"Show Cause Notice, Adjudication, Offences, Penalties, Appeals, Revision, Prosecution and Compounding"

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"*Litigation: A machine which you go into as a pig and come out of as a sausage"*
[Ambrose Bierce]

1. Introduction:

India can easily rank as one of the most litigious countries in the world. In fact, the country's judicial system is almost crumbling under the crushing burden of the litigation. Amidst the varied types of litigations clogging the country's judicial system, the **tax litigation** probably occupies the largest space. This can easily be seen from the following details of pending cases **as on 31.03.2017** as stated in the Economic *Survey -2017-18:*

A. Pending cases relating to Direct Tax:

- Before the Supreme Court, 6357 cases involving an amount of Rs. 0.08 lakhs crore;
- Before the High Courts, 38,481 cases involving an amount of Rs. 2.87 lakhs crore;
- Before the ITAT, 92,338 cases involving an amount of Rs. 2.01 lakhs crore.

B Pending cases relating to Indirect Tax:

- Before the Supreme Court, 2946 cases involving an amount of Rs. 0.28 lakhs crore;
- Before the High Courts, 14141cases involving an amount of Rs. 0.37 lakhs crore;
- Before the CESTAT, 83,338cases involving an amount of Rs. 1.92 lakhs crore

It is pertinent to note here that just like the taxpayers, the Department, not to be left behind, also remains a chief contributor to the mounting litigation and remains a constant litigant, filing, at many times, frivolous and unwarranted appeals before the higher judicial fora. This is despite the continued dismal success rate of the departmental appeals.

The reasons for the **tax disputes** can be wide and varied. However, vague and poorly drafted tax legislations, arbitrary interpretation by the Revenue Officers, tax avoidance (if not, tax evasion) tendency of the taxpayers, pressure of revenue targets, frequent tweaking of the statutory provisions and Notifications, retrospective amendments, confusing clarifications issued by the CBDT or CBIC, conflicting judicial pronouncements by the different

Benches of the Tribunal or Courts on the same issue, to cite a few, are the main causes behind the ever increasing tax litigation.

Since 'tax disputes' are inevitable under any tax legislations including GST laws, it is absolutely essential that the various aspects of tax litigation are closely studied and understood. The tax litigation process under the GST laws mainly comprise of show cause notice, adjudication, appeals, revision, prosecution and compounding of offences. Each of these aspects are briefly analysed and discussed in this Paper in the context of the relevant statutory provisions of the GST laws.

2. Concept of 'Assessment':

2.1 'Assessment' is one of the most crucial aspects of any taxation law. The concept therefore needs to be understood before one delves into the various aspects of adjudication.

In Bhopal Sugar Industries vs. State of MP – AIR 1979 SC 357, the Supreme Court observed: 'Assess' in a taxing statute means the computation of the income of assesse, the determination of tax payable by him and the procedure for collecting or recovering the tax."

In Kalavati Devi vs. CIT – AIR 1968 SC 162, the Apex Court observed: "The word 'assessment' can comprehend the whole procedure for ascertaining and imposing liability upon the taxpayer'.

Simply put, 'assessment' means the process of determination of the amount of tax payable. Levy, assessment and collection are the three angles of the taxation triangle. 'Assessment' comes between the stages of levy and collection.

2.2 Assessment is at the root of adjudication under taxation. It shall be noted that in the GST regime, the practice of 'self-assessment', as was prevalent in the erstwhile Central Excise and Service Tax regime, has been continued. Thus, the taxpayer himself determines the tax payable on his taxable supply of goods or services after considering the aspects such as taxability, classification, valuation, exemption, etc. Any short payment or non-payment of tax, whether or not intentional, as a result of such 'self-assessment' may consequently, lead to litigation.

The importance of 'assessment', therefore, cannot be understated.

2.3 'Assessment' under GST laws:

The term 'assessment' is defined in sub-section (11) of S.2 of the Central Goods and Services Tax Act, 2017 ('the CGST Act' or 'the Act') as under:

> *"S.2 In this Act, unless the context otherwise requires,-*
>
> *(11) "assessment" means determination of tax liability under this Act and includes self-assessment, re-assessment, provisional assessment, summary assessment and best judgment assessment".*

The term ‘assessment’ is thus, defined in an inclusive manner. However, neither the expression ‘self-assessment’ nor other expressions used in the definition are defined in the CGST Act. Chapter XII of the CGST Act titled ‘Assessment’ contains the provisions relating to the various types of assessments contemplated in the definition of ‘assessment’.

S.59 of the Act provides that ‘*every registered person shall self-assess the taxes payable under this Act and furnish a return for each tax period as specified under S. 39’.*

The question of ‘provisional assessment’ would arise where the taxable person is unable to determine the value of goods or services or both or determine the rate of tax applicable thereto. He can then request the proper officer in writing giving reasons for the payment of tax on provisional basis, whereupon, the proper officer, within the maximum period of ninety days, pass an order permitting such payment on provisional basis. *[S.60(1) of the Act refers.]*

The proper officer can resort to ‘summary assessment’ only in exceptional circumstances and with a view to protect the interest of revenue *[S.64 of the Act refers.]*

On the other hand, the proper officer can resort to ‘best judgement assessment’ in the following circumstances:

In case of registered persons:

- Where a registered person fails to furnish the return under S.39 or S.45, even after serving of notice on him under S.46; *[S.62(1) of the Act refers.]*

In case of unregistered persons:

- Where a taxable person fails to obtain the registration even though liable to do so; or
- Whose registration has been cancelled under S.29(2) but who was liable to pay tax.

[S.63(1) of the Act refers.]

It shall be noted that both, S.62 and 63 carry ‘*non-obstante clause’* and are overriding S.73 and S.74 (relating to issue of show cause notice) of the Act. Proviso in S.63 however, stipulates that the principles of natural justice (i.e. grant of an opportunity of being heard in person) shall be followed by the proper officer before passing any assessment order under this provision.

3. Show Cause Notice:

3.1 Introduction:

As explained above, in the era of ‘self-assessment’, a taxpayer may fail to correctly determine and assess the tax payable on his supply that results into

‘non-payment’ or ‘short payment’ of tax. Likewise, a taxpayer may have wrongly taken or utilized the ‘Input Tax Credit’ (‘the ITC’) or has been erroneously granted the refund of tax.

In all such cases, the proper officer is empowered to issue a show cause notice to the taxpayer and then adjudicate the same.

3.2 Relevant statutory provisions and the scope thereof:

The provisions relating to the issue of show cause notice and the adjudication thereof are contained in S.73 and S.74 of the Act. The provisions are substantially the same as were contained in S.11A of the erstwhile Central Excises Act, 1944 (‘the CEA’) and S.73 of the erstwhile Finance Act, 1994 (‘the FA’), as the case may be.

Essentially, the provisions of S.73 and S.74, though both dealing with the ‘demand and recovery’, operate in two different situations viz:

- Demand arising for any reason ***other than the reason of***fraud or any willful statement of facts or suppression of facts with intent to evade tax *[S.73 refers];*
- Demand arising *by the reason of fraud* or any willful misstatement or suppression of facts to evade payment of tax *[S.74 refers.]*

Though the provisions of S.74(1) of the Act are analogous to the erstwhile provisions of the proviso to S.11A(1) of the CEA or the proviso to S.73(1) of the FA, there is an interesting differencebetween these two set of provisions. The erstwhile provisions stipulated **‘collusion’** and **‘contravention *of the provisions of the Act* (i.e. CEA or FA, as the case may be) and the rules made thereunder’** also as reasons leading to evasion of duty or service tax. These two elements are ‘*conspicuous by its absence’*in S. 74(1) of the Act.

Yet another notable distinction between the provisions of S.73 and S.74 of the Act and the erstwhile provisions of S.11A of the CEA or S.73 of the FA relate to the ‘demand and recovery of credit wrongly availed or utilized.’ In the erstwhile regime, the provisions relating to the demand and recovery of Cenvat credit were contained in R.14 of the Cenvat Credit Rules, 2004 (‘the CCR’) and the provisions of S. 11A of the CEA or S.73 of the FA, as the case may be, were made applicable thereto *mutatis mutandis.* However, under GST regime, the provisions relating to the demand and recovery of ‘input tax credit wrongly availed or utilized’ are contained in S.73 or S.74, as the case may be, of the Act itself.

In fact, one significant feature of GST laws is that quite a few substantial provisions are enacted as a part of the main enactment i.e. the CGST Act, 2017 itself, unlike the erstwhile CEA or FA where such provisions were contained in various Rules made thereunder. In a way, the containment of the provisions in the main enactment itself imparts a certainty and stability to the provisions as the same will not be susceptible to the amendment by the Central Government through notification at its wishes, under delegated legislation. The amendments to the provisions of the Act would require the

recommendation by the GST Council and the legislative approval of the Parliament. At the same time, one may feel handicapped when a dire necessity and urgency is felt for the amendment of a particular provision of the Act but that cannot be done unless the lengthy process involving the recommendations by the GST Council and the legislative approval is followed.

3.3 Authority empowered to issue show cause notice and adjudicate the demand:

Both, S.73 and S.74 provide for the issue of show cause notice by a **'Proper Officer'** in the specified circumstances as enumerated therein. The term 'proper officer' is defined in S.2(91) of the Act which reads as under:

> *"S.2 In this Act, unless the context otherwise requires,-*
>
> *(91) "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."*

Under S.4 of the Act, the Central Board of Indirect Taxes & Customs ('the Board') is empowered to notify,*such persons*, in addition to the officers notified by the Central Government under S.3 of the Act, as it may deem fit, the officers under the Act.

3.4 Monetary limits for issue of show cause notice and demand:

3.4.1 Fixation of monetary limit by the CBIC:

The Central Board of Indirect Taxes & Customs ('the CBIC') has, by Circular No. 1/1/2017-GST dated 26.06.2017 assigned proper officers for provisions relating to registration and composition levy under the Act and the rules made thereunder. Further, vide Circular No. 3/3/2017-GST dated 05.07.2017, the proper officers for provisions other than registration and composition under the Act were assigned.

Subsequently, by Circular No. 31/05/2018-GST dated 09.02.2018, the Board has designated all officers upto the rank of Additional/Joint Commissioner of Central Tax (including the Superintendent) as 'the proper officer' for issuance of show cause notices and orders under sub-sections (1),(2), (3), (5), (6), (7), (9) and (10) of Sections 73 and 74 of the Act.

Further, for optimal distribution of work relating to the issuance of show cause notices and orders under Sections 73 and 74 of the Act and also under the IGST Act, monetary limits for different levels of officers of Central Tax have been specified by the above Circular. It is also provided that the Central Tax Officers of Audit Commissionerates and DGGSTI shall exercise the powers only to issue show cause notices which shall be adjudicated by the competent officer of the Commissionerate in whose jurisdiction the Noticee is registered. If there are multiple show cause notices for one Noticee having business in multiple Commissionerates, the notices will be adjudicated

by a competent officer in whose jurisdiction the principal place of business of Noticee from whom the highest demand of tax has been made, falls.

In case of show cause notice issued by DGGSTI in which the principal place of business of the Noticees fall in multiple Commissionerates and the amount of tax involved is more than Rs.5 crores, the same shall be adjudicated by an officer of the rank of Additional Director/Additional Commissioner, as assigned by the Board, and who shall not be on the strength of DGGSTI and working there at the time of adjudication.

Lastly, it is provided by the Circular that in case of show cause notices involving similar issues but answerable to different levels of adjudicating authorities within a Commissionerate, such notices shall be adjudicated by an adjudicating authority who is competent to decide the case involving the highest amount of tax.

3.4.2 Validity of notice issued by an officer in excess of monetary limit:

It may be seen that S.2 (91) read with S.4 of the Act do not stipulate any monetary limit in case of the designated 'proper officer' for the purpose of issue of show cause notice and adjudication of demands under S.73 or S.74 of the Act. The monetary limits are specified by the Board by its Circular dt. 09.02.2018 (supra) as administrative instructions.

In the erstwhile Central Excise/Service Tax regime also, the Board had specified the monetary limits for the purposes of issue of notice and adjudication of demand by its various Circulars in a similar manner.

A question, therefore, may arise as to whether a notice issued by an officer exceeding the monetary limit prescribed for him will be valid or not.

*In Pahwa Chemicals (P) Ltd. vs. CCE – 2005 (181) ELT 339 (SC 3 Member Bench***),** *the Apex Court held that* administrative direction of the Board allocating different works to various classes of officers cannot cut down jurisdiction vested in them by statute and may be followed by them at best as matter of propriety. It was further held that the issuance of show cause notice or adjudication contrary to such directions could not be set aside for want of jurisdiction, especially as no prejudice is caused thereby to Assessee.

