



# The Institute of Chartered Accountants of India



*Handling GST notices specifically  
issued u/s 74*

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# Presentation Overview

## List Of Topics

- *Legal Provisions*
- *Section 73 vs Section 74*
- ~ *Strategies while replying to SCN*
- *Assessments & adjudications*
- *Self assessment V/s. Burden proof*
- *Glimpses of Evidence Act*
- *Essentials of SCN*
- *Other provisions*

## विभीषण गीता

रावन् रथी बिरथ रघुबीरा ।  
देखी बिभीषण भयउ अधिरा ॥  
नाथ न रथ नहीं तन पदत्राणा ।  
केही बिधि जितब बीर बलवाना ॥

सौरज धीरज तेहि रथ चाका ।  
सत्य सील दृढ ध्वजा पताका ॥

# Examples 1:

- Retailer of readymade garments
- Dept Alleges average GP on branded products 56% & non branded products 134%
- Dept divided entire purchase register into branded products and non branded products
- Dept extrapolated purchase register into sales by applying GP ratio and alleged “Sale suppression”

## Examples 2 :

- Retailer of readymade garments
- Dept verified e – way bills & value of inward supply.
- Dept alleged, there is difference between e way bill value and value of inward supply of Rs. 15,65,423/- and by adding GP @25%, total value of inward supply will be Rs. 19,56,779.
- Hence, RTP is liable to reverse ITC @9% Rs. 1,76,110 CGST & SGST each.

## Examples 3 :

- There is other income in the balance sheet.
- Dept. asked to pay tax @18% claiming no tax has been paid and issued SCN.

## Examples 4 :

- Failing to reply to notice ASMT – 10/ DRC 01A, Dept issued SCN for GSTR 3B vs GSTR 2A difference.
- Dept. considered 85% of ITC appeared in GSTR 2A as eligible and compared it with ITC availed in GSTR 3B.
- 15% considered as ineligible u/s 17(5), ITC availed from suppliers from whom purchases not made, credit note not considered etc
- Dept. demanded liability alongwith interest and penalty.

[DRC-1 FY 2020-21.pdf](#)

## Strategy for SCN replies



**Legal  
aspects**

**PROCEDURE**

- 1.
- 2.
- 3.



**Procedural  
aspects**

- Commissioner of Customs, Mumbai Vs Toyo Engineering India Ltd – 2006 (201) E.L.T 513 (S.C)

*“Department cannot travel beyond show cause notice”*

- Commissioner of C. Ex, Chandigarh Vs Shital International – 2010 (259) E.L.T 165 (S.C)

*“unless the foundation of the case is laid in the show cause notice, the revenue cannot be permitted to build up a new case against the assessee”.*

- Associated Switch Gears and Projects Ltd. Vs State of UP – 2024 (20) Centax 96

*“Any attempt by authority to expand scope of inquiry or introduce new allegations beyond those articulated in notice would violate this principle of specificity, depriving recipient of fair opportunity to address accusations levelled against it”*

- Principle of natural justice – Doctrine of *audi alteram partem* means *no one should be condemned unheard*



# Types of assessments under GST

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Self-assessment – u/s 59

Provisional assessment – u/s 60

Scrutiny of returns – u/s 61 \*

Assessment of non-filers of return (Best judgement) – u/s 62 \*

Assessment of unregistered persons – u/s 63

Summary assessment – u/s 64

# Audits/ Inspection, Search, Seizure under GST

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Audit by tax authorities – u/s 65 \*

Special audit – u/s 66

Inspection, search, seizure – U/s 67

*All the assessments, audits and investigations will end up with issuance of SCN in case of –*

*Tax not paid / short paid / erroneously refunded / ITC wrongly availed or utilized*

# Legal provisions (Section 73/ Section 74) [applicable till FY 23-24]

## Section 73

*(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.*

## Section 74

*(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.*

# Section 74

- Onus is on revenue to establish that the ingredients of section 74 are present.  
“Uniworth Textiles Ltd. Vs C.Ex. Raipur – 2013 (288) E.L.T. 161 (S.C)”
- Such ingredients need to be clearly brought out in the SCN alongwith evidenced thereof.
- Fraud : an act of deliberate deception in order to gain by another’s loss (*Apex court in S.P. Chengalvaraya Naidu Vs. Jagannath [1994(1)SCC1]*)
- Misstatement : means to state incorrectly
- Suppression (explanation 2 to sec 73/74) :
  - non declaration of facts/ information required to declare in return, statement or report
  - failure to furnish any information on being asked for by proper officer

