

Letter Head of Company

Dated :

To

Sub : Remand of SCN for Pre-consultation – M/s. , New Delhi - c/r

Ref : SCN F.No. - dated -

Dear Sir,

A The undersigned has been appointed as the Counsel to the aforesaid Noticee. Vakalatnama is enclosed.

B Noticee requests Your Honour [Ld. ADG, DGGSTI (“DGGSTI”)] to please withdraw and reconsider the subject Demand Show Cause Notice (“SCN”) as the issuing Authority, on the grounds of non-adherence of provisions of law, as well as, to the legality and validity of exercise of jurisdiction, inasmuch as it was not preceded by pre-show cause notice consultative procedure as mandated under Master Circular dated 10.03.2017 [“Master Circular”] w.r.t. Instruction dated 21.12.2015 bearing F. No. 1080/09/DLA/MISC/15 [“Instructions”], read with instructions dated 08.07.2016, issued by the Central Board of Excise and Customs, *inter-alia*, on the following grounds:-

1.0 That, Your Honour in exercise of powers as Commissioner, did not adhere to the mandate of the Master Circular and Instructions issued by the CBEC, which cast a statutory obligation on the Principal Commissioner or the Commissioner, as the case may be, to conduct a pre-show cause notice consultation with the Assessee in cases where demand of duty exceeds Rs. 50 Lakh, in consonance with ‘National Litigation Policy-2010’ of the Government of India, to curb litigation

involving the Government. The pre-show cause consultation mechanism is in line with the mandate of Section 73(3) of the Act. It is a matter of record that vide the impugned Show-Cause Notice dated 27.04.2018 , Your Honour determined the duty payable by the Noticee to the tune of Rs. -/- Therefore, it was incumbent upon Your Honour to afford a fair opportunity to the Noticee , prior to issuance of a formal Show-cause Notice. The inquiry communications by your office only sought records and transaction details.

2.0 The need for pre-show cause notice consultation was duly emphasized in the First Report of the Tax Administration Reform Commission [TARO] dated 30.05.2014. In furtherance of the avowed object sought to be achieved by the TARC, Instruction dated 21.12.2015 bearing F. No. 1080/09/DLA/MISC/15, was issued by the CBEC providing for the following:-

"5. Pre show cause notice consultation with the Principal Commissioners and Commissioners is being made mandatory prior to issue of SCN in the case of demands of duty above Rs. 50 Lakhs (except for preventive / offence related SCN's)"

2.1 The relevance of pre-show cause consultation was also recognized in the Master Circular dated 10.03.2017 issued by CBEC. Relevant extract from the Master Circular is reproduced herein below for ready reference:-

"5.0 Consultation with the noticee before issue of Show Cause Notice: Board has made pre show cause notice consultation by the Principal Commissioner/ Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs. 50 lakhs (except for preventive/ offence related SCN's) mandatory

vide instruction issued from F No. 1080/09/DLA/MISC/15 dated 21st December 2015. Such consultation shall be done by the adjudicating authority with the assessee concerned. This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show cause notice."

2.2 Even prior to that, there is another circular issued by the CBEC dated 08.07.2016, which also gives similar directives with regard to the pre show cause notice consultation. The operative portion of the circular reads as follows:-

Please refer to the instruction issued vide F No 1080/09/DLA/MISC/15 dated 21st December 2015, wherein, pre show cause notice consultation with the Principal Commissioner / Commissioner prior to issue of show cause notice in cases involving demands of duty above Rs. 50 lakhs (except for preventive / offence related SCN's) has been made mandatory.

2.3 Instructions / circulars / clarifications as mentioned above, make it expressly clear that these are steps towards trade facilitation and promoting voluntary compliance and also a measure to reduce the necessity of issuing show cause notices where avoidable. In fact, Master Circular dated 10.03.2017 uses the phrase '*such consultation shall be done by the Adjudicating Authority with the Assessee concerned*'.

2.4 According to Black's Law Dictionary, the word 'consultation' is defined as follows:

'1. The act of asking the advice or opinion of someone. 2. A meeting in which parties consult or confer. 3. International law. The interactive methods by which states seek to prevent or resolve disputes.'

2.5 A holistic reading of the above extracts makes it clear that the Department has incorporated an Alternative Dispute Resolution Mechanism by way of the consultation process to reduce litigation wherever possible. This is to facilitate resolution of disputes in the light of the responses sought and received from the Assessee arising out of prima facie view of the Department, thus obviating the necessity of even a show cause notice where the dispute can be resolved in an amicable fashion.

2.6 The obvious inference is that the consultation has to be between the assessee and the officer and prior to the stage of issuance of show cause notice. Such consultative process as envisaged by the Department mandates an opportunity of personal hearing with the Assessee, face to face, in order to make the process meaningful. The Noticee, in this case, has been denied this opportunity.