Applying the principle laid down in the above judgement in the present context, it can be said that if a show cause notice is issued by an officer in excess of monetary limit as applicable to him as per the Board's Circular (supra), the notice will not be rendered invalid or without authority of law merely for that reason.

3.5. Principles of law governing issue of show cause notice:

The notice, in fact, is the first step taken by the department in the often long-drawn process of litigation initiated against the taxpayer. It is a basic but a very crucial document in the whole process. It will, therefore, be

essential and advantageous to keep in view certain important principles of law laid down by various judicial pronouncements in the context of the erstwhile provisions of the CEA or FA, as the case may be, governing the show cause notice and which are equally relevant in the GST era. These principles are briefly discussed below:

3.5.1 Limitation period for issue of show cause notice:

In view of the importance of this topic, it is being dealt with in detail later in this Paper ***[See discussion under Para 3.8 (infra.)]***

3.5.2 Issue of show cause notice is a 'condition precedent' to a demand:

Issue of show cause notice is mandatory before the adjudication of a demand against the taxpayers as is evident from the careful reading of S.73 or S.74 of the Act.

In *Gokak Patel Volkart Limited vs. CCE – 1987 (28) ELT 53 (SC),*the Supreme Court held that considering the statutory scheme of S.11A of the CEA, notice is a condition precedent to a demand.

The above judgement was followed by the same Court in *Metal Forgings vs. UOI – 2002 (146) ELT 241 (SC),* in which the Court held that issuance of show cause notice is a mandatory requirement of law and communication or orders cannot be deemed to be a show cause notice.

In *UOI vs. Madhumilan Syntex Pvt. Ltd. – 1988 (35) ELT 349 (SC),*it was held that a demand raised without issue of show cause notice is invalid and further that a post-facto show cause notice cannot be regarded as adequate in law.

Also see,
1. *CC vs. Tin Plate Co. – 1996 (87) ELT 589 (SC);*
2. CCE vs. Akay Cosmetics – 2005 (182) ELT 294 (SC- 3-Member Bench)

3.5.3 **A mere letter or communication asking for payment is not a notice:**

It is a common experience of the taxpayers to receive a letter or communication in any other form asking them to pay the tax as specified for the reasons stated therein. At times, even the amount is not specified in such letter, etc. and is left to be worked out by the taxpayer. Sometimes, the reasons or basis of such direction for payment of tax are also not provided in the communication.

Can such letter, etc. be considered or equated with a show cause notice as contemplated in law?

In *Metal Forgings vs. UOI (supra***),** the Supreme Court agreed with the findings of the Tribunal that letters either in the form of suggestion or advice

or demand notice issued prior to the finalization of the classification cannot be taken as show cause notice.

Following the above judgement, the Karnataka High Court, in the case of *CC, Bangalore vs. Merchant Impex – 2012 (276) ELT 458 (Kar),* held that the order rejecting exemption claimed by the importer passed after the issuance of mere letter by jurisdictional officer is invalid as the letter cannot be deemed to be a show cause notice.

*In Steel Ingots vs. UOI – 1988 (36) ELT 529 (MP),*it was held that a mere letter from Superintendent/Assistant Commissioner asking the Assessee to pay duty is not a valid show cause notice, as it is violative of the principles of natural justice.

*In Sidwal Refrigeration vs. CCE – 2002 (145) ELT 682 (Tri-Del.),*it was held that a letter of Superintendent communicating audit objections with request to pay the duty is not a show cause notice. It was further held that such letter is not a valid appealable order and no appeal can be filed against such letter.

3.5.4 **Other essential requirements of a show cause notice:**

Issuance of show cause notice is not only mandatory before adjudicating a demand, such notice must also conform to certain fundamental requirements as explained below:

3.5.4.1 **Show cause notice must be in writing:**

In *Voltas Ltd. vs. CCE – 2000 (121) ELT 802 (Tri-Mum.),*it was held that demand under S.28 of Customs Act, 1962 and S.11A of the CEA must be in writing.

3.5.4.2 **Whether oral show cause notice is valid? Can a show cause notice be waived?**

An interesting question may arise here and that is, whether an oral show cause notice can be regarded as valid? Can an assessee waive the issue of show cause notice and settle for oral show cause notice?

In *CC vs. Virgo Steels - 2002 (141) ELT 598 (SC-3 Member Bench),*it was held that though a show cause notice is a mandatory requirement, it can be waived by the assessee as the provision deals with individual's right. It is a notice to the person concerned and not a public notice and right to receive show cause notice can be waived.

[Also see, *CC vs. Jagdish Cancer & Research Centre -2001 (132) ELT 257 (SC-3 Member Bench)]*

However, the above judgement was, it must be kept in mind, rendered in the context of the specific provisions of the proviso to S.124 of the Customs Act that, inter alia, provides for the waiver of a written show cause notice by the party who may settle for oral notice in the circumstances specified therein.

No such provisions providing for waiver of the notice existed in the erstwhile CEA or FA.

Recently, an interesting issue had arisen for consideration of the Karnataka High Court in the case of *National Co-op.Bank Ltd. vs. CST (Audit), Bangalore – 2018 (15) GSTL 202 (Kar.).*

Stated briefly, the Petitioner, a Co-operative Bank and was registered under service tax pre and post-30.06.2012. Pursuant to the objections raised by the Audit and as informed by the Audit, the Petitioner paid a total amount of Rs. 58,08,851/- towards Cenvat Credit, interest and penalty. However, the Petitioner, on realizing that the actual amount of Cenvat Credit payable was Rs. 13,38,021/- (including interest and penalty), sought the refund of the excess amount of Rs. 44,78,830/- or alternatively issue of show cause notice under proviso to S.73(1) of the FA so as to determine the tax demanded and recovered, which was not legally payable or was barred by limitation. However, the Petitioner was conveyed that proceedings had concluded at the option of the petitioner under second proviso to S. 78(1) of the Act, since petitioner had paid 15% of the service tax as penalty vide letter dated 28.7.2016 and that no further action is required under the provisions of S. 73(3) read with proviso to S.78(1) of the Act. The communication was challenged by the Petitioner with further challenge to the action of demanding the penalty at the time of audit and collected during audit.

After hearing both the sides, the High Court held that the contention of the Revenue that no show cause notice was necessary as assesse had paid tax and penalty on the basis of tax ascertained by the Audit Enquiry Officer before service of notice is untenable; that, the Assessee had made it clear that the amount paid was provisional and under protest and had not accepted the suggestion of the Department for waiver of the notice by not filling the format provided by the Department; that, invocation of extended period was subject to issuance of show cause notice which must put assesse to notice specifically as to various commissions/omissions stated in proviso to S.73(1) of the FA.

The High Court, accordingly, quashed the letter/communication as well as Audit Report under challenge and remitted matter to the Commissioner to issue show cause notice in accordance with law.

This is a significant decision and is quite relevant in GST era as well. It must be remembered that neither S.73 nor S.74 provides for waiver of show cause notice. Therefore, the ratio laid down in Virgo Steel's case (supra) would not apply. In fact, in the above case before the High Court, reliance had been placed by the Revenue on the judgment in Virgo Steel's case (supra) but the same was distinguished by the High Court by observing as under:

"In this context, it would be beneficial to refer to the judgment of the Hon'ble Apex Court in the case of Virgo Steels supra, referred to by the Learned Counsel for the Revenue. The judgment was rendered by the Hon'ble Apex Court in the context of the assessee categorically making the submissions that 'we do not want any show cause notice and personal hearing in the matter". Along with the said letter, they also enclosed a cheque though

postdated as a token of their commitment made by them. In such circumstances, the Hon'ble Apex Court held that a notice was not necessary in the facts and circumstances of the case. In the present set of facts, on the request made by the revenue to fill the format and submit for waiver of show cause notice, the same was not accepted by the assessee. Hence, the said judgment of the Hon'ble Apex Court in Virgo Steels supra, is not applicable to the facts of the present case."

It is also pertinent to note here that by its *Circular No. 290/6/97-CX dt. 20.01.1997,* the Board has clarified that when stakes are high and/or complicated legal questions are involved, show cause notices should not be waived and same should be issued and served on parties. However, early hearing may be granted to expedite the adjudication.

3.5.4.3 **Show Cause notice must contain all essential details:**

In *CCE vs. Brindavan Beverages (P) Ltd. – 2007 (213) ELT 487 (SC),*it was observed as under:

"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".

In *Mehta Pharmaceuticals vs. CCE – 2003 (157) ELT 105 (Tri-Mum),* it was observed as under:

"6. The extract of the show cause notice cited above does not seem to challenge inadequacy of the documents. It could be that such inadequacy could be inferred there from but the notice, which is meant to put the recipient on notice, must always spell out the exact charge. A notice, which is ambiguous or capable of interpretation, cannot be the ground for sustaining an order based on the inference drawn from the show cause notice."

In *CCE vs. Bhikhlal Dwarkadas – 1998 (99) ELT 438 (Tribunal),*it was held that a show cause notice has to state clearly the allegations made against the noticee. Where the allegations are absent or not substantiated, that defect cannot be cured at subsequent stages and certainly not at the stage of the second appeal.

Issue of show cause notice is not an empty formality. The notice, therefore, must adhere to the principles of natural justice i.e. it must contain all the requisite details, all evidences on which the Department intends to rely upon must be disclosed and the basis of demand shall be clearly spelt out. The notice shall not be vague and confusing and the nature of allegation shall not be left to the imagination of the Assessee.

3.5.4.4 **Show Cause notice shall not be based on assumptions and presumptions:**

In one of the oldest but landmark judgements, the Supreme Court, in the case of *Oudh Sugar Mills Ltd. vs. UOI – 1978 (2) ELT (J172) (SC)* held that show cause notice issued on the basis of assumptions and presumptions and the findings based thereon without any material evidence but being based only on inferences involving unwarranted assumptions are vitiated by an error of law. In this case, the allegations of clandestine removal were made based on mere sample testing of raw materials and machinery usage but were otherwise, unsubstantiated by any tangible evidence.

3.5.4.5 **Should show cause notice indicate the amount demanded?**

In *Bihari Silk & Rayon Processing Mills (P) Ltd. vs. CCE – 2000 (121) ELT 617 (Tribunal-LB),*the majority view (3:2) was that a show cause notice issued without quantification of demand would still be valid. It was held that *'specified'* is not the same as *'determined'*. While there is an element of definiteness in specifying an amount, describing or stating in detail is the same as specifying. The majority relied upon the judgement of the Delhi High Court in the case of *Hindustan AluminiumCorpn.Ltd. vs. Supdt.ofC.Ex -1981 (8) ELT 642 (Delhi),* wherein the contrary decision of a single judge of the Bombay High Court in *JBA Printing Inks Ltd. vs. UOI – 1980 (6) ELT 121 (Bom)* was held as not laying down a correct law.

On the other hand, the minority's contra view was that a show cause notice without quantification of demand was not legal and valid. The words in section 11A(2) *'not being in excess of the amount specified'* presuppose specification of the amount in notice, without which, determination of amount of duty under section 11A(2) by the Central Excise Officer becomes impossible. As for determination of amount by him, he has to take into account the caveat that the amount cannot exceed the amounts specified in section 11A(1).

*In Gwalior Rayon Mfg. (Wvg.) Co. vs. UOI – 1982 (10) ELT 844 (MP),*it was held by the High Court that non-mention of the necessary particulars in the notice is not a valid ground for quashing the notice as it is open to the Petitioner to seek further particulars, if any, that may be necessary for it to show cause if the same is deficient.

It appears that the minority view expressed in *Bihari Silk Mill's case (supra)* is rational and correct. It shall be noted that S.73(1) and S.74(1) of the Act also uses the same words *"requiring him to show cause as to why he should not pay the amount specified in the notice….."* as were employed in erstwhile S.11A(1) of the CEA or S.73(1) of the FA. It is also significant to note that in S.75 of the Act, 'general provisions relating to determination of tax' are specified. Sub-section (7) of S.75 reads as under:

"*S.75 (7) 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."*

In view of this explicit provisions, it is difficult to accept the view that a notice without quantification of demand will still be valid.

3.5.4.6 **Show cause notice issued under the wrong provision – Is it valid?**

In *N.B. Sanjana vs. The Elphinstone Spg. & Wvg. Mills Co.Ltd. – 1978 (2) ELT J 399 (SC),*it was held that if the authorities have the power to issue notice either under Rule 10A or Rule 9(2), the fact that the notice refers specifically to a particular rule which may not be applicable, will not make the notice invalid.

