

SEMINAR ON CRITICAL ISSUES IN SERVICE TAX



Organized by

WIRC OF ICAI, MUMBAI

At

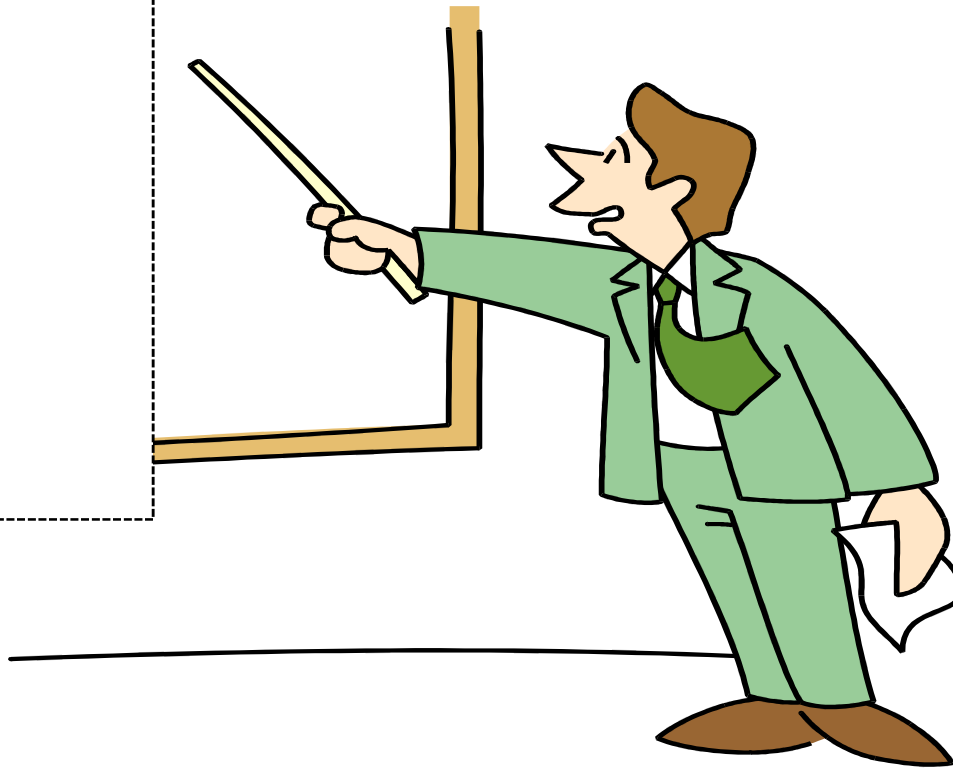
Khimji Kunverji Vikamsey Auditorium, ICAI
Tower, Bandra Kurla Complex, Mumbai.



☞ **Audit**

☞ **Investigation**

☞ **Adjudication
Procedures**



PRESENTED BY



RAJIV LUTHIA

**DISCUSSION IS EXCHANGE OF INTELLIGENCE
ARGUMENT IS EXCHANGE OF IGNORANCE**

1st October, 2011

SERVICE TAX AUDIT

- ✓ **Audit of selected services (telephone, non life insurance and stock brokers) was started in the year 1996 in accordance with the CBEC Circular No.. 19/13/96 dt.21/11/1996**
- ✓ **From the year 2002, the service tax audit was extended to cover selected service providers in four metropolitan cities.**
- ✓ **The directorate of service tax has issued guidelines for implementation of audit of service tax (Circular No.38/01/2002-CX dated 7th February,2002).**
- ✓ **The audit is confined to the accounts for the year 1999-2000 and subsequent years.**
- ✓ **Audit is required to be completed **within 10 working days**.**
- ✓ **The Audit would be conducted as per proforma Annexure –II (as provided in the Circular No.38/01/2002). The said proforma is based on the EA-2000 Audit being carried out on the Central Excise side.**

