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Assessing section 168a of the CGST act, 2017: Post-covid impact on notices and orders under section 73

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Abstract

Section 168A of the Central Goods and Services Tax Act (CGST), 2017, allows the government to extend statutory deadlines during force majeure events like pandemics. While it provided relief during COVID-19, its continued use for deadline extensions post-pandemic has raised legal concerns. Notifications such as 35/2020, 14/2021, 13/2022, and 09/2023 extended deadlines under Section 73, sparking debate on whether administrative challenges qualify as force majeure, which requires impossibility, not mere difficulty. Critics argue these extensions contradict the legislative intent of Section 168A, leading to legal challenges over jurisdictional overreach. This paper examines its scope, post-pandemic application, and impact on taxpayers and litigation, assessing its legal and constitutional validity. Findings emphasize the need for clearer legislative guidelines to prevent misuse of emergency provisions.

Keywords: Section 168A, CGST Act, *force majeure*, statutory extensions, compliance deadlines, GST council, judicial scrutiny, taxpayer rights

Introduction

The COVID-19 pandemic significantly disrupted economic and administrative processes, necessitating various legal adjustments to ensure continuity in governance and compliance. Among the many legislative responses in India, Section 168A of the Central Goods and Services Tax (CGST) Act, 2017, emerged as a pivotal provision introduced to address the unprecedented challenges posed by the pandemic. Enacted through an ordinance in 2020, this section grants the government powers to extend or exclude periods for compliance with any provision of the CGST Act. It aimed to mitigate hardships faced by taxpayers and authorities due to the nationwide lockdowns and operational delays caused by the pandemic. Section 168A empowers the government to extend prescribed time limits in cases where compliance is disrupted due to *force majeure* circumstances, such as epidemics, natural calamities, or other unforeseen events. This provision was primarily utilized to extend the statutory deadlines under Section 73 of the CGST Act, which deals with the issuance of notices and orders for recovery of tax not paid or short-paid. However, the post-COVID period has seen growing debates around the applicability and misuse of Section 168A as this provision has been controversially used to extend the deadlines for issuing orders under Section 73, particularly for the Financial Years (FY) 2017-18 and 2018-19. Therefore, Understanding the intricacies of Section 168A of the CGST Act is crucial in unraveling the complexities surrounding the extended timelines for GST notices.

“Force Majeure” and its Introduction under GST

The term *force majeure*, which appears to have been borrowed from the Code Napoleon, has received extensive judicial interpretation, particularly in English courts. Over the years, *force majeure* became a widely accepted legal principle dealing with events beyond human control, such as wars, natural calamities, and unforeseen circumstances.

In the Indian legal framework, the doctrine of *force majeure* is closely associated with Section 56 of the Indian Contract Act, 1872, which provides for the *frustration of contracts*. The Hon'ble Supreme Court has interpreted and decided on the scope of *force majeure* through various precedents. In the case of *Alopi Prashad and Sons vs. Union of India* ^[1], the Supreme Court emphasized that commercial hardship alone cannot justify invoking *force majeure* or frustration of contract. The Court clarified the distinction between impossibility and impracticability and reemphasized the principle that frustration must render the

performance of a contract impossible, not merely onerous or inconvenient.

The concept of *force majeure* was invoked in the GST framework primarily during the COVID-19 pandemic. Finance Minister, *Smt. Nirmala Sitharaman* first invoked *force majeure* during the 41st GST Council Meeting as a justification for the Centre's inability to fulfill the GST compensation shortfall. The core argument was that the unprecedented disruption caused by the pandemic rendered compliance and performance impossible under the existing statutory time limits.

Thereafter, the Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 was issued to grant relaxation and relief, because of the COVID-19 pandemic situation. This Ordinance inserted Section 168A in the CGST Act, 2017 empowering the Government to extend the time limit for compliance due to *force majeure*. For said section, the expression "*force majeure*" means a case of war, epidemic, flood, drought, fire, cyclone, earthquake, or any other calamity caused by nature or otherwise affecting the implementation of any of the provisions of the CGST Act.

