

**A  
PRESENTATION  
ON**

**“Adjudication, Penalties and  
Interest under GST”**

**IDT Refresher Course – GST 2.0**

**On 16<sup>th</sup> October, 2019**

**Organised by :**

**WIRC of ICAI at Mumbai**

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“Litigation: A machine which you go into as a pig and come out as a sausage.”

[Ambrose Bierce]

# Taxation Laws and Litigation

- Mounting litigation in the taxation fields
- Main reasons leading to tax litigation:
  - ✓ Vague and poorly drafted tax legislations
  - ✓ Arbitrary and revenue-biased interpretation by the Revenue officers
  - ✓ Tax avoidance (if not „tax evasion“) tendency of the taxpayers
  - ✓ Pressure of revenue targets
  - ✓ Frequent tweaking of the statutory provisions and Notifications

# Taxation Laws and Litigation...

- ✓ Retrospective amendments
- ✓ Confusing and controversial clarifications issued by the Board
- ✓ Conflicting judicial pronouncements.
- Tax disputes“ are unavoidable and inevitable
- Nature and handling of „tax disputes“ under Direct Tax Laws and Indirect Tax laws – vastly different.

# Assessment

- S.2 (11) defines the term „assessment“ so as to mean “*determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment.*”
- „Assessment“ – the process of determination of the amount of tax payable. Levy, assessment and collection are the three angles of the taxation triangle. “Assessment” comes between the stage of levy and collection.

# Assessment...

- „**Provisional assessment**“ **S.60(1)**

- ✓ taxable person's inability to determine value or rate of tax

- ✓ written request for provisional assessment

- ✓ order within 90 days permitting provisional assessment

- ✓ **finalization of assessment** within „**6 months**“ from the date of communication of order under sub-section (1)[S.60(3)]

- Extension by „**six months**“ by Joint/Additional Commissioner and „**four years**“ by Commissioner [Proviso to S.60(3)]

- On finalization of assessment

- if tax becomes payable, interest @ 24% p.a. from the due date in terms of S.50[S.60(4)]

- if refund arises, then interest @ 6% (or 9%(?) in terms of S.56 [S.60(5)]

# Assessment...

- **Issues relating to „provisional assessment“ and „finalization“ thereof:**
  - ✓ Relevance of the limitation period prescribed u/s. 73 or 74 when assessment is provisional
  - ✓ Whether demand as a consequence of finalization of assessment is necessary? [erstwhile S.73(6)(ii) of FA and S.11A(3)(ii)(b)]
  - ✓ Whether a provisional assessment is provisional for all purposes?
  - ✓ Whether an application for refund is required to be filed on finalization of provisional assessment?
  - ✓ Whether show cause notice is required before the finalization of assessment?
  - ✓ Refund is subject to „unjust enrichment“.

# Assessment...

- **Self-assessment**

- ✓ S.59

- ✓ „Self-assessment“ or „self-trap“?

- ✓ Does „self-assessment“ absolve the revenue officers of all their responsibilities?

- ✓ Standard, stereo-type recital in show cause notice

- ✓ Safeguards against future demands, etc.



# Show Cause Notice

## Statutory Provisions :

- ✓ S.73, S.74 and S.75 – complete machinery
- ✓ SCN – a mandatory requirement
  - Principles of natural justice
  - A condition precedent for demand.

## •Structure of SCN

- ✓ A starting point of entire proceedings and resolution of disputes.
- ✓ CBEC's Circular F.No. 96/1/2017-CX.1 dt. 19.01.2017 (Draft Circular?)

# Show Cause Notice...

- ✓ Introduction of the case
- ✓ Legal framework
- ✓ Factual statement and appreciation of evidences
- ✓ Discussion, facts and legal framework
- ✓ Discussion on limitation
- ✓ Calculation of duty and other amount due
- ✓ Statement of charges
- ✓ Authority to adjudicate.