In *BSE Brokers Forum vs. SEBI – 2001 AIR SCW 628 (SC 3 Member Bench),*it was held that as long as impugned power is traceable to concerned statute, mere omission or error in reciting the correct provision of law does not denote the power of authority of taking a statutory action so long as its action is legitimately traceable to a statutory power governing such action.

However, where assesse is given notice for penal action in one clause which was not applicable and assesse was not given any opportunity to meet the case in sustaining penalty in another clause, jurisdiction cannot be sustained. *– CST vs. Anoop Wires (1988) 71 STC 262.*

-See also, Shree Precoated's case – 2006 (203) ELT 255 (T)

3.5.4.7 Issue of Corrigendum/Addendum to show cause notice:

Both the words *"corrigendum"*and *"correct"* are derived from the latin verb "c*orrigere*" which means *'to correct'*. The dictionary meaning of the word *'corrigendum'* is *'a mistake in a printed text that needs to be corrected'*.

An 'addendum' on the other hand, is an addition required to be made to a document by its author subsequent to its printing or publication. It comes from the Latin verb *addendum est,* being the *gerundive* form of the verb *addere* (lit. 'give toward') meaning '(that which) must be added.' (Wikipedia).

It may sometimes happen that a show cause notice issued by a proper officer contains some mistake or error or omission that needs to be corrected or supplied. Consequently, the proper officer may issue a corrigendum or addendum, as deemed fit, to a notice correcting the error or supplying the lacunae. Generally, in such cases, the original show cause notice remains valid and the period of limitation is required to be reckoned from the date of notice only. However, what happens if the corrigendum or addendum is on an entirely different ground or makes a substantial change in the notice so as to change its entire context? Can it still be regarded as mere 'corrigendum' or 'addendum' so as to leave the original notice unaffected?

*In CCE vs. SAIL – 2008 (225) ELT A 130(SC),*the Supreme Court upheld on merits and limitation, the order of the Tribunal, wherein it was held that a belated corrigendum issued to the show cause notice for enlarging the scope of the first notice was bad-in-law.

If earlier notice did not indicate amount of duty demanded, subsequent notice indicating amount demanded will be treated as 'fresh notice' and not

mere corrigendum – *CCE vs. Kasturi Foods and Chemicals Ltd. – 1992 (59) ELT 68 (CEGAT).* If basis of show cause notice (which was not mentioned in original show cause notice) is mentioned in corrigendum, it amounts to new ground by department and hence for purpose of limitation, date of corrigendum will only be relevant – *CCE vs. Bhor Industries 1997 (95) ELT 536 (CEGAT).*

If second notice makes major and material change (by proposing new classification), it is a fresh notice and time bar will be calculated with reference to date of fresh show cause notice – *Ahuja Radio vs. CC – 1999 (105) ELT 251 (CEGAT).*

The above discussion and the principles of law are relevant in the context of an adjudication order as well.

3.5.4.8 Is principle of Res Judicata is applicable to show cause notice?

The Latin term *res judicata* means a thing which is already adjudged. In the context of adjudication, it implies that a matter once adjudged and having attained finality cannot be reconsidered.

In *Metal Extruders Pvt. Ltd. vs. UOI – 1994 (69) ELT 477 (Bom),*it was held that the principle of *res judicata* would apply if a second show cause notice is issued on the same cause of action and the period in issue is same as that of the first show cause notice.

In *CCE vs. Siddhartha Tubes – 2004 (170) ELT 331 (CESTAT),*it was held that second show cause notice for same period on different grounds cannot be issued, after the matter has been adjudicated and matter is in appeal – same view in *Paro Food Products vs. CCE – 2005 (184) ELT 50 (CESTAT),* where it was observed that this is barred on principle of '*res judicata'.*

*In CCE vs. Spintech Inc – 2004 (163) ELT 367 (CESTAT),*it was held that once the matter has been adjudicated, second show cause notice on same set of facts by changing stand is not sustainable, even if Tribunal had remanded matter for re-adjudication.

3.5.5 **Service of show cause notice:**

S.169 of the Act prescribes the mode of service of notice, decision, order, etc. and provides that the notice, etc. shall be served by any one or more of the methods prescribed therein.

A careful reading of the provision would reveal that the '*modes of service'* prescribed therein are to be adopted in sequential manner and it is not permissible for the department to ignore the order of methods of service as prescribed. For instance, the first model of service is essentially provides for personal service to the person [clause (a) refers], the next mode refers to the service by registered post or speed post or courier with acknowledgement due [clause (b) refers]. Now, ignoring these two

sequential modes, the department cannot directly resort to mode prescribed at clause (c) and that is, by e-mail communication.

Sub-section (2) of S.169 contains a deeming provision and provides that every decision, notice, etc. *shall be deemed to have been served* on the date on which it is tendered or published or a copy thereof is affixed in the manner as prescribed in sub-section (1).

In *Rajesh Kumar Jain vs. Union of India – 1999 (133) ELT 57 (Cal.),* it was held that the service of show cause notice would be complete either by tendering or sending the same by registered post. In such a case, the date on which the notice was tendered would be the date of its service.

In *Overseas Paints Linkers vs. UOI – 2001 (127) ELT 42 (Al.),* it was held that the term 'given' in the context of giving notice to the assesse within 6 months would mean service of the notice and not merely issuing it.

In *Sewing Systems (P) Ltd. vs. CC – 1992 (62) ELT 725 (CEGAT),* it was held that the show cause notice has to be *served* on the person concerned and mere issue is not enough. It the notice was issued and posted by registered post before last date but received after the last date, the demand notice is not sustainable as it was not 'served' in time.

3.6 **Issue of statement of demand [S.73(3) & S.74(3)]:**

In case of an issue having recurring effect, the department is required to issue periodical show cause notices for the subsequent period once a notice has been issued for a specified earlier period. This exercise may continue till the matter is resolved finally or there is any change in the circumstances making an issue of such periodical or follow-up demands unwarranted.

S.73(3), again a legacy from the erstwhile indirect tax regime, is aimed at saving time, energy and paper for the department which would otherwise be spent in issuing such repeat notices.

It is provided that in such cases, the proper officer may serve a statement of demand, containing the details of tax not paid or short paid, etc. for such period, other than those covered under earlier notice, on the person chargeable with tax.

A similar provision is made in sub-section (3) of S.74 where the original notice has been issued alleging fraud, etc. against the person chargeable with tax and generally invoking extended period of limitation.

Sub-section (4) of S.74 places such 'statement of demand' issued under sub-section (3) at par with notice issued under sub-section (1) of S.73 provided the grounds, other than the grounds relating to frauds, etc. are the same as in contained in the notice issued under S.73(1).

In other words, once a notice has been issued to a person on any count for a particular period, the proper officer may serve on him a statement of demand for the subsequent period provided the basis/grounds of demand are the same.

Such statement of demand ought to be issued within normal period of limitation as prescribed in S.73(1).

This is based on an established principle of law that once the department is in full knowledge of all the material facts, repeated allegations of suppression of facts, etc. are not justified.

In *Nizam Sugar Factory v. CCE – 2006 (197) ELT 465 (SC),*the Supreme Court held as follows:

"9. *Allegation of suppression of fact against the appellant cannot be sustained. 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. We agree with the view taken in the aforesaid judgment and respectfully following the same, hold that there was no suppression of facts on the part of the Assessee/Appellant."*

In this case, the Supreme Court had referred to and followed its earlier judgments in the case of *P & B Pharmaceuticals (P) Ltd. v. CCE – 2003 (153) ELT 14 (SC); ECE Industries Ltd. v. CCE – 2004 (164) ELT 236 (SC) and Hyderabad Polymers (P) Ltd. v. CCE – 2004 (166) ELT 151 (SC).*

It is pertinent to note here that the principle laid down in these judgements stand embodied in S. 74(4) of the Act.

3.7 Conclusion of the proceedings with waiver/reduced penalty [S.73(6), (8) & (11)/S.74(5), (8) and (11)]:

[Refer to discussion at Para 5.13 under 'Penalty' Section]

3.8 Time limit for issue of show cause notice:

3.8.1 Introduction:

Initiation of the proceedings for recovery of tax, etc. cannot be an 'open-ended' scheme. There has to be a time limit within which the department can issue the notice raising the demand against a person. This imparts a sort of certainty, stability and succor to the taxpayer in the matter of tax liability. Such time limit also known or understood as 'limitation' has been an inevitable and integral aspect of the ax legislations and rightly so.

S.73 and S.74 of the Act also prescribes the limitation period for issue of a show cause notice under the respective provision depending upon whether the non-payment or short-payment of tax or wrong availment or utilization of ITC, etc. is occasioned due to the reason other than fraud, etc. or for the reason of fraud, willful statement of facts, etc. with intent to evade tax. Both these situations and certain related aspects are discussed here.

3.8.2 **Normal period of limitation:**

3.8.2.1 Absence of fraud, willful misstatement or suppression of facts with intent to evade tax [S.73(1) & (2)]:

Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where ITC has been wrongly availed or utilized ***other than by reason***of fraud, willful misstatement or suppression of facts to evade tax, he shall serve a show cause notice to the person concerned as provided under sub-section (1) of S.73 of the Act.

Sub-section (2) of S.73 prescribes the time limit for issue of show cause notice under sub-section (1) and provides that such notice shall be issued ***at least 3 months prior to the time limit specified in S.73(10) for issuance of the order.***

Sub-section (10) of S.73 provides that the proper officer shall issue the order under sub-section (9) within ***3 years from the due date for furnishing of Annual return for the financial year to which tax not paid or short paid or ITC wrongly availed or utilized relates to or within 3 years from the date of erroneous refund.***

Thus, in cases ***not involving*** fraud, etc. the proper officer has ***maximum time limit of 33 months*** from the due date as prescribed for the issue of notice.

[***For further discussion on this aspect, refer Para 3.8.3(infra)]***

3.8.2.2 **Existence of the ingredients of fraud, etc. with intent to evade tax [S.74 (1) & (2)]:**

In cases involving the non-payment of short payment of tax or erroneous refund or wrong availment or utilization of the ITC by reason of fraud or willful misstatement or suppression of the facts with intent to evade tax, the notice is required to be served by the proper officer as provided under S.74(1) of the Act.

Sub-section (2) of S.74 provides that in such cases, the proper officer shall issue the notice under sub-section (1) at ***least 6 months prior to the time limit specified in sub-section (10) for the issuance of the order.***

Sub-section (10) of S.74 prescribes the time limit of ***5 years from the due date for furnishing of Annual return for the financial year to which tax not paid or short paid or ITC wrongly availed or utilized relates to or within 5 years from the date of erroneous refund.***

Thus, in such cases involving the evasion of tax, etc. by recourse to fraud, etc., maximum time limit of 54 months from the due date as prescribed is available to the proper officer for the issue of the notice.

3.8.3 Unique prescription of limitation period and its implications:

As can be observed, the time limit for the issue of the show cause notice under both S.73 and S.74, has been prescribed in a very unique manner. In the previous regime, such time limit was to be computed from the 'relevant date', an

expression that was exhaustively defined in the relevant Act itself. However, under the present GST regime, the time limit is linked to the last date for issuance of the order in both the cases which, in turn, is based upon the due date for furnishing annual return or the date of erroneous refund, as the case may be.

Yet another distinctive feature of the present provision is the unreasonably longer time limit of '3 years' provided for the issue of the notice in the normal cases even while the extended period of limitation has been retained at '5 years'. In the present digital era where all the transactions of the taxpayer are captured on-line, the period of '3 years' provided to the department is unreasonably long and this should be a matter of concern for all.

However, still greater worry lies elsewhere! A close look at the provisions would reveal that a proper officer can happily wait till the last moment and issue the notice in the 33rd month or 54th month, as the case may be, depending upon whether the demand is based upon the allegations of fraud, etc. or not. The use of the seemingly innocent expression '***at least***' in S.73(2) and S.74(2) is a pointer to this fact.

It is also significant to note here that S.75(10) clearly provides that the ***adjudication proceedings shall be deemed to be concluded*** if the order is not issued within the time limit of '3 years' or '5 years' as prescribed under S.73(10) or S.74(10), as the case may be. This is also a unique and an unprecedented provision that virtually binds the proper officer to complete the adjudication proceedings and issue the order within the specified time limit.

