

SHOW CAUSE NOTICE – ITS INGRIDIENT –
PART-I

By

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In the GST regime, of late, the Show Cause Notice (hereinafter called SCN) has started pouring in. In last about ten months, there had been audits and investigation in respect of transitional credits or otherwise – which led to issuance of Show Cause Notice (hereinafter called SCN). The SCN were issued under the regime of (a) Central Excise, (b) Service Tax etc. primarily under Section 11A of the Central Excise Act, 1944 within a period of two years from the relevant date (time limit of one year upto 14th May, 2016). However, where the Department was alleging fraud, collusion, willful mis-statement and suppression of facts, with an intent to evade payment of duty, demand can be raised within a period of five years. In other words, the department can issue SCN within a period of five years by invoking the extended period of limitation.

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However, no SCN can be issued seeking to demand tax/duty for a period more than five years as has been held in the case of CCE Vs. Pashupati Spinning & Weaving Mills Ltd MANU/CE/0140/2012 (Tri) and also Endurance Technologies (P) Ltd Vs. CCE MANU/CE/0381/2012 (Tri). However, where there is continuous and recurring obligation on the part of assessee, then the period of five years shall not be apply as has been held by the Five Member Bench of Tribunal in the case of Bombay Hospital Trust Vs. CCE 2005(188) ELT 374 – where medical equipments were imported without payment of custom duty with a condition that the certain percentage of patients shall be treated free and such condition has not been fulfilled – no time limit shall apply. Under GST regime, Section 73 of CGST Act, lays down the time limit (normal period) within which, the SCN is required to be issued to the assessee. Section 74 of CGST Act, lays down time limit laying extended period of limitation.

SERVICE OF SCN IS MANDATORY

2: No demand can be raised without issuance of SCN – CCE Vs. Akay Cosmetics 2005(182) ELT 294 SC. Here issuance means actual service of notice and not merely issuance of a notice by the Department without its actual service upon the party . In the case of Union of India and Ors. v. Madhumilan Syntex Pvt. Ltd. MANU/SC/0550/1988 : 1988 (35) ELT 349 (SC), this Court held that the demand raised without notice was

invalid. Section 11A clearly proceeded to say that prior show-cause notice must be issued to the person against whom any demand on grounds of short-levy or non-levy was proposed and, therefore, post-facto show-cause notice cannot be regarded as adequate in law.

SCN IS MUST EVEN IF PARTY ADMITTED LIABILITY.

3: Even if the party has agreed to pay the duty during investigation stage, yet the adjudication of SCN (i.e. service of SCN, receiving reply to SCN, grant of reasonable opportunity of personal hearing and passing of adjudication order is must)- Balaji Vegetables Vs. CCE 1999 (108) ELT 802; Saphai Saw Mills Vs. CCE 1999 (109) ELT 197. Despite the fact that the duty has been deposited (either with protest or without protest), SCN is a must as has been held in AR Plastic Vs. CCE 2004(171) ELT 413 and also Veera Spinning Mills Vs. CCE 2001(131).

3.1: No demand can be confirmed either upon Director or on partners unless SCN has been served upon them by the Department – Prabhat Forging Vs. CCE 2002(139) ELT 720. Similarly no tax and penalty can be confirmed on employee unless he had been served with SCN setting out his role in the commission of offence or evasion of duty– Pfizer Ltd GVs. CCE 2001(131) ELT 251 (Tri).

3.2 In case of partnership firm, SCN must be served upon the firm and the service of notice only upon the partner is not a good service and shall not be deemed to be service upon partnership firm. Nityanand Nirmal Vs. CCE 1999(109) ELT 522 followed in CCE Vs. Sompura Ceramics 2001(130) ELT 195 (Tri).

MERE A LETTER DEMANDING DUTY/TAX IS NOT SCN

4. A communication sent by the Department either in the form of directions or suggestion or advice shall not be construed as SCN as SCN requires clear, specific unambiguous charge, alleged violation of law or rules, clear and specific demand of duty/tax/penalty and grounds for levy of penalty and above all, if the extended period is invoked, then the reasons/grounds for invocation of extended period. Metal Forgings Vs. UOI 2003(146) ELT 241 SC. However, every communication cannot be equated with SCN unless the communication contains all the necessary ingredients, as stated above in this para , of SCN are contained as has been held in the case of J K Synthetics Vs. UOI 2009(234) ELT 417 (Delhi HC) and CCE Vs. Merchant Impex 2012(276)ELT 458 Karnataka DB.

4.1: A letter issued by Supdt/AC asking the party to pay Tax/Duty is not a valid notice and is in violation of principal of natural justice Steel Ingots Vs. UJOI 1988 (360 ELT 529(MP): Ennore Steel Vs. UOI 1990(47) ELT 363 Madras. cannot be treated as SCN.

THERE IS NO PRESUMPTION EVERYONE KNOWS THE ENTIRE LAW.

5. It is generally said that ignorance of law is no excuse as has been held in Bharat Electronics Ltd Vs. CCE 2005(142) STC 417 and also in State of UP vs. Twin Jewellers Association 2006(147) STC 354. However, are some old judgments of Hon'ble Supreme Court wherein it has been held that there is no presumption that everyone known all laws. Motilal Padampat Sugar Mills Co Ltd Vs. State of UP AIR 1979 SC 621 and also in D Cawasji & Co Vs. State of Mysore 1978(2) ELT J154 SC.

