

SMART APPROACH TO DRAFT RESPONSES FOR SCN AND SUMMONS

Presented By :

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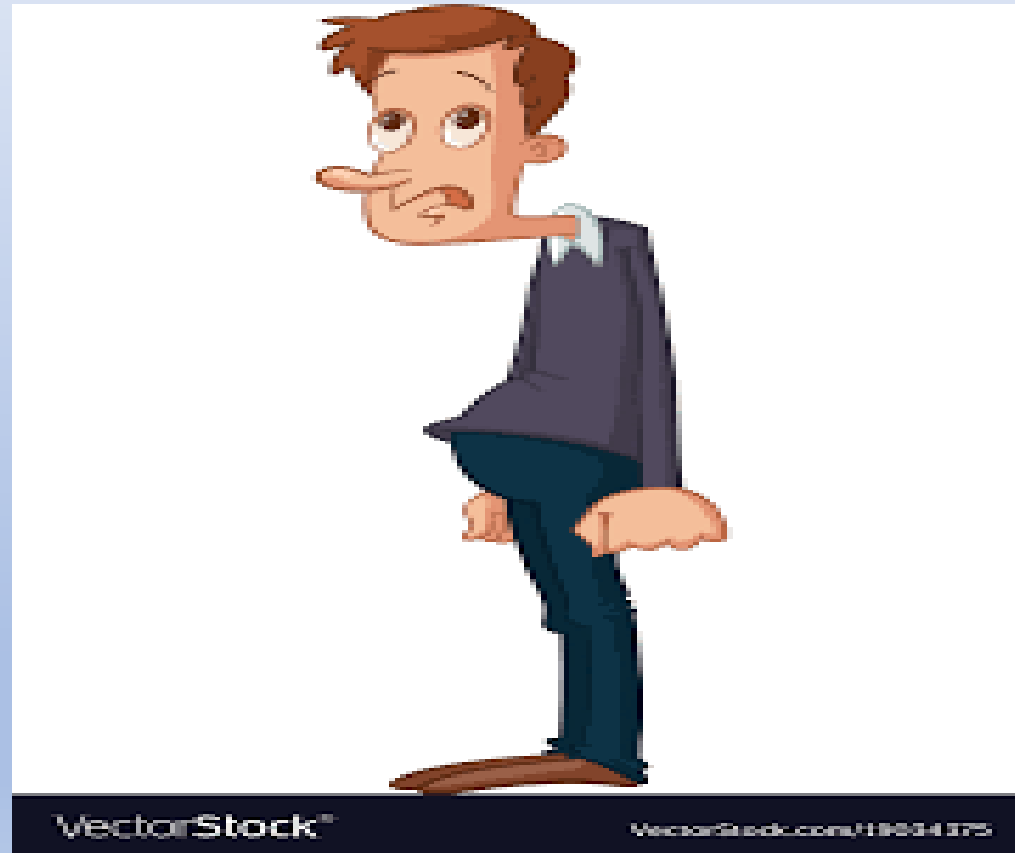
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Legal Provisions

- Chapter XII- Assessment (Covering Sections 59-64)
- Chapter XIII – Audit (Covering Section 65-66)
- Chapter XIV – Inspection, Search , Seizure and Arrest(67-72)
- Chapter XV – demand and recovery (Covering Section 73-84)

When Communication/Letter/Notice received by the tax payer.



Preliminary Observation

- **Section 160. Assessment proceedings, etc., not to be invalid on certain grounds**
 - 1) No assessment, re-assessment, adjudication, review, revision, appeal, rectification, notice, summons or other proceedings done, accepted, made, issued, initiated, or purported to have been done, accepted, made, issued, initiated in pursuance of any of the provisions of this Act shall be invalid or deemed to be invalid merely by reason of any mistake, defect or omission therein, if such assessment, re-assessment, adjudication, review, revision, appeal, rectification, notice, summons or other proceedings are in substance and effect in conformity with or according to the intents, purposes and requirements of this Act or any existing law.

Preliminary Observation

- **Section 160. Assessment proceedings, etc., not to be invalid on certain grounds**

(2) The **service** of any notice, order or communication **shall not be called in question**, if the notice, order or communication, as the case may be, has already been acted upon by the person to whom it is issued or **where such service has not been called in question at** or in the earlier proceedings commenced, continued or finalised pursuant to such notice, order or communication.

