



Sec 73 vs 74 and Time Barring under GST

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Audit, Assessment & Investigation – Different powers

Assessment – Chapter XII

- Self Assessment (S. 59)
- Provisional Assessment (S. 60)
- Scrutiny of Returns (S. 61)
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Audit – Chapter XIII

- Audit by Tax Authorities (S. 65)
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Investigation – Chapter XIV

- Power of inspection, search & seizure (S. 67)
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- Power of Arrest (S. 69)
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Demands & Recovery – Chapter XV

- Adjudication of taxes – Matters not involving fraud etc. (S. 73)
- Adjudication of taxes – Matters involving fraud etc. (S. 74)

Findings in CAG (Report No. 1 of 2021) Dated 24.03.2021

5.9 Deficiencies noticed in SCNs pending for Adjudication

In the selected 116 offices, 11,723 SCNs were pending for adjudication as on 31 March, 2019. We examined 4,457 SCNs involving money value of ₹ 29,672.96 crore and noticed irregularities in 1,407 SCNs (31.57 per cent) involving money value of ₹ 12, 162.53 crore. Deficiencies noticed pertain to incorrect computation of demand in SCN, delay in adjudication and not taking steps to reduce litigation etc. as detailed in the table 5.5 below:

Table No. 5.5: Deficiencies noticed in SCNs pending for adjudication

Sl. No.	Type of Deficiency	No. of Deficiencies	Money value (in ₹ crore)	Deficiencies in % of sample (No.)
1.	Incorrect computation of demand in SCN resulting in Short demand raised	161	36.63	3.61
2.	Late issuance of SCNs which may result in demand getting time-barred in adjudication	71	30.17	1.59
3.	Delay in Adjudication	373	4,310.17	8.37
4.	Non-intimation regarding settlement commission	768	7,658.32	17.23
5.	Incorrect invocation of extended period	2	3.19	0.04
6.	Abnormal delay in Preparation of SCNs	23	94	0.52
7.	Short raising of demand due to delay in finalization of investigation	6	30.05	0.13
8.	Incorrect issue of SCN	3		0.07
	Total Deficiencies noticed	1,407	12,162.53	31.57
	Total Cases examined by Audit	4,457	29,672.96	
	Total Cases pending for adjudication in selected units	11,723		

Findings in CAG (Report No. 1 of 2021) Dated 24.03.2021

Table No.5.6: Deficiencies noticed in adjudicated SCNs during FY17 to FY19

Sl. No.	Type of Deficiency	No. of Deficiencies	Money value (in ₹ crore)	Deficiencies in per cent of sample (No.)
1.	Invocation of extended period of time held irregular in adjudication	10	17.32	0.3
2.	Invocation of extended period of time for issuing periodical SCN which may be held irregular in further appeal	9	4.94	0.27
3.	Non-inclusion of demand for part period due to late issuance of SCN	4	8.26	0.12
4.	Incorrect computation of demand resulting in short confirmation of demand in adjudication	15	147.81	0.45
5.	Delay in adjudication	340	4,716.09	10.19
6.	Delay in issuance of OIO within stipulation period after completion of last PH	581	4,063.89	17.42
7.	Dropping of demand due to non-availability of Relied upon documents	9	48.55	0.27
	Total Deficiencies noticed	968	9006.86	29.03
	Total Cases examined by Audit	3,335	17,208.40	
	Total Cases adjudicated in selected units	8,766		---

Service of Show Cause Notice

- Where it appears to the Proper officer that,
 - ✓ Tax has not been paid or
 - ✓ Short paid or
 - ✓ Erroneously refunded, or
 - ✓ ITC has been wrongly availed or utilised

S. 73 – For any reason other than

- ✓ fraud, or
- ✓ any wilful-misstatement, or
- ✓ suppression of facts to evade tax.

S. 74 – By reason of:

- ✓ fraud, or
- ✓ any wilful-misstatement, or
- ✓ suppression of facts to evade tax.

