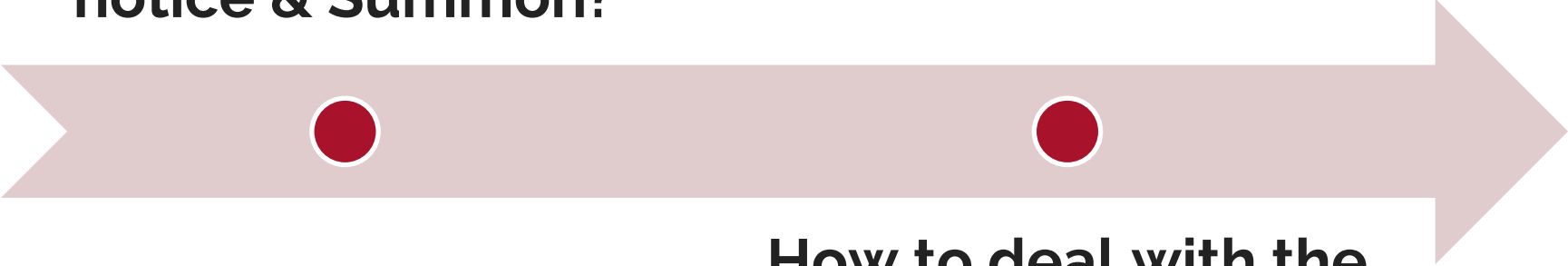


A complete approach on how to deal with
**Show Cause Notice &
Summon**

Topics to be covered

**What is Show Cause
notice & Summon?**



**How to deal with the
show cause
notice/Summon?**

Show Cause notice



*Tax laws are the most imaginative
fiction being written today.*

Audi Alteram Partem

It is a time-tested principle of natural justice i.e. audi alteram partem meaning '**let the other side be heard**' that no person can be adjudged guilty without being given an opportunity to answer charges against such person.

And to hear a person, such person should be "put at notice" which clearly states various aspects about the charges or allegations in such notice so that the person can understand the allegations and answer them.

Sine Qua Non

In GST, as with every legislation, this notice is called “show cause notice” and this show cause notice is a mandatory requirement for raising demands.

Any other communication, letter, endorsement, suggestion or advisory from tax Department cannot be considered to be a show cause notice.

The Supreme Court in the case of **Canara Bank v V K Awasthy MANU/SC/0249 2005** has dealt with extensively significance of principles of natural justice.

Notice is thus a **sine qua non** for any demand proceedings and SCN is the one that ‘sets the law in motion’.

Proceedings Where Show Cause Notice Is Mandatory

1. Proceeding u/s 52 of GST act (FORM – GST – DRC- 01).
2. Determination of tax liability u/s 73 in normal case (FORM – GST – DRC -01).
3. Determination of tax liability u/s 74 in fraud case (FORM – GST – DRC -01).
4. Tax collected but not paid u/s 76 (FORM – GST – DRC -01).
5. Levy of penalty u/s 122 for specified offences (FORM – GST – DRC -01).
6. Levy of interest u/s 50 (FORM – GST – DRC -01).
7. Levy of penalty u/s 123 for failure to furnish information (FORM – GST – DRC -01).
8. Imposing fine for failure to furnish information return u/s 151 (FORM – GST – DRC -01).
9. Levy of general penalty u/s 125 for contraventions of provisions of the act (FORM – GST – DRC -01).
10. Levy of penalty in certain cases u/s 127 of the act (FORM – GST – DRC -01).
11. Levy of penalty u/s 129 of the act for transport of any goods or store any goods while they are in transit in contravention of provisions of the act and rules (FORM – GST – DRC -01).

Proceedings Where Show Cause Notice Is Mandatory

12. Confiscation of goods or conveyance and levy of penalty u/s 130 of the act (FORM – GST – DRC -01).
13. Cancellation of the registration u/s 29 of the act (FORM-GST-REG-17) .
14. Rejection of an application for revocation of cancellation of registration u/s 30 of the act (FORM-GST-REG-23) .
15. Denial of option to pay tax u/s 10 of the act under composition scheme (on the ground of violation of conditions of restrictions prescribed u/s 10) (FORM-GST-CMP-05) .
16. Rejection of refund u/s 54 read with rule 92 (3) (FORM-GST-RFD-08) .
17. Assessment of unregistered person u/s 63 of the act (FORM-GST-ASMT-14) and (FORM – GST – DRC -01) .
18. Dis qualification of Goods and Service Tax Practitioner u/r 83 (4) of the rules (FORM-GST-PCT-03) .
19. Revision proceeding u/s 108 of the act (FORM-GST-RVN-01)

Proceedings – No Need to Issue Show Cause Notice!

1. Best judgment assessment of non -filers of return u/s 62 of the act .
2. Levy of Interest on delayed payment of taxes u/s 50 of the act.

But..