# Assessment

- **Certain principles governing show cause notice:**
- **Whether show cause notice can be waived?**
  - ✓ No express provisions for waiver of SCN
  - ✓ S.73(5) or S.74(5) – Implications
  - ✓ Relevance of the judgements of the SC in
    - ✓ 1. Virgo Steels" case – 2002 (141) ELT 593(SC)
    - ✓ 2. Jagdish Cancer & Research Centre"s case -2001 (132) ELT 257(SC)
  - Karnataka HC in National Co-op. Bank Ltd"s case - 2018 (15) GSTL 202 (Kar.)

# Show Cause Notice...

- **Whether a mere letter or communication asking for payment is a notice?**
    - ✓ Metal Forgings v/s UOI-2002(146) ELT 241(SC)
    - ✓ Sidwal Refrigeration v/s CCE-2002 (145) ELT 682 (T)
  - **Should the show cause notice indicate the amount demanded?**
    - ✓ Tribunal LB in Bihari Silk & Rayon's case - 2000 (121) ELT 617 (Tri-LB);
    - ✓ M.P. HC in Gwalior Rayon's case -1982 (10) ELT 844 (MP)
    - ✓ Referred in Circular dt. 19.01.2017
    - ✓ S.75(7) – Implications
    - ✓ Observations in Bihari Silk's case –Bombay HC in JBA Printing Inks – 1980 (6) ELT 125 (Bom.)
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- ✓ Delhi HC in Hindustan Aluminium's case -1981 (8) ELT 642 (Del).

# Show Cause Notice

- **SCN issued under wrong provisions – Is it valid?**
- **Issue of corrigendum/addendum to SCN**
  - ✓ Enlarging the scope or changing the basis of notice through corrigendum/addendum – whether permissible?
  - ✓ Effect on limitation
- **Issue of corrigendum/addendum taking advantage of the party's submissions – Is it permissible?**
  - ✓ Calcutta HC in Jashoda Jiban Saha v/s S.K. Chatterjee's case
- **Relevant documents to be provided with SCN and un-relied upon documents/records to be returned**

# Show Cause Notice...

- **Applicability of the principle of „*Res Judicata*’**
  - ✓ Can fresh notice alleging willful suppression of fact, etc. be issued if the relevant or new facts are discovered later though a notice is issued earlier?
    - CBEC’s Circular No. 339/55/97-CX dt. 03.10.1997
    - Tribunal in Kapoor Lamp Shade -2001 (136) ELT 376 (T)
    - SC in Charminar Nonwovens” case – 2004 (167) ELT 372 (SC)
  - ✓ **Statement of Demand:**
    - S.73(3) and S.74(3)
    - Periodical or follow-up demand in case of issue of recurring nature
    - S.74(4)
      - No repeated allegations of willful suppression of facts, etc.
      - SC in Nizam Sugar Factory”s case -2007(197) ELT 465(SC).

# Show Cause Notice...

- **Limitation period for issue of show cause notice:**
  - ✓ Different limitation periods for cases **not involving** fraud or willful misstatement or suppression of facts to evade tax **and** involving such elements so as to evade tax.
  - ✓ Provisions broadly follow the erstwhile provisions.
  - ✓ **Absence of „collusion“ and „contravention of the statutory provisions“ as elements in S.74(1)**
  - ✓ Implications
  - ✓ Will „collusion“ stand covered by „fraud“?
  - ✓ **Omission of the words „intent“**

# Show Cause Notice

- Implications
- SC in Cosmic Dye Chemical's case – 1995 (75) ELT 721 (SC)
- Is the „intent“ in-built into „fraud“ and other expressions?
- Whether the adjective „willful“ qualify only „mis-statement“ or „suppression“ of facts also?
- Can mere suppression or failure to disclose a fact be used to invoke extended period of limitation?
- Is there an attempt to dilute or nullify the ratio of the principles laid down by SC in various judgments?



# Show Cause Notice...

## ✓ Computation of the limitation period for issue of SCN

- S.73(2) and S.74(2)

- Provision is distinct than the erstwhile provisions of S.11A of CEA or S.73 FA

- Is this the legacy of VAT legislations?

