

Can mere delay in payment of tax trigger Sec 74 under GST?

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Introduction

Section 74 of the Central Goods and Services Tax Act, 2017 represents the most stringent arm of the GST demand machinery, reserved for cases involving fraud, wilful misstatement or suppression of facts to evade tax. The statutory scheme makes a clear distinction between a mere failure to pay tax and a culpable non-payment attracting penal consequences. Yet, in practice, this boundary is often blurred, particularly in cases of delayed filing of returns and belated discharge of tax.

Judicial precedents have consistently held that Section 74(1) cannot be invoked merely because of non-payment of GST. There must be cogent material evidencing fraud, wilful misstatement or suppression of facts, intending to evade tax, with such evidence forming part of the SCN. In this regard CBIC has issued **Instruction No. 05/2023-GST dated 13th December 2023** which clearly says –

*“3.3 From the perusal of wording of section 74(1) of CGST Act, it is evident that section 74(1) can be invoked only in cases where there is a fraud or wilful mis-statement or suppression of facts to evade tax on the part of the said taxpayer. **Section 74(1) cannot be invoked merely on account of non-payment of GST, without specific element of fraud or wilful misstatement or suppression of facts to evade tax.** Therefore, only in the cases where the investigation indicates that there is material evidence of fraud or wilful mis statement or suppression of fact to evade tax on the part of the taxpayer, provisions of section 74(1) of CGST Act may be invoked for issuance of show cause notice, and such evidence should also be made a part of the show cause notice.”*

The harder question is more specific: **where a taxpayer fails to file monthly returns, delays payment of tax, and later pays the tax before issuance of the show cause notice, can the department still invoke Section 74?** It is this question that came into sharp focus in ***Sriba Nirman Company v. Commissioner (Appeals)***ⁱ, where the Andhra Pradesh High Court upheld the invocation of Section 74, and the Supreme Court declined to interfere. The decision is important not because it dilutes the requirement of *mens rea*, but because it explains how *mens rea* may be inferred from conduct in a return-driven tax system., thereby clarifying the legal position regarding the interplay between monthly compliance, suppression of facts, and voluntary payment.

Factual Background

The petitioner, a partnership firm, engaged as a sub-contractor in infrastructure-based Engineering Procurement Construction contracts, failed to file monthly GSTR-3B and discharge output tax for the period July 2017 to March 2018. Although the entire tax liability was paid prior to the issuance of the show cause notice (SCN) and interest paid subsequently, mandatory 15% penalty contemplated under Section 74(5) was not paid. The Department invoked Section 74, alleging wilful suppression of facts and both the adjudicating authority and appellate authority upheld the 100% penalty. The Andhra Pradesh High Court dismissed the writ petition, and the Supreme Court declined to interfere, including at the review stage.

Petitioner's contention

1. Since the tax liability had already been discharged prior to issuance of the SCN, section 74(5) was inapplicable.

2. Mere non-payment of tax does not constitute fraud, willful misstatement, or suppression of facts with intent to evade tax and therefore proceedings u/s 74(1) could not be initiated.
3. As the tax was paid before the due date for filing the annual return, mere non-filing of monthly returns cannot be regarded as suppression of facts.

Issues of determination

The present litigation raises the issue- whether a penalty under Section 74(1) of the CGST Act can be levied where a taxpayer collected tax from the recipient but failed to file monthly GST returns, despite discharging the entire tax liability prior to the issuance of SCN without payment of interest, and whether such conduct amounts to **wilful** suppression of facts?

Findings of the Hon'ble High Court

A combined reading of Sec 74(5) and Sec 74(6) shows that the issuance of SCN under Sec 74(1) is not permissible where the taxpayer has discharged the entire the tax liability along with interest under Sec 50 and a penalty equal to 15% of the tax amount. Since the petitioner had not paid the interest and 15% penalty before issuance of the SCN, the Hon'ble Court upheld the Department's jurisdiction to invoke Section 74(1).

Referring to Section 39 read with Rule 61(2), the Hon'ble Court held that the petitioner was under a statutory obligation to file monthly returns and remit tax within the prescribed due dates. The argument that the GST liability had been discharged before the due date for filing the annual return was not accepted.

Relying upon Explanation 2 to Section 74, the Hon'ble Court further held that non-filing of monthly returns within the prescribed timelines amounts to suppression of facts. However, it clarified that such non-filing would attract a 100% penalty only if it is established to be wilful. In the facts of the case, since the petitioner had already received payments from the main contractor but still failed to discharge GST liability in time, the Court held that the suppression was wilful and accordingly sustained the 100% penalty.

Author's comments

In the current GST landscape, ***"Pay later with interest"*** is replaced with ***"Pay later with interest and penalty"***.

Explanation 2 to Section 74 expands the scope of "suppression" by including non-declaration of facts required to be disclosed in returns or other statutory documents. This provision is significant in the GST context, where compliance is fundamentally return-centric. Failure to file GSTR-3B or failure to disclose liability therein is not merely procedural, it constitutes non-declaration within the statutory reporting mechanism.