Important aspects related to SCN & Order

- *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.*
[Cosmic Dye Chemical vs. CCE -1995 (75) ELT 721 (SC)]

Important aspects related to SCN & Order

Wilful would exclude casual, accidental, bonafide or unintentional acts

- *Wilful would exclude casual, accidental, bonafide or unintentional acts or genuine inability. A wilful act would not encompass accidental, involuntary, or negligence in the act. It must be intentional, deliberate, calculated and conscious with full knowledge of legal consequences flowing there from – [Md. Illiyas AIR 2006 SC 258]*
- Whether non-disclosure of information in the return shall tantamount to suppression (Explanation to Sec. 74)?
- For the purposes of this Act, the expression “suppression” shall mean 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 failure to furnish any information on being asked for, in writing, by the proper officer. [Explanation 2 to Sec. 74] – ***[Smt. Shirishti Dhawan vs. Shaw Brothers -AIR 1992 SC 1555 & Apex Electricals (Pvt) Ltd. vs. UOI -1992 (61) ELT 413 (Guj.)]***

Important aspects related to SCN & Order

Does non-supply of information which is not specifically required under statute amount to suppression

- When certain information is not required to be supplied under the law and the same is not supplied to the department, it does not amount to suppression. ***[Supreme Electricals Pvt. Ltd. v. CCE (1992) 61 ELT 413]***
- No rule could be pointed out requiring a manufacturer to disclose the turnover of exempted goods. Even assuming it was, the appellant could not be held guilty of suppression when the law itself was not certain. ***[Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay 1995 (78) ELT 401 (S.C.)]***

Important aspects related to SCN & Order

- *Details declared in the books of accounts cannot be said to be suppressed – [Super Industries - 2017 (348) E.L.T. A127 (S.C.)]*
- *When both the sender and the owner importer in India declared the value of drawings and designs imported through courier at nominal figure of one dollar, it would clearly amount to wilful mis-statement and suppression. In this case, it was clear that the worth of drawings and designs were substantial. Moreover, in customs legislation the terminology of 'intent to evade payment' is not present. [ACC vs. CC (2001) 128 ELT 21 (SC)]*

Important Aspects related to SCN & Order

While issuing subsequent show cause notices, same/similar facts could not be taken as suppression of facts on part of assessee

- When the first SCN was issued, all the relevant facts were in the knowledge of the authorities. Later on, while issuing the second and third show cause notices the same/similar facts could not be taken as suppression of facts on the part of the assessee as these facts were already in the knowledge of the authorities. ***[Nizam Sugar Factory 2008 (9) S.T.R. 314 (S.C.)]***

Department already had the knowledge of the transaction

- Where the source agreement on the basis of which price was being fixed was within the knowledge of the department from March-April, 1995, show cause notice issued in 2000 was barred by limitation. ***[Monsanto manufacturers 2010 (260) E.L.T. 335 (S.C.)]***
- Assessee was filing returns regularly and all facts were within the knowledge of the department, extended period cannot be invoked. ***[Pahwa Chemicals 2005 (189) ELT 257 (SC)]***

Important aspects related to SCN & Order

Information to department asking for clarification

- Where an assessee had written to the superintendent of Central Excise for a clarification regarding the classification of the goods and there was further correspondence between the assessee and the Department on the said issue, then suppression could not be alleged. ***[CCE vs. Malleable Iron and Steel Casting Steel Company (1998) 100 ELT 8 (SC)]***

Can extended period be invoked in the cases involving revenue neutrality:

- No element of mis-declaration or evasion was involved as the price list declared by them accepted by the department since 1994 and the entire exercise is revenue neutral as they are entitled to Cenvat/ Modvat credit in its entirety. ***[Nirlon Ltd 2015 (320) E.L.T. 22 (S.C.)]***

Important Aspects related to SCN & Order

Something positive other than mere inaction or failure

- Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Mere non-declaration in the return cannot be labeled as suppression. ***[CCE vs. Chemphar Drugs & Liniments -1989 (40) ELT 276 (SC)]***
- When the manufacturer has classified the dhoops and agarbatthies as handicrafts based on the export policy in vogue, then mere failure or negligence of the manufacturer to take out licence or pay duty when there was scope for doubt that goods were not dutiable, then extended period cannot be invoked. ***[Padmini Products vs. Collector of Cex (1989) 43 ELT 195.]***