The taxpayers and the tax professionals may, therefore, brace themselves for a tough time if the notices are issued barely before the expiry of the prescribed time limit which will leave them with hardly any time to effectively defend his case!

3.8.4 **Meaning of the expressions 'fraud, willful misstatement or suppression of facts':**

S.74 provides for an extended period of limitation of '5 years' where the non-payment or short payment of tax or erroneous refund of tax or wrong availment or utilization of ITC is occasioned by recourse to fraud, willful misstatement or suppression of facts with intent to evade tax. These expressions were also used in S.11A of the erstwhile CEA and S.73 of the erstwhile FA and need to be understood in light of the various judicial pronouncement rendered by judicial fora in the previous regime.

a. 'Fraud' :

In *Cosmic Dye Chemical vs. CCE – 1995 (75) ELT 721 (SC),* the Supreme Court was dealing with these expressions as were used in the proviso to S. 11A of the CEA and explained the same as under:

"*Fraud and collusion: As far as fraud and collusion are concerned, it is evident that the intent to evade duty is built into these very words.*

Misstatement or suppression: 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.

Contravention of any provisions: 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'.

The Court further held that there cannot be suppression or mis-statement of fact, which is not willful and yet constitute a permissible ground for the purpose of invocation of the proviso to S.11A.

In *UOI vs. Jain Shudh Vanaspati Ltd. – 1996 (86) ELT 460 (SC),* it was held that 'fraud, if established, unravels all'.

b. Willful misstatement or suppression of facts:

In one of the leading judgements on this issue, the Supreme Court, in the case of *CCE vs. Chemphar Drugs & Liniments – 1989 (40) ELT 276 (SC),* has observed that fraud, etc. is essentially a question of fact and has to be established if there is a positive act. Non-declaration of something in the returns is not suppression if there is no deliberate withholding of information.

In *Cosmic Dye Chemicals case (supra*), the Supreme Court observed that a false statement becomes 'willful' if it is deliberate or intentional. It is not willful if the statement is accidental or inadvertent. A statement will not be misstatement only because full facts were not disclosed. 'Willful' means 'with intent to evade duty'.

In *Tamilnadu Housing Board vs. CCE – 1991 (74) ELT 9 (SC),* the Supreme Court observed that intention to evade payment of duty is not mere failure to pay duty. It must be something more, i.e. that assesse must be aware that duty was leviable and he must deliberately avoid payment of duty. 'Evade' means defeating the provision of law of paying duty. It is made more stringent by the use of word 'intent'. In other words, the assesse must deliberately avoid payment of duty payable under the law. Where there was scope of doubt whether duty was payable or not, it is not 'intention to evade duty'.

3.8.5 Certain established principles of law governing the invocation of the extended period of limitation*:*

Since the invocation of the extended period of limitation entails serious consequences and use of this provision by the department is *'more a rule than an exception',* it will be advantageous to have a look at certain principles of law established by various judicial pronouncements in this regard and which are equally relevant in the GST regime.

i. Non-supply of information not mandated under the statute does not amount to suppression:

In *Smt. Shirishti Dhawan v. Shaw Brothers – AIR 1992 SC 1555***,** the Supreme Court held that there can be no suppression of facts if facts which are not required to be disclosed are not disclosed.

A similar view was expressed by the Gujarat High Court in the case *Apex Electricals (Pvt) Ltd. vs. UOI – 1992 (61) ELT 413 (Guj.).*

Significantly, this principle is now explicitly recognized and embodied in the Explanation 2 to S.74 of the Act that reads as under:

"*Explanation 2.–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."*

ii. Mere inaction or failure is not a suppression of facts:

In *Padmini Products vs. CCE – 1989 (43) ELT 795 (SC),* it has been held that mere non-declaration is not sufficient to invoke larger period but some more positive act is required. It was held that mere failure or negligence on part of manufacturer to take licence or pay duty in case where there was scope for doubt as to whether goods were dutiable or not, could not attract the extended period of limitation.

iii. Bonafide belief and suppression of facts, etc.:

If the assesse had a bonafide belief or doubt about non-dutiability for any reason, extended period of limitation is not available.

See, 1*. Padmini Products vs. CCE (supra)*
2. Uniworth Textiles Ltd. vs. CCE -2013 (288) ELT 161 (SC)
3. Pushpam Pharmaceuticals Ltd. vs. UOI – 1998(78) ELT 401 (SC).

In *Amco Batteries Ltd. vs. CCE – 2003 (153) ELT 7 (SC),* it was held that if the manufacturer and department were under bonafide belief regarding the non-excisability of a product, extended period of five years is not applicable.

iv. **Ignorance of law – Whether suppression of facts can be alleged?**

In *Peter and Millers Packers vs. CCE – 2008 (232) ELT 635 (Tribunal),* it was held that if non-payment was done due to ignorance of law, larger period is not invokable and penalty is not sustainable.

v. **No suppression if all material facts are disclosed:**

If all material facts were within the knowledge of the department, suppression of facts cannot be alleged and consequently, longer period of limitation cannot be invoked.

See, *1. Sarabhai M. Chemicals vs. CCE – 2005 (179) ELT 3 (SC)*
2. Anand Nishikawa Co. Ltd. vs. CCE – 2005 (188) ELT 149 (SC).

vi. **Mere claiming classification under a particular heading or benefit of exemption is not a suppression or misstatement of facts:**

In DensonsPultretaknik vs. CCE – 2003 (155) ELT 211 (SC), it was held that for invoking extended period of limitation, duty should not have been paid, short levied or short paid by suppression of fact or in contravention of any provision or rules, but there should be willful suppression. By mere claiming classification under specific tariff heading, it cannot be said that there was any willful misstatement or suppression of fact.

In *Virlon Textile Mills Ltd. vs. CCE – 2003 (158) ELT 469 (Tribunal),* it was held that wrongly claiming a benefit does not amount to suppression or mis-declaration with intent to evade duty, unless such wrong claim is made by suppressing relevant facts which are germane to the claim. If such facts are suppressed, extended period is available.

In *Northern Plastics Ltd. vs. CC* – the Supreme Court held that laying claim to some exemption, whether admissible or not, is a matter of belief of assessee and does not amount to misdeclaration.

vii. **Revenue Neutrality:**

In *Jay Yushin Ltd. v. CCE – 2000 (119) ELT 718 (Tri-LB),* the Larger Bench of the CESTAT held as under:

"a. *Revenue neutrality, being a question of fact, the same is to be established in the facts of each case and not merely by showing the availability of an alternate scheme.*

b. Where the scheme opted for by the assessee is found to have been misused (in contradistinction to mere deviation or failure to observe all the conditions), the existence of an alternate scheme would not be an acceptable defence.

c. With particular reference to Modvat Scheme (which has occasioned this reference), it has to be shown that the revenue neutral situation comes about in relation to the credit available to the assessee himself and not by way of availability of credit to the buyer of the assessee's manufactured goods."

See also, *Nirlon Ltd. v. CCE – 2015 (320) ELT 22 (SC).*

In *CCE v. Mahindra & Mahindra Ltd. – 2005 (179) ELT 21 (SC*), it was, however, held by the Supreme Court that the judgment rendered by it in another case of *Amco Batteries v. CCE – 2003 (153) ELT 7 (SC)* where the argument of revenue neutrality was accepted on the ground of the availability of credit to the assessee himself, has to be read in the context of the facts. It was held that availability of Cenvat Credit to assessee by itself is not conclusive or decisive considerations. It may be one of the relevant consideration. How much weight is to be attached thereto would depend upon facts of each case.

In *Essar Steel v. CCE – 2009 (19) STT 42 (CESTAT),*it was held that if the assessee was eligible for Cenvat Credit on payment of tax (under reverse

charge method), there cannot be intention to evade payment of tax and hence, penalty is not imposable

viii. **Extended period is not available if penalties are dropped:**

In *Kapadia Enterprises vs. UOI – 2013 (287) ELT 255 (Guj),* it was held that if the lower authority has dropped the penal proceedings on the ground that the assesse is not involved in the fraud, different yardstick cannot be adopted for extended period of limitation as regards the duty amounts.

Also see, *Indian Institute of Chemical Technology vs. CCE -2010 (17) STR 420 (Tri-Bang.)[Affirmed in CCE vs. Indian Institute of Chemical Technology – 2012 (26) STR 97 (AP)]*

ix. **Burden of proof to establish fraud, etc. is on the department:**

In *CCE vs. Bajaj Auto Ltd. – 210 (260) ELT 17 (SC),* it was held that initial burden to show ingredients of S.11A of CEA existed is on department, but burden shifts on assesse once department is able to produce material to show the assesse guilty of any of the situations visualized in S.11A of CEA.

See also, 1. *Tamilnadu Housing Board vs. CCE (supra)*
2.Uniworth Textiles Ltd. vs. CCE (supra)
3. T.N. Dadha Pharmaceuticals vs. CCE-2003 (152) ELT 251 (SC)

4. **Adjudication proceedings and issuance of Orders:**

4.1 Introduction:

Once a show cause notice is served upon the taxpayer, it has to be adjudicated by the competent authority in accordance with law.

The term 'adjudication' has been defined in various legal dictionaries and lexicons. However, for the purposes of this Paper, only one such definition shall suffice.

In *P. Ramanatha Aiyar's Advanced Law Lexicon, Third Edition*, the term 'adjudication' is defined as under:

"*The act of adjudicating; the process of trying and determining a case judicially. The application of the law to the facts and an authoritative declaration of the result.*

The word 'adjudication' means judicial determination of a cause after taking into consideration the material on record and after hearing the parties.

The words 'adjudication' & 'judgment' import the performance of a judicial power."

Following are the essential ingredients that must be present in the adjudication proceedings and the consequential order passed by competent authority:

a. Adherence to the principles of natural justice;
b. Reasoned and speaking order.

However, before these two aspects are discussed, certain other aspects concerning the adjudication may be advantageously discussed.

4.2 Whether adjudicating authority is a quasi-judicial authority?

In *Orient Paper Mills Ltd. Vs. UOI – 1978 (2) ELT J 345 (SC),* it was held that adjudication, appeal and revision are quasi-judicial proceedings and the same would get vitiated if administrative considerations, namely departmental clarifications and Board Rulings influence the quasi-judicial authority.

In *Asst. Collector of C.Ex. vs. National Tobacco of India Ltd. – 1978 (2) ELT J416(SC),* it was held that the assessment of a tax on a person or property is of a quasi-judicial character, therefore, the rules of natural justice have to be followed and assessment is a quasi-judicial process involving due application of mind to the facts as well as to the requirements of law.

In the case of *Province of Bombay v. Khushaldas S. Advani — AIR 1950 SC 222,* Supreme Court held:

"(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a *lis* and prima facie, and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi- judicial act provided the authority is required by the statute to act judicially."

4.3 Opportunity for presentation of case to the notice:

a. Reply to the notice:

Before taking any decision or passing any order on the notice, the adjudicating authority must provide sufficient opportunity to the party for presenting his case through written and oral submissions. Sub-section (9) of S.73 or sub-section (9) of S.74 or sub-section (3) of S.76 of the Act, implicitly recognizes the right of party to file his submissions when served with a notice. However, there is no specific time limit prescribed in the Act or the Rules made thereunder.

The Board has administratively prescribed a time limit of 'one month' for furnishing of a reply to the notice issued on any count whatsoever. In practice, it is always observed that in case of notice for the recovery of erroneous refund or for the denial of refund, a shorter time limit of '15 days' is provided in the notice for furnishing the reply which is not proper and justified.

b. Reply and hearing are not substitute of each other:

In *Seth Enterprises Pvt.Ltd. vs.CC – 1996 (88) ELT 652 (Cal),* the High Court held that the principles of natural justice require that personal hearing ought to be granted. In this case, the assesse had not filed the reply to Show Cause Notice in spite of opportunity given by the department and where the adjudication order was passed without giving opportunity of personal hearing, it was held that opportunity to submit reply is not an opportunity of hearing and the party is entitled to opportunity of hearing before passing of the final adjudication order even if he has not availed right of reply to Show Cause Notice.

c. **Party can raise inconsistent and contrary pleas:**

It is permissible for the party to raise various pleas which apparently may appear to be inconsistent or conflicting with each other. Such please can be raised by the party as alternative pleas and are generally qualified with the phrases *"assuming without admitting" or "without prejudice to the aforesaid contentions."*

d. **Issue of taxability or rate of tax (duty) can be raised even if not raised earlier:**

In *Lili Foam Industries Ltd. vs. CCE – 1990 (46) ELT 462 (Tribunal),* it was held that in order to decide quantum of demand, determination of rate of duty is necessary. Hence, assessee can raise dispute regarding rate of duty when duty is demanded, even if he had not raised it earlier. In this case, the charges of clandestine removal as well as misdeclaration of value had been levelled against the Appellant and before the Tribunal, the Appellant successfully contended that whenever the department seeks to reopen the assessment and demands differential duty for whatever reasons, it is open to the Assessee to contest the demand of the higher differential duty with an argument that the rate of duty originally applied was wrong.

