Pre-Notice Consultation: Is it a blessing or an eye wash?

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If a taxpayer has not paid or short paid the tax (GST) which is payable under the law or has been granted the refund erroneously or has taken or utilised the Input Tax Credit (ITC) wrongly, then in such cases, a proper officer can issue a show cause notice under Section 73(1) or Section 74(1), as the case may be, of the CGST Act, 2017 ('the Act'). If the demand is not based on the charges of will suppression of facts, etc. with an intent to evade payment of tax, then the provisions of Section 73 will come into play. However, if the proper officer is of the view that a taxpayer has resorted to tax evasion, etc. by wilfully suppressing or mis-declaring the facts or by fraud, then the provisions of Section 74 and the extended period of limitation prescribed thereunder will be invokable. In such show cause notice, besides the amount of tax or refund or ITC demanded, the recovery of interest and also imposition of penalty, if warranted, and the relevant statutory provisions are also specified as mandatorily required in law. As a matter of fact, whatever may be the basis of demand, the issue of show cause notice is a pre-condition before any demand is raised and/or recovered from a taxpayer. A taxpayer can also opt for the alternative of the closure of proceedings available under Section 73(5) or Section 74(5) of the Act in case he wishes to avoid the long-drawn, complex and expensive process of litigation.

The procedural formalities (including the Forms) in respect of the issue of show cause notice under Section 73 or Section 74 of the Act are prescribed under Rule 142 of the CGST Rules, 2017 ('the Rules') . Vide Notification No. 49/2019-CT dated 09.10.2019, a sub-rule (1A) has been inserted in the said Rule 142 of the Rules. As per sub-rule (1A), before service of the show cause notice under Section 73 (1) or Section 74 (1) of the Act, the proper officer is required to communicate to the person concerned, the details of any tax, interest and penalty as ascertained by the said officer in Part-A of Form GST DRC-01A. Let us now discuss whether this requirement of sub-rule (1A), popularly described as '**Pre-Notice Consultation'** is a blessing or is meaningless?

The roots of the concept of 'Pre-notice Consultation' lie in the recommendations contained in the **First Report** of the **'Tax Administration Reform Commission' (TARC**) constituted under

the Chairmanship of Dr. Parthasarathi Shome. The Commission had recommended the Pre-notice Consultation so as to ensure that utterly frivolous, unnecessary and completely avoidable disputes do not take birth at all.

Acting on these recommendations, the Central Board of Excise & Customs ('the Board') had, vide its Circular issued on December 21, 2015, made the 'Pre-notice Consultation' mandatory in all cases involving the demand of Rs. 50 lakhs or more. These instructions were later on reiterated vide the Master Circular issued by the Board on March 10, 2017 (para 5.0 of the Circular refers). However, it is pertinent to note here that the 'Preventive cases' had been kept out of the 'Pre-notice Consultation' process.

Sub-rule (1A) of Rule 142 of the Rules grants statutory recognition to the concept of 'Pre-notice Consultation' which hither to, operated through the Board's Instructions in Central Excise and Service Tax regime. It is also interesting to note here that no exclusions based on the amount involved and/or the nature of the case has been provided under sub-rule (1A) and the Pre-notice Consultation has been extended to all cases where the show cause notices are proposed to be issued under S. 73(1) or S.74(1) of the Act.

The question here is: **'Whether a show cause notice issued without adherence to the requirement of Pre-notice Consultation is rendered illegal and invalid?'** Hon'ble Delhi High Court, in the case of **Amadeus India Pvt. Ltd. vs. Pr. Commissioner, C.Ex, ST & CT – 2019-TIOL-1027-HC-DEL-ST,** has set aside the show cause notice issued to the Petitioner, inter alia, observing 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 exception specified in para 5.0 were attracted in the present case. In an earlier case involving the same issue, the Hon'ble High Court of Madras, in **Tube Investment of India Ltd. vs. UOI – 2018-TIOL- 330-HC-MAD-CX**, had set aside the SCN challenged after noticing that para 5.0 of the Master Circular was not adhered to prior to the issuance of the SCN. This judgement was followed by the Hon'ble Delhi High Court in Amadeus India's case (supra). Recently, the Hon'ble Delhi High Court has reiterated the same view vide its judgement dated April 05, 2021 rendered in the case of **Back Office IT Solutions Pvt. Ltd. vs. UOI & others** involving the same issue. The Hon'ble High Court took note of the judgement of the Coordinate Bench of the same Court in Amadeus India's case (supra) and followed the same. These judgements have been rendered in the context of the demand relating to Service Tax or Cenvat Credit, as the case may be. The principle of law laid down in these judgements is that a show cause notice

issued without following the requirement of the Pre-notice Consultation as mandated by the Board, is rendered illegal. The ratio of the principle laid down in these judgements will, no doubt, strongly apply under GST regime since the concept of Pre-notice Consultation before issue of the show cause notice has now been statutorily embodied in Sub-rule (1A) of Rule 142 of the Rules.