- **Mahadeo Construction Co. at Chhatarpur, Palamau through its partner Anil Kumar Singh Versus The Union of India &**
- **THE SUPERINTENDENT OFFICE OF CENTRAL G.S.T VERSUS M/S. LC INFRA PROJECTS PVT., LTD**

M/s Brindavan Beverages (P) Ltd [2007(213)
ELT487(SC),

*“The show cause notice is the **foundation** on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary **vague, lack details** and/or **unintelligible** that is **sufficient to hold** that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice.”*

Why Show Cause Notice is Important?

In **UOI vs Madhumilan Syntex Ltd. 1988 (35) ELT 349**, the Supreme court held that any demand raised without issuing show cause notice or granting a hearing would be invalid in terms of section 11A of the Central Excise Act, 1944.

In **CCE v Kosan metal Products Ltd. 1988 (38) ELT 573**, the Supreme court held that show cause notice is necessary before adjudication mere noting in the periodical returns is not a notice.

Why Show Cause Notice is Important?

In the case of **CCE v Ballarpur Industries 2007 (215) 489 (SC)**, the Supreme court held that the show cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest; where a certain matter has not been invoked in the show cause notice, it would not be opened to the Central Excise Officer to invoke the same subsequently.

Further, the **Supreme Court in the case of CC v Toyo Engineering India Ltd. 2006 (201) ELT 513 (SC)** held that where a certain grounds were not mentioned in the show cause notice, the department could not travel beyond the show cause notice.

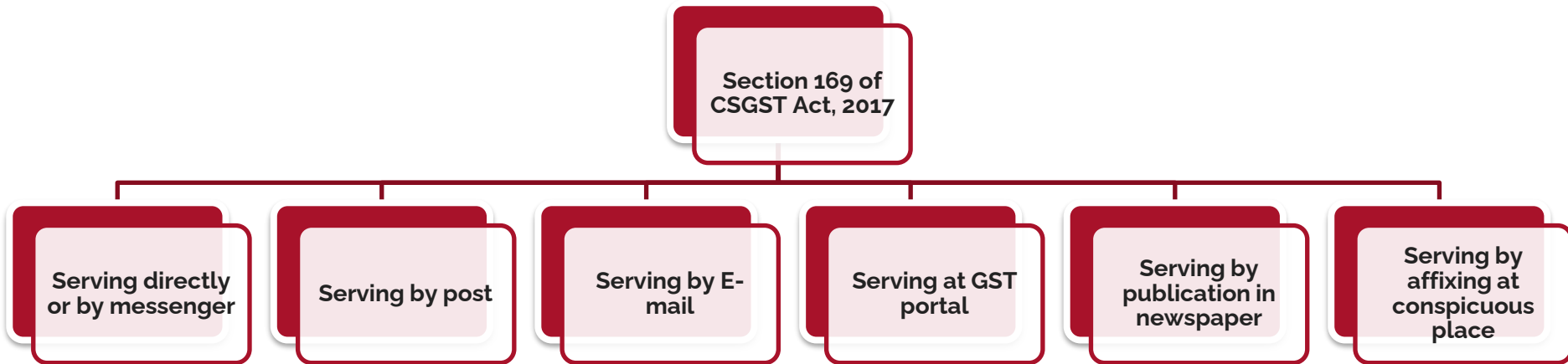
Proper Officer

Proper Officer – Section 2(91) read with **Circular 03/3/2017-GST dated 05.07.2017** - Commissioner of Central Tax or Officer who has been assigned the function by the Commissioner in the Board.

Service of notice in certain circumstances.

'Service' means giving legally required notice to other parties that you have filed papers asking for a court order that may affect them. The court papers can only be delivered in a manner permitted by law, and proof of proper delivery must be filed with the court. But why it is necessary to serve a notice to other parties.

Service of notice in certain circumstances.



The Apex court in **State of Punjab Vs. Khemi Ram (MANU/SC/0434)** held that the word 'communicate' cannot be interpreted to mean that the order would become effective only on its receipt by the concerned govt. officer. Communication is once the order is put in the course of transmission and thus, goes out of control of the authority issuing it.

Issue Vs. Service

V. R. A. Cotton Mills (P.) Ltd. wherein the hon'ble Punjab and Haryana High Court after relying upon the hon'ble Supreme Court decision in the case of **Banarsi Debi v. ITO [1964] 53 ITR 100 (SC) ; AIR 1964 SC 1742** has held that the term 'issue and service' can be used interchangeably.

GSTR-1 Return filing amounts to determination of tax

- ❑ In the case of **Kabeer Reality Private Limited V The Union of India & Others** this was observed by MP High court.
- ❑ This Court is of the considered opinion that the tax determination has already been done in the present case, as the petitioner itself has quantified its tax liability under the GSTR-1 Returns.
- ❑ Statutory provision of law makes it very clear that it was mandatory for the petitioner to file GSTR-3B Return.
- ❑ Not only this, bare perusal of the statutory provision as contained under Section 79 of the Act of 2017 and procedure adopted by the respondents reveal that the procedure contemplated under Chapter 15 of the Act of 2017 has been followed as Section 79(1)(c) falls in Chapter 15 of the Act of 2017 and the same has rightly been invoked.

Form and Content of Show Cause Notice

- ✓ Facts of the case.
- ✓ Relevant provisions of law.
- ✓ Discussion on limitation period.
- ✓ Reason for applicability of extended limitation period u/s 74 of the act.
- ✓ Findings of earlier verifications.
- ✓ Cause of proposed action.
- ✓ Grounds relied for proposed additional tax liability / actions.
- ✓ Specific allegations / charges with evidences.
- ✓ Basis for rejection, denial of claims or exemptions.
- ✓ Justification for how and why taxable person is liable to pay tax.
- ✓ Consideration and appreciation of evidences produced.
- ✓ Details of contraventions of act and rules where necessary.

Form and Content of Show Cause Notice

- ✓ Discussions on legal issues.
- ✓ Quantification of proposed tax , interest and penalty.
- ✓ Date of hearing for giving opportunity of hearing.
- ✓ Indicating clear message that it is prima facie opinion/proposal and not final opinion, and reply will be considered in effective manner.

Master Circular on Show Cause Notice, Adjudication and Recovery: 1053/2/2017-CX. dated 10-Mar-2017 issued by CBEC

Ninety two Circulars and Instructions on Show Cause Notices and Adjudication issued by the Board from time to time, placed at the Annexures to this Master Circular.

Master Circular shall have overriding effect on the CBEC's Excise Manual of Supplementary Instructions to the extent they are in conflict.

Document Identification Number (DIN)

- ✓ CBIC has issued **Circular No. 128/47/2019-GST dated 23-12-2019** regarding the generation and quoting of Document Identification Number (DIN)
- ✓ Mandatory Generation of DIN: With effect from 24-12-2019, the electronic generation and quoting of Document Identification Number (DIN) shall be done in respect of all communications (including e-mails) sent to tax payers and other concerned persons by any office of CBIC across the country.
- ✓ Document not containing DIN invalid: The CBIC directed that any specified communication which does not bear the electronically generated DIN, shall be treated as invalid and shall be deemed to have never been issued.

Key Judgements by the Apex Court

Metal Forgings v. UOI - 2003 (146) E.L.T. 241 (S.C.).

- Letters either in the form of suggestion or advice or deemed notice cannot be taken note of as SCN for the recovery of demand. Issuance of a SCN in a particular format is a mandatory requirement of law.
- The law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order.
- The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand.
- The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand.
- Therefore, it will be futile to contend that each and every communication or order could be construed as a show cause notice.

Kaur Singh vs C C E New Delhi 1997 4 ELT 289

- It was held by Supreme Court that SCN must communicate to the addressee the specific allegation/charge and the basis for the demand of tax.
- The party to whom SCN is issued must be made aware of the allegations against it and that this is a requirement of natural justice.

Limitation Period – General

- ✓ Different time limit has been prescribed for different proceedings.
- ✓ For the purpose of demand and recovery of tax liability u/s 73 where proposed demand is not due to fraud or any willful misstatement or suppression of facts to evade tax, the proper Officer should issue notice within 2 year and 9 months from due date of filing of annual return for the financial year to which demand pertains or from the date of erroneous refund **(sub section 2 of section 73)**.
- ✓ Notice issued after limitation is not sustainable and order passed on the basis of said SCN is bad in law.
- ✓ The Proper officer has no jurisdiction to initiate proceedings after limitation period.
- ✓ **It is important to note that no limitation period has been specified in section 76 to issue SCN for the recovery of taxes collected but not paid.**

Limitation Period – Fraud

- ✓ Limitation period has direct nexus with jurisdictions of authorities.
- ✓ There may be difference of opinions on the reasons of the proposed demand and applicability of section 74 and consequential higher limitation periods.
- ✓ Terms “fraud or any willful misstatement or suppression of facts to evade tax are very important and subject to different interpretation on different facts.
- ✓ There may be more disputes on this issue. It is pertinent to note that fraud ,or willful misstatement or suppression of facts should be to evade tax , then only case may covered under **Section 74**.
- ✓ If no such intention is present higher limitation period may not be applicable.

Limitation Period – Fraud

- ✓ Hence, definition of “suppression” has been specifically provided in explanation 2 of section 74 in order to reduce disputes and litigation.
- ✓ Such type of provisions were presents erstwhile indirect tax laws (for example section 11 Central Excise act , section 73 Service Tax law etc.
- ✓ Therefore, judicial pronouncement under said act may be applicable if facts are identical.
- ✓ In the case of **M/s Naresh Kumar Vs Union Of India dated 25-04-2014** observed that willful suppression can not be assumed and or presumed merely on failure to declare certain facts unless it is preceded by deliberate non – discloser to evade payment of tax .

**Cosmic Dye Chemical v. Collector of Central Excise,
Bombay, (1995) 6 SCC 117**

- ✓ "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 "**willful**" 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**" is 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 suppression or mis-statement of fact, which is not willful and yet constitute a permissible ground for the purpose of the proviso to Section 11-A.
- ✓ Mis- statement or suppression of fact must be willful."

**Anand Nishikawa Co. Ltd. v. Commissioner of Central
Excise, Meerut, (2005) 7 SCC 749,**

“...we find that “suppression of facts” can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty, when facts were known to both the parties, the omission by one to do what he might have done not that he must have done would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be some positive act from the side of the assessee to find willful suppression.”

Pre Show Cause Notice Consultation (Pre GST)

Pre-show cause notice consultation with assessee, prior to issuance of SCN in case of demands of duty is above Rupees 50 Lakhs (except for preventive/offence related SCN's), is mandatory and shall be done by the Show Cause Notice issuing authority" -

C.B.I. & C. Circular No. 1076/02/2020-CX., dated 19-11-2020 reiterated Master Circular No. 1053/02/2017-CX., dated 10-3-2017.

Hon'ble Delhi High Court in the case of Amadeus India Pvt. Ltd. vs. Pr. Commr. of C. Ex., S.T. & Central Tax - 2019 (25) GSTL 486 (Del.) had set aside the SCN issued without pre consultation being contrary to aforesaid circular and relegated the parties to the stage prior to issuance of impugned SCN. Same view was taken Hon'ble Madras High Court in the case of **Hitachi Power Europe GMBH Versus C.B.I. & C. - 2019 (27) G.S.T.L. 12 (Mad.)**

Pre Show Cause Notice Consultation (GST)

- ❑ Sub-rule (1A) of Rule 142 of the Rules grants statutory recognition to the concept of 'Pre notice Consultation' which just follows the Board's Instructions in Central Excise and Service Tax regime.
- ❑ 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 U/S. 73(1) or U/S.74(1) of the Act.

Where a taxable person dies - Whether SCN could be issued on Legal representative?

Section 93 of the CGST Act, 2017

law binds to the legal heir/legal representative or successor of deceased person to discharge the liability of tax, interest or penalty out of the estate of deceased person, whatever has been determined before his death but has remained unpaid or is determined after his death.

Shabina Abraham – 2015(332) E.L.T. 372 (S.C.)

The issue in the case was whether a show-cause notice under the Central Excise and Salt Tax Act, 1944 ('CE Act') could be issued to the legal heirs of a sole proprietor after his death, against whom a show-cause notice had been issued raising a demand of excise duty. The Supreme Court agreed with the Appellant in the above mentioned case that there was no machinery provision under the CE Act which enabled the continuation of such proceedings against the legal heirs of a deceased Assessee.

SCN Based on assumptions or presumptions

In **Oudh Sugar Mills Ltd. v. Union of India 1978 (2) ELT (J 172) (SC)**, the Supreme Court pointed out that the inference drawn by the authorities only on the basis of the entries in the ledgers would be insufficient. It was pointed out that in the factory where the turnover was considerable and the operations conducted involved a human element in a significant way it would not be right to base the conclusions only on surmises.

Mistakes in the SCN!

Cauvery Iron & Steel (India) Ltd. Versus Commissioner of Central Excise, Hyderabad Final Order No. 738 of 2012 & PENGUIN ELECTRONICS (P) LTD-2005 (185) E.L.T. 194 (Tri.)

- One important question survives for consideration and the same is whether the legal mistake committed by the Department can be corrected to ensure that the offender does not escape punishment under the Central Excise law.
- There is a clear distinction between a **mistake of fact** and a **mistake of law**.
- The former cannot be rectified at later stage but the latter is rectifiable subject, of course, to legal constraints.

ONE WHO ALLEGE MUST PROVE/ESTABLISH

13: Often, question arises about the onus to prove the allegations leveled in the SCN. On many occasions, Department levels all frivolous, perverse and baseless allegations in the SCN and leave the assessee to prove its innocence. The Delhi High Court in the case of **Lord Chloro Alkali vs. Special Director Enforcement Directorate MANU/DE/2692/2017** has observed as under:-

16. *Further, it is a settled principal of law that "Affirmati Non Neganti Incumbit Probatio", that is, "the burden of proof is upon him who affirms - not on him who denies".*

Similar View in:-

Bhagwan Jagannath Markad and Ors v. State of Maharashtra reported in MANU/SC/1171/2016 & Shanti Prasad Jain Vs. Director of Enforcement, MANU/SC/0250/1962

RELIED UPON & NON-RELIED UPON DOCUMENTS

- ❑ It is seen that the Department is reluctant to supply even the documents relied upon in the SCN and also non-relied upon documents on the plea that they have not relied upon these documents and hence, there is no necessity of supplying those documents to the party.
- ❑ The Division Bench of Hon'ble Allahabad High Court in **Novamet Industries & Ors. v. UOI 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 documents/records which have not been relied upon may be returned to the party under proper receipt.

