where penalty is specified as a fixed sum or as a fixed percentage.

Provisions related to prosecution:

Section 132(1) of the CGST Act contains provisions related to prosecution for certain offences. These provisions are as under:

Amount of tax evaded or input tax credit wrongly availed or utilized or amount of refund wrongly taken	Imprisonment with fine
Exceeds Rs.5 Crore	5 years with fine
Exceeds Rs.2 Crore but does not Exceeds Rs.5 Crore	3 years with fine
Exceeds Rs.1 Crore but does not exceeds Rs.2 Crore	1 year with fine
Falsifies financial records or produces fake accounts or prevents any officer from discharging his duties or destroys any material evidence or document	6 months or with fine or both
Offence committed again	5 years with fine for second and every subsequent offence

Confiscation or detention of goods:

If any person transports any goods or stores any such goods while in transit without invoice and a declaration, or supplies or stores any goods that he has not recorded in his books of account, then such goods shall be liable for detention or seizure along with any vehicle on which they are being transported. When owner comes forward, such goods shall be released on payment of applicable tax and 100% penalty or on furnishing 100% security. In case of exempted goods, penalty is 2% of value of goods or Rs.25000/- whichever is less. When assessee does not come forward, levy of penalty shall be 50% of value of such goods and in case of exempted goods levy of penalty shall be 5% of value of such goods.

Section 129 of the CGST Act provides for detention, seizure and release of goods and conveyance in transit, while section 130 provides for confiscation of goods or conveyances and imposition of penalty. Section 130 prescribes that the goods are liable for confiscation, if any person:

- Supplies or receives any goods in contravention of any provisions of the Act
- Does not account for any goods in the manner required under the Act.

- Supplies goods that are liable to tax under the Act without applying for registration.
- Uses any conveyance as a means of transport for carriage of goods in contravention of CGST/SGST Act.
- Contravenes any provisions of the Act/Rules with the intention of evading payment of tax.

In case of confiscation of the goods, option has been given to the owner to pay fine in lieu of confiscation. Such fine shall not exceed market price of confiscated goods and it shall be in addition to tax and other charges payable in respect of such goods.

The confiscated goods shall be released on payment of applicable tax, penalty or fine.

Further, if the vehicle is found to be transporting goods without e-way bill, such vehicle along with goods can be detained or seized and would be released only on payment of appropriate tax and penalty. If the owner comes forward to pay the penalty and tax amount, he must pay 100% of tax payable and if he not comes forward, penalty will be 50% of value of goods.

Here one notable point is that third proviso of notification No. 12/2018 dated 07.03.2018 specifies that *“where the goods are transported for a distance of up to fifty kilometers within the State or Union Territory from the place of business of the consignor to the place of business of the transporter for further transportation, the supplier or the recipient, or as the case may be, the transporter may not furnish the details of conveyance in Part B of FORM GST EWB-01.”*. Hence merely non-mentioning of vehicle no. in part-B of e-way bill in such cases cannot be the ground for seizure of goods. Allahabad High Court in case of VSL Alloys (India) Pvt. Ltd. vs. State of U.P. and another held that where assessee is not supposed to file part-B of e-way bill and where all documents are accompanied by the goods, merely non-mentioning of vehicle no. in part-B of e-way bill cannot be the ground for seizure of goods.

Necessity of mensrea for penalty and prosecution

Section 135 of the Act specifies that *“in any prosecution for an offence under this Act which requires culpable mental state on the part of accused, the court shall presume the existence of such mental state. but it shall be a defense for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.”* Hence mensrea is a necessary ingredient under this Act, the court shall presume its existence and burden of proof to show its absence is on accused. Culpable state of mind includes intention, motive, knowledge of fact and belief in or reason to believe the fact. A fact is said to be proved only when the court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability. Mensrea is not essential to attract penalty under this Act. It was classical view that *“no mensrea no crime”*. There are some court rulings which direct that *“absence of mensrea can be taken as defense available for any prosecution*

under the Act.” But several laws in India and abroad, especially regarding economic crimes and departmental penalties have created several punishments even where the offences have been defined to exclude mensrea.

Intricacies related to penalty provisions

Where goods are supplied without payment of tax, the penalty cannot be leviable when assessee has immediately paid the tax with interest. In case of M/s. Xerox India Ltd. vs. State of Karnataka, where dealer disputed tax liability on the basis of judgment of apex court, but after receiving clarification from apex court, assessee has immediately paid the tax with interest. The Karnataka High Court held that penalty cannot be leviable merely because it is lawful to do so. Hence penalty is not justifiable in such cases.

Moreover, if the applicant has committed mistake while filing GST registration, penalty cannot be imposed for non-filing of GST return, and non-depositing the tax, if the applicant deposits the tax and files GST return within two weeks of issuance of correct registration certificate. In case of Modern Pipe Industries vs. State of U.P. and Ors., (2017) 84 taxmann.com 254 (Allahabad), it was held that at the time of migration to GST, assessee has by mistake obtained registration as sole proprietor instead of partnership firm. The Allahabad High Court directed the department to issue necessary login id/password in the name of partnership firm within a period of two weeks and the corrected registration certificate within a week after and also directed not to levy penalty if the applicant deposits the tax and files GST return within two weeks of issuance of correct registration certificate.

One notable point is that section 129 does not indicate manner of payment of penalty. as per section 49(1), every deposit made towards tax, interest, penalty, fee or any other amount by a person by internet banking, RTGS, NEFT, or by using credit or debit cards or any other prescribed mode shall be credited to electronic cash ledger of such person. Hence penalty can also be paid on GST portal maintained by the Government. The Department cannot insist to pay the penalty only in cash or by demand draft. But Input Tax credit cannot be utilized for payment of penalty.

Compounding of offence

Commissioner has granted power under GST to compound the offence. Section 138 of the CGST Act specifies that compounding can be done either at the time or before the prosecution on payment of compounding amount. The compounding of offence is allowed only after payment of tax, interest and penalty involved. The lower limit for amount of compounding is Rs.10000/- or 50% of tax whichever is higher and upper limit is Rs.30000/- or 150% of tax whichever is higher. On payment of compounding amount, no further proceedings under the Act to be initiated and criminal proceeds shall stand abated. In following cases, compounding under GST cannot be allowed:

