

PART-I

FAKE INVOICE UNDER GST - DETAILED ANALYSIS

The term Fake Invoice is not defined anywhere in GST Act. In common parlance it means invoices issued by an entity without actual supply of goods or services or payment of GST. In other words, GST collected on such invoices is neither paid nor intended to be paid.

Following are the main reasons behind issue of fake invoice:

- To evade GST on taxable output supply
- Converting ITC into cash
- To get more income tax benefits
- Diverting business funds to other business
- Money Laundering

How to know fake invoice?

First Check the GST registration no of the supplier

Secondly, whether the supplier has raised the invoice as per GST Act

Thirdly, whether the supplier has charged the applicable rate of GST in the invoice supplied to the buyer

Finally use control points like lower rate, insist immediate payment etc. to avoid fake invoices

In spite of taking abundant precaution to prevent the issue of fake invoices some entities do engage in the same fraudulent activity again. Under such circumstances we have to ensure the following:

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- Database for those suppliers who are involving in issue of fake invoice to be created and check periodically
- Ensure whether the fraudulent suppliers get themselves re registered under GST with different number, it is mandatory to have physical verification
- List out those entities that availed ITC based on fake invoices:
- To prevent these fraudulent entities from obtaining undue credit, it is necessary to block the Input Tax Credit (ITC) of such persons, including their beneficiaries falling under the jurisdiction of other GST authorities.
- Invoke provisional attachment of property and bank accounts u/s 83 of read with Rule 159
- Check the criminal involvement of Directors
- Check E-way bills generated and transaction details in GST returns differ
- Check whether Fake vehicle numbers mentioned on e-way bills and invoice data. Verifying details of vehicles with records with the Regional Transport Office (RTO)

A fake GST invoice is usually prepared without the actual supply of goods or services to the registered GST supplier. GST charged on those invoices is neither paid nor intended to be paid.

As we already aware that supplies includes sale, transfer, exchange, barter, license, rental, lease and disposal. If a person undertakes either of these transactions during the course or furtherance of business for consideration, it will be covered u/ 7 of CGST Act

Under Section 31 to 34 of CGST Act, 2017 along with Tax Invoice, Credit and Debit Note Rules are the governing law for the purpose of documents of supply of Goods/ Services. Apart from the above one more documents required by

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department is Toll Receipt to prove movement of goods. However the same is not listed out in Sec 31 to Sec 34.

Penalty for issue of fake invoices

Sec 73(5) - pay the amount of tax along with interest payable thereon under section 50 on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

Sec74(5) - pay the amount of tax along with interest payable under section 50 and a penalty equivalent to 15% of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

Penalty u/s 122 in case of Issues an invoice without supply of goods or services or both in violation of the provisions of the Act

Penalty equivalent to amount of tax evaded or ITC availed or passed on will be levied on a person committing any of the following offences.

- Goods / services / both are supplied without issue of invoices / issue of incorrect or false invoice.
- Issue of invoice / bill without supply of goods / services / both
- Takes / utilises input tax credit without actual receipt of goods / services
- Takes / distributes Input tax credit in contravention to provisions of Section 20 of CGST Act, 2017

If any penalty is imposed under section 73 or section 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act - Sec 75(13)

The Department has clarified vide Circular No. 171/03/2022-GST dated 6.7.2022 the following points under which condition, which section will apply for penalty on Supplier and Recipient.

Issue

A registered person “A” has issued tax invoice to another registered person “B” without any underlying supply of goods or services or both, whether such transaction will be covered as “supply” under section 7 of CGST Act and 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.

Clarification

An issuance of tax invoice by the registered person ‘A’ to registered person ‘B’ without the underlying supply of goods or services or both, therefore, such an activity does not satisfy the criteria of “supply”, as defined under section 7 of the CGST Act. As there is no supply by ‘A’ to ‘B’ in respect of such tax invoice in terms of the provisions of section 7 of CGST Act, no tax liability arises against ‘A’ for the said transaction, and accordingly, no demand and recovery is required to be made against ‘A’ under the provisions of section 73 or section 74 of CGST Act in respect of the same. Besides, no penal action under the provisions of section 73 or section 74 is required to be taken against ‘A’ in respect of the said transaction.

Issue

Any penal action can be taken against registered person ‘A’ in such cases

Clarification

The registered person ‘A’ shall, however, be liable for penal action under section 122 (1)(ii) of the CGST Act for issuing tax invoices without actual supply of goods or services or both.

Issue

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. 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. 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.

Clarification

Registered person 'B' has availed and utilized fraudulent ITC on the basis of the said tax invoice, without receiving the goods or services or both, in contravention of the provisions of section 16(2)(b) of CGST Act, he shall be liable for the demand and recovery of the said ITC, along with penal action, under the provisions of section 74 of the CGST Act, along with applicable interest under provisions of section 50 of the said Act.