*Continue...*

➤ Apex court in case of M/s Pushpam Phramaceuticals Co. Vs CCE, Bombay [1995 (78) E.L.T 401] interpreting the term “suppression” held –

- *The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise.*
- *A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly.*
- **It does not mean any omission.**
- **The act must be deliberate.**
- **In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty.**

➤ **Apex court in case of M/s Cosmic Dye Chemical Vs CCE, Bombay [1995 (75) E.L.T 721] has laid down clearly –**

- *Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words.*
- *So far as mis-statement or suppression of facts are concerned, they are clearly qualified by the word “wilful” preceding the words “mis-statement or suppression of facts” which means with intent to evade duty.*
- *The next set of words “contravention of any of the provisions of this Act or Rules” are again qualified by the immediately following words “with intent to evade payment of duty”.*
- *It is, therefore, not correct to say that there can be a suppression or mis-statement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11A.*
- *Mis-statement or suppression of fact must be wilful.*

## Legal provisions (Section 73/ Section 74)

### Section 73 (2)/ 73(10)

#### ➤ Time limit :

- ✓ 73(2) : 3 months prior to the limit specified in subsection (10) for issuance of order.
- ✓ 73(10) : PO shall **issue** order within 3 years from the due date for furnishing of annual return for FY or within 3 years from date of erroneous refund.

### Section 74 (2)/ 74(10)

#### ➤ Time limit :

- ✓ 74(2) : 6 months prior to the limit specified in subsection (10) for issuance of order.
- ✓ 74(10) : PO shall **issue** order within 5 years from the due date for furnishing of annual return for FY within 5 years from date of erroneous refund.

## Legal provisions (Section 73/ Section 74)

### Section 73 (5) / (6)

- **Voluntary payment & penalty:**
  - ✓ Person chargeable with tax may, before service of SCN, pay tax alongwith interest payable.
- **Conclusion of proceedings:**
  - ✓ PO shall not serve any notice in respect of tax so paid.

### Section 74 (5) / (6)

- **Voluntary payment & penalty:**
  - ✓ Person chargeable with tax may, before service of SCN, pay tax alongwith interest payable & penalty 15% of tax payable.
- **Conclusion of proceedings:**
  - ✓ PO shall not serve any notice in respect of tax so paid.



## Legal provisions (Section 73/ Section 74)

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### Section 73 (7)

- *Initiation of proceedings on short payment of tax*
- ✓ *Where PO is of the opinion that amount to paid falls short the amount actually payable, he shall proceed to issue SCN.*

### Section 74 (7)

- *Initiation of proceedings on short payment of tax*
- ✓ *Where PO is of the opinion that amount to paid falls short the amount actually payable, he shall proceed to issue SCN.*

# Legal provisions (Section 73/ Section 74)

## Section 73 (8) / (9)

### ➤ Time limit for Deposit of amount & penalty

- ✓ Section 73(8) : If taxes paid alongwith interest within 30 days of issue of SCN, no penalty shall be payable and all proceedings shall be deemed to be concluded.

### ➤ Issuance of order

- ✓ Section 73(9) : PO shall determine amount of tax, interest & penalty equivalent to 10% or Rs. 10,000 whichever is higher & issue an order.

## Section 74 (8) / (9)

### ➤ Time limit for Deposit of amount & penalty

- ✓ Section 74(8) : If taxes paid alongwith interest & penalty @25% within 30 days of issue of SCN all proceedings shall be deemed to be concluded.

### ➤ Issuance of order

- ✓ Section 74(9) : PO shall determine amount of tax, interest & penalty. (Min - 50% penalty).