4.4 **Principles of natural justice:**

The term 'principles of natural justice' is derived from the expression *"jus natural"* pf the Roman Law. The principles, as such, does not have force of law particularly when they are not specified or embodied as a part of statute. Nevertheless, the adherence to the principles of natural justice is held to be of prime importance and unavoidable by the courts in their various judicial pronouncements. When a quasi-judicial body takes upon a task of determining disputes between the parties, or any administrative action involving civil consequences is an issue, these principles have necessarily to be followed.

In *Automative Tyre Manufacturers Assocn. vs. Designated Authority – 2011 (263) ELT 481 (SC),* the Hon'ble Supreme Court held that it is trite that the rules of 'natural justice' are not embodied rules. The phrase 'natural justice' is also not capable of a precise definition. The underlying principle of natural justice, evolvedunder the common law, is to check the arbitrary exercise of power by the State or its functionaries. Therefore, the principle implies a duty to act fairly i.e. fair play in action.

In *A.K. Kraipak vs. Union of India – AIR 1970 SC 150, a* Constitution Bench of the Supreme Court observed that the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. This was

also a landmark decision subjecting administrative orders to observe principles of natural justice as they too would affect the civil rights of the society.

A similar view has been taken by the Supreme Court in *Sahara India (Firm) vs. Commissioner of Income Tax, Central-I- 2008 (226) ELT 22 (SC).*

The principles of natural justice essentially recognize three principles, viz:

- Nemo debetessc judex in propria causa i.e. No man can be a judge in his own cause ['Doctrine of Bias']
- Audi alterem partem i.e. parties to a cause must be heard.
- Speaking or reasoned orders/decisions.

4.4.1 **Nemo debetessc judex in propria causa:**

The first principle of impartiality roughly translated into English means nobody shall be a judge in his own cause or in a cause in which he is interested. This principle is more popularly known as the **Doctrine of Bias.** That is, the authority sitting in judgment should be impartial and act without bias. To instill confidence in the system, justice should not merely be done but seen to be done.

Bias can be categorized in three categories namely pecuniary, personal and official.

4.4.2 **Audi alterem partem:**

The second principle of natural justice means – 'to hear the other side'. The grant of fair and reasonable opportunity of being heard to a person is necessary though, no absolute and rigid standard can be set in this regard. The concept has gained significance and shades with time. It found its first exposition in the historic document "Magna Carta" made in 1215. In the words of Sir Edward Coke, '*natural justice'* requires to *vocate, interrogate and adjudicate.* In the celebrated case of Cooper vs. Wandsworth Board of Works [(1863) 143 ER 414], the principle was thus stated:

> "*Even God did not pass a sentence upon Adam, before he was called upon to make his defence. "Adam" says God, "where art thou? Hast thou not eaten of the three whereof I commanded thee that thou shouldest not eat".*

The principle, in simple words, states that 'no one should be condemned unheard'.

4.4.3 Personal hearing:

Sub-section (4) of S.75 provides that an opportunity of hearing shall be granted where a request is received in writing from the notice or where any adverse decision is contemplated against the noticee.

Sub-section (5) of S.75 provides that the proper officer, if sufficient cause is shown by the noticee, shall grant an adjournment of the hearing to the person chargeable with tax i.e. the noticee.

Proviso to S.75(5) restricts the number of adjournments to three. This is again a legacy from the erstwhile tax regime.

Judicial pronouncements:

a. Fixing multiple dates of hearing in single letter is violative of the principles of natural justice:

Even since the provision restricting the number of adjournments to three is introduced, the adjudicating authorities have been resorting to a novel way of (mis)using this provision. The authorities adopt a practice of fixing three dates of personal hearing for appearance before it in one letter. Is this practice valid?

In *Bindal Sponge Ltd. vs. UOI– 2015 (322) ELT 657 (Ori.),* the Tribunal held that such approach of fixing multiple dates of hearing by one letter is not in accordance with the principles of natural justice and with these observations, set aside the order under challenge remanding the matter for re-adjudication.

Similar view has been taken in *Afloat Textile (P) Ltd. vs. CCE – 2007 (215) ELT 198 (Tri-Ahmd).*

b. A fair and reasonable hearing is necessary:

A personal hearing shall not be granted as an empty formality. It is observed in *Hevacrumb Rubber (P) Ltd. vs. Superintendent of Central Excise - 1983 (14) ELT 1685 (Ker.)* that requirement of a fair and reasonable hearing has two elements – first that opportunity to be heard must be given and second that such opportunity must be real and not illusory and make believe.

In an interesting decision, the Supreme Court held in *Aluminium Corporation of India vs. Union of India - 1978 (2) ELT J320 (SC)* that a fair and reasonable hearing means a hearing which is adequate for the purpose of bringing before the officer who makes the decision on all the relevant submissions. If fresh factual evidence is brought in and is likely to influence the decision, a fresh hearing should be given.

c. **Same officer who heard the matter shall pass the order:**

The requirement of fair hearing involves decision being taken by the officer who heard the case. If after hearing, that particular officer is transferred, normal rule would be that the successor must hear the arguments afresh before he could pass an order.

See, *1. Shri Amir Singh vs. Govt. of India &Ors.- AIR 1965 P&H.84*
2. Bhagirathi Iron& Steel (P) Ltd. vs. CCE -1999 (113) ELT 678 (Tribunal).

4.5 Reasoned and speaking order is must:

The third principle of natural justice require the authority, acting in a quasi judicial capacity, to pass a speaking and reasoned order. It is now universally acknowledged fact that giving reasons for a certain decision is one of the fundamentals of good administration and a safeguard against arbitrariness. When the order to be passed is an appealable order, the requirement of giving reasons would be a real requirement.

In *Siemens Engineering and Manufacturing Co. of India Ltd. Vs. Union of India - AIR1976 SC 1785***,** it was held that where an authority makes an order in exercise of a quasi-judicial function it must record its reasons in support of the order it makes. The Court observed:

"Every quasi-judicial order must be supported by reasons. It must be noted that if courts of law were to be replaced by administrative authorities and tribunals it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. The rule requiring reasons to be given in support of an order is like the principle of audi alteram partem, a basic principle of natural justice which must adhere to the quasi-judicial process. It is seen from the pleadings in which charges find place that the applicant has followed the quasi judicial process. His ultimate views may not be upheld by the higher judicial fora but he cannot be faulted to have circumvented the prescribed quasi judicial decision making process. In this regard he passed the test that his decision followed the quasi judicial process."

Significantly, in sub-section (6) of S.75 of the Act, it is provided that the proper officer, in his order, shall set out the relevant facts and the basis of his decision. Thus, the necessity of passing a speaking and reasoned order is recognized and embodied in the statutory provision itself.

Judicial pronouncements:

a. Order cannot go beyond or be contrary to the notice:

In *Saci Allied Products Ltd. vs. CCE - 2005 (183) ELT 225 (SC),* it was held that the Tribunal cannot sustain a case of Revenue against assessee on a ground not raised by Revenue either in show cause notice or in the order.

See also, 1. *CCE vs. Gas Authority of India Ltd. – 2008 (232) ELT 7 (SC)*
2. *GTC Industries Ltd. vs. CCE – 1997 (94) ELT 9(SC)*

b. Can an officer review his own order?

In Dwarka Das vs. State of M.P. – AIR 1999 SC 1031, it was held that after passing of judgement, decree or order, the court or tribunal becomes *functus officio* and thus being not entitled to vary the terms of judgements, decrees or orders earlier passed. Only accidental omissions or mistakes can be corrected.

This principle applies to adjudicating authority and Commissioner (Appeals) also.

5. Offences, Penalty and Interest under GST:

"Only the Rule of Law can guarantee security of life and the welfare of the people".
[Kautilya in "The Arthashastra"]

5.1 Introduction:

International Tax Dialogue, 2005 defines 'VAT' as "*a broad based tax levied at multiple stages of production (and distribution) with – crucially – taxes on inputs credited against taxes on output. That is, while sellers are required to charge the tax on all their sales, they can also claim a credit for taxes that they have been charged on their inputs. The advantage is that revenue is secured by being collected throughout the process of production (unlike a retail sales tax) but without distorting production decisions (as turnover tax does)".*

Under the 'destination principle' – which is the international norm – commodities or services are taxed by the jurisdiction in which they are consumed. This is generally implemented under the VAT by zero rating exports and charging VAT on imports.

Except Japan that applies a 'subtraction method' of VAT, all the countries, including India, who have adopted VAT/GST, have applied 'invoice credit method' for the implementation of VAT.

5.2 Enforcement, evasion and VAT/GST:

As observed by Michael Keen and Stephen Smith (2007**)**, *"The implementation of a VAT involves the same core elements as does any other self-assessed tax; the identification and registration of those required (or choosing) to pay the tax; collection and processing of amounts spontaneously remitted with periodical returns; audit to ensure accuracy of returns; and enforcement action on delinquent payers."* Like any tax, VAT (or GST) is also vulnerable to evasion or fraud. At the heart of VAT/GST is the credit mechanism, with tax charged by a seller available to the buyer as a credit against his (buyer's) liability on his own sales and, if in excess of the output tax due, refunded to him (buyer), [**Keen and Smith (2007)].** This credit and refund mechanism does offer unique opportunity for abuse and gives rise to several types of frauds characteristic of VAT/GST.

The critics often stress that the case for these 'self-enforcing' or 'self-policing' or 'self-correcting' features of the VAT cannot be overstated. It had been recognised that there was scope for evasion, in spite of these intrinsic features of the VAT. As **Hemming and Kay (1981)** stress, the notion that the VAT is self-enforcing is ultimately 'illusory'.

5.3 A typology of VAT/GST fraud and evasion:

There are many ways in which VAT/GST can be evaded or fraudulently exploited. To derive a sense of the main risks, it is useful to distinguish between those that also arise under other forms of sales tax, Retail Sales Tax (RST) being an area of focus, and those reflecting distinctive features of the invoice credit VAT.

a. Frauds that can arise under both, a VAT and other forms of Sales Tax e.g. RST:

Following are the types of frauds that are generally attributed to or observed as arising under both, VAT/GST and other forms of Sales Tax including RST:

- Under-reported sales
- Failure to register
- Misclassification of commodities or services
- Omission of self-deliveries
- Tax collected but not remitted
- Imported goods not brought into tax

b. **Frauds distinct to the VAT/GST:**

At the heart of the VAT/GST is the credit mechanism, with tax charged by a seller available to the buyer as a credit against their liability on their own sales and, if in excess of the output tax due, refunded to them. This creates opportunities for several types of fraud which are distinct to the VAT/GST. VAT fraud comes in various guises, but the following main types deserve the mention:

- False claims for credit or refund
- Credit claimed for VAT on purchases that are not creditable
- Bogus traders or "Invoice mills"
- Shadow economy fraud
- Suppression fraud
- Insolvency fraud
- Carousel fraud

Given the susceptibility of VAT/GST to evasion and fraud, particularly the Input Tax Credit (ITC) related frauds, the legislators and tax administrators all over the world, have been constantly devising the 'ways and means' to check the tax evasion, promote tax compliance and in turn, enhance revenue collection.

The debate over the most effective model of regulation to ensure the tax compliance on part of the taxpayers continues unabated. The '*deterrence model'*, in preference to '*accommodative model'* and '*norms model',* has tended to dominate policy making and enforcement approaches in taxation and continues to do so even in the present era.

In fact, the highly centralized Kautilyan state was regulated by an elaborate system of penalties. That is why, the ***'Arthashastra'*** *(Economics)* is also called '***Dandaniti'*** *(the science of punishment).* Chanakya puts it succinctly when he says, "*the maintenance of law and order by the use of punishment is the science of government."*

5.4. Penalty under GST Laws:

A quick glance at the penal provisions, particularly those relating to ITC, of GST laws would reveal two things, viz:

- that, the legislators are conscious of the evasion-prone, fraud-inducing nature of GST as an indirect tax policy; and
- that, they believe that the elaborate and effective penal provisions based on 'deterrence theory' would control the tax evasion and credit frauds and ensure tax compliance.