Further, as per provisions of section 75(13) of CGST Act, if penal action for fraudulent availment or utilization of ITC is taken against 'B' under section 74 of CGST Act, no penalty for the same act, i.e. for the said fraudulent availment or utilization of ITC, can be imposed on 'B' under any other provisions of CGST Act, including under section 122.

Issue

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. 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.

Clarification

ITC availed by 'B' in his electronic credit ledger on the basis of tax invoice issued by 'A', without actual receipt of goods or services or both, has been utilized by 'B' for passing on of input tax credit by issuing tax invoice to 'C' without any

underlying supply of goods or services or both. As there was no supply of goods or services or both by 'B' to 'C' in respect of the said transaction, no tax was required to be paid by 'B' in respect of the same. The input tax credit availed by 'B' in his electronic credit ledger on the basis of tax invoice issued by 'A', without actual receipt of goods or services or both, is ineligible in terms of section 16(2)(b) of the CGST Act. In this case, there was no supply of goods or services or both by 'B' to 'C' in respect of the said transaction and also no tax was required to be paid in respect of the said transaction. Therefore, in these specific cases, no demand and recovery of either input tax credit wrongly/ fraudulently availed by 'B' in such case or tax liability in respect of the said outward transaction by 'B' to 'C' is required to be made from 'B' under the provisions of section 73 or section 74 of CGST Act.

However, in such cases, 'B' shall be liable for penal action both under section 122(1)(ii) and section 122(1)(vii) of the CGST Act, for issuing invoices without any actual supply of goods and/or services as also for taking/ utilizing input tax credit without actual receipt of goods and/or services.

Our Comments

In our opinion issuance of tax invoice by the registered person to other registered person without supply of goods or services or both does not satisfy the criteria of "supply", as defined under section 7 of the CGST Act. Since there is no supply by one registered person to other registered person in respect of such tax invoice in terms of the provisions of section 7 of CGST Act, no tax liability arises against Issuer of Fake invoice for the said transaction, and accordingly, no demand and recovery is required to be made against issuer of fake tax invoice under the provisions of section 73 or section 74 of CGST Act in respect of the same.

No penal action under the provisions of section 73 or section 74 is required to be taken against registered person in respect of the said transaction.

On the other hand Section 122 will apply for penalty regarding issue of invoice without supply of goods or services.

PART-II

FREQUENTLY ASKED QUESTIONS

1. What constitutes a fake invoice?

An invoice issued without actual supply of goods or services or GST payment.

2. How can one identify a fake invoice?

Verify GST registration, invoice details, and control points like immediate payment demands.

3. What penalties apply for issuing fake invoices?

Penalties equal to tax evaded or ITC availed under Section 122, or prosecution in severe cases.

4. Are fake invoices considered a "supply"?

No, they don't meet the criteria of a supply under Section 7 of the CGST Act.

5. Can ITC be availed on fake invoices?

No, fraudulent ITC availed on fake invoices is recoverable with penalties.

6. What is the most common reason for issuing fake invoices?

To claim fraudulent ITC or evade GST on taxable supplies.

7. How can taxpayers avoid fake invoices?

By verifying GST registration, invoice details, and payment records of suppliers.

8. What is the penalty for availing ITC on fake invoices?

Penalty under Section 74 includes full recovery of ITC with interest and an equivalent penalty.

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9. Can directors of a company be held liable for fake invoices?

Yes, directors may face legal action, including prosecution.

10. What happens if fake invoices are detected during an audit?

Immediate suspension of ITC, provisional attachment of properties, and penalties.

11. Are there specific sectors prone to fake invoices?

Yes, sectors like trading, manufacturing, and construction often face such issues.

12. What role does e-way bill data play in identifying fake invoices?

E-way bill discrepancies, such as fake vehicle numbers, help detect fraud.

13. Can criminal charges be filed for issuing fake invoices?

Yes, under Sections 132(1)(b) and (c) of the CGST Act, imprisonment may apply.

14. What are the signs of a fake GST supplier?

Non-existent business premises, unverified GSTIN, and inconsistent billing practices.

15. How can the public report fake invoices?

Through the CBIC helpline or GST grievance redressal portal.

16. What is the role of AI in detecting fake invoices?

AI systems flag suspicious transactions based on mismatches in GST returns.

17. How are buyers affected by fake invoices?

Buyers face ITC denial, penalties, and reputational damage.

18. Can fake invoices lead to GST registration cancellation?

Yes, under Rule 21, fraudulent activity may result in deregistration.

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19. How does Section 122(1)(ii) apply to fake invoices?

It imposes penalties for issuing invoices without actual supplies.

20. What is the impact of fake invoices on ITC reconciliation?

Mismatched data between GSTR-2B and GSTR-3B highlights such discrepancies.