3.0 Vide the Impugned Show-cause notice issued by Your Honour, alleging *inter alia* that tax was not paid on Transferable Development Rights ("TDR") being the alleged taxable services rendered by the Noticee, a substantial demand to the tune of Rs. -was determined in the impugned notice. Further, the Noticee was also called upon to show-cause why penalty under Section 76, 77 and 78 of the Finance

Act, 1994 r.w. Section 174 of Central Goods & Services Tax Act, 2017 ['CGST Act'] should not be levied, in addition to recovery of interest u/s 75 of the Finance Act, 1994 from the Noticee, as well as, personal penalty u/s 78A on the Directors of the Noticee.

3.1 Had the Noticee been given an opportunity for placing on record his considered and informed view that no Service Tax was payable on such transactions. There were unique facts and circumstances to this case. Noticee would have pleaded *inter-alia* that there are numerous decisions, including by the Adjudicating & Appellate Authorities, including several CESTAT Benches on the issues raised in the SCN.

4.0 Had such consultation been conducted, according to the petitioner there might well have been no necessity for a SCN which triggers the commencement of adversarial proceedings between the petitioner and the Department. It is trite law that issuance of a show-cause notice is the point of commencement of *lis*. Once a formal show cause notice is issued, Noticee will be constrained to take note of the effect of Show-cause notice in the accounts by making a provision therein. Further, a show-cause notice is also required to initiate and levy penalty under the Act. Pre-show cause notice consultation is a non-substantive proceeding where the assessee, in consultation with the concerned officer, has the opportunity to arrive at a resolution without undergoing a substantive assessment entailing penalty. Even otherwise, once extended period of limitation is invoked, levy of penalty is a *fait accompli* in view of provisions of Sections 76, 77 & 78 of the Act. Since the pre-consultation stage precedes issuance of a formal show-cause notice, penalty proceedings under the Act do not get triggered in the event of an amicable settlement. In the event, the Officer is not persuaded with the stand of the Assessee within the

prescribed time period, it is open to him to raise a demand by way of a formal show-cause notice.

5.0 Circulars and Instructions issued by the CBEC are binding on the authorities and there cannot be any exception thereto [CCE, Bolpur Vs. Ratan Melting and Wire Industries, reported in 2008 13 SCC 1]. Circulars issued under Section 37B of the Central Excise Act, 1944 r.w. Section 83 of the Finance Act, 1994, carry the force of law in as much as they supplement or supplant the statute. The authority is vested with the Board with the intent of effective and proper administration of the provisions of the statute. Thus, where in cases it is made compulsory to conduct a pre show-cause notice hearing / consultation with the Assessee, any action in contravention of the said mandate would amount to violation of natural justice.

5.1 In **R & B Falcon (A) Pty. Ltd. Vs. CIT, reported in (2008) 12 SCC 466**, the Hon'ble Supreme Court laid down that:-

"The CBDT has the requisite jurisdiction to interpret the provisions of the Act. The interpretation of the CBDT, being in the realm of executive construction, should ordinarily be held to be binding, save and except where it violates any provisions of law or is contrary to any judgment rendered by the Courts. The reason for giving effect to such executive construction is not only same as contemporaneous which would come within the purview of the maxim temporaria caste pesto, even in certain situation, a representation made by an authority like Minister presenting the Bill before the Parliament may also be found bound thereby.

5.2 Thus, Circulars issued by the Board in exercise of power u/s 37B of the Central Excise Act, 1944 r.w. Section 83 of Finance Act, 1994, are binding on the authorities functioning within the four corners of the Act. There can be no exception to the aforesaid principle of law.

6.0 The said pre-show cause notice hearing was introduced as an alternate dispute resolution mechanism with the solemn object of trade facilitation and curbing litigation. It is categorically prescribed in the Master Circular issued by the Board that "... This is an important step towards trade facilitation and promoting voluntary compliance and to reduce the necessity of issuing show-case notice." Vide Notification No. 29/2018-Cus. (N.T.), dated 02.04.2018, the Board in exercise of power vested under Section 157(2)(e) r.w. Section 28(1) of the Customs Act, 1962, introduced the 'Pre-notice Consultation Regulations, 2018' prescribing the mode and manner of conducting the pre-notice consultation with the Assessee. Similar provision has been introduced for the purposes of proceedings under the Customs Act, 1962, vide the Pre-notice consultation Regulations, 2018.

6.0 Pre-consultation is identical to the procedure devised by the Hon'ble Supreme Court in **GKN Driveshafts Vs. ITO, reported in 259 ITR 19 (SC)**, for assumption of jurisdiction u/s 147 of the Income Tax Act, 1961, to reassess a concluded income tax assessment. The Apex Court in a number of decisions observed that jurisdictional facts are like polycentric web and jurisdictional facts must be available on record. Pre-consultation is envisaged only to cull out and settle the jurisdictional facts. In the present context, Pre-consultation is relevant since Your Honour has assumed jurisdiction to issue a show-cause notice by invoking the extended period of limitation, based on incorrect jurisdictional facts.