Initial Check List

- Document Identification Number(DIN)
- Pre Communication
- Valid Jurisdiction
- Time Limit
- Legal provisions

Important points to remember

- Be Patient – Study the communication/Letter/Summon/Notice etc
- Update on the legal provisions before starting the draft reply
- Language should be clear and simple
- Presentation should be taken due care
 - Paragraphs /Sub paragraphs
 - Proper Alignment
 - Margins
 - Highlight the important points
 - Bullets/bold/italics – should be used to get the maximum attention on important points
- Personal hearing is very important-
 - Properly dressed Up
 - Submission/Arguments Notes should be prepared
- Preparation for the personal hearing/arguments

Document Identification Number(DIN)

- Circular No. 122/41/2019-GST dated 05.11.2019
 - Search Authorisation
 - Summon
 - Arrest Memos
 - Inspections
 - Letter for inquiry etc
- Circular No. 128/47/2019-GST dated 23.12.2019
 - For All Communications.

Exclusions

- (i) when there are technical difficulties in generating the electronic DIN, or
- (ii) when communication regarding investigation/enquiry, verification etc. is required to issued at short notice or in urgent situations and the authorized officer is outside the office in the discharge of his official duties.

4. The Board also directs that any specified communication which does not bear the electronically generated DIN and is not covered by the exceptions mentioned in para 3 above, shall be treated as invalid and shall be deemed to have never been issued.

Enquiry /Investigation

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graph TD; A[Enquiry /Investigation] --> B[SCN]; B --> C[Order]; C --> D[1st Appeal]; D --> E[Tribunal and further Judiciary];
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SCN

Order

1st Appeal

Tribunal and further Judiciary

Pre Communication

- Rule 142- Notice and order for demand of amounts payable under the Act.-
(1) The proper officer shall serve, along with the
- [(1A) The proper officer shall, **before service of notice** to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, **shall communicate** the details of any tax, interest and penalty as ascertained by the said officer, in Part A of FORM GST DRC-01A.]
- [(2A) Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of FORM GST DRC-01A.]

Jurisdiction

- Section 2(91) “proper officer” in relation to any function to be performed under this Act, means the Commissioner or the officer of the central tax who is assigned that function by the Commissioner in the Board;
- Circular No. 3/3/2017 – , Dated the 5th July, 2017,
GST- Proper officer relating to provisions other than Registration and Composition under the Central Goods and Services Tax Act, 2017–Reg.
- Circular no. 31/05/2018 dated 09.02.2018.(For amendment in earlier circular)

- Section 70. **Power to summon persons to give evidence and produce documents.**—

(1) The **proper officer** under this Act shall have power to summon **any person** whose attendance he considers necessary either **to give evidence or to produce a document** or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908.

(2) Every such inquiry referred to in sub-section (1) shall be deemed to be a **“judicial proceedings”** within the meaning of section 193 and section 228 of the Indian Penal Code.

- Section 70 talks about the power of PO to summon person and demand evidences during the course of any inquiry. The word 'inquiry' is having a thin line difference with the term 'enquiry'. The dictionary meaning of both the terms is as under:
- Enquiry is used for the general sense of 'an act of asking for information' while inquiry is reserved for the meaning 'a formal investigation'.
- Section 27(CPC). Summons to defendants .-Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed.
- **Section 28(CPC). Service of summons where defendant resides in another State.**
- The said section provides summons may be sent for service in another state to such court and in such manner as prescribed by the rules in force in that state.
- Further, it has been provided that where the language of the summons sent for service to another state is different from the language from where the said summons is sent, a translation, in Hindi or English shall also be sent together.

- Judicial Proceeding:
- As per Section 70(2) of the CGST Act, any inquiry referred to in Section 70 (1) of the Act shall be deemed to be a "judicial proceedings" within the meaning of Section 193 and Section 228 of the IPC.
- Section 193 of IPC: **Punishment for false evidence**
- Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding shall be punished with an imprisonment of 0-7 years and fine.
- Section 228 of IPC: **Intentional insult or interruption to public servant sitting in judicial proceeding**
 - **Whoever intentionally offers any insult,**
 - **Or causes any interruption to any public servant,**
 - **While such public servant is sitting in any stage of a judicial proceeding**Shall be punished with an imprisonment of 0-6 months or fine of up to Rs. 1,000 or with both.