RELIED UPON & NON-RELIED UPON DOCUMENTS

- ❑ The Hon'ble Delhi High Court in **Vikas Gumber Vs. 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. Likewise, Hon'ble Tribunal in the case of **Selvi Paper Mills Ltd Vs. CCE MANU/CC/0085/2012** has observed as under:-
- ❑ ***“Considering the fact that the appellants were not supplied with the un-relied upon documents, in that situation, the adjudicating authority is directed to supply the remaining documents which were seized and not relied upon to them appellants...”***

PRESENCE OF ADVOCATE AT THE TIME OF RECORDING OF STATEMENT

M.K. Kundia Vs. Union of India 2015 (319) ELT 9 (SC).

- ❑ The Supreme Court has permitted the presence of Counsel for the person who is sought to be interrogated U/s 108 of the Customs Act, 1962 but, however, the presence of the Counsel should be at such distance, which is beyond the hearing distance but within the visible distance - general law is that Advocate cannot accompany the person who is interrogated.

Summon

Provisions

1. Power to summon is mentioned in direct tax cases under **section 131 of the IT act 1961**.
2. The same is mentioned for indirect taxation cases in **section 14** of erstwhile Central Excise Act 1944 subsumed under **section 70** of the CGST act 2017 and section 108 of the customs act 1962.
3. If we look at the text as mentioned in **section 14** of erstwhile CE act 1944, though it is written that the proceedings under the section are termed as judicial proceeding as in **section 193** and **section 228** of **IPC 1860** but the power was somewhat diluted as there was no mention of the situation where a taxpayer fails to appear before the summoning authority even after reasonable time or repeated opportunities.

Provisions

1. In such situations, the practical procedure was very cumbersome.
2. The summoning authority needed to approach the civil court through their lawyer after giving intimation to the senior authorities for the execution of summons against the taxpayer.
3. The civil court in such cases either ordered the taxpayer to appear before the summoning authority or has the powers to invoke **section 172, section 173, section 174 and section 175** of IPC 1860 as the case may be, against the taxpayer for non-appearance on being summoned.
4. This was a big hurdle in the course of investigation and an opportunity to the taxpayer for defiance of law.
5. The judicial process in the civil courts is often time consuming and an additional burden on the exchequer.

Section 70 of the CGST Act, 2017

1. The PO under this Act shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the **Code of Civil Procedure, 1908 ('CPC')**.
2. Every such inquiry referred to in sub-section (1) shall be deemed to be a "judicial proceedings" within the meaning of **Section 193 and Section 228 of the Indian Penal Code ('IPC')**.

Proper Officer

1. **Section 2(91) of the CGST Act, 2017**, states "proper officer" in relation to any function to be performed under this Act, means the Commissioner or the officer of the central tax who is assigned that function by the Commissioner in the Board.
2. As per **Circular No. 3/3/2017-GST dated July 05, 2017**, Superintendent of Central Tax and above is the PO under sub-section (1) of Section 70 of the CGST Act.

Judicial Proceeding

1. Any inquiry referred to in Section 70 (1) of the Act shall be deemed to be a "judicial proceedings" within the meaning of Section 193 and Section 228 of the IPC.
2. **Section 193 of IPC: Punishment for false evidence** :- Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding shall be punished with an imprisonment of 0-7 years and fine.

Judicial Proceeding

Section 228 of IPC: Intentional insult or interruption to public servant sitting in judicial proceeding

- ✓ Whoever intentionally offers any insult,
- ✓ Or causes any interruption to any public servant,
- ✓ While such public servant is sitting in any stage of a judicial proceeding
- ✓ Shall be punished with an imprisonment of 0-6 months or fine of up to Rs. 1,000 or with both.

Section 136 of CGST Act, 2017

A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains -

- ✓ when the person who made the statement is dead or cannot be found, or incapable of giving evidence, or kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable;

Or

- ✓ When the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

**Responsibilities of the person so summoned: [Source:
CBIC FAQ's]**

A person who is summoned, legally bound to attend either in person or by an authorized representative and he is bound to state the truth before the officer who has issued the summon upon any subject which is the subject matter of examination and to produce such documents and other things as may be required.

Consequences of non-appearance to summons [Source: CBIC FAQ's]

The proceeding before the official who has issued summons is deemed to be a judicial proceeding. If a person does not appear on the date when summoned without any reasonable justification, he can be prosecuted under **Section 174** of the Indian Penal Code (IPC). If he absconds to avoid service of summons, he can be prosecuted under Section 172 of the IPC and in case he does not produce the documents or electronic records required to be produced, he can be prosecuted under Section 175 of the IPC.