6.1 In the matter of **Tube Investment of India Ltd. Vs. Union of India, in WP(C) No. 11858 of 2017**, vide judgment dated 09.02.2018, the Hon'ble Madras High Court made the following observations:-

"5. The concern of the CBEC appears to have been that, when large tax payers are visited with show cause notices, there should be a consultation process and the monetary limit has been fixed where duty demands are above Rs.50 lakhs, except for preventive/offence related show cause notices. The Circular mandates that such consultation should be made by the Principal Commissioner / Commissioner prior to the issuance of show cause notice. Though the Circular dated 10.03.2017 came to be issued much after the impugned show cause notice, it reiterates the procedure stipulated in the Circular dated 21.12.2015, wherein, the following directives have been issued:-

7. Admittedly, the above referred procedure, which has been held to be a mandatory by CBEC, has not been adhered to in the instant case..."

8. Thus, for the above reasons, this Court is inclined to entertain the present Writ Petition, challenging the show cause notice. In the result, the Writ Petition is allowed, the impugned notice is set aside and the matter is remanded to the fourth respondent, for fresh consideration. The fourth respondent is directed to afford an opportunity of personal hearing to the authorized representative(s) of the petitioner..., after affording full and effective opportunity, consider the case and then proceed in accordance with law..."

The Hon'ble Madras High Court was pleased to set aside SCN issued to Tube Investment without carrying out the pre-show cause consultation and remanded it to the concerned officer for *de novo* consideration.

6.2 In **Amadeus India Pvt. LTD. Vs Principal Commissioner, Central Excise, Service Tax And Central Tax Commissionerate [2019 (5) TMI 669 - Delhi High Court]**, the Hon'ble Court observed :

1. .. The question that arises is whether prior to issuing the impugned show cause notice (SCN) dated 4th September 2018, the Office of the Principal Commissioner, Central Excise, Service Tax and Central Tax Commissionerate, Delhi South (the Respondent herein) ought to have held a pre-notice consultation with the Petitioner in terms of para 5.0 of 'Master Circular' dated 10th March, 2017 issued by the Central Board of Excise and Customs ('CBEC')?

While advertng to TARC recommendations, it stated :

10. Further, the TARC was of the view that the tax officers should not be allowed to resort to coercive actions for recoveries during the consultation process. The TARC recommended that only those officers competent to issue notices should engage in such consulation; they should adopt 'an open and receptive attitude and give full consideration to tax payer's points of view first before formulating their own opinion.' This exercise was to narrowed down the issues and confine the notice only 'in respect of unreserved issues'. Further the points on which agreement has been reached should not be contested any further by either party.

While referring to CBEC Master Circular of 10th March, 2017, it observed:

16. The mandatory character of the Master Circular can be traced to Section 83 of the Finance Act, 1994 which makes Section 37 B of the Central Excise Act, 1944 applicable in relation to service tax. In terms Section 37 B of the Central Excise Act, 1944 instructions issued by the CBEC would be binding on the officers of the Department.

Court also referred to the well-settled legal position laid down in **State of Tamil Nadu v. India Cements Ltd. (2011) 13 SCC 247 (SC)** and the **Tube Investment of India Ltd. v. Union of India** (Madras High Court), and held:

18. In the present case, the Court is satisfied that it was necessary in terms of para 5.0 of the Master Circular for the Respondent to have engaged with the Petitioner in a pre SCN consultation, particularly, since in the considered view of the Court neither of the exceptions specified in para 5.0 were attracted in the present case.

Thus, the Court in Amadeus case set aside the impugned SCN and relegated the parties to the stage prior to issuance of impugned SCN.

6.3 Further reliance is placed on the following similar case-laws of Madras High Court :

- Hitachi Power Europe GMBH Project Office Versus Central Board Of Indirect Taxes And Customs, Senior Audit Officer/Cera Party V 361 Anna Salai, Assistant Commissioner Of Service Tax, The Principal Commissioner Of Cgst And Central Excise in Writ Petition No.30456 of 2018 And WMP

No.35527 of 2018. Order pronounced on 02 April 2019 [2019 (5) TMI 874 - MADRAS HIGH COURT]

- Freight Systems (India) Private Limited Versus The Commissioner Of Central Goods And Service Tax And Central Excise - Audit Ii Commissionerate, Chennai in Writ Petition No.1618 of 2019 & WMP Nos.1800 & 1801 of 2019 & WMP Nos.5609 and 5624 of 2019. Order pronounced on 28 February 2019 [2019 (2) TMI 1622 - MADRAS HIGH COURT]

It is noteworthy that in both the cases, the SCNs were relegated to the Issuing / Adjudicating Authority by the Madras High Court; that the orders of another High Court are binding on other jurisdictions unless that jurisdictional High Court has passed a contrary judgement on the same issue; and that these were pronounced prior to issuance of SCN in this case:

C Under the circumstances the Noticee humbly prays that Your Honour should withdraw / reconsider the SCN by adhering to the instructions stated explicitly in the subject Master Circular, other instructions and directives, as well as, the binding judgements of the High Courts, in letter and spirit, as discussed above and to afford an effective opportunity to consider our stand on why such amounts paid by us are not taxable.

The Noticee awaits an early formal communication to appear before Your Honour with all relevant materials and be granted opportunity of pre-SCN Consultation.

Yours truly,