Hence, by exercising the power conferred under section 168 A of CGST Act, 2017, the Government of India first and foremost issued Notification No. 35/2020 dated 03.04.2020 and subsequently, Notification No. 14/2021 dated 01.05.2021 because of the spread of pandemic COVID-19 across many countries of the world including India, extending the time limit for completion of any proceeding or passing of any order or issuance of any notice, intimation, notification, sanction or approval or such other action, or filing of any appeal, reply or application or furnishing of any report, document, return, statement or such other record. Thereafter, the Government of India while exercising the power conferred by section 168A of CGST Act, 2017 and in partial modification of Notifications No. 35/2020-Central Tax, dated the 3rd April 2020, and Notification No. 14/2021-Central Tax, dated the 1st May, 2021, issued a Notification No. 13/2022 bearing F. No. CBIC-20001/2/2022-GST extending the time limit specified under sub-section (10) of section 73 for issuance of order under subsection (9) of section 73 of the said Act by further 8 months, for recovery of tax not paid or short paid or of input tax credit wrongly availed or utilized, in respect of a tax period for the financial year 2017-18 and 2018-19, up to the 30th day of September 2023 and 31st day of December 2023 respectively and following to the Notification No. 13/2022 dated 05.07.2022, The Government of India, on recommendation of the council issued notification no. 09/2023-Central Tax dated 31st March 2023 extending the time limit specified under subsection (10) of section 73 for issuance of an order under sub-section (9) of section 73 of the said Act, for recovery of tax not paid or short paid or of input tax credit wrongly availed or utilized, relating to the period as specified below ^[2], namely-

- a) For the financial year 2017-18, up to the 31st day of December 2023;
- b) For the financial year 2018-19, up to the 31st day of March 2024;
- c) For the financial year 2019-20, up to the 30th day of June 2024

The Intricacy of Section 73 and Section 168A of CGST Act, 2017

Determination of Tax for Non-Fraudulent Cases U/sec.

Section 73: Section 73 addresses situations where tax has been.

- Not paid,
- Short-paid,
- Erroneously refunded, or
- Input Tax Credit (ITC) has been wrongly availed/utilized.

For cases without fraud or willful misstatement, Section 73(10) specifies a time limit *i.e.* 3 years from the due date of the Annual Return (GSTR-9) for the relevant Financial Year.

For instance, for FY 2017-18, the original due date for filing GSTR-9 was 31st December 2018. However, multiple extensions were granted up to 7th February 2020. Accordingly, the 3-year period under Section 73(10) ended on 7th February 2023.

The Force Majeure Provision (Section 168A): Section 168A empowers the government to extend statutory timelines. It provides,

"Notwithstanding anything contained in this Act, the Government may, on the recommendations of the Council, by notification, extend the time limit specified in, or prescribed or notified under, this Act in respect of actions which cannot be completed or complied with due to *force majeure*."

The provision includes an explanation: "*Force majeure* means a case of war, epidemic, flood, drought, fire, cyclone, earthquake, or any other calamity caused by nature or otherwise affecting the implementation of any provisions of this Act."

The key factors are

- A non-obstante clause, allowing the provision to override other parts of the Act.
- *Force majeure* circumstances must demonstrably hinder compliance ^[3].

Key Characteristics of the term Force Majeure

- The term "*force majeure*" is a French phrase meaning "greater force."
- According to Black's Law Dictionary, *force majeure* refers to events or effects that cannot be anticipated or controlled. It includes both acts of nature (e.g., floods, hurricanes) and acts of people (e.g., wars, riots).
- In the French commercial law tradition, *force majeure* is applied to two scenarios:

First- Legal impossibility - Arising from a change in law or a governmental decree that makes performance illegal.

Second- Physical impossibility - Arising from "Acts of God" or events that materially prevent performance.

As observed in Rene David's "Frustration of Contract in French Law ^[4]", *force majeure* traditionally deals with impossibility, not a mere inconvenience. Difficulty vs. Impossibility, while the *force majeure* clause was invoked by the Government due to difficulties faced during the COVID-19 pandemic, it is important to note that *force majeure* cannot be invoked merely on the grounds of

difficulty. The law is well settled that impossibility of performance-not just difficulty-qualifies as the basis for invoking the *force majeure* doctrine.

This distinction was upheld in the English case of *Tsakiroglou & Co. Ltd. vs. Noble Thorl GmbH* ^[5]. In this case, despite the closure of the Suez Canal, which was a customary route for shipping goods, the court ruled that the contract was not frustrated. The Court emphasized that while the alternative route (around the Cape of Good Hope) was much longer and more expensive, the performance was still possible. The ruling established that impossibility, not mere inconvenience or increased cost, is the threshold for frustration.