- Responsibilities of the person so summoned: [Source: CBIC FAQ's]
 - A person who is summoned, legally bound to attend either in person or by an authorized representative and he is bound to state the truth before the officer who has issued the summon upon any subject which is the subject matter of examination and to produce such documents and other things as may be required.
- Consequences of non-appearance to summons: [Source: CBIC FAQ's]
 - The proceeding before the official who has issued summons is deemed to be a judicial proceeding. If a person does not appear on the date when summoned without any reasonable justification, he can be prosecuted under Section 174 of the Indian Penal Code (IPC). If he absconds to avoid service of summons, he can be prosecuted under Section 172 of the IPC and in case he does not produce the documents or electronic records required to be produced, he can be prosecuted under Section 175 of the IPC.
 - Further, in case he gives false evidence, he can be prosecuted under Section 193 of the IPC. In addition, if a person does not appear before a CGST/ SGST officer who has issued the summon, he is liable to a penalty upto 25,000 under Section 122(3)(d) of the CGST Act. (General penalty)

Guidelines for issue of summons: [Source: CBIC FAQ's and F. No. 207/07/2014-CX-6 dated January 20,2015]

- The CBIC in the Department of Revenue, Ministry of Finance has issued guidelines from time to time to ensure that summons provisions are not misused in the field. Some of the important highlights of these guidelines are given below:
 1. Summon is to be issued as a last resort where assesses are not co-operating and this section should not be used for the top management;
 2. The language of the summons should not be harsh and legal which causes unnecessary mental stress and embarrassment to the receiver;
 3. Summons by Superintendents should be issued after obtaining prior written permission from an officer not below the rank of Assistant Commissioner with the reasons for issuance of summons to be recorded in writing;
 4. Where for operational reasons, it is not possible to obtain such prior written permission, oral/ telephonic permission from such officer must be obtained and the same should be reduced to writing and intimated to the officer according such permission at the earliest opportunity;

- 5. In all cases, where summons is issued, the officer issuing summons should submit a report or should record a brief of the proceedings in the case file and submit the same to the officer who had authorized the issuance of summons;
- 6. Senior management officials such as CEO, CFO, General Managers of a large company or a Public Sector Undertaking should not generally be issued summons at the first instance. They should be summoned only when there are indications in the investigation of their involvement in the decision-making process which led to loss of revenue.

Precautions to be observed while issuing summons [Source: CBIC FAQ's]

- The following precautions should generally be observed when summoning a person: -
 - (a) A summon should not be issued for appearance where it is not justified. The power to summon can be exercised only when there is an inquiry being undertaken and the attendance of the person is considered necessary.
 - (b) Normally, summons should not be issued repeatedly. As far as practicable, the statement of the accused or witness should be recorded in minimum number of appearances.
 - (c) Respect the time of appearance given in the summons. No person should be made to wait for long hours before his statement is recorded except when it has been decided very consciously as a matter of strategy.
 - (d) Preferably, statements should be recorded during office hours; however, an exception could be made regarding time and place of recording statement having regard to the facts in the case.

Cross Empowerment

- Section 3: Officers under this Act.- The Government shall, by notification, appoint the following classes of officers for the purposes of this Act, namely:—
 - a) Principal Chief Commissioners of Central Tax or Principal Directors General of Central Tax,
 - b) Chief Commissioners of Central Tax or Directors General of Central Tax,
 - c) Principal Commissioners of Central Tax or Principal Additional Directors General of Central Tax,
 - d) Commissioners of Central Tax or Additional Directors General of Central Tax,
 - e) Additional Commissioners of Central Tax or Additional Directors of Central Tax,
 - f) Joint Commissioners of Central Tax or Joint Directors of Central Tax,
 - g) Deputy Commissioners of Central Tax or Deputy Directors of Central Tax,
 - h) Assistant Commissioners of Central Tax or Assistant Directors of Central Tax, and
 - i) any other class of officers as it may deem fit:

Provided that the officers appointed under the Central Excise Act, 1944 shall be deemed to be the officers appointed under the provisions of this Act

- Section 4 -Appointment of Officers.—

- (1) The Board may, in addition to the officers as may be notified by the Government under section 3, appoint such persons as it may think fit to be the officers under this Act.
- (2) Without prejudice to the provisions of sub-section (1), the Board may, by order, authorise any officer referred to in clauses (a) to (h) of section 3 to appoint officers of central tax below the rank of Assistant Commissioner of central tax for the administration of this Act.

- 5. Powers of officers under GST
 - (1) Subject to such conditions and limitations as the Board may impose, an officer of central tax may exercise the powers and discharge the duties conferred or imposed on him under this Act.
 - (2) An officer of central tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of central tax who is subordinate to him
 - (3) The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other officer who is subordinate to him.
 - (4) Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other officer of central tax.