## Legal provisions (Section 73/ Section 74)

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### Section 74 (11)

➤ *Deposit of amount within 30 days of issue of order*

*If taxes paid alongwith interest & penalty @50% within 30 days of communication of order all proceedings shall be deemed to be concluded.*

# Deposit of liability and time limit for penalty

## Section 73

Liability paid within	Penalty %
Tax + interest paid before " <u>service</u> " of notice	No penalty
Tax + interest paid in 30 days of " <u>issue</u> " of notice	No penalty
Tax + interest paid thereafter	10% penalty of tax or Rs. 10,000, whichever is higher

## Section 74

Liability paid within	Penalty %
Tax + interest paid before " <u>Service</u> " of notice	15% of tax
Tax + interest paid in 30 days of " <u>issue</u> " of notice	25% of tax
Tax + interest paid within 30 days of " <u>communication</u> " of order	50% of tax
Tax + interest paid thereafter	100% of tax

## Rule 142 of CGST Rules, 2017 -

- ✓ Rule 142(1)(a) : PO shall serve alongwith notice (SCN) a summary in FORM DRC 01
- ✓ Rule 142(1)(b) : PO shall serve alongwith statement u/s 73(3)/ 74(3) a summary in FORM DRC 02
- ✓ Rule 142(1A) : Pre – consultation
  - before service of notice, PO may (w.e.f. 15/10/2020) communicate details of liability in FORM DRC 01A - “Rule contradicting with section”
  - Para 5 of master circular no. 1053/02/2017-CX dt. 10.03.17 – mandatory for demand above Rs. 50 lakh
- ✓ Rule 142(2) : Voluntary payment before “service” of notice – FORM DRC 03 & acceptance thereof in FORM DRC 04

## *Rule 142 of CGST Rules, 2017 -*

✓ *Rule 142(3) : Payment u/s 73(8) / 74(8) within 30 days of “service” of a notice*

*– payment to be made in FORM DRC 03*

*- PO shall issue intimation in form DRC 05 concluding the proceeding*

*“Rule contradicting with section”*

✓ *Rule 142(4) : Reply to SCN to be furnished in FORM DRC 06*

*\* Whether penalty still payable if SCN was issued u/s 73 & tax was paid within 30 days of issue of SCN but interest was not paid ??*

*✓ Yes*

*✓ Section 73(8) : Tax alongwith interest to be paid*

*✓ Tax not paid with interest on the same means tax not paid within due date*

*✓ It will fall under term tax not paid*

*✓ Mahadeo Construction Vs Union of India – Jharkhand HC*

# Legal provisions (Section 73/ Section 74)

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## Section 73 (11)

➤ *Self assessed liability not paid within 30 days*

✓ *Notwithstanding anything contained in sub-section (6) or sub-section (8),*

✓ *penalty under sub-section (9) shall be payable*

✓ *where any amount of self-assessed tax or any amount collected as tax has not been paid*

✓ *within a period of thirty days from the due date of payment of such tax.*

>> *Provision has overriding impact*

>> *Self assessed tax and amount collected as tax but not paid within 30 days shall be treated differently than short paid, not paid tax liability*

>> *No penalty payable for delayed filling of Form GSTR 3B subject to payment of interest and late fees (Circular no. 76/50/2018 dt. 31.12.18)*



# Section 73(11) vs Section 75(12)

## Section 73 (11)

- *Self assessed liability not paid within 30 days*
- ✓ *Notwithstanding anything contained in sub-section (6) or sub-section (8),*
- ✓ *penalty under sub-section (9) shall be payable*
- ✓ *where any amount of self-assessed tax or any amount collected as tax has not been paid*
- ✓ *within a period of thirty days from the due date of payment of such tax.*

## Section 75 (12)

- *Recovery without issuing SCN*
- ✓ *Notwithstanding anything contained in section 73 or section 74,*
- ✓ *where any amount of self-assessed tax in accordance with a return furnished under section 39 remains unpaid, either wholly or partly,*
- ✓ *or any amount of interest payable on such tax remains unpaid,*
- ✓ *the same shall be recovered under the provisions of section 79.*

*Explanation- For the purposes of this sub-section, the expression "self-assessed tax" shall include the tax payable in respect of details of outward supplies furnished under section 37, but not included in the return furnished under section 39*

# Analysis

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- *Penalty u/s 73(11) not payable if taxes alongwith interest are already paid since notice u/s 73(1) cannot be issued.*
- *Penalty u/s 73(11) payable if taxes are paid but interest is not yet paid till issuance of SCN.*
- *Sec 75(12) recovery cannot be done in case of disputed liability including liability of interest.*
- *For clerical error in GSTR 1 and resultant difference in GSTR 1 vs GSTR 3B, PO may send a communication to taxpayer. (Instruction no. 01/2022 dt. 07.01.22)*
- *For deviation between GSTR 1 vs GSTR 3B exceeding specified limit, automated notice in Form DRC 1B is issued on portal.*