- Implications

- **Certain principles governing the invocation of the extended period of limitation:**

# Show Cause Notice...

- **Certain principles governing the invocation of the extended period of limitation:**

- ✓ **Ignorance of law – Can suppression be alleged?**

- A controversial maxim

- **Ignorantia legis neminem excusat – “Ignorance of law is no excuse”**

- SC in Bharat Electronics” case (2005) 142 STC 417 (SC)

- SC in Twin City Jewellers Asso. case – (2006) 147 STC 354 (SC).

- **Ignorantia facti excusat – Ignorance of fact is excusable**

- **No presumption that everyone knows law**

- SC in Motilal Padampat”s case (1979) 118 ITR 326 (SC)

- SC in D. Cawasji & Co”s case – (1978) 2 ELT J 154 (SC)

- Tribunal in Peter and Millers” case – 2008 (232) ELT 635 (Trib.)

- Conclusions

# Show Cause Notice...

- ✓ **Non-supply of the information not mandated under the statute does not amount to suppression**
  - SC in Smt. Shrishti Dhawan's case – AIR 1992 SC 1555
  - Gujarat HC in Apex Electrical's case – 1992 (61) ELT 413 (Guj.)
  - Explanation 2 to S.74.
- ✓ **Bonafide belief is not a suppression of fact, etc.**
  - SC in various judgements
  - Whether the omission of the word „intent“ render the principles laid down irrelevant?
  - Bonafide belief vs. blind belief
  - Tribunal in Interscape's case – 2006 (198) ELT 275 (T)

# Show Cause Notice...

- **Concept of „revenue neutrality“ and its impact on limitation:**
  - ✓ A controversial concept
  - ✓ Relevance and applicability to be decided in light of the facts of each case
  - ✓ ITC availability to the taxpayer himself or to others – distinct consequences
  - ✓ Availability to ITC to the taxpayer himself
    - Tribunal LB in Jay Yushin’s case -2000 (119) ELT 718 (Trib)
    - SC in NirlonLtd’s case – 2015 (320) ELT 22 (SC)
    - SC in AmcoBatteries’s case – 2003 (153) ELT 7 (SC)
    - SC in M & M’s case – 2005 (179) ELT 21 (SC)

# Show Cause Notice...

- ✓ Availability of ITC in case of RCM
  - Tribunal in Essar Steel's case -2009 (13) STR579(T)
  - Tribunal in Punjab Chemicals' case – 2017 (47) STR 345 (T)
  - Plea of revenue neutrality when credit is available to the buyer
  - Tribunal in Autolite's case – 2002 (146) ELT 345 (T) -affirmed in 2003 (154) ELT A 169 (SC).

# Adjudication proceedings

- Certain principles governing adjudication proceedings
  - ✓ Restriction on the number of adjournments
    - S.75(5)
    - Whether „shall“ to be read as „may“?
    - **SC in Salem's case**
    - Para 14.3 of Circular dt. 19.01.2017
- **Reply and hearing are not substitute of each other**
  - S.73(9) and S.74(9)
  - Time-limit for reply

# Adjudication proceedings

- ✓ Adjudication Manual
- ✓ Calcutta HC in Seth Enterprises" case -1996 (88) ELT 652(Cal.)
- **Pleas in reply**
  - ✓ Importance of raising all pleas
  - ✓ Filing of evidence and judgements
  - ✓ Filing of additional submissions (Board"s instructions)
- **Issue of taxability or rate of tax can be raised for the first time:**
  - ✓ Principle
  - ✓ Tribunal in Lili Foam Industries" case -1990 (46) ELT 462 (Tribunal)

# Adjudication proceedings

- ✓ Tribunal in Bakeman"s Home Products" case- 1997 (95) ELT 278 (Tribunal)
  - ✓ Tribunal in Decora Ceramics" case -1998 (100) ELT 297 (Tribunal)
  - ✓ **Can an order go beyond the show cause notice?**
    - Order contrary to the allegations is not valid
    - SC in Saci Allied Products" case -2005 (183) ELT 225 (SC)
    - SC in GAIL"s case – 2008 (232) ELT 7 (SC)
    - SC in Suresh Synthetics" case – 2007 (216) ELT 662 (SC)
    - SC in Hindustan Polymer"s case – 1999 (106) ELT 12 (SC)
    - SC in Reckitt & Colman"s case – 1996 (88) ELT 641(SC)
    - SC in GTC Industries" case – 1997 (94) ELT 9 (SC)
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# Adjudication proceedings

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# Adjudication proceedings...

