

## CBIC Clarification

**Clarification on various issues relating to applicability of demand and penalty provisions under the CGST Act in respect of transactions involving fake invoices: Circular No 171/03/2022**

<b>1) Fact:-</b>	In case where a registered person 'A' has issued tax invoice to another registered person 'B' without any underlying supply of goods or services or both,
<b>Issue</b>	<p>1. whether such transaction will be covered as "supply" under section 7 of CGST Act</p> <p>2. whether any demand and recovery can be made from 'A' in respect of the said transaction under the provisions of section 73 or section 74 of CGST Act.</p> <p>3. whether any penal action can be taken against registered person 'A' in such cases.</p>
<b>Clarification</b>	<p><b>1) Is it supply under section 7</b></p> <ul style="list-style-type: none"> <li>⇒ Registered person 'A' has only issued a tax invoice to registered person 'B' without any underlying supply of goods or services.</li> <li>⇒ As there is <b>no supply involved</b> from 'A' to 'B', therefore, such an activity does not satisfy the criteria of 'supply' under section 7 of the CGST Act.</li> </ul>
	<p><b>2) penal action under section 73/74</b></p> <ul style="list-style-type: none"> <li>⇒ no tax liability arises against 'A' for such transaction, and therefore, <b>no demand and recovery</b> can be made against 'A' under section 73 or section 74 of the CGST Act.</li> <li>⇒ Besides, <b>no penal action</b> under the provisions of section 73 or section 74 is required to be taken against 'A' in respect of the said transaction.</li> </ul> <p><b>3) penal action under section 122</b></p> <p>'A' shall be <b>liable for penal action under section 122 (1)(ii)</b> of the CGST Act for issuing tax invoices without actual supply of goods or services or both.</p>
<b>2) Fact:-</b>	<p>A registered person "A" has issued tax invoice to another registered person "B" without any underlying supply of goods or services or both. 'B' avails input tax credit on the basis of the said tax invoice.</p> <p>B further issues invoice along with underlying supply of goods or services or both to his buyers and utilizes ITC availed on the basis of the above mentioned invoices issued by 'A', for payment of his tax liability in respect of his said outward supplies.</p>
<b>Issue</b>	Whether 'B' will be liable for the demand and recovery of the said ITC, along with penal action, under the provisions of section 73 or section 74 or any other provisions of the CGST Act.
<b>Clarification</b>	<p><b>1) penal action under section 73/74</b></p> <ul style="list-style-type: none"> <li>⇒ Registered person 'B' has availed and utilized fraudulent ITC on the basis of the fake invoices without receiving the goods or services.</li> <li>⇒ <b>ITC is availed in contravention of section 16(2)(b) of the CGST Act.</b></li> <li>⇒ Therefore, <b>"B" shall be liable for the demand and recovery</b> of such ITC along with penal action <b>under section 74 of the CGST Act.</b></li> <li>⇒ Interest shall also apply under section 50 of the said Act.</li> </ul>
	<p><b>2) penal action under section 122</b></p> <p>as per <b>section 75(13)</b> of CGST Act, if penal action is taken against 'B' under Section 74 for fraudulent availment or utilization of ITC</p> <p style="text-align: center;"><b>then no penalty for the same act, i.e. wrong availment or utilization of ITC, can be imposed on 'B' under any other provisions of CGST Act, including section 122.</b></p>

<b>3) Fact:-</b>	A registered person 'A' has issued tax invoice to another registered person 'B' without any underlying supply of goods or services or both. 'B' avails input tax credit on the basis of the said tax invoice and further passes on the said input tax credit to another registered person 'C' by issuing invoices without underlying supply of goods or services or both.
<b>Issue</b>	<b>Whether 'B' will be liable for the demand and recovery and penal action, under the provisions of section 73 or section 74 or any other provisions of the CGST Act.</b>
<b>Clarification</b>	<p><b>1) Is it supply under section 7</b></p> <ul style="list-style-type: none"> <li>⇒ In this case, 'B' has availed ITC in his electronic credit ledger on the basis of fake invoices without actual receipt of goods or services.</li> <li>⇒ Further, 'B' has utilized such ITC for payment of output liability on fake invoices issued to 'C' without any underlying supply of goods or services.</li> <li>⇒ With respect to supply made by 'B' to 'C', there is no supply of goods or services. Accordingly, no tax is payable by 'B' on such a transaction.</li> <li>⇒ <b>ITC availed by "B" on the basis of a fake invoice issued by 'A' is ineligible as per section 16 (2)(b) of the CGST Act.</b></li> <li>⇒ With respect to the transaction of supply from 'B' to 'C', <b>no tax is payable as there is no supply.</b></li> </ul> <p><b>2) penal action under section 73/74</b></p> <p>In these specific cases, <b>no demand and recovery</b> of either ITC wrongly/ fraudulently availed by 'B' or output liability on a supply made by 'B' to 'C' is required to be made from 'B' under section 73 or section 74 of CGST Act.</p> <p><b>3) penal action under section 122</b></p> <ul style="list-style-type: none"> <li>⇒ <b>'B' shall be liable for penal action both under section 122(1)((ii) and section 122(1)(vii)</b> of the CGST Act, for issuing invoices without any actual supply of goods or services, and for taking/ utilizing ITC without actual receipt of goods or services.</li> <li>⇒ Under <b>Section 122(1)(ii)</b>, a penalty is imposed for 'issues any invoice or bill without supply of goods or services or both in violation of the provisions of this Act or the rules made thereunder"</li> <li>⇒ Under <b>Section 122(1)(vii)</b>, a penalty is imposed for 'takes or utilizes input tax credit without actual receipt of goods or services or both either fully or partially, in contravention of the provisions of this Act or the rules made thereunder;"</li> </ul>

The circular also clarifies that proceeding under **section 122(1A)** can be initiated against any person who has retained the benefit of the transactions specified therein or at whose instance such transactions are conducted.

It has also been clarified that provisions of **section 132** of the CGST Act may also be invocable in cases of

- ⇒ wrongful/fraudulent availment or utilization of input tax credit, or
- ⇒ in cases of issuance of invoices without supply of goods or services or both,

leading to wrongful availment or utilization of input tax credit or refund of tax.

The provisions of **section 132** would be invocable subject to the satisfactions of conditions specified therein and based on facts and circumstances of each case.