## Section 74A at a glance

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- *Applicable from FY 2024-25 onwards*
- *Time limit for issuance SCN shall be 42 months from the due date of furnishing annual return or date of erroneous refund*
- *Above time limit is applicable for all cases i.e SCN emerging from fraud or non fraud cases.*
- *Order to be issued within 12 months from the date of issuance of notice*
- *Time limit and penalty payable at different stages (continue...)*

# Section 74A at a glance

	Penalty payable - Cases other than fraud, wilful misstatement, suppression		Penalty payable - Cases of fraud, wilful misstatement, suppression	
Tax (+) Interest paid -	Section 73 (Till FY 23-24)	Section 74A (From FY 24-25)	Section 74 (Till FY 23-24)	Section 74A (From FY 24-25)
<b>Voluntary before service of SCN</b>	Nil	Nil	15%	15%
<b>Within prescribed time limit of issue of SCN</b>	Nil (if tax + interest Paid within 30 days of issue of SCN)	Nil (if tax + interest Paid within 60 days of issue of SCN)	25% (if tax + interest Paid within 30 days of issue of SCN)	25% (if tax + interest Paid within 60 days of issue of SCN)
<b>Penalty while confirming demand</b>	10% of tax or Rs. 10,000 whichever is higher	10% of tax or Rs. 10,000 whichever is higher	100%	100%
<b>Penalty payable if paid within prescribed time limit of communication of order</b>	Same as above	Same as above	50% (If tax + interest + 50% penalty paid within 30 days of communication of order)	50% (If tax + interest + 50% penalty paid within 60 days of communication of order)
<b>Penalty payable thereafter</b>	Same as above	Same as above	100%	100%
<b>Time limit to issue SCN</b>	3 months prior to time limit specified below.	42 months from due date of furnishing annual return.	6 months prior to time limit specified below.	42 months from due date of furnishing annual return.
<b>Time limit to issue Order</b>	3 years from due date of furnishing annual return.	12 months from the date of issuance of SCN.	5 years from due date of furnishing annual return.	12 months from the date of issuance of SCN.

## Section 75 – Important provisions

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➤ *Section 75(2) – Can SCN issued u/s 74 be converted to SCN u/s 73 if it is not sustainable u/s 74 ??*

✓ *Yes*

✓ *Section 75(2) - Where any Appellate Authority or Appellate Tribunal or court concludes that the notice issued under sub-section (1) of section 74 is not sustainable for the reason that the charges of fraud or any wilful-misstatement or suppression of facts to evade tax has not been established against the person to whom the notice was issued, the proper officer shall determine the tax payable by such person, deeming as if the notice were issued under sub-section (1) of section 73.*

✓ *However, time limit as per section 73 will be applicable.*

✓ *Circular no. 185/17/2022 - GST*

## Section 75 – Important provisions

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➤ *Section 75(3) – SCN was issued u/s 73. In appeal, tribunal remanded back the matter. However, period to issue order u/s 73(10) was over. Whether Department can still adjudicate ??*

✓ *Yes*

✓ *Section 75(3) - Where any order is required to be issued in pursuance of the direction of the Appellate Authority or Appellate Tribunal or a court, such order shall be issued within two years from the date of communication of the said direction.*

✓ *Hence, time limit in this case will be 2 years from the date of communication of the said direction.*

## Section 75 – Important provisions

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- *Section 75(4) – While submitting reply to SCN, personal hearing was not asked specifically. PO passed adverse order. Whether such order tenable ?*
- ✓ *No*
- ✓ *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.*
- ✓ *Hence, even if no personal hearing is asked for, it is mandatory to provide an opportunity of being heard.*

## Section 75 – Important provisions

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- *Section 75(7) – Allegation in SCN is A but while confirming order, it was based on grounds A & B. Is it tenable ??*
- ✓ *No*
- ✓ *The amount of tax, interest and penalty demanded in the order shall not be discretion, the amount specified in the notice and*
- ✓ *no demand shall be confirmed on the grounds other than the grounds specified in the notice.*
- ✓ *Always compare your SCN and Order.*
- *Example - Associated Switch Gears and Projects Ltd. Vs State of UP – 2024 (20) Centax 96 – Allahabad HC*
- *SCN issued and penalty was levied for E Way wherein destination was wrongly mentioned*
- *Appeal was accepted considering minor discrepancy, but penalty was levied since E Way bill was expired*
- *Held : OIO confirmed on grounds other than grounds mentioned in SCN – Not tenable*