However, the taxpayers need not overtly rejoice at this provision of Pre-notice Consultation. In majority of the cases, the process of Pre-notice Consultation turns out to be a trap for the taxpayers who innocently walk into it! The statement or notice in Form GST DRC-01A prescribed for the Pre-notice Consultation contain or is expected to contain the details of the nature of dispute, basis of dispute, the amount demanded, relevant statutory provisions and other prescribed details. If a taxpayer does not agree with the proposed liability, whether in its entirety or partly, he can make his submission in Part B of Form GST DRC-01A as provided under sub-rule (2A) which has also been inserted in Rule 142 simultaneously on 09.10.2019 vide Notification No. 49/2019-CT-ibid. It is, however, a matter of common experience that the proper officer routinely reject the submissions made by the taxpayer at Pre-notice Consultation stage and proceeds to issue the show cause notice to him. In such show cause notice, the reasons for the rejection of the submissions made by the taxpayer are generally given and the very allegations contained in the Pre-notice Consultation intimation are reproduced or repeated as allegations in the show cause notice. One should not feel surprised as this happens routinely and mechanically. Under these circumstances, one may wonder as to what meaningful and effective submissions can be made by a taxpayer against the “regular’ show cause notice? The defence submissions made by the ‘poor’ taxpayer at the Pre-notice Consultation stage have already been rejected by the proper officer and there will hardly be any new material in the show cause notice issued later by the proper officer. It should also be noted that the taxpayer has already exposed his line of defence during the Pre-notice Consultation and thereby has effectively sealed his fate!

Therefore, the taxpayers need not be too enthused or enticed by the provision of Pre-notice Consultation. Actually, one needs to seriously consider whether to participate in Pre-notice Consultation or not. **It may be pointed out here that the statement in Form GST DRC-01A is merely an intimation and a taxpayer is not bound to honour the demand indicated in the said statement.** On the flip side, it should also be noted that though sub-rule (2A) of Rule 142 provides for the filing of submissions by the taxpayer in Part-B of the Form GST DRC-01A in case he doesn’t agree with the proposed liability, it is not provided under the said Rule 142 anywhere that the taxpayer should be afforded an opportunity of being heard in

person on the submissions made by him. In short, this is a provision for "**Consultation Without Consultation"!** As if this is not enough, the Central Government, on the recommendations of the GST Council, issued, on 15.10.2020, a Notification No.79/2020-CT carrying out the amendments in various provisions of the CGST Rules, 2017. Vide this Notification, sub-rule (1A) has also been amended and the words "**proper officer shall"** have been substituted by the words "**proper officer may"** and the words **"shall communicate**" have been substituted by the word **"communicate**". For the ease of understanding, sub-rule (1A) as existing prior to and post-amendment is reproduced below:

Pre-amendment:

"*(1A) The **proper officer shall**, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, **shall communicate** the details of any tax, interest and penalty as ascertained by the said officer, in **Part A** of **Form DRC-01A.**"*

Post-amendment:

"*(1A) The **proper officer may**, before service of notice to the person chargeable with tax, interest and penalty, under sub-section (1) of Section 73 or sub-section (1) of Section 74, as the case may be, **communicate** the details of any tax, interest and penalty as ascertained by the said officer, in **Part A** of **Form DRC-01A.**"*

It is evident from the above amendments that the issue of the statement in Form GST DRC-01A (loosely described as 'Pre-notice Consultation') has been left to the discretion of the proper officer. It may also be noted that it is not provided as to whether the proper officer shall record and/or communicate the reasons for exercising his discretion against indulging into the Pre-consultation! The entire process of 'Pre-notice Consultation' has thus become meaningless, superficial and farcical making mockery of the taxpayer and the law!

It is therefore essential that a taxpayer exercises due diligence and seriously weigh his options before participating in the pre-notice consultation process which, as is commonly experienced, is aimed at throwing dust in the eyes of the taxpayers!

[Concluded]