The provisions relating to penalty are contained in S. 73 and S.74 of Chapter XV (Demands and Recovery) of the CGST Act. Aside from this, Sections 122 to 138 of Chapter XIX ('Offence and Penalties') contain elaborate provisions relating to offences, penalties, prosecution and compounding.

Those provisions shall apply *mutatis mutandis*, so far as may be, in relation to Integrated Tax, Union Territory Tax and State GST as provided under the IGST Act, 2017, UTGST Act, 2017 and the respective SGST Acts of 2017.

5.4.1 Penalty – Meaning of:

It is interesting to note here that in spite of elaborate and substantive penal provisions it contains, the CGST Act does not provide any definition of the term 'penalty'. It will, therefore, be advantageous to refer to the dictionary meaning of the term and a few judicial pronouncements that have explained this term.

a. Dictionary meaning:

P. Ramanathan Aiyar's Advanced Law Lexicon defines the term 'penalty' as follows:

"A penalty is a sum which a party agrees to pay or forfeit in the event of a breach, but which is fixed, not as pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach, or as security, where the sum is deposited or the covenant to pay is joined in by one or more sureties, to insure that the person injured shall collect his actual damages. Penalties are not recoverable or retainable as such by the person in whose favour they are framed. Charles T. McCormick, Handbook on the Law of Damages section 146, at 666 (1935).

b. *Judicial pronouncements:*

"The term 'penalty' is an elastic term with many different shades of meaning, mainly involving the idea of punishment, corporeal or pecuniary or civil or criminal, although its meaning is generally confined to pecuniary punishment. [Allied v. Graves 261 NC 31, 134].

A penalty is a sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act

which is required to be done. [Hidden Hollow Ranch v. Collins, 146 Mont. 321, 406 P.2d 365 368].

"The sum a party agrees to pay in the event of a contract breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent the breach." [Westmount Country Club v. Kameny, 82 N.J.Super.200, 197 A.2d 379, 382].

5.5 'Penalty', 'Tax' and 'Interest' – Difference:

Here, it would be interesting to understand the difference between three terms viz. 'penalty', 'tax' and 'interest', which are commonly used in the fiscal statutes. This has been explained by the Supreme Court in the case of ***Pratibha Processors v. Union of India – 1996 (88) ELT 12 (SC)***as under:

" *'Tax' is an amount payable as a result of the charging provision and it is a compulsory extraction of money by a public authority for public purposes, the payment of which is endorsed by law. 'Penalty' is ordinarily levied for some contumacious conduct or for a deliberate violation of the provisions of the particular statute. 'Interest' is compensatory in character and is imposed on an assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to the actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty, – which is penal in character."*

Keeping in mind the meanings attributed to the term 'penalty' as above, let us now briefly study and analyse the penal provisions of CGST Act.

5.6 Penal provisions of CGST Act, 2017:

The penal provisions of the Actcan broadly be divided into the following broad categories, viz:

a. Penalty for non-payment or short payment of tax or grant of erroneous refund or wrong availment or utilisation of ITC [S.73 or S.74 read with S. 122(2)]

b. Penalty for the specified offences [S.122 (1)]

c. Penalty for offences by any person who aids or abets the specified offences [S.122(3)]

d. Penalty for failure to furnish information return or statistics [S.123 & S.124]

e. General i.e. residual penalty [S.125]

f. General penalty in certain cases [S.127]

g. General disciplines related to penalty [S.126]

h. Waiver of penalty in certain circumstances [S.73(8) read with Explanation 1 to S.74]

A close look at the aforesaid penal provisions would reveal that the same are, by and large, patterned on the penal provisions prevalent in the erstwhile Central Excise and Service Tax regime. The principles of law laid down on various aspects of the penal provisions existing in the erstwhile tax regime may, therefore, become quite important and relevant while analysing and understanding the penal provisions of GST laws.

In the ensuing paragraphs, the above provisions are briefly discussed in light of certain important judicial pronouncements rendered in the context of the penal provisions of the erstwhile tax regime. The relevant provisions are also referred to for better understanding.

5.6.1 Penalty for short payment or non-payment of tax or grant of erroneous refund or wrong availment or utilisation of ITC [S.73 or S.74 read with S. 122(2)] :

Where the demand towards short payment or non-payment of tax, etc. other than by reason of fraud, etc. is raised under S. 73(1), the person chargeable with tax will also be liable to penalty equivalent to 10% of tax or Rs.10,000/-, whichever is higher, due from such person. [S. 73(9) refers]. The quantum of penalty prescribed under S. 73(9) is generally perceived as mandatory in nature and it is believed that a lower penalty cannot be imposed. This is despite the fact that the wrong availment or utilisation of ITC is not due to any fraud or willful suppression of facts, etc. with intent to evade tax. However, this proposition is debatable.

On the other hand, where the demand towards non-payment or short payment of tax, etc. is raised under S. 74(1), inter alia, alleging fraud or willful suppression of facts, etc. with intent to evade tax, against the person chargeable with tax, such person shall be liable for penalty equal to tax as provided under S.74(1) itself. It is pertinent to note here that once the elements of fraud, etc. are established, there is no discretion left with any authority to reduce the quantum of penalty prescribed. The reduction in penalty will be possible only in the circumstances specified in sub-sections (5) or (11) of S.74 of the Act.

5.6.2 **Penalties under S.73 or S.74 vis-à-vis Section 122(2):**

It will be observed that sub-section (9) of S. 73 or sub-section (1) read with sub-section (9) of S.74 of the CGST Act prescribes the quantum of penalty to be levied on a person chargeable with tax and against whom the demand has been raised and upheld under the respective provisions.

At the same time, S. 122(2) of the CGST Act also deals with the similar situations and provides for the imposition of the same quantum of penalty on any registered person in case of omission or commission of any act resulting

into the non-payment or short payment of tax or erroneous refund or wrong availment or utilization of ITC , whether by reason of fraud, etc. or otherwise.

At first glance, there appears to be the *double jeopardy* in so far as the penal action provided under S.73 or S. 74 vis-à-vis Section 122(2) is concerned. However,sub-section(13) of S.74 provides that where any penalty is imposed under S.73 or S.74, no penalty for the same act or omission shall be imposed on the same person under any other provision of this Act.

5.6.3 Judicial pronouncements:

1. **Issue of show cause notice is mandatory before levying penalty:**

   In a customs case, the CESTAT held that penalty under sections 112 and 114 of the Customs Act, 1962 cannot be imposed without show cause notice.
   [Henkel India Ltd. v. CC – 2007 (217) ELT 61 (Tri-Chennai)]

2. **Mens rea i.e. guilty mind – Is it an essential element for imposing penalty?**

i. Mens rea is not an essential element for breach of civil obligations:

It has been consistently held by the Supreme Court, High Courts and the Tribunal that *mens rea* is not an essential ingredient for imposing a penalty unless statute specifically prescribes so. In *R.S. Joshi v. Ajit Mills Ltd. – AIR 1977 SC 2279*, the Supreme Court observed:

"The classical view that 'no mens rea, no crime' has long ago been eroded and several laws in India and abroad, especially regarding economic crimes and departmental penalties, have created severe punishments even where the offences have been defined to exclude mens rea. Therefore, the contention that Section 37(1) fastens a heavy liability regardless of fault has no force in depriving the forfeiture of the character of penalty."

ii. Mens rea is mandatory when the statutory provision provides so:

In the case of *CCE v. Pepsi Foods Ltd. – 2010 (260) ELT 481 (SC*), the Supreme Court dealt with the applicability of *mens rea* for imposition of mandatory penalty under Section 11AC of the CEA. It was held that when the statute creates an offence and an ingredient of that offence is a deliberate attempt to evade duty either by fraud or misrepresentation, *mens rea* would be a necessary constituent of such offence and therefore, the imposition of penalty under Section 11AC of the CEA would be wholly impermissible when no fraud, suppression or misstatement was alleged in the show cause notice. Therefore,

criminal intent or '*mens rea'* would be necessary in order to attract the penalty provisions under Section 11AC of the CEA.

3. Maximum penalty – whether discretionary powers exist ?

In *UOI v. Dharmendra Textile Processors – 2008 (231) ELT 3 (SC*), the Supreme Court, inter alia, held that lesser penalty was not imposable in the cases inviting imposition of mandatory penalty under Section 11AC of the CEA as there was no discretion available regarding the quantum of penalty under the said provision.

The judgement in Dharmendra Textile's case (supra) was later clarified by the Supreme Court in the case of *UOI v. Rajasthan Spinning & Weaving Mills Ltd. – 2009 (238) ELT 3 (SC).*

In *CCE v. Illpea Paramount Pvt. Ltd. – 2006 (202) ELT 744 (SC),* the Supreme Court held that once the levy of penalty is found to be warranted having regard to the requirements of statute under Section 11AC of the CEA, the quantum of penalty is not at the discretion of authority and the same has to be equal to the amount of duty.

4. Penalty not imposable if the demand of duty/tax is not sustainable:

In *CCE vs. HMM Ltd. 1995 (76) ELT 497 (SC*), the Supreme Court held that the penalty under Rule 9 (2) and 173Q of the Central Excise Rules, 1944 would not be imposable unless the department was able to sustain the demand under challenge on the grounds of limitation. It was held that the question of penalty would arise only if the department was able to sustain its demand and where demand failed, the penalty would follow suit.

See, *Pahwa Chemicals P. Ltd. v. CCE – 2005 (189) ELT 257 (SC*).

5. Retrospective amendment – Whether penalty is imposable?

In one of its historic judgments rendered in the case of *J.K. Spinning and Weaving Mills Ltd. v. UOI – 1987 (32) ELT 234 (SC),*the Supreme Court dealt with the challenge made to the retrospective operation of amendments of Rules 9 and 49 (of Central Excise Rules, 1944) wherein, under the Explanation, the said amendments to the Rules had been given retrospective effect. In this context, the Supreme Court held that it would be against all principles of legal jurisprudence to impose a 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.

In the case of *P. V. Mohammad Barmay Sons v. Director of Enforcement - 1992 (61) ELT 337,* the Supreme Court held that penal provisions could neither have retrospective applicability nor could a

greater penalty than the one in force at the time of commission of the offence be imposed in view of the provisions of Article 20(1) of the Constitution of India. It was held that Article 20 (1) of the Constitution of India provides that no person could be convicted of any offence except for a violation of the law in force at the time of 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 in force at the time of commission of the offence.

In the case of *Commissioner of Central Excise, Coimbatore v. ElgiEquipments Ltd. 2001 (128) ELT 52 (SC),* in the context of mandatory penalty stipulated under section 11AC of Central Excise Act, 1944, the Supreme Court held that such penal provisions would be prospective in operation since the illegality committed prior to the insertion of the said section in the Act could not be the subject matter of penalty under the said provision. Further, it was held that the presumption against retrospective operation was strong in cases in which the statute, if operated retrospectively, would prejudicially affect the vested rights or the illegality of the past transactions, or impair contracts, or impose a new duty or attach new disability in respect of past transactions or consideration already passed.

6. Penalty is not imposable when issue relates to the statutory interpretation:

In the case of *Uniflex Cables Ltd. v. CCE – 2011 (271) ELT 161 (SC),* the Supreme Court dealt with the issue with regard to the imposition of penalty where the issue involved was of interpretational nature. Taking note of the fact that the Commissioner himself had found that it was only a case of interpretational nature, the Supreme Court quashed the order of the Commissioner imposing the penalty as also the order of the Tribunal so far as it confirmed the imposition of penalty on the Appellant.

5.7. **Penalty for the specified offences [S.122 (1)]:**

Section 122(1) of the CGST Act enumerates the offences which invite penal consequences for the person committing such offence.

Section 122(1) contains total 21 offences including the specific offences relating to ITC. For the sake of brevity, these offences are not being listed here.

The penalty, in case of any of the offences covered by S.122(1) committed by a taxable person, shall be Rs. 10,000/- or an amount equivalent to the tax evaded or the tax not deducted under S.51 or short deducted or deducted but not paid to the Government or tax not collected under S.52 or short collected or collected but not paid to the Government or ITC availed of or passed on or distributed irregularly, or the refund claimed fraudulently, as the case may be, whichever is higher.

From the careful study of Section 122(1) and the offences listed therein as also the quantum of penalty prescribed, it will be observed that the '*mens rea'* is an essential constitute of such offence and unless, it is established as existing, the penal provision of S.122(1) cannot come into play. The onus to establish *mens rea* on part of the person concerned lies on the department. It is viewed that *mens rea* cannot be presumed to be existing in case of any of such offences if committed by the taxable person though it is not explicitly prescribed as an essential element. The stringent penalty, equivalent to the amount of tax or ITC involved, etc. is a pointer to this fact.