- **Section 6 - Authorisation of officers of State tax or Union territory tax as proper officer in certain circumstances.—**

(1) Without prejudice to the provisions of this Act, the officers appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act are authorised to be the proper officers for the purposes of this Act, subject to such conditions as the Government shall, on the recommendations of the Council, by notification, specify

(2) Subject to the conditions specified in the notification issued under sub-section (1),—

(a) where any proper officer issues an order under this Act, he shall also issue an order under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as authorised by the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act, as the case may be, under intimation to the jurisdictional officer of State tax or Union territory tax;

- **Section 6 of SGST Act is also similar worded for empowerment of Central Tax Officers**
- *Section 6(2) provides for issuance of an order by central tax officer for state tax in terms of SGST Act but the words “....as authorised by the State Goods and Services Tax Act.....”*
- *Further ‘...under intimation to the jurisdictional officers of state....’ mentioned in Section 6(2)(b) indicate that GST law does envisage dual control on assessee by both Central and State tax officers. Hence allocation of units between State and Centre as per GST Council decision should be done by way of proper notification when two laws (CGSTA and SGSTA) and set of officers are involved.*
- a formal approval in the form of a notification/circular citing the provision of GST law needs to issued and certain powers like refunds sanction, scrutiny , assessment etc should be exclusively entrusted to the officers of state or Central to whom the unit is allotted keeping in view of fact that there is division of units between the Central and State jurisdiction.

Limitation Period

- Three years in normal cases u/s 73.
- Five years in fraud cases u/s 74.
- Period of 3 or 5 years to be reckoned from the due date of filing annual return.
- Notice to be issued at least three/six months prior to limitation period for proceedings u/s 73 /74 respectively.
- No time limit for orders to be issued u/s 76 but order to be issued within one year from the date of issue of SCN.

Adjudication u/s 73

- ☐ Most of the assessment/adjudication of normal cases (other than fraud) would be taken up under this section only.
- ☐ Causes – tax deficiency, excess refund released & excess ITC claimed etc.
- ☐ Show cause notice to be issued stating the facts and amount of tax short paid/not paid or excess ITC or refund claimed.
- ☐ Statement can also be issued subsequent to SCN for subsequent tax period on the same issue.
- ☐ Person concerned is free to declare tax deficiency voluntarily i.e. before issue of SCN. No further proceedings on the issue if payment is acceptable to the authorities. Person to intimate in writing.
- ☐ If tax deficiency is noticed after voluntary declaration, then SCN for balance amount can be issued.
- ☐ Person is free to deposit the amount of tax deficiency stated in the SCN with interest within 30 days of the issue of SCN. Benefit of waiving penalty still available barring few cases.
- ☐ Order/DRC-07 to be started after 30 days of issue of notice with tax, interest and penalty due.
- ☐ Proceedings to be concluded within 3 years of filing of annual return

Adjudication u/s 74

- ❑ Assessment/adjudication under this section will be framed in case of fraud only.
- ❑ Causes – Same as in section 73 i.e. tax deficiency, excess refund released & excess ITC claimed etc.
- ❑ Show cause notice to be issued stating the facts and amount of tax short paid/not paid or excess ITC or refund claimed.
- ❑ Statement can also be issued subsequent to SCN for another tax period on the same issue but will be treated as issued u/s 73.
 - ❑ Person concerned is free to declare tax deficiency voluntarily i.e. before issue of SCN. Penalty amount to be reduced to 15%; no further proceedings on the issue. Person to be intimated in writing.
- ❑ If tax deficiency is noticed after voluntary declaration, then SCN for balance amount can be issued.

- ☐ Person is free to deposit the amount of tax deficiency stated in the SCN with interest and penalty amounting to 25% within 30 days of the issue of SCN.
- ☐ Order to be started after 30 of issue of notice with for tax, interest and penalty due.
- ☐ If payment of tax & interest is made within 30 days of communication of order (DRC-07), then penalty amount is reducible by 50% (penalty also to be paid).
- ☐ Proceedings to be concluded within 5 years of filing of annual return.

Adjudication u/s 76

- ❑ SCN under this section can be issued if tax has been collected but not deposited.
- ❑ Amount of penalty is equivalent to tax. Interest to be levied from the date of collection of the amount representing tax.
- ❑ Order to be issued within one year of issue of notice.
- ❑ Period of stay by Court or Tribunal to be dies-non.
- ❑ Excess amount, if any, deposited before issue of order to be refunded or to be credited in the Fund.

(b) where a proper officer under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act has initiated any proceedings on a subject matter, no proceedings shall be initiated by the proper officer under this Act on the same subject matter.

(3) Any proceedings for rectification, appeal and revision, wherever applicable, of any order passed by an officer appointed under this Act shall not lie before an officer appointed under the State Goods and Services Tax Act or the Union Territory Goods and Services Tax Act .