SERVICE TAX AUDIT

- ✓ The Central Excise department have brought service tax audit manual (CBEC Circular No.742/58/2003-CX dated 3rd September,2003) which ,inter alia, provides detailed guidelines 'of audit of Service Tax assessee.
- ✓ CBEC vide Letter F.No.381/145/2005 dated 6th June,2006 has revised the norms for Service Tax Audit

Quantum of annual total duty payment in Cash + CENVAT Credit	Frequency of Audit
Taxpayers paying more than Rs.50 Lakhs	Every year
Taxpayers paying between Rs.25 Lakhs & Rs.50 Lakhs	Once in two years
Taxpayers paying between Rs.10 Lakhs & Rs.25 Lakhs	Once in five years
Taxpayers paying below Rs.10 Lakhs	2% of total number every year

BASIC PROCEDURE OF DEPARTMENTAL AUDIT **& POINTS TO BE KEPT IN MIND**

- ✓ **Selection of the Assessee.....based on the risk factors (eg: evasion cases, major audit objections in past, regular defaulter in payment, heavy cenvat credit etc)**
- ✓ **Desk review by the Auditors.....gathering of advance information about the assessee from various available sources**
- ✓ **Auditors may call for the various details in the specified format ...(Questionnaire)**
- ✓ **Additional documents / information may be called from the assessee during the desk review stage.**
- ✓ **Assessee needs to make proper submission in writing only and get it documented.**
- ✓ **Assessee should produce proper & complete books of accounts & records for the verification by the audit team**
- ✓ **Make and maintain documents to substantiate the attendance of the auditors.**

Certain Do's and Dont's

- ✓ **Visit of the Audit team and the duration of the audit should be taken in writing & should be intimated to the assessee well in advance.**
- ✓ **A team of responsible persons who are aware of the basic provisions of the law & business profile should attend to answer the queries of the audit team.**
- ✓ **Officials have no power to take custody of any documents or records and take the same outside the premises of the assessee. Do not allow the officer to carry the soft data.**
- ✓ **Auditor to issue draft audit memo containing objections and issues, with a view to seek response of assessee.**
- ✓ **The assessee to submit response in writing and obtain acknowledgment of the same.**
- ✓ **The Auditor to issue final report considering the response from assessee.**
- ✓ **Auditor has no power to compel the assessee to pay tax, interest or penalty. Department is duty bound to issue SCN based on the findings of the Auditor.**

SERVICE TAX AUDIT (SPECIAL AUDIT)

- ✓ Section 72A inserted w.e.f. 28th May,2012 whereby powers are granted to the Commissioner of Central Excise to direct any person liable to pay service tax to get his accounts audited by a CA or CWA nominated by him **if he has reasons to believe** that such person-
 - i. has failed to declare or determine the value of a taxable service correctly; or
 - ii. has availed & utilized CENVAT Credit
 - a) which is not within the normal limits having regard to the nature of taxable service provided, the extent of capital goods used or the type of inputs or input services used, or any other relevant factors as he may deem appropriate; or
 - b) by means of fraud, collusion, or any willful misstatement or suppression of facts; or
 - iii. has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said commissioner.

SERVICE TAX AUDIT (SPECIAL AUDIT)

- ✓ **Such CA or CWA shall submit a report duly signed & certified to the said Commissioner within a specified period mentioning therein specified particulars.**
- ✓ **The Commissioner is empowered to order for such audit irrespective of the facts that the accounts of such person have been audited under any other law for the time being in force.**
- ✓ **The Commissioner shall give an opportunity of being heard to such person in respect of any material gathered on the basis of the audit and proposed to be utilized in any proceedings under the provisions of the Act.**

Hon'ble Kolkata High Court in the case of SKP Securities Ltd Vs. Deputy Director (RA-IDT) & ORS (2013) TIOL 38 -HC KOLKATA