21. Are refunds claimed on fake invoices recoverable?

Yes, the GST department can recover fraudulently claimed refunds.

22. What preventive measures can businesses take?

Regular supplier audits, background checks, and using GST compliance software.

23. How does GSTN assist in detecting fake invoices?

GSTN cross-verifies data across returns and e-way bills to flag anomalies.

24. Can a taxpayer claim ITC if the supplier is later found to issue fake invoices?

No, ITC claimed on such invoices will be reversed.

25. What recent case laws address fake invoices?

Cases like Bhawani Singh Shekhawat vs UOI emphasize the liability for fraudulent ITC claims.

PART-III

RELATED CIRCULAR/NOTIFICATIONS/CASE LAWS

Circular No. 171/03/2022-GST-Clarification On Demand & Penalty On Fake Invoices

1. Penal action against a person issuing fake Invoices without an unlying supply of goods or services

Issue

Where a registered person “A” has issued a tax invoice to another registered person “B” without any underlying supply of goods or services or both, whether such transaction will be covered as “supply” under section 7 of the CGST Act.

Further, whether any demand and recovery can be made from ‘A’ in respect of such transaction under any of the following sections of the CGST Act.

section 73: Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or any wilful misstatement or suppression of facts

section 74: Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful-misstatement or suppression of facts.

Also, whether any penal action can be taken against the registered person ‘A’ in such cases.

Clarification

Registered person “A” has only issued a tax invoice to registered person ‘B’ without any underlying supply of goods or services.

As there is no supply involved from “A” to “B”, therefore, such an activity does not satisfy the criteria of “supply” under section 7 of the CGST Act.

Accordingly, no tax liability arises against ‘A’ for such transaction, and therefore, no demand and recovery can be made against ‘A’ under section 73 or section 74 of the CGST Act.

Besides, no penal action under the provisions of section 73 or section 74 is required to be taken against ‘A’ in respect of the said transaction.

However, ‘A’ shall be liable for penal action under section 122 (1)(ii) of the CGST Act for issuing tax invoices without actual supply of goods or services or both.

2. Penal Action against person availing ITC on the basis of Fake invoice without receiving any goods or services

Issue

On fake invoices issued by a registered person “A”, registered person “B” avails ITC without receiving an actual supply of goods or services.

“B” issues genuine invoices to his buyers along with an underlying supply of goods or services.

However, for payment of such output liability arising from genuine transactions, “B” utilizes ITC availed on the fake invoices.

In such cases, Whether ‘B’ will be liable for the demand and recovery of the said ITC, along with penal action, under section 73 or 74 or any other provisions of the CGST Act.?

Clarification

Registered person 'B' has availed and utilized fraudulent ITC on the basis of the fake invoices without receiving the goods or services.

Such ITC is availed in contravention of section 16(2)(b) of the CGST Act.

Therefore, "B" shall be liable for the demand and recovery of such ITC along with penal action under section 74 of the CGST Act.

Interest shall also apply under section 50 of the said Act.

Please note that as per section 75(13) of CGST Act, if penal action is taken against "B" under Section 74 for fraudulent availment or utilization of ITC 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.

3. Penal action against a person who avails ITC on fake invoices and in turn passes on such ITC through fake invoices

Registered person 'A' issued tax invoice to registered person 'B' without any underlying supply of goods or services.

In turn, 'B' avails ITC on basis of such fake invoices without receiving an actual supply of goods and services and further passes on such fake ITC to another registered person 'C' by issuing fake invoices.

Whether 'B' will be liable for the demand and recovery and penal action under section 73 or 74 or any other provisions of the CGST Act.

Clarification

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.

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.

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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.

Also, ITC availed by “B” on the basis of a fake invoice issued by “A” is ineligible in terms of section 16 (2)(b) of the CGST Act.

With respect to the transaction of supply from “B” to “C”, no tax is payable as there is no supply.

Therefore, in these specific cases, no demand and recovery 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.

However, ‘B’ shall be liable for penal action both under section 122(1)((ii) and section 122(1)(vii) 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.

Under Section 122(1)(ii), 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”

Under Section 122(1)(vii), 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;”

Conclusion

GST authority may adopt the above laid fundamental principles to decide demand and penal action against a person for such unscrupulous activity.

However, actual action will depend upon the specific facts and circumstances of the case. Any case may involve a complex mixture of the above scenarios or even may not be covered by any of the above scenarios.

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Any person who has retained the benefit of transactions specified under Section 122(1A) of the CGST Act, and at whose instance such transactions are conducted, shall also be liable for penal action.

Also, in case of wrongful/ fraudulent availment or utilization of ITC or issuance of the fake invoice, leading to wrongful availment or utilization of ITC or refund of tax, provisions of section 132 (Punishment for certain offenses.) of the CGST Act may also be invocable based on facts and circumstances of each case.

Thanks and Regards

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