## Section 75 – Important provisions

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- *Section 75(5) – Adjournment of hearing maximum 3 times*
- *Section 75(6) – Proper officer to set out relevant facts and basis of decision in order [Order must be speaking order]*
- *Section 75(8) – Interest or penalty stand modified if Appellate Authority, Tribunal or Court modifies the tax amount*
- *Section 75(9) – Interest is payable on tax short paid/ not paid whether or not specified in order*
- *Section 75(10) – Adjudication proceedings deemed to be concluded on failure to issue order within time*

# Section 59 vs Section 155

## Section 59

- *Self assessment*
- ✓ *Every registered person shall self-assess the taxes payable under this Act and*
- ✓ *furnish a return for each tax period as specified under section 39.*

## Section 155

- *Burden of proof*
- ✓ *Where any person claims that he is eligible for input tax credit under this Act,*
- ✓ *the burden of proving such claim shall lie on such person.*

Hence, apart from ITC issues, burden of proof is on department.

# Essentials of show cause notice & strategies



1

No specific allegations  
/ vague SCN / SCN  
based on assumptions  
and presumptions

# Example

## ➤ GSTR 2A vs GSTR 3B

*“Suppliers have not reported supply in GSTR 1 and hence not reflected in GSTR 2A, hence it is presumed that the ITC in respect of such supply is not paid to Government.”*

CCE  
Bangalore Vs  
Brindavan  
Beverage  
Pvt Ltd [2007  
(213) ELT  
487] SC

- SCN is the foundation on which the department has to built up the case.
- If the allegations in the SCN are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the notice was not given proper opportunity to meet allegations.
- Department needs to place on record sufficient material to substantiate the stand of the appellant.

**Mehta  
Pharmaceuticals  
Vs  
Commissioner of  
Customs and C.  
Ex – Tri. Mumbai**

- SCN must always spell out the exact charge.
- SCN which is ambiguous or capable of interpretation, cannot be the ground for sustaining an order based on the inference drawn from SCN.

Oudh Sugar  
Mills  
Vs  
Union of India,  
1978 (2) ELT 172  
(SC)

If notice was issued totally ignoring the factual position, but based on mere assumption, unwarranted inferences and presumptions, such notices are not sustainable in the eyes of law.



2

SCN issued beyond  
scope of provisions

## Example - 1

- Notice ASMT – 10 issued u/s 61
- PO is asking for additional books of accounts since he is not satisfied with reply furnished in ASMT - 11

## Example - 2

- Commissioner appeals remanding back matter
- ✓ Section 107(11) -

*The Appellate Authority shall, after making such further inquiry as may be necessary, pass such order, as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against but shall not refer the case back to the adjudicating authority that passed the said decision or order:*

- Nazir Ahmed vs King Emperor – AIR 1936 PC 253
- Chandra Kishore Jha vs Mahavir Prasad & Ors – AIR 1999 SCC 266
- CIT vs Anjum M. H. Ghaswala

- Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.
- It is well Settled principle that if a statute provides for a thing to be done in a particular manner, then it has to be done in that manner and in no other manner.
- It is a normal rule of construction that when a statute vests certain power in an authority to be exercised in a particular manner then the said authority has to exercise it only in the manner provided in the statute itself.

3

Burden of proof  
on department

Whether department needs to prove  
allegations in SCN ??

# Union of India Vs Garware Nylons - SC

- The burden of proof is on the taxing authorities to show that the particular case or item in question, is taxable in the manner claimed by them.
- Mere assertion in that regard is of no avail.

4

Components to tax  
anything must be  
present



# Example

## Construction sector – Case study

### Facts of the case :

- ✓ JV arrangement between landowner and developer
- ✓ JV entered in the month of February, 2018
- ✓ Decided to share certain area with landowner
- ✓ Supplementary agreement was done on September, 2021 wherein flats allotted to landowner were identified
- ✓ Project was not yet completed
- ✓ Department issued SCN seeking demand on constructed area / units provided to landowner

# Analysis

- Notifications issued 3/2019 – CT (R), 4/2019- CT (R), 6/2019- CT (R) are not applicable since agreement done before 1<sup>st</sup> April, 2019
- Notification no. 4/2018 – CT (R) dt. 25.01.2018 – specifies time of supply as the date of transfer of possession or right in constructed unit to landowner by entering into conveyance deed or other instrument such as allotment letter.
- Since, supplementary agreement was done in September, 2021, time of supply was already triggered.
- Valuation ?