Further, in case he gives false evidence, he can be prosecuted under **Section 193** of the IPC. In addition, if a person does not appear before a CGST/ SGST officer who has issued the summon, he is liable to a penalty upto 25,000 under **Section 122(3)(d)** of the CGST Act. (General penalty)

Guidelines for issue of summons: [Source: CBIC FAQ's and F. No. 207/07/2014-CX-6 dated January 20, 2015]

The CBIC in the Department of Revenue, Ministry of Finance has issued guidelines from time to time to ensure that summons provisions are not misused in the field. Some of the important highlights of these guidelines are given below:

- ✓ Summon is to be issued as a last resort where assesses are not co-operating and this section should not be used for the top management;
- ✓ The language of the summons should not be harsh and legal which causes unnecessary mental stress and embarrassment to the receiver;
- ✓ Summons by Superintendents should be issued after obtaining prior written permission from an officer not below the rank of Assistant Commissioner with the reasons for issuance of summons to be recorded in writing;
- ✓ Where for operational reasons, it is not possible to obtain such prior written permission, oral/ telephonic permission from such officer must be obtained and the same should be reduced to writing and intimated to the officer according such permission at the earliest opportunity;

Guidelines for issue of summons: [Source: CBIC FAQ's and F. No. 207/07/2014-CX-6 dated January 20, 2015]

- ✓ In all cases, where summons is issued, the officer issuing summons should submit a report or should record a brief of the proceedings in the case file and submit the same to the officer who had authorized the issuance of summons;
- ✓ Senior management officials such as CEO, CFO, General Managers of a large company or a Public Sector Undertaking should not generally be issued summons at the first instance. They should be summoned only when there are indications in the investigation of their involvement in the decision-making process which led to loss of revenue.

Precautions to be observed while issuing summons

[Source: CBIC FAQ's]

The following precautions should generally be observed when summoning a person:

- ✓ A summon should not be issued for appearance where it is not justified. The power to summon can be exercised only when there is an inquiry being undertaken and the attendance of the person is considered necessary.
- ✓ Normally, summons should not be issued repeatedly. As far as practicable, the statement of the accused or witness should be recorded in minimum number of appearances.
- ✓ Respect the time of appearance given in the summons. No person should be made to wait for long hours before his statement is recorded except when it has been decided very consciously as a matter of strategy.
- ✓ Preferably, statements should be recorded during office hours; however, an exception could be made regarding time and place of recording statement having regard to the facts in the case.

How to deal with the show cause notice/Summon?

Challenge to SCN In High Court

Challenge to SCN in court by filing writ under article 226 is not ordinarily permissible. It is seen that on following grounds writs were admitted:-

- ✓ Predetermined mind.
- ✓ Violation of principle of natural justice.
- ✓ Abuse of process of law.
- ✓ Lack of jurisdiction.
- ✓ Question of limitation.

Favorable Stand by the Courts While admitting the Writ

Union of India V. Vicco Laboratories 2007 (11) TMI 21 (Supreme Court)

Normally the writ should not interfere at the stage of issuance of show cause notice by the authorities.

In such a case the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence if the case for proceeding against the person against whom the show cause notice has been issued.

However, the said rule is not without any exceptions.

Where a show-cause notice is issued either without jurisdiction or an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of show cause notice.

The interference at the show cause notice stage should be rare and not in a routine manner.

Mere ascertain by the petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice.

It should prima facie be established. Where factual adjudication would be necessary interference is ruled out.

Oryx Fisheries Private Limited Vs. Union of India & Ors.

“Show cause notice cannot be read hyper technically and it is well settled that it is to be read reasonably. But while reading a show-cause notice the person who is subject to it must get the impression that he will get an effective opportunity to rebut the allegations contained in the show-cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show-cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show-cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defense.”

**TRF Limited V. Commissioner of Central Excise & Service Tax,
Jamshedpur' – 2013 (4) TMI 21 - JHARKHAND HIGH COURT**

It was held that neither the issuing authority nor assessee should make a prestige issue. It is especially so as quasi-judicial proceedings are initiated by officers exercising vast statutory power and jurisdiction, which should not be misunderstood to have been exercised to humiliate a person holding the position in assessee company. The reasons for forming opinions against assessee are required to be reflected in the notice itself. It cannot render notice illegal as being issued with a pre-determined mind. However, notice reflecting in unequivocal terms decision on contentious issues rather than pulling question to the assessee, may something reflect the pre-determined mind of issuing authority.

**Naresh Kumar & Co, Private Limited V. Union of India 2013 (2)
TMI 676 (CALCUTTA HIGH COURT)**

High Court can interfere with a show-cause notice would be in flagrant violation of principles of Natural Justice. Furthermore, the High Court might also interfere with a show-cause notice which does not fulfill the statutory conditions for issuance thereof or ex-facie does not disclose any offense, misconduct or other cause of action for which action is contemplated in the show cause notice can be initiated. For this purpose the court may examine whether jurisdiction to issue show cause notice has been properly exercised or such jurisdiction is usurped by the pretended invocation of a provision of a statute.