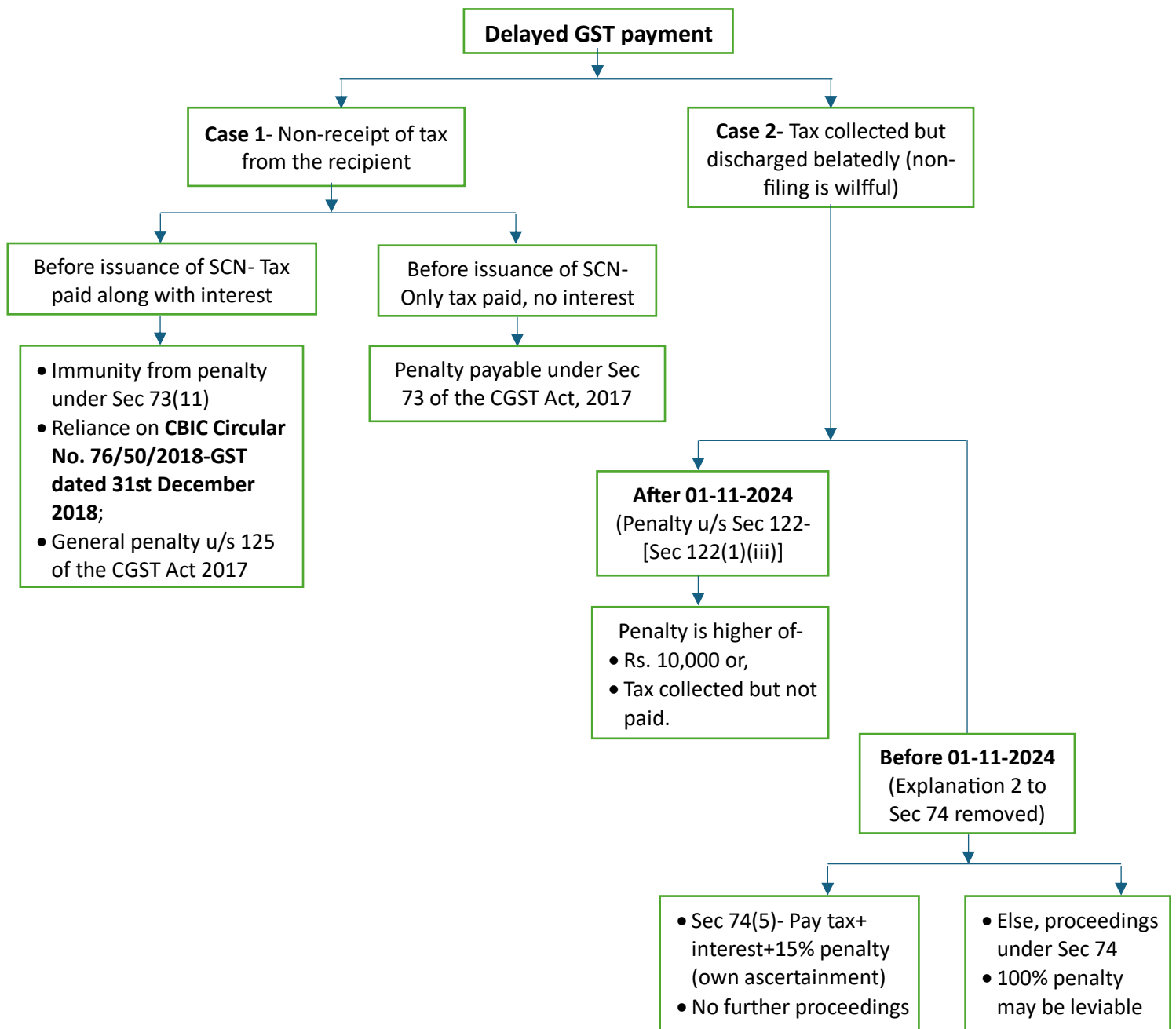
However, it does not dispense with the requirement that such suppression must be **wilful and directed towards evasion of tax**. The expression "to evade tax" continues to govern the provision. Therefore, non-filing of returns may constitute suppression in a technical sense, but the invocation of Section 74 still depends upon whether such suppression is accompanied by a culpable intent. This distinction is reinforced by the structure of Section 73, which covers cases of tax not paid or short paid for reasons other than fraud or suppression. The coexistence of Sections 73 and 74 reflects a legislative recognition that **every delay or default is not a suppression or fraud case**.

The judgement places greater emphasis on 'wilful suppression' and does not separately analyse 'intent to evade tax'. For instance, in Scenario 5 (For eg. GSTR-1 and GSTR-3B filed with NIL value merely to avoid cancellation of GST registration) or Scenario 6 below, the suppression might be wilful but may still lack the necessary intent to evade tax.

However, the court specifically observed that ‘suppression of facts’ under Section 74 cannot be mere suppression but must be ‘wilful suppression’ for the purpose of evading tax. It further held that the word ‘evade’ itself imports the requirement of intention and mens rea.