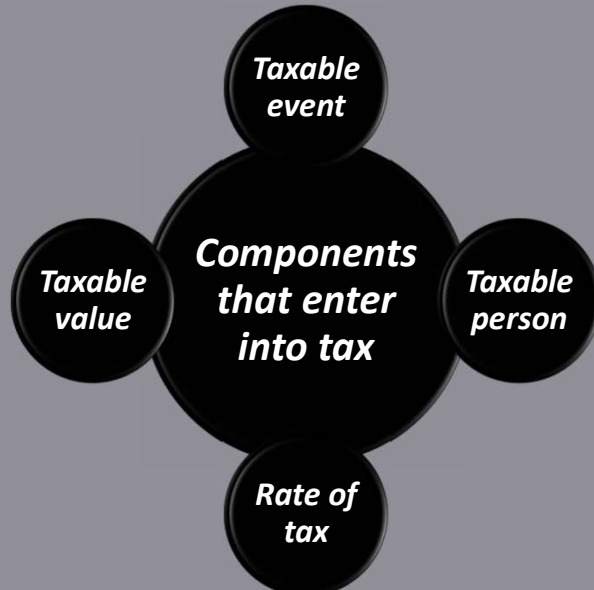
# Valuation

- Section 15(1) – Price actually paid is not in money
- Rule 27 – Open market value – varies in construction industry
- Dept. demanded tax on valuation as per rule 28 – “Estimated” Cost + 10 %

## *Our view :*

- *Since project is not yet completed, value of supply cannot be determined with certainty.*
- *Hence, no liability as on date.*

# Govind Saran Ganga Saran Vs Commissioner of Sales Tax & Ors - SC



- The components which enter into the concept of tax are well known.
- The first character of the imposition known by its nature which prescribes the taxable event, attracting the levy.
- The second is a clear indication of the person on whom the levy is imposed and who is obligated to pay tax.
- The third is the rate at which tax is imposed, and
- the fourth is a measure or value to which the rate will be applied for computing the tax liability.
- If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law.
- Any uncertainty or vagueness in the legislative scheme in defining any of those components of levy will be fatal to its validity.

5

# Applicability of evidence Act for taxation laws

# Chuharmal vs CIT – 1988 AIR SC 1384

- The rigours of rule of evidence contained in the Evidence Act were not applicable to the Income-tax Act but,
- on first principles and on general law, the principles of Evidence Act can be applied to proceedings under the Income-tax Act.
- Hence, principles of Evidence Act are applicable to taxation laws also.

# Glimpses of Evidence Act, 1872

➤ Section 58 : Facts admitted need not to be proved

*No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.*

Ex :



➤ Hence, we need to dispute each and every fact/ allegation in SCN.



Ex.

1. GSTR 2A vs GSTR 3B issue – Dispute legally 1<sup>st</sup> and then provide reconciliation
2. ITC reversal as per rule 42 – Calculation Dispute



*Dispute each and every allegation in SCN/ OIO confirmed.*

➤ Section 160(2) :  
Assessment  
proceedings etc. not  
to be invalid on  
certain grounds

- ✓ The service of any notice, order or communication shall not be called in question,
- ✓ (i) 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
- ✓ (ii) 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.

➤ Section 101 : Burden of proof

vs

➤ Section 102 : On whom burden of proof lies

### Section 101 : Burden of proof

Permanent burden of proof

*Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*

Shifting burden/onus of proof

### Section 102 : On whom burden of proof lies

*The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side*

# Burden of proof vs Onus of proof

## *A. Raghavamma Vs. A Chenchamma, AIR 1963 (SC)*

- There is an essential difference between "burden of proof" as a matter of law and pleading and as a matter of adducing evidence.
- Burden of proof lies upon the person who has to prove a fact.
- The burden of proof never shifts.
- Onus of proof shifts from time to time.
- Such shifting of onus is a continuous process in the evaluation of evidence.