In the context of GST, despite the disruptions caused by the pandemic, the government could have demonstrated difficulty, but it could not show impossibility in continuing assessments and raising demands under Section 73 of the CGST Act, post-June 2020. The lockdown was declared in March 2020, but government offices continued to function as essential services, and the lockdown did not last beyond June 2020. Therefore, there was no clear justification as to why the Department could not complete the necessary assessments after June 2020 ^[6].

Initial COVID-19-related extensions applied across GST provisions until June 30, 2021. However, subsequent extensions (till December 2023 for Section 73 orders) appear inconsistent with the reduced impact of COVID-19 restrictions post-2021.

Notifications such as 9/2023-CT have been criticized for lacking a concrete explanation of "impossibility" post-pandemic. Recent GST Council recommendations also fail to justify these extended timelines adequately ^[7].

Moreover, the 47th and 49th GST Council meetings, along with notifications such as Notification No. 9/2023-CT dated 31.03.2023, demonstrate the government's invocation of Section 168A of the CGST Act to extend compliance timelines, citing disruptions caused by the COVID-19 pandemic. However, a detailed analysis raises questions about the validity of using *force majeure* as a justification for these repeated extensions.

Examination of Agenda and Notifications

The 47th GST Council Meeting: The rationale for invoking Section 168A was based on challenges arising from the pandemic, including reduced workforce, staggered office hours, and exemptions granted to certain employees. These factors delayed essential processes such as audits and scrutiny, which could only resume once COVID-related restrictions were lifted.

The 49th GST Council Meeting: During discussions on 18.02.2023, tax administrations requested further extensions of timelines under Section 73 for FY 2017-18, 2018-19, and 2019-20 until 31.12.2024. The Council, acknowledging these operational difficulties, recommended additional extensions to facilitate smoother compliance. The Key Concerns are:

1. Force Majeure Justification: Section 168A enables the government to extend deadlines when a *force majeure* event-such as an epidemic, war, or natural disaster-renders compliance or action impossible. While COVID-19 initially met the criteria for a *force majeure*, subsequent notifications, particularly those issued after 2021, fail to justify how the pandemic continued to

hinder departmental functioning. By 2023, most restrictions had been lifted, raising doubts about the necessity of further extensions.

- 2. Arbitrary Implementation:** Notification No. 9/2023-CT, which extended timelines for issuing orders under Section 73(9) for FY 2018-19 and 2019-20, seems to protect departmental inefficiencies over an extended period. With more than six years since GST's rollout and access to adequate data from returns, reconciliations, and audits, these delays appear to stem from administrative lapses rather than genuine constraints.
- 3. Taxpayer Hardship:** The extensions have resulted in a wave of backdated and vague show cause notices (SCNs), with some invoking Section 74 on dubious grounds of fraud, willful misrepresentation, or suppression of facts. This approach has placed an undue burden on taxpayers, who are forced to respond within limited timeframes and justify their compliance during the relevant financial years, leading to unnecessary disputes.
- 4. Lack of Transparent Reasoning:** Neither the agenda for the 49th GST Council Meeting nor the subsequent notification adequately explains why the prior extensions under Notifications No. 13/2022-CT and No. 9/2023-CT were insufficient. The reasoning appears generic and fails to demonstrate how these timelines required further relaxation, particularly when normalcy had largely returned post-pandemic.

The implications of the agenda are

- 1. Potential Legal Challenges:** The continuous reliance on Section 168A without a credible *force majeure* basis could face judicial scrutiny. Courts have held that mere administrative difficulties do not qualify as *force majeure* unless compliance becomes genuinely impossible.
- 2. Impact on Businesses:** Taxpayers now face increased litigation risks due to unclear allegations and retrospective actions. This undermines the trust in the GST framework, which was intended to simplify taxation ^[8].

Judicial Scrutiny: A Growing Legal Debate

The invocation of Section 168A without a valid *force majeure* justification has been challenged in several courts: In the case of *M/s SRSS Agro Pvt. Ltd. vs. Union of India (Gujarat High Court)* ^[9]. The petitioner argued that Notification No. 9/2023 lacks any special circumstances required for invoking Section 168A and the Hon'ble Gujarat High Court was pleased to issue notice, wherein, it was mentioned that the notification dated 31.03.2023 extending the time limit specified under Section 73 of the Act by virtue of the powers under Section 168A of the Act is unjustified as the extension has to be for special circumstances.