- Since there is no provision in Chapter V of the Finance Act, 1994 or for that matter in the CAG Act which empowers the CAG to audit the accounts of an assessee which is a non-government company
- Sub-section (2) of Section 94 also does not empower the Central Government to frame rules for audit of the accounts of an assessee by any audit team under the Comptroller and Auditor General of India
- CAG has no power to conduct Service Tax Audit for a private assessee
- **This case is referred to Divisional bench in view of conflicting decision by Hon'ble Kolkata High Court in the case of Berger Paints Ltd (2006) TIOL 466 HC KOLKATA.**

Hon'ble Delhi High Court in the case of Travelite (India) Vs. UOI & ORS ,(2014) TIOL 1304 HC DEL

- Service Tax / Central Excise Audit by departmental officers/ CAG under the authorization of rule 5A of the STR,1994 is ultra vires under the rule making power conferred under Section 94(1).
- Only special audit u/s 72A is within the contemplation of the statute.

Summons (Section 83)

- **Section 14** of CE Act, 1944 made applicable to Service Tax vide Section 83.
- **CEO has 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 which such officer is making for any of the purposes of this Act.
- **Person so summoned is bound to state the truth upon any subject respecting which he is examined or make statements and to produce such documents & other things as may be required.**

Summons

- Every inquiry shall be deemed to be a “judicial proceeding” within the meaning of Section 193 & 228 of IPC, 1860.
- Section 193 of IPC.....Punishment with imprisonment for a term up to 7 years & also fine for intentionally giving false evidence or fabrication of false evidence in any stage of judicial proceeding.
- Section 228 of IPC.....Punishment with simple imprisonment for a term up to 6 months or fine upto Rs.1,000/- or both on person intentionally offering any insult, or causing any interruption to any public servant while such public servant is sitting in any stage of a judicial proceeding.

Summons

- **Section 174 of IPC.....Non attendance** in response to summons is an offence punishable with imprisonment **up to 6 months & fine up to Rs.1,000/-**
- **Documents required to be produced must be specifically stated in the summons**



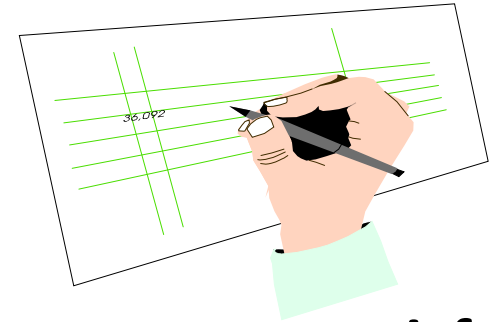
Summons

- Letter F. No.137/39/2007-CX4 dated 26/02/2007Instructions to be followed by CEO before issuing summons
 - Mode of communication should be either in the form of **telephone call** or by way of sending a **simple letter**
 - If the above mentioned modes **fail or found to be ineffective**, only then CEO shall issue summons for personal presence of the concerned person
 - Summons can be issued only after obtaining **prior written permission** from the officer not below the rank of Asst. Commissioner
 - The **reasons** for issuance of summons to be recorded.



Instructions

Summons



- The officer authorizing issuance of summons must satisfy himself that **no harassment** has been caused during the visit of the person summoned.
- A person **whose statement is recorded** during the inquiry has **no right to have a copy** of his statement **on the spot**. However, he is entitled to get the copy of statement **at the time of issue of SCN or otherwise** in case where the statement is proposed to be used against such person.
- Statement made in pursuance of summons is valid even if retracted subsequently & can be used as evidence in the proceedings.

Few Important Decisions..... Summons



- **Hon'ble Delhi HC.....K.T.Advani Vs State (1987) 30 ELT 390...The person has **no right to get copies** of his statement at the stage of investigation. However, he can keep note of his statement.**
- **Hon'ble SC.....Poolpan Division Superintendent (1992) 60 ELT 24.....Person being interrogated is not an accused nor can he plead that there is possibility of his being made an accused in future hence he has **no right to ask for presence of lawyer during inquiry**. However, interrogating officer may permit, if he deems fit.**