# Burden of proof vs Onus of proof

*Rajendra Jagannath Parekh v. Commissioner of Customs [2004] 175 ELT 238 /2004 taxmann.com 1567 (Mum.-CESTAT)*

- There is an essential difference between "burden of proof" as a matter of law and pleading and as a matter of adducing evidence.
- Burden of proof is upon the party who invites a decision in the existence of certain facts which he asserts.
- This burden is constant and never shifts.
- Onus of proof shifts from time to time having regard to the evidence adduced by one party or the other, or the presumption of fact law raised in favour of the one or the other.
- Such shifting of onus is a continuous process in the evaluation of evidence.

# Bogus ITC issue

*SCN issued for ITC claimed from NGTP supplier.*

- Permanent burden of proof is on taxpayer w.r.t eligibility of ITC
- Once such burden is discharged by taxpayer i.e once he fulfilled conditions of
  - Invoices furnished
  - Movement of goods established
  - Filing of return by recipient
- Onus shifts to on Department to prove contrary

# 6

## Master circular on show cause notice

*Circular no. 1053/02/2017-CX dt. 10<sup>th</sup> March,  
2017*

*(Important paragraphs)*

## 2.2 Structure of SCN

- a. Introduction of the case
- b. Legal frame work
- c. Factual statement and appreciation of evidences
- d. Discussion, facts and legal frame work,
- e. Discussion on Limitation
- f. Calculation of duty and other amounts due
- g. Statement of charges
- h. Authority to adjudicate.



## 2.4 Legal Framework

*The authority issuing the SCN should clearly lay down the legal provisions in respect of which the person shall be put to notice. While specifying the provisions, care should be taken to be very accurate in listing all the provisions and the law in respect of which the contraventions are to be alleged in the SCN.*

## 2.5 Factual statement and appreciation of evidence

- *In this part of SCN, the facts relating to act of omission and commission pertinent to the initiation of the proceedings against the noticee need to be stated in a most objective and precise manner.*
- *All evidences in form of documents, statements and material evidence resumed during the course of enquiry /investigation should be organised serially in a manner so as to establish the charges against the noticee.*
- *While discussing the facts and evidences, care should be taken to be precise and succinct in expression so that unnecessary details are avoided.*



## 13.0 Service of SCN & relied upon documents

- A show cause notice and the documents relied upon in the Show Cause Notice needs to be served on the assessee for initiation of the adjudication proceedings.
- The documents/records which are not relied upon in the Show Cause Notice are required to be returned under proper receipt to the persons from whom they are seized.



## 14.3 Personal hearing

- *After having given a fair opportunity to the noticee for replying to the show cause notice, the adjudicating authority may proceed to fix a date and time for personal hearing in the case and request the assessee to appear before him for a personal hearing by himself or through an authorised representative.*
- *At least three opportunities of personal hearing should be given with sufficient interval of time so that the noticee may avail opportunity of being heard.*
- *Separate communications should be made to the noticee for each opportunity of personal hearing.*
- *In fact separate letter for each hearing/extension should be issued at sufficient interval. The Adjudicating authority may, if sufficient cause is shown, at any stage of proceeding adjourn the hearing for reasons to be recorded in writing. However, no such adjournment shall be granted more than three times to a noticee.*

## 14.5 Adjudication order



- *The adjudication order must be a speaking order.*
- *A speaking order is an order that speaks for itself.*
- *A good adjudication order is expected to stand the test of legality, fairness and reason at higher appellate forums.*
- *Such order should contain all the details of the issue, clear findings and a reasoned order.*

## 14.6 Analysis of issues

- *The Adjudicating authority is expected to examine all evidences, issues and material on record, analyse those in the context of alleged charges in the show cause notice.*
- *He is also expected to examine each of the points raised in the reply to the SCN and accept or reject them with cogent reasoning.*
- *After due analysis of facts and law, adjudicating authority is expected to record his observations and findings in the adjudication order.*

## 14.7 Body of order

- *The adjudication order should generally contain brief facts of the case, written and oral submissions by the party, observation of the adjudicating authority on the evidences on record and facts of omission and commission during personal hearing and finally the operating order.*
- *At any cost, the findings and discussions should not go beyond the scope and grounds of the show cause notice.*

## 14.8 Quantification of demand

- *The duty demanded and confirmed should be clearly quantified and the order portion must contain the provisions of law under which duty is confirmed and penalty is imposed.*
- *The duty demanded in an adjudication order cannot exceed the amount proposed in the Show Cause notice.*



# THANKS

अश्वं नैव गजं नैव, व्याघ्रं नैव च नैव च /  
अजापुत्रं बलिं दद्यात् देवो दुर्बलघातकः ॥

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