**Bhubaneswar Development Authority V. Commissioner of Central Excise
& Service Tax 2015 (4) TMI 464 (Orissa High Court)**

The challenge is on the ground that the conditions precedent for exercise of jurisdiction to invoke the extended period of limitation are wholly absent and the Commissioner has not properly applied his mind to the questions as to the condition for invoking the extended period of limitation existed and/or acted mechanically. It was submitted that the impugned show cause notice amounts to wrongful invocation of jurisdiction and hence ought to be quashed.

The High Court held that the issue of whether the extended period of limitation was applicable, was yet to be determined by the Adjudicating Authority at the first instance itself. Hence writ petition was not maintainable.

Contrary Stand by the Courts While admitting the Writ

Commissioner Of Central Excise, Haldia vs. M/s. Krishna wax

The excise law is a complete code in itself and it would normally not be appropriate for a Writ Court to entertain a petition under Article 226 of the Constitution and that the concerned person must first raise all the objections before the authority who had issued a show-cause notice and the redressal in terms of the existing provisions of the law could be taken resort to if an adverse order was passed against such person.

The Apex Court set aside the order and directed that the proceedings pursuant to show cause notice be taken to the logical conclusion.

Malladi Drugs and Pharma Ltd. vs. Union of India

it was observed:- "...The High Court, has, by the impugned judgment held that the Appellant should first raise all the objections before the Authority who have issued the show cause notice and in case any adverse order is passed against the Appellant, then liberty has been granted to approach the High Court... ..in our view, the High Court was absolutely right in dismissing the writ petition against a mere show-cause notice."

**State of U. P. v. Anil Kumar Ramesh Chandra Glass Works
[2005] 11 SCC 451**

The High Court held that the jurisdiction of the High Court, under Article 226 of the Constitution, should not be permitted to be invoked in order to challenge a show-cause notice unless, accepting the facts stated therein to be correct, the show-cause notice is, ex facie, without jurisdiction.

What's next after Receipt of Show Cause notice

**State of U. P. v. Anil Kumar Ramesh Chandra Glass Works
[2005] 11 SCC 451**

Date of Receipt

Time limit to reply for Show Cause notice

Reading of A Show Cause Notice

Analysis of Issue with Client and Collection of further Details

Drafting of Response

Date of Receipt

- ✓ The date of receipt of the show cause notice plays a vital role in commencing the decision making process. The date of receipt can be ascertained from copy of email, postal cover, etc. Hence, it is very important that a documentation for the date of receipt of the notice is created without fail.
- ✓ It is suggested that, a one-page print of email or photocopy of the postal cover should be preserved in the file. The calculation of 30 days from the date of communication of notice will start only from the date when you receive the show cause notice.

Time limit to reply for Show Cause notice

- ✓ Section 73 / 74 does not prescribe any time limit per se within which the person has to respond to the notice. In many occasions, the date of personal hearing may be specified in the SCN which implies that written response need to be submitted on or before the said date. In certain cases, a particular date may be mentioned within which the taxpayer will have to respond. Hence, that can also be treated as the due date to furnish a reply to a show cause notice.
- ✓ It is suggested that one should take a time of 30 days within which the proper officer may start expecting the reply. It is necessary that the tax payer responds to the notice within the first 30 days by either submitting the reply that has been prepared or seeking an extension in order to submit a reply.

Reading of A Show Cause Notice

- ✓ A show cause notice should be read line by line and in detail.
- ✓ We need to look for the details which can give us the complete picture of the issue right from the basic details of the assessee including GST Number, tax period concerned with the issue, the transactions captured in the notice, details of the Sections and Rules of the GST Acts referred in the show cause notice and the alleged violations by the noticee, other allegations made by the department, manner in which the value has been arrived, the way in which goods or services have been classified, the details of input tax credit being disallowed, the rate of tax considered for arriving at the tax amount, etc.
- ✓ This will enable us to get a good grip on the issue which can help us while we draft the reply to show cause notice.

Analysis of Issue with Client and Collection of further Details

- ✓ Many details may come out over a one to one discussion on the table. It is suggested that, the details gathered by studying the show cause notice be discussed in detail with the client and his views on the allegations made in the show cause notice be sought from him in order to take the case forward.
- ✓ One should also seek further information by asking questions on the issue viz., date of transaction, what was the input tax credit that is alleged as ineligible, whether invoice was raised properly, whether e-way bill was raised, was there any issue during the said period, whether the applicable taxes were paid on time or with delay...etc.
- ✓ The client may sometimes come up with a new information which can be relevant for the case on hand.

Drafting of Response

- ✓ The drafting of a reply to a show cause notice is an art.
- ✓ It requires regular practice of reading the law and its daily updates along with references to landmark judgements pronounced by various judicial fora.
- ✓ A good and tasty food though prepared well, will not be attractive unless it is presented well.
- ✓ Similarly, the presentation of response matters a lot when it comes to responding to a show cause notice.
- ✓ Further the environment for drafting of response should be calm and quiet without disturbance which will enhance the quality of reply with proper flow of contents.