It is significant to note that a few of the offences listed in sub-section (1) of Section 122 were also earlier covered by Section 77 of the erstwhile FA for which the penalty prescribed under the said Section was '**maximum Rs.10,000/-'.** As against this, the penalty prescribed for the similar offences under Section 122(1) is '**Rs.10,000/- or equivalent to tax or credit involved, whichever is higher'** and the same is apparently prescribed as 'mandatory'. The quantum of penalty prescribed certainly marks a quantum jump over the quantum otherwise prevalent in the erstwhile regime in respect of certain offences. This appears to be based on the 'standard deterrence model'.

In the case of *Chirag Gosalia v. CC – 2008 (230) ELT 224 (Bom),* the Bombay High Court considered whether the imposition of penalty under Section 112 of the Customs Act, 1962 was mandatory in nature. It was held that on a reading of the section, it was clear that the legislature had used the term 'shall be liable'. In other words, it was a mandatory provision. Therefore, the High Court agreed with the order of the CESTAT and held that no question of law would arise and dismissed the appeal of the Assessee.

However, the issues as to whether the penalty prescribed under S.122(1) is mandatory or not and whether the same will get attracted irrespective of whether *mens rea* exists or not are debatable issues.

The penal consequences of S.122(1) will be attracted when any of the offences listed therein is committed by a 'taxable person'. The term 'taxable person' is defined in S.2(107) of the Act so as to mean '*a person who is registered or liable to be registered under Section 22 or Section 24.'* Therefore, the penal provisions of S.122(1) are not restricted only to 'registered person'. Even if a person is not registered and found to be 'liable for registration', he can be penalized under this provision depending upon the offence committed by him.

5.8 Penalty for offences by any person who aids or abets the specified offences [S.122(3)]:

Sub-section (3) of Section 122 provides for the penal action against **any person** who is guilty of omission or commission of any specified act and in the manner specified therein. Clause (a) of sub-section (3) provides that any person who aids or abets any of the offences specified in Section 122(1) of the Act shall be liable to a penalty prescribed thereunder.

The quantum of penalty prescribed under Section 122(3) is maximum Rs.25,000/-. Since the words used in the provision are 'may extend to Rupees twenty five thousand', it is clear that the quantum of penalty prescribed is 'maximum' and not 'mandatory'.

It is interesting to note that the quantum of penalty prescribed under Section 122(3) appears to be quite low when compared to the quantum prescribed in Rule 26 of the erstwhile,CER or S.78A of the erstwhile FA or S.112 of the Customs Act, 1962 in similar circumstances.

5.9 Penalty for non-payment of tax or wrong availment of ITC, etc:

Sub-section (2) of S.122 provides for the imposition of penalty *on a registered person* who has not paid or short paid the tax or to whom tax has been erroneously refunded or who has wrongly availed or utilized ITC.

Different quantum of penalty is prescribed in such cases depending upon whether the offence is committed by reason of fraud or any willful statement or suppression of facts to evade tax or not.

[Also refer discussion at Para 5.6.2 (supra)]

5.10. Penalty for failure to furnish information return or statistics [S.123 & S.124]:

Section 123 of the Act provides that if a person who is required to furnish an information return under Section 150 fails to do so within the period specified in the notice under Section 150(3), the proper officer may direct that such person shall be liable to pay a penalty of Rs. 100/- for each day during which the default continues, subject to maximum Rs. 5,000/-.

Section 150 of the Act requires the persons specified therein to file an information return as prescribed therein.

Section 124 of the Act provides that any person required to furnish any information or return under Section 151,-(a) without reasonable cause, fails to furnish such information or return; or (b) willfully furnishes or causes to furnish any false information or return, shall be punishable with fine which may extend to Rs. 10,000/- and in case of continuing offence, to a further fine which may extend to Rs. 100/- for each day of default subject to maximum Rs. 20,000/-.

Section 151 of the Act empowers the Commissioner to collect the statistics relating to any matter dealt with by or in connection with the Act.

5.11 General i.e. residual penalty [S.125]:

The provisions of S.125 are residual in nature and provides for the imposition of maximum penalty upto Rs. 25,000/- in a case where no

penalty is separately provided for in the CGST Act for the contravention of any of the provisions of the Act or any rules made thereunder by any person.

In the erstwhile Service Tax regime, the residual penalty prescribed was maximum Rs.10,000/- under S.77(2) of the FA.

5.12 General penalty in certain cases [S.127]:

Section 127 of the Act provides that where the proper officer is of the view that a person is liable to a penalty and the same is not covered under any proceedings under:

- S. 62 (assessment of non-filers of returns) or
- S. 63 (assessment of un-registered persons) or
- S. 64 (summary assessment in certain special cases) or
- S. 73 (determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilised for any reason other than fraud, etc.)
- S. 74 (determination of tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilised by reason of fraud, etc.)
- S. 129 (detention, seizure and release of goods and conveyances in transit) or
- S. 130 (confiscation of goods or conveyances and levy of penalty),

he may issue an order levying such penalty after giving a reasonable opportunity of being heard to such person.

Strangely, the provision does not prescribe any quantum of penalty whatsoever. The very validity of the provision is therefore debatable.

5.13 General disciplines related to penalty [S.126]:

Section 126 of the Act contains 'general disciplines related to penalty'. The provision is presented as a beneficial piece of legislation and embodies certain sound principles of law laid down in the matter of imposition of penalty on a person for commission of any offence under the relevant statute. However, unfortunately, the principles are rarely followed in practice by the authorities.

The 'general disciplines' enshrined in S. 126 are as follows:

- No penalty shall be levied for minor breaches of tax regulations or procedural requirements and in particular, any omission or mistake in documentation which is easily rectifiable and made without fraudulent intent or gross negligence [S. 126(1) refers].

  The Explanation to sub-section (1) states that- 'for the purpose of this sub-section,-

  a) a breach shall be considered a 'minor breach' if the amount of tax involved is less than five thousand rupees;

b) an omission or mistake in documentation shall be considered to be easily rectifiable if the same is an error apparent on the face of record.

- Penalty shall depend upon the facts and circumstances of each case and shall be commensurate with the degree and severity of the breach [S. 126 (2) refers]

- Penalty shall not be imposed on any person without granting personal hearing [S.126(3) refers]

- The nature of the breach and the applicable law, regulation or procedure under which the amount of penalty for the breach has been specified, shall be mentioned in his order by the officer while imposing a penalty for any such breach on any person. [S. 126 (4) refers]

- Voluntary disclosure by a person before the officer of the circumstances of a breach of the tax law, regulation or procedural requirement prior to the discovery of the breach by the officer shall be considered as a mitigating factor when quantifying a penalty for that person. [S.126(5) refers].

Finally, as a rider, it is provided, in sub-section (6) that the provisions of S.126*shall not apply* in such cases where the penalty specified under this Act is either a fixed sum or expressed as a fixed percentage. This effectively means that the above disciplines would come into play only where 'maximum' penalty is prescribed under the relevant provision and the discretion is vested in the proper officer to impose a lesser penalty under such provision.

5.14 Waiver of and/or lower penalty in certain circumstances [S.73 and S.74]:

5.14.1 Waiver of penalty in case of payment before issue of show cause notice [S.73 (5) & (6)]:

As discussed above, sub-section (1) and sub-section (3) of Section 73 provides for the issue of show cause notice or the statement of demand, as the case may be, in case of the wrong availment and utilization of ITC by any person chargeable with tax. The demand raised under this provision also entails interest as well as penalty as prescribed.

However, sub-sections (5) and (6) of S.73 provides an 'escape route' to such person. It is provided that a person chargeable with tax may pay the amount of tax (or ITC) along with interest payable thereon, on the basis of his own ascertainment of tax (or ITC) or the tax (or ITC) as ascertained by the proper officer before service of notice or the statement under sub-section (1) or sub-section (3), as the case may be and inform the proper officer in writing of such payment. Sub-section (6) provides that on receipt of such information regarding payment made in terms of sub-section (5), the proper officer shall not serve any notice or statement under sub-section (1) or sub-

section (3), as the case may be, in respect of tax (or ITC) so paid or any penalty payable under the provisions of the Act or the rules made thereunder.

Sub-section (6) of S. 73 uses the phrase **'shall not serve any notice.... or the statement....'** and it means that once a person chargeable with tax pays the appropriate amount of tax or ITC wrongly availed or utilisedalongwith interest on his own ascertainment or as ascertained by the proper officer but before issue of the show cause notice or statement, the issue of any such notice or statement, whether for recovery of the amount of tax or ITC or for penalty payable under any provisions of the Act or the rules made thereunder is prohibited.

5.14.1.1 Judicial pronouncements:

In *Mannalal Khetan v. Kedar Nath Khetan – AIR 1977 SC 536,* it was held that if wording is negative i.e. 'shall not register', it will be mandatory provision, as negative words are clearly prohibitory.

See also, *UOI v. A. K. Pandey – (2009) 10 SCC 522;*
Prakash Kumar v. State of Gujarat – AIR 2005 SC 1075

5.14.1.2 Waiver of penalty post-show cause notice [S.73(8)]:

In case a person chargeable with tax has already been served with a show cause notice or the statement under sub-section (1) or sub-section (3), as the case may be, of S.73, he has been given an option vide sub-section (8) of S. 73 to pay the said amount of tax, etc. along with interest thereon within 30 days of issue of the show cause notice and if so paid, no penalty shall be payable by such person and all proceedings in respect of the said notice will be deemed to be concluded.

5.14.1.3 Exception to the provisions of lower penalty [S.73(9) and S.73(11)]:

Sub-section (9) of S.9 provides that the proper officer shall, after considering the submissions, if any made by the person chargeable to tax, determine the tax, interest and a penalty equivalent to ten percent of tax or ten thousand rupees, whichever is higher, due from such person by an order.

Thus, where a person opts to not close the proceedings either under S.73(5) read with S.73(6) [payment of tax and interest before issue of notice] or S.73(8) [payment of tax and interest within 30 days of the receipt of notice], and instead, opts to contest the notice, he would be exposed to penalty of Rs.10,000/- or 10% of tax, whichever is higher in terms of S.73(9).

Significantly, sub-section (11) of S.73 seeks to make the protection from levy of penalty under S.73(6) or S.73(8) unavailable in certain circumstances. It is provided that where any amount of self-assessed tax or any amount collected as tax has not been paid within 30 days of the due date of payment of such tax, then penalty under S.73(9) i.e. Rs.10,000/- or 10% of the amount of tax, whichever is higher, shall be payable. It shall not

be noted that sub-section (11) commences with a '*non-obstante clause'* and is overriding sub-sections (6) and (8) of S.73. In other words, if a person fails to pay the self-assessed tax or any amount collected as tax within 30 days of the due date for payment of such tax, he is sought to be debarred from seeking protection from levy of penalty available under S.73(6) or S.73(8) discussed above.

[Also refer to CBIC Circular dt. 31.12.2018]

5.14.2 Lower penalty in cases involving fraud, etc. [S.74 (5) & (8)]:

As explained above, S.74 of the Act provides for the issue of show cause notice in respect of the tax not paid or short paid or erroneously refunded or ITC wrongly availed or utilized by reason of fraud or willful misstatement or suppression of facts with intent to evade tax. Such amount would be recoverable with interest as prescribed and the person is also exposed to the penalty equivalent to the amount of tax or ITC involved.

However, as a relief measure, it is provided vide sub-section (5) of S. 74 that the person chargeable with tax may pay the amount of tax or ITC along with interest thereon and a penalty equivalent to 15% of such tax or ITC on the basis of his own ascertainment of such tax or ITC or the tax or ITC as ascertained by the proper officer before issue of the notice under sub-section (1) and inform the payment particulars to the proper officer. In other words, a person who has fraudulently or by resorting to willful suppression of facts, etc. evaded tax or has availed or utilized ITC, may take the benefit of reduced penalty of 15% of the amount of the tax or ITC involved by making the payment of the entire amount of tax or ITC involved along with interest and such reduced quantum of penalty on his own before issue of the show cause notice to him. Once, the payment is made in this manner as prescribed, the issue of notice under S. 74(1) in respect of the tax or ITC so paid or any penalty payable under the Act or the rules made thereunder is prohibited.

However, in case a person has already been served with a show cause notice in terms of sub-section (1) of S. 74, he still has the option to pay the amount of tax or ITC with interest thereon and a penalty equivalent to 25% of such tax or ITC within 30 days of issue of the notice and in that case, all the proceedings in respect of the said notice shall be deemed to be concluded.