WHO CAN ISSUE SCN ? – ITS EFFECTS

6. The Section 73 and 74 of CGST Act authorize “proper officer” to issue SCN and the proper officer has been defined in Section 2(91) to mean “Commissioner” or the officer of the Central Tax who is assigned that function by the Commissioner in the Board. What is the affect if the SCN has been issued by a person who is not a “proper officer” ?

7: In Godrej Soap Vs. CCE 2004(174) ELT 35 (Three Member Bench) of the Tribunal has held that SCN issued by a person who is not authorized to do so, SCN is void in totality and good part of the SCN, cannot be severed from the bad part. In Pahwa Chemicals (P) Ltd Vs. CCE AIR 2005 SC 1532 = 2006(181) ELT 339 has held that if the law authorized proper officer to issue and adjudicate the SCN, the Board Instructions/Circular can neither curtail nor enlarge the power of adjudication.

CONTENTS OF SCN

8. The CBEC has issued a Master Circular No.1053/02/2017-CX dated 10.3.2017 which lays down guidelines for drafting of SCN. It, inter-alia, says that the SCN should include (a) introduction of the assessee (b) introduction of the case (c) legal framework (d) factual statement and appreciation of evidence (e) discussions, facts and legal frame work (f) allegation on limitation (g) calculation of duty and other amounts due (h) statement of charges/allegations/apprehensions (i) Authority who will adjudicate. Any demand without issuance of SCN is void as has been held in Gokak Patel Vs Volkart Ltd 1987 (53) SC.

9: The Supreme Court CCE Vs. Brindavan Beverages 2007 (213) ELT 487 SC observed “SCN is foundation on which Department has to build its case. If allegations in SCN are not specific and on the contrary vague, lack details and/or unintelligible, it is sufficient to hold that the notice is not given proper opportunity to meet allegations of SCN.

10: The SCN must specify what is the offence alleged otherwise the proceedings are invalid as has been held in CCE Vs. HMM Ltd 1995(76) ELT 497 SC and Kaur & Singh 1997(94) ELT 289 SC. The SCN which has demanded incorrect amount of duty would not be invalid on this count i.e. Section 11A of Central Excise Act. Jagdish Sales Corpn Vs. CCE 2002(144) ELT 73 (Tri).

SUPPLY OF DOCUMENTS RELIED UPON BY

**THE DEPARTMENT IN THE SCN AS WELL
AS SUPPLY OF NON-RELIED UPON
DOCUMENTS.**

11: The Bombay High Court in the case of Silicon Graphics System (India) Pvt. Ltd. Vs. Union of India MANU/MH/0963/2006 : 2006 (204) ELT 247 (Bombay) has held that un-relied upon documents may not be relevant for department but the same may be relevant for effected party to file their reply to the show cause notice and such request cannot be held to be frivolous request. The Board vide its circular No. 171/05/96-CX : MANU/EXCR/0010/1996 dated 2/2/1996 have also observed that the documents which have not been relied upon in the show cause notice may be returned to the party.

12: The Tribunal in the case of Hindustan Dyeing & Printing Works vs. Commissioner of C. Ex. (03.07.2013 - CESTAT - Delhi) : MANU/CE/0444/2013, has observed as under:-

Fairness of the adjudication requires the department to return back all the relied upon/non-relied upon documents. No reason on the part of the Revenue can justify such non-return of the documents. I really sometimes fail to understand as to what can be the objection of the Revenue for return of such seized documents, which they no longer require and which admittedly belong to assessee.

13: The non-supply of relied upon documents amounts to violation of principal of natural justice (a) Sanghi Textiles Processors v. UOI 1993 (65) ELT 357; (b) Methodex Systems v.

UOI MANU/MP/0486/2000;(c) Balakrishna Dass and Sons v. CC, New Delhi MANU/CE/4102/2001; and (d) PGO Processors Pvt. Ltd. v. CCE 2000 (122) ELT 25.

14: The Hon'ble Tribunal in the case of Anagha Surface Transport Pvt. Ltd. vs. The Commissioner of Customs and Central Excise (19.06.2008 - CESTAT - Bangalore) : MANU/CB/0431/2008

We are of the considered opinion that the department is bound to supply all the relied upon documents in the show cause notice. The assessee is also entitled to take copies from the seized documents, even if the same had not been relied in the show cause notice for the purpose of raising effective defense.

15: The Division Bench of Hon'ble Allahabad High Court in Novamet Industries & Ors. v. Union of Inda & Anr. MANU/UP/0912/2007 after referring to circular issued by the Department of Revenue concerning seizure of books and records held that non-relied seized goods and documents should be released to the assessee, in cases where show cause notice is not issued, within six months from the date of the seizure. Once the show cause notice is issued to the party, the document/records which have not been relied upon may be returned to the party under proper receipt.

16: The Hon'ble Delhi High Court in *Vikas Gumber v. Commissioner of Customs MANU/DE/4998/2009* observed that the Departmental Authorities are under obligation to release such documents as are not relied upon by them within a reasonable time.

.....Contd –Examination & Cross - Part-II