Important Aspects related to SCN & Order

'Mensrea' as a necessary constituent of such an offence

- *It is well settled that when the statutes create an offence and an ingredient of the offence is a deliberate attempt to evade duty either by fraud or misrepresentation, the statute requires 'mensrea' as a necessary constituent of such an offence. But when factually no fraud or suppression or misstatement is alleged by the revenue against the respondent in the show cause notice the imposition of penalty under Section 11AC is wholly impermissible. [CCE vs. Pepsi Foods Ltd. -2010 (260) ELT 481 (SC)]*

Matter involving interpretation - Issue pending with various courts

- *Where there was no definitive view on the issue of classification of product as clearing preparation or disinfectant, no extended period of limitation can be invoked. [Nirmala Dychem 2007 (207) E.L.T. 161 (S.C.)]*
- *When the classification of the micro-nutrient fertilizers was not settled and there was also a conflict of views between the ministry of finance and ministry of agriculture, the question of invoking extended period of limitation did not arise. [CCEx vs. Karnataka Agro Chemicals (2008) 227 ELT 12 (SC)]*

Important Aspects related to SCN & Order

Extended period cannot be invoked in case of retrospective amendment:

- It would be against all principles of legal jurisprudence to impose penalty on a person or to confiscate his goods for an act or omission which was lawful at the time when such act was performed or omission made, but subsequently made unlawful by virtue of any provision of law. ***[JK Cotton Spinning and weaving mills 1998 (99) E.L.T. 8 (S.C.)]***
- No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law at the time of the commission of the offence. ***[Article 20 of the Constitution of India]***
- Where penalties dropped, extended period cannot be invoked. ***[Kapadia enterprises vs UOI]***

Important Aspects related to SCN & Order

Initial burden to prove is on department

- *The initial burden is on the Department to prove that the situations visualised by the proviso existed. But once the Department is able to bring on record material to show that the appellant was guilty of any of those situations which are visualised by the section, the burden shifts and then applicability of the proviso has to be construed liberally.*
- *When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the **assessee must be aware that the duty was leviable and it must deliberately avoid paying it.***
- *The word 'evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word 'intent'. In other words the assessee must deliberately avoid payment of duty which is payable in accordance with law. **[Tamil Nadu Housing Board vs. CCE -1991 (74) ELT 9 (SC)]***

Important Aspects related to SCN & Order

- *It is a cardinal postulate of law that the burden of proving any form of malafide lies on the shoulders of the one alleging it.*
- *It cannot be overlooked that burden of establishing malafide is very heavy on the person who alleges it. The allegations of malafide are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility. [Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur 2013 (288) ELT 161 (S.C.)]*

SCN issued due to departmental audit

- *Irregular credit availment was found only during the audit cannot be sustained where there is no allegation in the show cause notice that the assessee was involved in the mis-declaration or suppression. [Dynamic Industries 2014 (307) E.L.T. 15 (Guj.)]*
- *It cannot be said that only because audit party had found some credit availed has inadmissible, suppression of fact is made out. [Medisray Laboratories P. Ltd. Vs CCGST (E/85429/2018) (CESTAT)]*

Time-limit for issuance of Show Cause Notice & Order

Section 73 – Normal Cases

- Proper officer shall issue the notice **at least 3 months** prior to the time limit specified for issuance of order;
- Proper officer shall issue order within:
 - ✓ 3 years from the due date for furnishing of annual return for the financial year to which the tax relates; or
 - ✓ 3 years from the date of erroneous refund.

Sec 74 – Cases involving fraud etc.

- Proper officer shall issue the notice **at least 6 months** prior to the time limit specified for issuance of order;
- Proper officer shall issue order within:
 - ✓ 5 years from the due date for furnishing of annual return for the financial year to which the tax relates; or
 - ✓ 5 years from the date of erroneous refund.