Show Cause Notice (SCN)

- Show cause notice shortly called as ‘SCN’ is a document served by the department on a person asking him to explain with reasons as to why a particular course of action should not be taken against him. It is similar to an opportunity given to a person who is proposed to be charged with violation of law by giving him sufficient opportunity to submit his view point as to why he should not be proceeded against for the alleged violation.
- In GST, as with every legislation, this notice is called “show cause notice” and this show cause notice is a mandatory requirement for raising demands. Any other communication, letter, endorsement, suggestion or advisory from tax Department cannot be considered to be a show cause notice.
- It has also been held that, a notice to show cause has to be issued under specific sections of law with all the essential ingredients

Show Cause Notice (SCN)

- Show cause notice is the foundation in the matter of recovery of duty, penalty and interest and if a particular point is not raised in the show cause notice, it cannot be raised later at any of the appellate stage(s).

Reasons for SCN

- The Show Cause Notice (SCN) for (i) recovery of statutory dues (ii) imposition of penalty (iii) recovery of interest (iv) confiscation of assets or (v) or any proceedings for deprivation of any properties (both moveable and immoveable) or for taking any coercive action against a person –like attachment of Property/ Bank Account.
- The Supreme Court in *Golak Patel Volkart Limited Vs. CCE MANU/SC/0400/1987*, holds that statutory scheme requires
- (a) issue of SCN by the Central Excise Officer,
- (b) Reply to SCN and
- (c) PH for final adjudication of SCN

- **SCN is a condition precedent to raising a demand.**
- Supreme Court viz. CCE Vs. Mehta & Co. MANU/SC/0107/2011
- UOI. Vs. Madhumilan Syntex Pvt. Ltd MANU/SC/0550/1988. Any order passed or contemplated action without service of SCN and without affording an opportunity of personal hearing shall be in violation of principle of natural and, therefore, shall be void and not voidable.

Under the Goods and Services Tax Law, there are multiple situations where we encounter the provision for issuance of show cause notice. These situations are as tabulated below.

| S.No | Situations | Form |
|-------------|-----------------------------------------------------------------------------|-------------|
| 1 | Denial of option to pay tax under Section 10 | GST-CMP-05 |
| 2 | For cancellation of regular registration | GST-REG-17 |
| 3 | For rejection of application for revocation of cancellation of registration | GST-REG-23 |
| 4 | For cancellation of provisional registration | GST-REG-27 |
| 5 | For disqualification of GST Practitioner | GST-PCT-03 |
| 6 | Rejection of refund claim | GST-REF-08 |
| 7 | Assessment under Section 63 | GST-ASMT-14 |
| 8 | Show cause notice under Section 73 | |
| 9 | Show cause notice under Section 74 | |
| 10 | Show cause notice under Section 76 | |

What's next after Receipt of Show Cause notice

- Date of Receipt
- Time limit to reply for Show Cause notice
- Reading of A Show Cause Notice
- Analysis of Issue with Client and Collection of further Details
- Drafting of Response
- Coverage of Issues
- Reference to Provisions of Law
- Interpretation Issues
- Classification Issues
- Calculation Tables
- Annexures

What's next after Receipt of Show Cause notice

- Documentation & Submission
- Authorisation to Appear
 - Personal Appearance
 - Appearance by Authorised Representative
 - Persons who cannot appear before the tax authorities
 - Automatic Disqualification

The Officer will serve an intimation vide Part A of Form GST DRC – 01A asking the person to remit the tax along with interest. Details about the tax demand will be stated briefly in Part A.

This is a mandatory facility that must be allowed before SCN so that the taxpayer who turns down this opportunity also gives up the concession that goes along with this facility, the concession being that in cases covered by section 73, if tax demanded along with interest is paid 'before SCN' then, penalty payable will be 'nil.

Situation where the Payment is not made in full

- In case, the assessee has made only partial payment and he is not accepting the remaining liability or he is disputing the entire liability, he can respond in Part B of the same form GST DRC-01A. Detailed arguments are not warranted in taxpayer's reply in Part B but information that would help clear any factual or legal misapplication in making this demand may be clarified to a certain extent.
- After such submission, the proper officer will proceed to serve show cause notice under Section 73(1) in respect of such amount which falls short of the amount actually assessed and is payable.