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Coverage of Issues

- ✓ The reply should be prepared by responding to each and every paragraph of the show cause notice.
- ✓ The drafting should cover response to all the issues and allegations made in the notice. If any of the issue/allegation is not addressed, the proper officer may deem it as acceptance of the same and it will have negative impact on the outcome of the adjudication process.

Reference to Provisions of Law

- ✓ The reply should be crisp and specific to the point and it should not be like beating around the bush.
- ✓ Wherever required, the references of the provisions of law can be quoted and explained in a detailed manner which will convey the clear message of how we have interpreted the provisions.

Interpretation Issues

- ✓ Issue involves interpretation, penal provisions cannot be invoked on the taxpayer.
- ✓ Whenever there is an interpretational issue, the response should contain the structured method of interpreting each and every word, phrase or line of the section or rule and arrive at a conclusion, giving the meaning as understood by us.
- ✓ Further, wherever possible, the allegations made in the SCN should also be referred and it should be brought to the notice of the adjudicating authority as to why the conclusion drawn in the show cause notice by way of wrong interpretation cannot be held valid in the eyes of the GST law.

Classification Issues



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Calculation Tables

- ✓ Whenever the issue pertains to valuation or calculation of tax liability, it should be the endeavor of the notice to give the complete basis and method of arriving at a particular value as per the valuation rules based on which the tax payer has declared the value of taxable supply and calculated the tax liability at appropriate rates.
- ✓ We should be able to defend the method and the calculation by highlighting what is missed or wrongly considered in the calculation adopted in the Show Cause notice.

Annexures

- ✓ The reply should not be cluttered by dumping all the details at one place. The items or details which are referred (Case Laws, Copy of the HSN Tariff Schedule or notes, Third Party Certificates...etc.) or which cannot fit within the response (calculations, widely tabulated information for ITC...etc.) should always be given as annexure.
- ✓ This will help the reader of the response to develop a positive feel and understand the issue in better manner and also refer to the annexures wherever necessary.

Documentation & Submission

- ✓ The reply to show cause notice shall be printed on the letter head of the noticee along with the annexures on white sheets of size A4 or legal as per the requirement. In total, three sets of the response shall be prepared. One for submission with the Department, second copy for obtaining acknowledgement and the third one as client copy which also will come handy in time of need.
- ✓ The response shall be printed with page numbers on every page including annexures. The papers shall be neatly assembled and tagged properly before submission to the Department.

Key Terms (For Drafting)

Law of precedents

- ✓ The doctrine of judicial precedents, judicial discipline and Res Judicata have been evolved to ensure stability and certainty in law.
- ✓ The Hon'ble Supreme Court in the case of **Union of India v. Kamlakshi Finance Corporation Ltd, reported in 1991(35) E.L.T.433(S.C.)**, held that *"The adjudicating Officer acts as a quasi-judicial authority. He is bound by the law of precedent and binding effect of the order passed by the higher authority or Tribunal of superior jurisdiction."*
- ✓ The Hon'ble Supreme Court in the case of **Commissioner of C. Ex, v. Novapan Industries Ltd.**, held that *"It is settled law that the department having accepted the principles laid down in the earlier case cannot be permitted to take a contra stand in the subsequent cases"*.

Doctrine of Merger

Doctrine of Merger is a common law doctrine which is founded on the principles of propriety in the hierarchy of justice delivery system. The underlying logic of Doctrine of Merger is that there cannot be more than one decree or an operative order governing the same subject-matter at a given point of time.

Obiter-Dictum

- ✓ Now, an 'obiter dictum' is an expression of opinion on a point which is not necessary for the decision of a case.
- ✓ This very definition draws a clear distinction between a point which is necessary for the determination of a case and a point which is not necessary for the determination of the case. But in both cases points must arise for the determination of the tribunal.
- ✓ Two questions may arise before a Court for its determination. The Court may determine both although only one of them may be necessary for the ultimate decision of the case.
- ✓ The question which was necessary for the determination of the case would be the 'ratio decidendi'; the opinion of the tribunal on the question which was not necessary to decide the case would be only an 'obiter dictum'.

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- ✓ The question which was necessary for the determination of the case would be the 'ratio decidendi'; the opinion of the tribunal on the question which was not necessary to decide the case would be only an 'obiter dictum'.

Mohandas Issardas And Ors. vs A.N. Sattanathan And Ors. on 9 August, 1954

Ratio decidendi

Ratio decidendi is the Latin term meaning “the reason for the decision,” and refers to statements of the critical facts and law of the case. These are vital to the court's decision itself.

Obiter dicta are additional observations, remarks, and opinions on other issues made by the judge. These often explain the court's rationale in coming to its decision and, while they may offer guidance in similar matters in the future.

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Thanks!

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