While the judgment is not elaborate on the separate element of “intent to evade tax, i.e., mens rea” it does not dispense with that requirement. Rather, it treats intent as something that can be inferred from the surrounding conduct and circumstances. The decision must therefore be understood in its proper context. It does not lay down that every delay or non-filing automatically attracts Section 74. Rather, it underscores that **where delay is coupled with non-disclosure and surrounding circumstances indicating conscious withholding, the inference of wilful suppression becomes legally sustainable.**

Judgement at a glance



Various scenarios of delayed payment of tax

Consider following scenarios in case of delay payment of tax-

Scenario	GSTR-1	GSTR-3B	Sec 73	Sec 74	Comments
1	✓	✗ (tax not collected)	✓		<ul style="list-style-type: none"> • If tax paid along with interest, general penalty may be leviable u/s 125 (<i>Immunity from penalty under Sec 73(11)- Reliance on CBIC Circular No. 76/50/2018-GST dated 31st December 2018</i>); • If only tax paid, no interest, penalty u/s 73 payable.
2	✓	Invoice omitted for 1-2 months but later rectified	✓		<ul style="list-style-type: none"> • If tax paid along with interest, general penalty may be leviable u/s 125 (<i>Immunity from penalty under Sec 73(11)- Reliance on CBIC Circular No. 76/50/2018-GST dated 31st December 2018</i>); • Interest on Gross tax liability [proviso to Sec 50(1)]
3	✓	✗ (tax collected)		✓	<ul style="list-style-type: none"> • If tax+ Interest+15% penalty paid before SCN, no further proceedings. • Else, 100% penalty leviable.
4	✗	✗		✓	<ul style="list-style-type: none"> • If tax+ Interest+15% penalty paid before SCN, no further proceedings • Else, 100% penalty leviable.
5	Filed but NIL			✓	
6	Both returns filed but time limit of annual return not expired- additional outward supply disclosed and paid via GSTR-9			✓	<ul style="list-style-type: none"> • If tax+ Interest on Gross tax liability [proviso to Sec 50(1)] +15% penalty paid before SCN, no further proceedings • Else, 100% penalty leviable.

Trade takeaways

1. **Timely filing of GSTR-3B assumes substantive importance.** Non-filing is not merely a procedural lapse but may constitute suppression under the statute.
2. **Delay in payment must be viewed in conjunction with disclosure.** Where liability is disclosed but payment is delayed, the case is fundamentally different from one where liability itself is not disclosed.
3. **Even where GST is subsequently paid voluntarily, non-filing of monthly returns and delayed payment of tax may be regarded as wilful suppression if the taxpayer had already received the consideration.** In such cases, penalty under Section 74 equivalent to the tax amount may be attracted unless the taxpayer discharges the tax, interest, and 15% penalty before issuance of the SCN in terms of Section 74(5).
4. Accordingly, businesses must ensure timely filing of GSTR-3B and payment of GST, irrespective of delays in receipt of funds from customers. Further, if delay occurs, tax payment should always be accompanied with interest to avoid any future penalties.

Conclusion

The proposition that mere delay in payment of tax attracts Section 74 is legally untenable. Section 74 is not a penalty for delay; it is a provision addressing non-payment arising from fraud, wilful misstatement or suppression of facts to evade tax. However, in a system where tax liability is required to be declared through periodic returns, delay accompanied by non-filing and non-disclosure may, depending on facts, assume the character of wilful suppression.

The true test, therefore, lies not in the existence of delay, but in the nature of the conduct underlying such delay. Where the conduct reflects conscious withholding of tax despite knowledge and capacity, the invocation of Section 74 may be justified. Where it reflects mere timing differences without concealment, Section 73 remains the appropriate route.

The decision in *Sriba Nirman Company* does not expand the scope of Section 74; it reinforces the principle that intent may be inferred from conduct. For taxpayers, the message is clear that compliance under GST is not merely about eventual payment, but about timely disclosure and disciplined adherence to the return framework.

The views expressed are strictly personal and cannot be regarded as an opinion. For any queries or feedback please write to meghajain@hnaindia.com and mannu@hnaindia.com.

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- [ⁱ M/s. Sriba Nirman Company Versus The Commissioner \(Appeals\), Guntur, Central Tax & Customs, Visakhapatnam., The Joint Commissioner of Central Tax, Visakhapatnam, The Joint Director, Directorate General of GST Intelligence, The Assistant Commissioner \(ST\), Aryapuram Circle - 2025 \(1\) TMI 1518 - ANDHRA PRADESH HIGH COURT](#)
 - [M/s. SRIBA NIRMAN COMPANY Versus THE COMMISSIONER \(APPEALS\), GUNTUR, CENTRAL TAX AND CUSTOMS & ORS. - 2025 \(5\) TMI 1274 - SC Order](#)
 - [M/s. Sriba Nirman Company Versus The Commissioner \(Appeals\), Guntur, Central Tax and Customs & Ors. - 2025 \(11\) TMI 1792 - SC Order](#)