Second Opportunity of Zero Penalty

- After having turned down the facility allowed under section 73(3) when the show cause notice is issued, the taxpayer is allowed a 'second' opportunity to pay tax demanded along with interest in Form GST DRC-03 within 30 days of issue of show cause notice and inform the proper officer in writing of such payment. The officer upon receipt of such information, shall give an intimation of conclusion of proceedings in Form GST DRC-05 and all the proceedings in respect of the said notice except proceedings under Section 132 shall be deemed to be concluded. Here too, penalty payable will be 'nil'. Taxpayers can take into consideration details of the charges made in the SCN and consider this 'second' opportunity to avoid further disputes.

Important Aspect

- It needs to be noted that, this benefit of zero penalty will apply only where the tax amount is other than by way of self-assessed tax or any amount collected as tax which has not been paid within a period of thirty days from the due date of payment of such tax.
- If the amount payable is self-assessed tax or an amount collected in the name of tax and paid after a period of thirty days from the due date of payment, then this benefit of zero penalty will not be available.

Show Cause Notice under Section 74

- The proper officer will serve an intimation vide Part A of Form GST DRC – 01A asking the person to remit the tax along with interest and 15% penalty without serving a show cause notice. Part A will contain brief details about the nature of allegation resulting in the demand being considered.
- On discharging the liability the Proper Officer shall not serve any notice under Section 74(1) or statement under Section 74(3) with respect of the tax, interest and penalty so paid.

Second Opportunity to get away with 25% penalty

- In case after the issuance of show cause notice, if the taxpayer comes forward and pays the balance amount of tax, interest along with 25% penalty in Form GST DRC-03 within 30 days of issue of show cause notice, then in such case all the proceedings in relation to the said notice except proceedings under Section 132 are deemed to be concluded and issue Form GST DRC-05 in effect of the decision.

Third Opportunity to get away with 50% penalty

- Where the taxpayer comes forward and pays the amount demanded, applicable interest along with 50% penalty in Form GST DRC-03 within 30 days of communication of the order, Then the officer upon receipt of such information, shall give an intimation of conclusion of all the proceedings in respect of the said notice except proceedings under Section 132.

'Suppression'.

- The term suppression shall mean
 - (a) non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or
 - (b) failure to furnish any information on being asked for, in writing, by the proper officer.

Show Cause Notice under Section 76

- Tax collected but not paid to Government.
- No time limit is prescribed for issuance of SCN.
- The final order needs to be passed within 1 year from the date of issuance of SCN.
- Only SCN is prescribed. No statement of demand.
- No question of zero penalty
- 100% of tax will be imposed as penalty

General Provisions Relating to Determination of Tax [Section 75]

- Exclusion of Stay Period
- Auto Conversion of Notice under Section 74(1) to Section 73(1)
- Time Limit for passing order in Remanded Matter
- Principles of Natural Justice
- Adjournments
- Speaking Order
- Order cannot travel beyond SCN
- Higher Authority's Order will prevail
- Interest Payable - Mandatory
- Invalid Proceedings if order is passed after prescribed time limit
- Time Limit not to apply in certain cases

General Provisions Relating to Determination of Tax [Section 75]

- Initiation of Direct Recovery Proceedings Auto Conversion of Notice under Section 74(1) to Section 73(1)
- No Additional Penalty

Common Issues

- Input tax Credit.
 - Vested Rights
 - Eicher Motors Ltd
 - Sidharth Enterprises
 - Dai Ichi Karkariya
- Tax Not deposited by supplier
 - Arise India Limited
 - R.S. Infra Transmission Ltd
 - On Quest Merchandising India Pvt Ltd.

- Section 75(4) An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person.
- A question arises, where no request has been received, Can AA, without PH went on to decide ex-parte. In all humility, the provision is completely incomprehensible. The SC repeatedly held that any order entailing civil consequences cannot be passed without giving opportunity of personal hearing. Sec.75(4) also says when adverse order is sought to be passed, Personal Hearing is must.
- The SC in *State of Orissa v. Binapani Dei and Ors.* MANU/SC/0332/1967:
- The SC in *Canara Bank v. V.K. Awasthy* MANU/SC/0249/2005 dealt extensively significance of principles of natural justice
- A) Administrative Order
- B):Quasi-judicial order
- Entailing civil consequences, **Personal Hearing is must.**

- **SCN ON ALLEGED FAKE INVOICE/CIRCULAR TRADING.**

- The SCN contains Department own perception of various statements such as (i) statement of suppliers (ii) statement of transporters (iii) statement of directors/partners of the Noticee Co/Firm (iv) statements of buyers firm (v) Statement of any other persons (vi) Reports of Experts/Engineers/Professionals
- (vii):Books of Accounts/Computers/Files/Note Books/Kuccha Parchis/
- (viii) Computer Print-out
- However, none of the above are supplied along with the SCN by the Department.