In *M/s New India Acid Baroda Pvt. Ltd. vs. Union of India* ^[10]. It was contended that Notification No. 9/2023-CT dated 31.03.2023, which extended the time limit for issuance of show-cause notices under Section 73(10) of the Central Goods and Services Tax Act, 2017, did not provide any justification or valid grounds for invoking Section 168A of the Act. The argument highlighted that by 2022, the COVID-19 pandemic had ceased to be a relevant factor, and

therefore, Section 168A-which applies in cases of *force majeure*-could not be legitimately invoked to justify the extension.

Further, attention was drawn to the explanation of Section 168A of the Act, which specifies the circumstances under which it can be applied, such as war, epidemic, or natural calamities. It was submitted that none of these contingencies existed when the impugned notification was issued, rendering the extension arbitrary and beyond the scope of the law.

Considering these arguments, the court granted *ad-interim relief*, directing that no final order should be passed by the respondent authority in connection with show-cause notices issued during the extended period under the impugned notification without prior permission of the court. This interim relief will remain effective until the next date of hearing.

In *M/s Indus Towers Limited vs. Union of India* (Guwahati High Court) ^[11]. It was argued that Notification No. 9/2023 dated 31.03.2023, issued under the powers conferred by Section 168A of the Central Goods and Services Tax Act, 2017, lacked a valid basis for invoking the concept of *Force Majeure*. The petitioner contended that after 2022, the COVID-19 pandemic no longer existed, making it inappropriate to rely on Section 168A to justify the extension of time limits.

An interesting observation highlighted in the interim order was the reference to the order dated 10.01.2022, passed by the Hon'ble Supreme Court of India in *Suo Motu Writ Petition [C] No. 3 of 2020*. In that order, the Supreme Court, after carefully considering all relevant factors, extended the period of limitation only until 28.02.2022. This demonstrated that even the Supreme Court while addressing the pandemic's impact, recognized no necessity to extend limitation periods beyond early 2022.

The petitioner argued that in light of the Supreme Court's order, there was no justification for the GST Council to rely on the COVID-19 pandemic as a reason to further extend the time limits under Section 73(10) of the CGST Act, 2017. Consequently, the extension granted by Notification No. 9/2023 was arbitrary and unwarranted ^[12].

Conclusion & Suggestions

The prolonged use of Section 168A of the CGST Act, 2017, initially meant for exceptional circumstances like COVID-19, has raised concerns. Invoking the pandemic beyond 2022 lacks legal and factual justification, as no such emergency persisted. The Supreme Court's *Suo Motu* Order extended limitation periods only until 28.02.2022, affirming compliance was no longer impacted.

However, subsequent notifications, like 9/2023-CT, arbitrarily extended deadlines for FY 2018-19 and FY 2019-20, citing administrative difficulties despite normal operations resuming by mid-2022. These extensions, along with vague and backdated show-cause notices, burden taxpayers and expose inefficiencies in tax administration.

Section 168A meant as temporary relief, cannot justify perpetual delays. Its misuse undermines taxpayer rights and contradicts GST principles of transparency and timeliness. The government must exercise restraint, enforce statutory deadlines, and enhance administrative efficiency to maintain trust in tax administration.

To address concerns about the invocation of Section 168A, several key measures should be implemented:

Legislative Reform: Clear legislative guidelines are essential to prevent misuse of Section 168A beyond genuine *force majeure* events. A sunset clause should be introduced to limit the duration of emergency provisions.

Judicial Oversight: Courts must rigorously review the invocation of Section 168A to ensure fairness and protect taxpayer rights. High courts and the Supreme Court should provide definitive rulings on the validity of post-pandemic extensions for consistent interpretation.

Administrative Efficiency: Tax authorities must enhance internal processes to meet statutory timelines for notices and orders under Section 73(10). Implementing digital tracking mechanisms can improve accountability and prevent unnecessary extensions.

Protection of Taxpayer Rights: Clear guidelines for issuing notices are needed to prevent vague or backdated show-cause notices. A stronger grievance redressal mechanism should allow taxpayers to challenge unjustified extensions effectively.

Future Policy Recommendations: In future emergencies, extensions should be based on objective criteria, not administrative convenience. The GST Council should establish a standardized framework for invoking *force majeure* provisions, ensuring consistency, fairness, and transparency in tax administration.

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