Few Important Decisions..... Summons



- **Hon'ble Mumbai CESTAT...Dodsai Pvt. Ltd. Vs CCE (2006) 193 ELT 518....Disclosure of facts & information given while recording the statement & admitting liability can also be challenged at later date by the assessee. There can not be estoppels in the matters of taxation.**

Few Important Decisions..... Summons



- Hon'ble Allahabad High Court in the case of Mirzapur Electrical Industries Ltd Vs. CCE (2013) 35 taxmann.com 15....held that service of any decisions, order, summons, notice, etc through “Speed Post” is a valid compliance with section 37C of the Central Excise Act,1944 since the object of sending post by registered post is to keep a record, which is also served by sending through speed post of same agency.
- Mumbai HC...Amidev Agro Care Pvt Ltd Vs. UOI 2012 TIOL 395.....Order sent by **Speed Post is not valid service.**
- Section 37C of the CE Act,1994 : Amended vide Finance Act,2013 w.e.f. 10th May,2013 to **include speed post with proof of delivery or courier approved by CBEC** as valid document for service of decisions, orders, summons etc.

- **RULE 5A OF STR,1994.....Access to Registered Premises**

- ★ Officer authorized by commissioner
- ★ Access to any registered premises
- ★ For purpose of scrutiny, verifications
- ★ Officer or audit party can call for following records:
 - Records as mentioned in sub rule 2 of Rule 5
(i.e. Records maintained by assessee under normal course of business)
 - Trial balance or its equivalent
 - Tax audit report.



- **SECTION 72- BEST JUDGEMENT ASSESSMENT**

- ★ CEO may require any person who is liable to pay ST,
- ★ But has failed to file return or filed return without assessing true liability, then
- ★ CEO after verification of accounts, documents or other evidence and after giving opportunity of being heard shall pass the order & make the assessment of the taxable value to the best of his judgment.
- ★ Determine the sum payable or refundable by/to the assessee.

Show Cause Notice-SCN

- **Section 73(1) CEO to issue SCN within 18 months w.e.f 28th May, 2012 from the relevant date where Service Tax**
 - Not levied or not paid
 - Short levied or short paid
 - Has been erroneously refunded
- **The period of issuing SCN shall be 5 years from the relevant date where above defaults are on account of**
 - Fraud; or
 - Collusion; or
 - Willful Mis-Statement; or
 - Suppression of facts; or
 - Contravention of any provisions with intent to evade payment of service tax.

Relevant date (Section 73(6))

CIRCUMSTANCE	RELEVANT DATE
<p>In the case of taxable service for which service tax has not been levied or paid or has been short levied or short paid:</p> <p>i) if the assessee is liable to file the return, and</p> <p>a) return is filed</p> <p>b) return is not filed</p> <p>c) In other cases</p>	<p>Date on which return filed</p> <p>Last date on which the return is to be filed</p> <p>Date on which tax is to be paid</p>
<p>Where service tax is provisionally assessed</p>	<p>Date of adjustment of service tax after final assessment</p>
<p>Where any sum has been erroneously refunded</p>	<p>Date of refund</p>

Show Cause Notice

- **Section 73(1A) inserted w.e.f. 28th May,2012.....**
 - **Any notice served U/s 73 for a particular period**
 - **Subsequent issuance of statement containing the details of ST not levied/short levied etc. for subsequent period**
 - **shall be deemed to be notice on such person**
 - **subject to the condition that the ground relied upon the subsequent period are same as that of earlier notices.**

Show Cause Notice

- **Section 73(2A) w.e.f. 10th May,2013.....**
 - where any appellate authority or tribunal or court
 - declares any SCN issued under proviso to Section 73(1) unsustainable
 - for the reasons that charge of fraud, collusion, willful misstatement, suppression of facts etc. are not established against the person to whom the SCN is issued,
 - CEO shall determine the service tax payable by such person for normal period of 18 months as if the notice was issued for the offences for which the normal period of limitation applied.