Time-limit for issuance of Show Cause Notice & Order

Sec. 73

Demand for the period	F.Y.2017-18
Due Date for filing Annual Return	31 st January 2020
Maximum Time for issuance of SCN	31 st October 2022
Adjudication Order to be passed	31 st January 2023

Sec. 74

Demand for the period	F.Y.2017-18
Due Date of filing Annual Return	31 st January 2020
Due Date for SCN	31 st July 2024
Adjudication Order to be passed	31 st January 2025 (5 years from above due date)

Other key Points to be noted

- No time limit if any amount as representing the tax is collected but not paid - Sec 76 (1)
- *A show-cause notice issued a decade back should not be allowed to be adjudicated upon by the revenue merely because there is no period of limitation prescribed in the statute to complete such proceedings. Larger public interest requires that revenue should adjudicate the show-cause notice expeditiously and within a reasonable period – Parle International Limited 2020 (11) TMI 842 – (Bom HC)*
- No Time-limit provided in the law for replying to the show cause notice;
- Delay in filing reply can affect the upper limit for issuance of orders.

Exclusions from the calculation of limitation

Sec. 75(1)

- Where the service of notice or issuance of order is stayed by an order of a court or Appellate Tribunal, the period of such stay shall be excluded in computing the period specified in sub-sections (2) and (10) of section 73 or sub-sections (2) and (10) of section 74, as the case may be.

Sec. 75(11)

- An issue on which the Appellate Authority or the Appellate Tribunal or the High Court has given its decision which is prejudicial to the interest of revenue in some other proceedings and an appeal to the Appellate Tribunal or the High Court or the Supreme Court against such decision of the Appellate Authority or the Appellate Tribunal or the High Court is pending, the period spent between the date of the decision of the Appellate Authority and that of the Appellate Tribunal or the date of decision of the Appellate Tribunal and that of the High Court or the date of the decision of the High Court and that of the Supreme Court shall be excluded in computing the period referred to in sub-section (10) of section 73 or sub-section (10) of section 74 where proceedings are initiated by way of issue of a show cause notice under the said sections.

Deemed conclusion of adjudication

- The adjudication proceedings shall be deemed to be concluded, if the order is not issued within three years as provided for in sub-section (10) of section 73 or within five years as provided for in sub-section (10) of section 74. [Sec. 75(10)] [***Commissioner of Central Excise, Ahmedabad-I vs. M. Square Chemicals 2008 (231) ELT 194 (S.C.) – No demand can be made beyond 5 years.***]

Procedure to be followed for service or reply to SCN/ Order

- The proper officer shall serve along with the notice/ statement, a summary thereof ***electronically*** in **FORM GST DRC-01 or DRC-02** respectively;
- Proper officer ***may***, before service of notice ***communicate*** the details of any tax, interest and penalty as ascertained by the said officer, in **Part A of FORM GST DRC-01A**. ‘Shall’ substituted for “may” vide Notification No. 79/2020-CT dated 15.10.2020. ***[Period between 09.10.2019 to 15.10.2020]***
- SCN can only be issued electronically on the common portal - Shri Shyam Baba Edible Oils Vs CCE (MP High Court) 2020-TIOL-2016-HC-MP-GST
 - *It is trite principle of law that when a particular procedure is prescribed to perform a particular act then all other procedures/modes except the one prescribed are excluded - This principle becomes all the more stringent when statutorily prescribed.*
- DIN to be quoted on all communications (including emails): To be treated as invalid and deemed to have never been issued - Circular No. 122/ 2019 & Circular No. 128/ 2019

Penalty Settlement Scheme

Section	Tax, Interest and Penalty	Action by the taxpayer	Action taken by the Authority
Voluntary payment before issuance of SCN			
Under Section 73	Tax + Interest	Intimate the Department about voluntary payment in Form DRC-03.	The proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04, and if satisfied, no notice will be issued.
Under Section 74	Tax + Interest + Penalty @ 15% of tax		

Penalty Settlement Scheme

Section	Tax, Interest and Penalty	Action by the taxpayer	Action taken by the Authority
Payment within 30 days of issue of SCN			
Under Section 73	Tax + Interest	Intimate the Department about voluntary payment in Form DRC-03.	If the Authority is satisfied with the reply, it will drop the proceedings by the issue an order in Form DRC-05, or else Notice of a personal hearing will be issued.
Under Section 74	Tax + Interest + Penalty @ 25% of tax		