- **Can an officer review his own order?**
  - ✓ **Principle of *functus officio***
  - ✓ No power vested in an officer to review his own order
  - ✓ SC in Kuntesh Gupta's case – 1987 (32) ELT 8 (SC)
  - ✓ Tribunal in Subex System's case – 2017(355) ELT 414 (Tri-Bang).
  - ✓ Tribunal in Vipin Mahajan's case – 2018 (364) ELT 527 (Tri-Mum).

# Offences, Penalty and interest under GST

- ✓ Enforcement, evasion and VAT/GST
- ✓ International experience
- ✓ Fraud-prone character of VAT/GST
- **Various Penal provisions of the CGST Act**
- **Penalties for non-payment of tax, etc. [S.73 & S.74]**
- **Penalty for non-payment of tax, etc. where the demand is raised within normal period of limitation [S.73]**
- Penalty leviable under the provisions of the Act or the rules made thereunder [S.73(1)]

# Offences, Penalty and interest under GST...

- Penalty equivalent to 10% of tax or Rs.10,000/- whichever is higher[S.73(9)]
- Proper officer ***to determine the penalty as prescribed due from the person and issue an order*** [S.73(9)]
- Is the penalty mandatory in nature under S.73?
- **Penalty for non-payment of tax, etc. when the demand is raised invoking extended period of limitation [S.74]**
- Penalty equivalent to the tax specified in the notice [S.74(1)]
- No discretion left with the proper officer once the element of fraud, etc. is established.

# Offences, Penalty and interest

SC in

1. Dharmendra Textile's case – 2008 (231) ELT 3 (SC)
  2. Rajasthan Spinning's case – 2009 (238) ELT 3 (SC)
  - 3. Ilpea Paramount's case – 2006 (202) ELT 744 (SC)
    - **Whether penalties under S.73/S.74 and S.122(2) imposable simultaneously for the same offence?**
    - **Benefit of waiver/reduction in penalty [S.73 & S.74]**
    - **S.73**
  - No penalty if entire tax along with interest thereon paid before service of the notice or statement of demand by the taxpayer on the basis of his own ascertainment or ~~as ascertained by the proper officer [S.73(5)& (6)]~~
-

# Offences, Penalty and interest under GST...

- No penalty if the tax along with interest is paid within 30 days of issue of the notice [S.73(8)]
- Proceedings in respect of the notice deemed to be concluded [S.73(8)]
- Non-payment of self-assessed tax or amount collected as tax within a period of 30 days from the due date of payment of such tax – Penalty under subsection (9) imposable[S.73(11)]

## **S.74**

- Penalty equivalent to 15% of tax if the amount of tax, interest and such penalty are paid by the taxpayer on his own ascertainment or as ascertained by the proper officer before issue of the notice or statement of demand [S.74(5) & (6)]

# Offences, Penalty and interest under GST...

- Penalty equivalent to 25% of tax if the amount of tax along with interest and the penalty are paid within 30 days of the notice and all proceedings in respect of the notice deemed to be concluded [S.74(8)]
- Penalty equivalent to 50% of the tax if the amount of tax, interest and penalty are paid within 30 days of the receipt of the order and all proceedings are deemed to be concluded [S.74(11)]
- **Clause (i) of Explanation 1 –**
  - *“all proceedings in respect of the said notice” to not include proceedings under S.132.*
  - S.132 – punishment including criminal prosecution in certain circumstances

# Offences, Penalty and interest under GST...

- Scope and implications
- **Clause (ii) of Explanation 1 –**
- On conclusion of proceedings against the main person, the proceedings against all the persons liable to pay penalty under Ss.122, 125, 129 and 130 are deemed to be concluded.