Show Cause Notice

- **Section 73(3).....Person chargeable with the ST or person to whom tax refund has erroneously been made, may pay the amount of such tax on the basis of his own ascertainment or ascertainment by CEO before service of SCN U/s.73(1) & inform CEO of such payment in writing, CEO shall not serve notice U/s.73(1).**
- **Explanation 2...No penalty shall be imposed where ST along with interest has been paid before issuance of SCN.**
- **Provisions of Section 73(3) not applicable to event occurring by reasons of fraud, collusion, willful mis-statement, suppression of facts or contravention of any provisions with intent to evade payment of service tax.....Section 73(4)**

Show Cause Notice (Section 73 (4))

- Where during the course of an **Audit, Investigation or Verification**.....it is found that ST short levied, not levied, short paid, not paid or erroneously refunded.....**But true and complete details of the transactions are available in specified records**.....Such person shall pay before issuance of SCN service tax in full or in part as he may accept to be his liability along with interest and **penalty equal to 1% of such tax for each month for the defaulting period up to maximum of 25% of tax amount**CEO on receipt of such information shall not serve SCN and proceedings in respect of the said amount shall be deemed to be concluded
- If the CEO determines any amount of service tax is still due from the person, the CEO shall proceed to recover the same as per the provisions of Section 73 (1) of the Act

Show Cause Notice

- **Section 73(4B) w.e.f. 6th August,2014..... TIME LIMIT**

- CEO shall determine the amount of service tax due u/s 73(2) within the following time limit

Nature of Demand	Time limit for adjudication
Cases where normal limitation period of 18 month applies	Within 6 months from the date of notice, <u>where it is possible to do so</u>
Cases where extended period is invoked or cases falling within proviso to Section 73(4A)	Within 1 year from the date of notice, <u>where it is possible to do so</u>

- **Above Time limit should be followed..... (Para 5.2.1 of DOF No.334/15/2014-TRU dated 10th July,2014)**
- **Prior to the above amendment..... Hon'ble Supreme Court in the case of Bhagsons Paint Industry (2003) 158 ELT 129 held that there is No time limit for adjudication.** Adjudication after lapse of 9 years from the issuance of SCN was permissible.

Show Cause Notice

- “Specified records” means records including computerized data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement; the invoices recorded by the assessee in the books of accounts shall be considered as the specified records.
- Opportunity of being heard given to the assessee if he so desires in any proceedings under this Act.
- **Maximum 3** adjournments granted to assessee on his showing sufficient and reasonable cause (Section 33A of the CE Act, 1944).

Powers to Adjudicate



• Notification No.48/2010-ST dt. 08/09/2010

CEO	Amount of ST or CENVAT specified in Notice
Superintendent	Not exceeding Rs.1 Lac (excluding the cases relating to taxability, valuation or cases involving extended period of limitation)
AC/DC	Not exceeding Rs.5 Lacs (except where superintendents are empowered to adjudicate)
Jt. CCE	Above Rs.5 Lacs not exceeding Rs.50 Lacs
Addl. CCE	Above Rs.20 Lacs not exceeding Rs.50 Lacs
CCE	Without any limit

Few Important Decisions.....



- **Hon'ble Supreme Court in AMRIT FOODS V/s CCE, 2005 (190) ELT433The assessee should be put to notice the exact nature of his contravention for which he is liable. Appeal cannot be disposed without addressing the arguments raised by the appellants.**
- **Hon'ble Supreme Court in the case of Nizam Sugar Factory Vs. CCE, AP (2008) 9 STR 314.....**
- **No suppression of facts, when all relevant facts are in knowledge of authorities when first show cause notice issued.**
- **While issuing second and third show cause notices on same/similar facts suppression of facts on part of assessee could not be construed as these facts were already in knowledge of authorities.**
- **Demands and penalty dropped.**