• INTERIM REPLY

(a) We are in receipt on _____ of your above referred SCN dated _____.

(b) We find that along with the above SCN, copies of (a) Statements of Sh _____, Sh _____, Sh _____, though have been relied upon by the Department in the captioned SCN - but copies of such statements have not been supplied to us.

(c) Further, we also request you to provide us photocopies of the Books of Accounts, Ledgers, Registers, Files, Records, and all other documents/papers (seized by the Department) and relied upon by Department, may also be supplied to us. In case, we are required to pay any amount towards photocopies charges, the same may also be kindly intimated to us so that we can remit by way of DD/Pay order .

- After the receipt of the photo-copies of the statements relied upon, Books of Accounts, Registers, Records, Files, Notes Books, etc., reply to SCN would be submitted. Kindly make available all the above persons whose statements has relied upon by Dptt, for the purpose of cross-examination by us.
- we would be submitting our detailed reply to the SCN within a period of 30 days from the date of completion of cross examination and after receipt of all documents relied upon by you , whichever is later. We also crave leave of this Hon'ble Authority for an opportunity of personal hearing after completion of all above exercise.

- **SCN IF VAGUE, AMBIGUOUS OR PRESUMPTIVE,**
- **THE CASE NEED NOT BE DECIDED ON MERITS.**
- SC in CCE, Bangalore vs. Brindavan Beverages (P) Ltd: MANU/SC/2645/2007 upheld order CESTAT, without going into merits, rejected the case of Department on the plea that SCN is totally presumptive.
- SCN is foundation on which Depp has to build up its case. If allegations in SCN (i) are not specific, (ii) lack details (iii) unintelligible
- It can be presumed that no proper opportunity to meet the allegations indicated in the show cause notice.

- In **Kaur & Singh Vs. C.C.E., New Delhi- 1997 (4) ELT 289 (SC)**, SC held SCN must communicate
 - (a) Specific allegation/charge
 - (b) basis for demand of tax.
 - (c) Party must be made aware of the allegations as this is a requirement of natural justice.

- In SCN, on many occasions, Department levels all frivolous, perverse, baseless allegations in SCN and leave the assessee to prove its innocence.
- Further, it is a settled principal of law that the burden of proof is upon him who affirms - not on him who denies".
- Referred:-The Delhi High Court in Lord Chloro Alkali vs. Enforcement Directorate MANU/DE/2692/2017

- **RECORDING OF STATEMENT OF SUPPLIER, TRANSPORTER, OFFICERS OF ASSESSEE, EXPERTS AND BUYERS ADMISSIBLE IN EVIDENCE.**
- **Statement (i) Supplier (ii) Transporter (iii) Assessee Director/Officers (iv) Buyers (iv) third parties**
- The statements, of the above categories of persons, were recorded (in pre-GST regime) under Section 14 Central Excise Act which is equivalent to Section 70 of CGST Act, 2017. The Statement were recorded before the Gazetted Officer of the Government and since the Gazetted Officer is not a police officer, the statements so recorded, can be read as a evidence against the party and in support of the case of the Department.

- Section 136 of CGST Act, 2017: Relevancy of statements under certain circumstances
- A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains –
- (a) when the person who made the statement is 1. dead or 2. cannot be found, or 3. incapable of giving evidence, or 4. kept out of the way by the adverse party, or 5. whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable;
 - OR
- (b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

- If the PO wants to invoke clause (a) of Section 136, he will have to pass a speaking order to the effect that he is satisfied that any of the 5 circumstances exist and he is thus straight away relying upon the statement of the maker without first examining him as witness.
- But, if PO wants to invoke clause (b) of Section 136 and wants to treat the statement as 'relevant' and 'admissible' under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the PO is also obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

- The AA may refuse cross-examination of the informants but AA should invariably allow cross-examination of “seizing officers”, “panch witnesses” and “witnesses” whose evidence the AA wishes to rely upon. The AA should bear in mind that cross-examination is an effective tool to test the veracity of the witness and the reliability of his evidence.
- The Central Board of Excise and Customs in the case of Vaidyanath Agency 1981 ELT page 94 (CBEC) held that the denial of cross-examination of the officer who conducted the inspection of stock is denial of natural justice.
- **NO CROSS EXAMINATION, NO EVIDENTIARY VALUE.**
- The Supreme Court and High Courts have consistently held that cross-examination is indispensable part of principle of natural justice.