## **Penal provisions of S.122(1)**

- Whether „*mens rea*’ is an essential constituent?
- Quantum of penalty vis-à-vis the quantum prescribed under erstwhile S.77 of the FA
- **General disciplines related to penalty [S.126]**
- Is the prescription really effective?



# Offences, Penalty and interest under GST...

- **Interest – S.50**

- Interest @ 18% for non-payment or short payment of tax, etc. [S.50(1)]
- Interest @ 24% for undue or excess claim of ITC [S.50(3)]

- **Issues:**

- Scope of S.50
- Whether wrong availment or utilization of ITC covered by S.50(3)?
- Whether interest is payable on gross amount of tax or net amount after allowing deduction of eligible ITC?
- Whether interest is payable even if ITC is not utilized?

# Appeals

- **Appeal before Commissioner (Appeals)[S.107]**
    - Appeal lies against an Order of an adjudicating authority
    - “Adjudicating authority” defined in S.2(4)
    - Designation of „proper officer” for the purpose of issue of show cause notice and order under S.73 and S.74 by the Board
    - Circular dated 09.02.2018
    - Officers upto the rank of Additional or Joint Commissioner of Central Tax designated by the Circular
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# Appeals...

- **“Commissioner” not designated as „proper officer” for the purpose of issue of the notice and order under S.73 & S.74**
- Implications
- Appeal against order of the Additional/Joint Commissioner lies to Commissioner (Appeals)
- Appeal against order of the Deputy/Assistant Commissioner lies to Joint Commissioner (Appeals)
- **Department empowered to file a review application before the appellate authority [S.107(2) & (3)]**

# Appeals...

- **Time limit for filing the appeal by the taxpayer/ department:**
- 3 months from the date of communication of the order in case of the Assessee
- 6 months for filing the review application by the department
- Condonation of delay period in both the cases is „**one month**“
- **Powers of the appellate authority:**
- Powers of remand are absent in the statutory provision
- Additional powers (of adjudication) vested in the appellate authority [S.107(11)]
- Implications

# Appeal before the Appellate Tribunal [S.112]

- Appeal lies before the Tribunal against the order passed by the appellate authority or revisional authority
- **Time limit for filing the appeal:**
- 3 months from the date of communication of the order in case of the taxpayer [S.112(1)]
- **6 months from the date of passing of the order in case of the department [S.112(3)]**
- Tribunal empowered to condone delay by 3 months in filing of the appeal by the taxpayer.

# Appeal before the Appellate Tribunal [S.112]

- **Filing of Cross Objections before the appellate authority/ Tribunal:**
- No provisions for filing cross objections under S.107 before the appellate authority
- Filing of cross objections in case of appeal preferred by the other party before the Appellate Tribunal provided under S.112(5)
- Cross objections to be filed within 45 days of the date of notice of the filing of the appeal by other party
- Appellate Tribunal empowered to condone delay by 3 months in filing the cross objections

# Appeal before the Appellate Tribunal...

- **Statutory requirement of pre-deposit for filing the appeal before the appellate authority/Appellate Tribunal:**
- **In case of the appeal before the appellate authority**
- Full amount of tax, interest, fine, fee and penalty as admitted
- Amount equal to 10% of the remaining amount of tax subject to maximum Rs.25 crores.
- **In case of the appeal before the Appellate Tribunal:**
- Full amount of tax, interest, fine, fee and penalty as admitted
- Amount equal to 20% of the remaining amount of tax (**in addition to 10% paid at the first appellate stage**) subject to maximum Rs.50 crores.