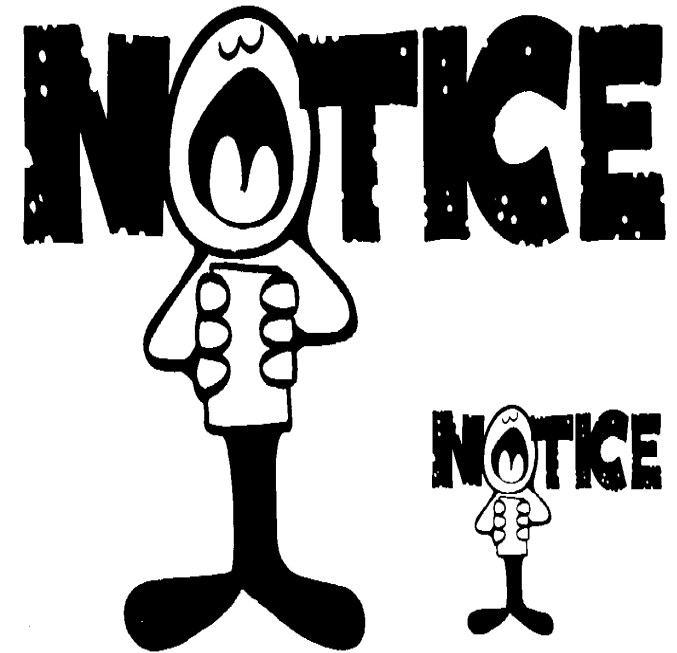
Gujarat Containers Ltd. Vs CCE (2003) TIOL 257... Hon'ble Mumbai CESTAT

➤ When the **adjudicating authority merely directed** the appellant to work out ST payable & **pay** the same with interest **without quantifying the demand**, SCN was held to be **null & void**.
Normally a SCN should indicate:

- ✓ The specific allegation against the assessee
- ✓ The quantum of tax/duty sought to be recovered
- ✓ The basis on which tax/duty is payable
- ✓ SCN must be served upon person chargeable to tax/duty
- ✓ SCN must be issued by officer empowered.

Hon'ble SC...Metal Forgings Vs UOI (2002) 146 ELT 241

- Issuance of SCN is a mandatory requirement for raising demand.
- Communications, orders, suggestions or advices from Department can not be deemed to be Show Cause Notice.
- A specific Show Cause Notice indicating the amount demanded & calling upon the assessee to show cause if he has any objection to such demand is necessary.



Few Important Decisions.....



- **Hon'ble Supreme Court in CCE, Mangalore V/s Pal Microsystems Ltd (2011) TIOL 70 SC CX ..**
 - **Audit Party visited the premises in 1996**
 - **SCN was issued in 2000...without any finding of fraud, wilful mis-statement etc....**
 - **SCN time barred....as extended period of limitation cannot be invoked..... Facts were already known to the department during audit.**
- **Hon'ble Karnataka High Court in the case of CCE (LTU), Bangalore Vs. Adecco Flexione Workforce Solutions Ltd (2011) TIOL 635.....**
 - **When ST along with interest is paid before issuance of SCN, the provisions of section 73(3) are invoked...**
 - **The section 73(3) prescribes that payment of tax with interest and when the said information is furnished to department, no notice should be served.**
 - **Therefore, authorities have no authority to initiate proceedings for recovery of penalty u/s 76 of the Act.**

Few Important Decisions.....



- **Hon'ble Ahmedabad CESTAT in the case of Aditya Birla Nuvo Ltd. Vs CCE, Vadodara (2011) TIOL 353**, has held that merely because the appellant did not approach the Revenue for clarification and did not disclose the activities undertaken by them, by itself cannot be made a reason for alleging any suppression or mis -statement to them.
- **Hon'ble Delhi CESTAT in the case of WEST MINISTER INTERNATIONAL (P) LTD.Vs. CCE, NEW DELHI (2002) 140 ELT 244** held that
- **Penalty imposable only under the provisions in existence at the time of issuing the Show Cause Notice.** “Section 77 was amended by Section 138 of the Finance Act, 1999 and as a result of this amendment the maximum penalty imposable under Section 77 is only Rs.2000/-
- **SCN is issued to them on 21-10-99 and as such penalty of more than Rs. 2000/- cannot be imposed ...bcoz the SCN is issued after the provisions of Section 77 of the Finance Act, 1994 have been amended, the maximum penalty imposable is Rs. 2,000/- hence penalty reduced to Rs. 2,000/-.**

Few Important Decisions.....