Penalty Settlement Scheme

Section	Tax, Interest and Penalty	Action by the taxpayer	Action taken by the Authority
Payment after 30 days of issue of SCN but within the stipulated time mentioned in SCN			
Under Section 73	Tax + Interest + Penalty @ 10% of tax or Rs. 10,000 whichever is higher	Reply to the SCN in Form DRC-06 and submit documents.	If the Authority is satisfied with the reply, it will drop the proceedings by the issue of Form DRC-05, or else Notice of a personal hearing will be issued.
Under Section 74	Tax + Interest + Penalty @ 50% of tax		

Subsequent period SCN

- Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised. **Sec. 73(3) & Sec. 74(3)**
- The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful misstatement or suppression of facts to evade tax, are the same as are mentioned in the earlier notice. **Sec. 74(4)**

SCN and voluntary payment

- Apart from the self-assessed tax, SCN is not warranted if the taxpayer voluntarily exercises the option u/s 73(5) or 74(5) to settle the dispute.
- Amount paid under the stress of investigation cannot lead to self-assessment or self-ascertainment when the petitioner is fully geared up to take the matter forward. Hence the said amount paid is required to be returned. [***Shri nandhidhall Mills India Private Limited v. Senior Intelligence Officer (W.P. No. 5192 and 6135 of 2020) (Mad.)***]

Notice deemed to be issued u/s 73 if fraud etc. not established

- 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. **[Sec. 75(2) of the CGST Act]**
- What if the adjudicating authority concludes that the notice issued u/s 74(1) 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?

Other Key Aspects

- The expression “all proceedings in respect of the said notice” shall not include proceedings under section 132 – **Punishment for certain offences.**
- Where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty **under sections 122 and 125** are deemed to be concluded.
- 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. [Sec 75(3)] – **Remand matters**
- 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. [Sec 75(4)] – **Opportunity of being heard**

Other Key Aspects

- The proper officer shall, if sufficient cause is shown by the person chargeable with tax, grant time to the said person and adjourn the hearing for reasons to be recorded in writing:
- *Provided that no such adjournment shall be granted for more than three times to a person during the proceedings. [Sec 75 (5)]*
- The amount of tax, interest and penalty demanded in the order shall not be in excess of the amount specified in the notice and no demand shall be confirmed on the grounds other than the grounds specified in the notice. [Sec 75 (7)]
- Where any penalty is imposed under section 73 or section 74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act. [Sec 75 (13)]

Other Key Aspects

- 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. [Sec 75 (12)]
- [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.]

Corrigendum to SCN

- No express provisions in law permitting the issuance of a corrigendum. The amendments made in the SCN through a corrigendum dates back to the original SCN.
- Corrigendum can cure errors in the SCN but cannot enlarge the scope or make a new case otherwise the statutory time limits will be given a go-by.
- We find that the decision of the Hon'ble Calcutta High Court in Jiban Sahacase (supra) relied by the appellants holding that revised notice issued for enlarging the scope of first notice by taking advantage of the defence already disclosed, would be illegal and barred as analogous of res judicata would be clearly applicable in the facts of the case. ***[Espi Industries Chemical vs. Commissioner of Central Excise, Hyderabad 2000 (115) ELT 81 (Tri.-Del)]***
- Corrigendum revising the demand issued after the expiry of statutory period is bad in law. ***[Truwoods Private Limited vs. Commr. of Customs, Visakhapatnam 2006 (204) ELT 288 (Tri.-Bang) (Affirmed by SC)]***

Testing validity and legality of the SCN

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Chronicle



GST Council to meet on February 18

During the 9th meeting of the GST Council, a high level forum of the Centre and all the states, a consensus was reached on how tax payers will be split for audit.

As per the agreement the states will have the power to assess and administer 90 per cent of the tax payers with less than Rs 1.5 crore annual turnover while the remainder would be controlled by the Centre.

However, intelligence based enforcement power will be with both the Centre and states. For tax-payers with more than Rs 1.5 crore turnover, the states and the Centre will control and administer them in a 50:50 ratio.

Mr Jaitley said each assessee will be assessed by only one authority. The states would also have the powers to levy tax on economic activity within 12 nautical miles of territorial waters even though such rights constitutionally vest with the Centre.

THANK YOU



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