# Appeal before the Appellate Tribunal [S.1

- **Principles governing and issues arising in case of the appeals:**
- Whether right of appeal is an inherent right or a creature of the statute?
  - SC in Anant Mills" case -AIR 1975 SC 1234
- Is right to appeal a vested right?
  - SC in Garikapati"s case -AIR 1957 SC 540
  - SC in HooseinKasam Dada"s case -1983 (13) ELT 1277(SC)
- Finality of an order if not appealed against
- Principles governing the condonation of delay in filing the appeal
  - SC in MST.Katiji"s case -1987 (28) ELT 185 (SC)



# Appeal before the Appellate Tribunal.....

- Can the appellate authority or Appellate Tribunal admit the appeal after expiry of the condonation period?
  - SC in Singh Enterprises" case -2008 (221) ELT 163 (SC)
  - Gujarat HC in Panoli Intermediates" case – 2015 (236) ELT 532 (Guj.)
  - Karnataka High Court in Icon Hospitality"s case [W.P. No. 17296/2018]
- Time limit for filing the appeal by the department before the appellate authority to be computed **from the date of communication of the order** but in case of appeal before the Tribunal, the time limit to be computed **from the date of passing of the order**

# Appeal before the Appellate Tribunal.....

- Implications
- SC in M.M. Rubber Co."s case-1991 (55) ELT 289 (SC)
- Tribunal in K.V. Paints" case -2017(356) ELT 104(T)
  - Can the appellate authority remand the matter for de-novo adjudication?
  - Can the Appellate Tribunal dismiss the appeal for non-prosecution?
  - **Absence of provisions for filing of cross objections by the other party in case of appeal filed by another party before the appellate authority under S.107**
- Whether intentional or accidental lapse?

# **Appeal before the Appellate Tribunal...**

- **No provisions for condonation of delay in filing the appeal by the department before the Appellate Tribunal under S.108**
  - Whether intentional or accidental lapse?
- **Curtailment of powers of condonation of delay vested in the Appellate Tribunal.**
- **No provision for adjudication by Commissioner and consequential filing of appeal before the Appellate Tribunal**
  - Whether intentional or accidental lapse?
  - Implications

# Appeal before the Appellate Tribunal...

- Requirement of pre-deposit – Can it be challenged?
- Quantum of pre-deposit as prescribed under GST vis-à-vis the quantum prescribed under the erstwhile tax regime – Implications
- Pre-deposit – Whether a condition precedent for „filing of the appeal“ or „admission of the appeal“?
- Quantum prescribed is only for CGST – Implications
- **Additional grounds/additional evidence:**
- S.107(10) – Filing of additional grounds – discretionary powers in the appellate authority
- No mention of filing of additional evidence before the appellate authority –

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Can it be filed?

# Appeal before the Appellate Tribunal...

- **Rule 112 empowers the appellate authority to allow the filing of additional evidence but is silent on filing of additional grounds.**
- **S.112 – Appeal before Appellate Tribunal – No specific provision for filing additional evidence or additional grounds – Can it be filed or raised ?**
- Rule 112 empowers the Appellate Tribunal also to allow the filing of additional evidence though the parent provisions are silent – However, no mention of filing of additional grounds in the Rule.
- **SC in Jute Corporation of India"s case– 1991 (51) ELT 176 (SC)**

# Appeal before the Appellate Tribunal...

- **Non-appealable orders [S.121]:**
  - Order directing transfer of proceedings from one officer to another officer
  - Order pertaining to the seizure or retention of Books of Accounts, Register and other documents
  - Order sanctioning the prosecution under the Act
  - Order passed under S.80 permitting the payment of tax or other amount in installments.

# What does a Client expect from a Professional?

**“C”** → Competence in the field  
→ Clarity of thought  
→ Communication

**“L”** → Loyalty to Self  
→ Loyalty to work  
→ Loyalty to client

**“I”** → Integrity  
→ Involvement  
→ Intelligence

**“E”** → Efficiency in work  
→ Ethical behavior

**“N”** → Non-complacency

**“T”** → Tenacity  
→ Transparency  
→ Trust

***“No man ever reached to excellence in any one art or profession without having passed through the slow and painful process of study and preparation.”***

Horace quotes (Ancient Roman Poet 65BC-8BC)

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