- **Hon'ble Mumbai CESTAT in the case of M/s Tirupati Pipe & Allied Industries Pvt Ltd Vs. CCE, Nashik 2008 – TIOL- 633, held that the order of the commissioner appeals **cannot be sustained as he has travelled beyond the grounds mentioned in SCN & O-I-O.****
- **In this case, SCN alleged to reject a refund claim on the ground that once the assessee has opted for exemption he was liable to reverse the credit in respect of inputs lying with him as on that date.**
- **However Ld. CCE(Appeals) upheld the O-I-O rejecting the refund claim on the ground that appellants have not challenged the assessment at the initial stage, hence the refund claim could not be sanctioned.....which is beyond the allegations in SCN.**

Pushpam Pharmaceuticals Company Vs CCE 78 ELT 401 (Hon. Supreme Court)



- **“Suppression of Facts”** to be interpreted strictly since it has been used **in company of strong words** such as fraud, collusion or willful mis-statement.
- When facts are known to both the parties, the omission by one to do what he might have done & not that he must have done, does not render it suppression of facts.
- In taxation, “suppression” can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty.
- Extended period of 5 years not applicable just for any **omission unless it is deliberate** to escape from payment of duty

Hon'ble SC....Continental Foundation Jt. Venture Vs CCE (2007) 216 ELT 177

- The expression “suppression” is accompanied by strong words such as “fraud” or “collusion”. It has to be construed strictly and mere omission to give correct information is not suppression of facts unless it was **deliberate** act to evade payment of duty.
- The word “suppression” gets its color from the words “fraud” & “collusion” preceding the same is in accordance with the principle of **Noscitur a sociis**.
- When two or more words susceptible of analogous meaning are coupled together, they take their color from each other & the meaning of the more general gets restricted to a sense analogous to that of less general.

Delhi CESTAT...Nityanand Nirmal (1999) 109 ELT 522

- In case of partnership firm, SCN should be served on the firm & not in the name of individual partner as partnership firm has a distinct identity.
- SCN issued in the name of individual partner is not sustainable since demand can be raised against the firm & not against it's partners.

Appeal to CCE (Appeals) (Section 84)

- The CCE may, on his own motion, call for and examine the record of any proceedings in which decision/order has been passed by subordinate adjudicating authority for the purpose of satisfying himself as the legality of such decision.
- Such review order should be passed **within 3 months** from the date of communication of the decision or order of the adjudicating authority.
- Commissioner may direct lower authorities to apply to CCE (Appeal).
- Lower authority to file appeal within **1 month** from date of communication by Commissioner & thereafter such application shall be heard by CCE (Appeals) in accordance with the provisions for appeals under the Act.



Appeal to CCE (Appeals)- S. 85

- Appeal to CCE (Appeals) against any decision/ order passed by adjudicating authority subordinate to CCE.
- Form ST-4 in duplicate along with Statement of Facts & Ground of Appeal.
- Form ST-4 to accompany certified copy of OIO.
- Appeal to be filed within 3 months (2 months in respect of decision or order passed after 28th May,2012) of receipt of order.

Appeal to CCE (Appeals)- S. 85

- **CCE(Appeals) is empowered to condone the delay up to a further period of 1 month as against erstwhile period of 3 months**
- **CCE (Appeals) to give reasonable opportunity of being heard before passing an order enhancing liability.**
- **No time limit prescribed under ST for passing an order unlike section 35A of CE Act where period of 6 months is prescribed.**
- **Copy of appeal filed to be submitted with the office of adjudicating authority.**

Any questions ????????



WITH KNOWLEDGE WE KNOW THE WORDS,
BUT WITH EXPERIENCE WE KNOW THE MEANING



CA. Rajiv Luthia