Laxman Exports Ltd. v. Collector of Central Excise MANU/SC/0548/2002 : (2005) 10 SCC 634

Swadeshi Polytex Ltd. v. Comm. Of Central Excise 2000 (122) ELT 641 (SC)

- **RETRACTED STATEMENT HAS NO EVIDENTIAL VALUE.**

- Apex Court in [2015 (321) ELT A210], Delhi High Court in Shakti Zarda Factory (I) Ltd. [MANU/DE/1665/2004 & Saakeen Alloys Pvt. Ltd. [MANU/GJ/0467/2014], held retracted statement is not admissible in evidence in absence of independent reliable evidence to corroborate the same.
- If any party wishes to rely upon the statements of any person, then such persons should be offered for cross examination as per Section 138 of Indian Evidence Act, 1872. The Indian Evidence Act, also applies to proceedings under the Indirect Tax Laws as per two judgments of Supreme Court:-

(1)Collector Customs Vs. D Bhoormall MANU/SC/0237/1974. If the cross examination is not offered, such statements cannot be relied upon.

(2)Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II: MANU/SC/1250/2015

- **EXTENDED PERIOD**

- Suppression would mean failure to disclose full and true information **with the intent to evade payment of duty.**
- (a): Continental Foundation Jt. Venture v. CCE (216) ELT 177 (SC)
- (b): and Anand Nishikawa Co. Ltd. v. CCE 2005 (188) ELT 149 SC.
- ©: If a party bonafide believes that no Tax/Duty is payable or no license/approval and if there is scope for such belief and doubt, penal provisions of Section 11A of Central Excise Act (now Section 74) will not apply.
- The Tribunal in Grasim Bhiwani Textiles Ltd Vs. CCE MANU/CE/0798/2015 has held that where appellants have written letter explaining the manner of availing the credit of inputs, capital goods and input service. Further, when the department called for, to furnish the details regarding availment of credit, the appellants had furnished the same.

- **EXTENDED PERIOD**

- A false statement becomes 'willful' if it is deliberate or intentional. It is not willful if the statement is accidental or inadvertent. A statement will not be misstatement only because full facts were not disclosed. UOI v. Rajasthan Spinning & Weaving Mills (2009) 238 ELT 3 (SC).

- **INITIAL BURDEN ON DEPARTMENT**

- **EVIDENTIARY VALUE OF DOCUMENTS PRODUCED:**

- Section 144 of CGST Act) deals with presumption as to certain documents seized from the custody and control of any person. SC in Bareilly Electricity Supply v. Workmen, MANU/SC/0501/1971 : 1971 (2) SCC 617 has observed as under:-
- "when a document is produced in a Court or Tribunal, "mere production of the documents does not amount to proof of it or the truth of the entries therein. The writer must be produced and his cross be allowed or his affidavit be filed & further an opportunity accorded to the opposite party who challenges this fact to assess the probative value of the contents of the documents

- **MERE SIGN/ATTESTATION DOES NOT AMOUNT TO ADMISSION.**
- The Tribunal in Plastic Duniya vs. CCE: MANU/CE/0614/2005 has held merely attestation of Panchnama which was prepared by the Office of Deptt does not lead to a conclusion that he admitted shortage of finished goods as claimed in Panchanama
- The SC in MANU/SC/0427/1969 held that AA should allow examinations/cross examination of **department witnesses**
- The SC in State of Kerala v. Shaduliyusuff MANU/SC/0303/1977 “opportunity to prove the correctness of a fact would, therefore, carry with it right to examine witnesses – include right to cross examine witnesses”.

ALLEGATION OF NON-RECEIPT OF RAW MATERIALS

- Copy of Invoices/Copy of Bill of Entry
- Payment Proof of Custom Duty
- Payment proof of IGST
- Evidence of Payment of other charges
- Transportation
- Copy of GR
- proof of payment of tax/fee/charges paid at the entry point of municipal limits of state/city.
- Registers/Records maintained at the factory gate
- Stock Register
- Bank Statements

ALLEGATION OF NON-RECEIPT OF RAW MATERIALS

- Evidence of Electricity/Fuel consumption for manufacture and supply of finished goods out of disputed raw materials
- Workers, Employees and other men-power used for manufacture of finished goods
- E way Bill
- **Mens rea is an essential ingredient for imposition of penalty.**
- If assessee had bonafide belief and credit has been taken after due intimation, no penalty imposable – Kalpana Industires Vs. CCE 2009(233)ELT 209 Tri.

Disclaimer

- *The views expressed are solely of the author and the content of this document is solely for information purpose and not to be construed as a professional advice. In cases where the reader has any legal issues, he/she must in all cases seek independent legal advice.*



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