Yet one more opportunity is provided to the defaulting person who has missed to avail the opportunity provided under sub-section (5) or sub-section (8) of S.74 of a reduced penalty. Any such person against whom an adjudication order has been passed consequent upon the proceedings held on the show cause notice issued under S. 74(1), may, within 30 days of the communication of the order, pay the amount of tax or ITC determined as payable along with interest thereon and a penalty equivalent to 50% of such tax or ITC and if so paid, all proceedings in respect of the said notice shall be deemed to be concluded.

5.14.2.1 Judicial pronouncement:

In the case of *CCE v. Viraj Alloys Ltd. – 2017 (346) ELT* 192 (*Bom),* the Bombay High Court has, inter alia, held that the benefit of reduced penalty will not be available if the payment of duty along with interest is not made within the stipulated period of 30 days.

6. Provisions relating to 'interest' under GST laws:

The provisions relating to 'interest on delayed payment of tax' are contained in S. 50 of the CGST Act.

6.1Interest – Meaning of:

The term 'interest' is not defined in the GST laws. However, it generally connotes the compensation payable for usage of other's money usually computed on a percentage basis. Here, it will be advantageous to refer to a few dictionary meanings of the term 'interest'.

Black's Law Dictionary: "*Interest in the context of usage of money is the compensation allowed by law or fixed by the parties for the use or forbearance of borrowed money."*

Corpus Juris Secondum, Vol.47: *"Interest is a compensation allowed by law, or fixed by the parties for the use or forbearance of money, or for detention."*

6.2 Interest – Statutory provisions [S.50]:

As discussed hereinabove, in case of non-payment or short payment of tax or erroneous refund or wrong availment or utilisation of ITC by a person chargeable with tax, the proper officer is empowered to issue a show cause notice to such person in terms of S. 73(1) or S.74(1) of the CGST Act, depending upon the existence or otherwise of the element of fraud or willful misstatement or suppression of facts with intent to evade tax. The notice shall contain the amount of tax (or ITC) and shall call upon the person why the said amount should not be recovered from him along with interest payable thereon under S.50 and penalty should not be imposed on him as prescribed in law.

S.50 provides for the recovery of 'interest on delayed payment of tax' in two circumstances viz.:

i. levy of interest in case of a failure of a person to pay the tax or any part thereof within the prescribed period [S.50(1) refers]; and

ii. levy of interest in case of an undue or excess claim of ITC or undue or excess reduction in output tax liability [S.50(3) refers].

6.3 Interest on unpaid tax or part thereof:

Sub-section (1) of S.50 provides that a person liable to pay tax in accordance with the Act or the rules made thereunder, fails to pay the tax or

any part thereof within the prescribed period shall pay, *on his own,* interest at such rate, not exceeding 18%, as notified by the Government on the recommendations of the Council, for the default period on such unpaid tax or part thereof.

The interest shall be calculated from the day succeeding the day on which such tax was due to be paid (S.50 (2) refers).

By Notification No. 13/2017-CT and 6/2017-IT both dated 28.06.2017 effective from 01.07.2017, the rate of interest for the purpose of S.50(1) has been notified at 18%.

6.4Interest on gross amount of tax or net amount after allowing deduction of eligible ITC?

S.50(1) provides for the levy of interest on '***tax payable'.*** It has been a general belief amongst the taxpayers and the tax professionals that interest shall be payable only on net amount of tax payable to Government in Electronic Cash Ledger after considering and allowing for the eligible ITC. However, the departmental authorities have been disputing such claim or view and are insisting that the interest shall be payable on the gross amount of tax payable.

Taking note of this controversy, the GST Council, in its 31st Meeting held on 22.12.2018, recommended the amendment to S.50 of the CGST Act so as to provide that interest will be payable only on tax payable in cash through Electronic Cash Ledger.

However, the proposed amendment will require the legislative sanction and therefore, may have to wait.

6.5 Interest on undue or excess claim of ITC [S.50 (3)]:

Sub-section (3) of S. 50 provides that if a taxable person makes undue or excess claim of ITC under S. 42(10) or undue or excess reduction in output tax liability under S. 43(10), he shall pay interest on such undue or excess claim or on such undue or excess reduction, as the case may be, as such rate not exceeding 24% as may be notified by the government on the recommendations of the Council.

Vide Notification No. 13/2017-CT dt. 28.06.2017 (parallel Notification No. 6/2017-IT dt. 28.06.2017), the government had notified '**24%'** as the rate of interest for the purpose of S. 50(3) of the Act.

It may be noted here that in case of failure of a person to pay tax or any part thereof within the prescribed period, the rate of interest leviable under S. 50 (1) has been notified at '**18%'** vide the aforesaid Notifications.

6.6Judicial pronouncements:

i. **Provisions relating to interest are the provisions of substantive law:**

In *J. K. Synthetics Ltd. v. CTO – AIR 1994 SC 2393,*the Constitution Bench of the Supreme Court held that the provisions relating to the charging and levying of interest in a statute are provisions of substantive law.

In the case of *CCE v. Ukai Pradesh Sahakari Khand Udyog Mandali Ltd. – 2011 (271) ELT 32 (Guj.),*the Gujarat High Court held that interest can be levied and charged on delayed payment of tax only if the statute that levies and charges the tax makes a substantive provision in this regard.

See also,*VVS Sugar v. Govt. of AP – AIR 1999 SC 2124 (SC 5 Member Bench)*

ii. Whether the discretionary powers exist in case of levy of interest?

In *CCE v. Padmavati V.V. Patil SSK Ltd.- 2007 (215) ELT 23 (Bom),* the Bombay High Court held that interest is a civil liability of assessee who has retained amount of public money. Interest is mandatory, even if evasion of duty is not malafide or intentional.

In *Futnani Steels v. CCE – 2009 (235) ELT 869 (Trib),* the CESTAT held that interest for delayed payment is a statutory liability and accrues automatically. It is payable even if there was a bonafide doubt or mistake. It was further held that the Tribunal cannot set aside the interest.

iii. Interest is payable even if duty/tax is paid before issue of show cause notice:

In *CCE vs. Karnataka Soaps – 2011 (267) ELT 593 (Kar.),* the Karnataka High Court held that interest is payable even if duty is paid before issue of show cause notice.

See also, *CC v. Toyota Kirloskar Motors – 2015 (324) ELT 636 (SC***)**

iv. Interest is not payable when a time-barred demand is voluntarily honoured:

In an interesting case, the Gujarat High Court held that interest is not payable if excise duty is paid voluntarily by assessee before show cause notice even when demand was time-barred ***– CCE v. Gujarat Narmada Fertilizers Co. Ltd. -2012 (285) ELT 336 (Guj).***

v. Interest is payable even if Cenvat Credit was available to the recipient unit of the same assessee:

In the case of *Bayers ABS Ltd. v. CCE – 2012 (281) ELT 296 (Tri),*assesse paid the duty without contesting and took Cenvat credit in its other unit

where goods were sent. It was argued by the assessee that if duty was paid earlier, the recipient unit could have taken Cenvat credit earlier and hence interest is not payable. However, theCESTAT, by a majority order (2 v.1) held that interest is still payable. (Minority view was that it was a revenue neutral exercise and hence interest is not payable).

vi. Interest is not payable when Cenvat Credit was available to other company, or for captive consumption:

In *Paper Products Ltd. v. CCE – 2013 (292) ELT 389 (CESTAT),* it was held that interest is not payable when Cenvat Credit was available to other company (sister unit in this case).

In *Reliance Industries Ltd. v. CCE – 2013 (292) ELT 378 (CESTAT),* it was held that interest is not payable on captive consumption when Cenvat Credit was available.

vii. Whether interest is automatic or a demand is necessary?

In *Haji Lal Mohd. Biri Works v. State of UP – AIR 1973 SC 2226,* the Supreme Court held that when liability to pay interest is automatic and arises by operation of law, it is not necessary to make an assessment in respect of interest or issue notice of demand in respect of interest.

A similar view was expressed in *Royal Boot House v. State of J & K – (1984) 56 STC 21 SC; CST v. Qureshi Crucible Centre – AIR 1994 SC 25; Prahlad Rai v. STO – AIR 1991 SC 1737; CCE v. K.L. Concast – 2007 (209) ELT 425 (Tri-SMB); CST v. Pepsi Cola – 2007 (8) STR 246 (Tri-SMB).*

viii. Whether the period of limitation is invokable for the demand of interest?

However, though as per the aforesaid judgments, a formal demand is not required for recovery of interest and therefore, the time limit for raising demand for interest would also not apply as a corollary, the issue is debatable. It has been held that when a specific provision for demand of interest is made in the statute like excise law, the time limit for raising the demand of duty will also apply to interest also. Nonetheless, even on this aspect, there are divergent views expressed by the differential judicial forums.

In *ANS Steel Tubes Ltd. v. CCE – 2011 (265) ELT 127 (Tri-Del.),*the Single Member Bench of the CESTAT held that the asssessee by not informing the department regarding non-payment of interest on differed payment of duty on supplementary invoices, had kept it in dark regarding the same and therefore, the extended period was invokable for demand of interest.

However, the judgment of the Tribunal was reversed by the Punjab & Haryana High Court in *ANS Steel Tubes Ltd. v. CCE – 2015 (318) ELT A 160 (P&H)* where the High Court answered the substantial questions of law as framed therein in favour of the Appellant-company. The High Court took due

note of the judgment of the Delhi High Court in the case of *Hindustan Insecticides Ltd. v. CCE – 2013 (297) ELT 332 (Del.)* in which case, the Delhi High Court, relying upon the judgements in *Kwality Ice Cream Co. v. UOI – 2012 (281) ELT 507 (Del.) and CCE v. TVS Whirlpool Ltd. – 2000 (119) ELT A 177 (SC),*held that as the period of limitation that applies to recovery of the principal amount shall also apply to the claim for interest thereon, the demand is time-barred and had reversed the judgment of the CESTAT under challenge before it.

A similar view is expressed in *CCE v. VAE VKN Industries Pvt. Ltd. – 2015 (332) ELT 269 (P&H).*

ix. Whether interest liability arises even if ITC is not utilised?

Section 73 and 74 of the CGST Act, inter alia, provides for the issue of demand in case of ITC has been **wrongly availed or utilised,** depending upon the existence or otherwise of the element of fraud, etc. The use of the disjunctive word '**or'** in the provision gives rise to an important issue as to whether the interest will still be payable even if the taxable person has not utilised the ITC claimed by the department as wrongly availed?

A similar question had arisen in the context of the Rule 14 of the erstwhile CCR as in force prior to its amendment w.e.f. 17.03.2012 before the Supreme Court in the case of *UOI v. Ind-Swift Laboratories Ltd.- 2011(265) ELT 3 (SC).* It was held that once the credit is taken, the beneficiary is at liberty to utilise the same, immediately thereafter, subject to the Credit rules. Relying on its own judgment in *CST, UP v. Modi Sugar Mills Ltd. – AIR 1961 SC 1047,* it was observed by the Court that taxing statute shall not be interpreted on any presumptions or assumptions and the Court must look squarely at the words of the statute to interpret them. Therefore, there is no necessity of reading the word '**OR'** as '**AND'.**

It appears that this judgment was rendered considering the antecedents of the case regarding false claim of Modvat Credit at the availment stage itself.

Mercifully, the Board effected immediate amendment to Rule 14 of the CCR by substituting the word *'or'* by *'and'* by Notification dated 17.03.2012 and later, substituting the entire Rule 14 itself by Notification No. 6/2015-CE (NT) dated 01.03.2015 so as to provide that the interest would be payable only if the Cenvat Credit is wrongly utilized.

Unfortunately, in view of the language used in S.73 and S.74, the issue as to whether interest liability would arise even when ITC is merely availed but not utilised, may raise its ugly head again ! One can only fervently hope that the GST Council will take note of this issue and a suitable corrective measure will be taken for the amendment of the provision by the Parliament so as to avoid any unpleasant dispute on this issue!

7. Conclusions:

From the careful study of the various offences listed in S. 122 and in particular, those relating to ITC, it will be observed that the same closely resemble to the frauds distinct to the VAT/GST like false claims for credit or refund, bogus traders or 'invoice mills', shadow economy fraud, carousel fraud, etc. The legislature, with a view to check the tax evasion and frauds, foster tax compliance and enhance revenue collection, has made the provisions for the stringent penalties which follow the 'standard deterrence model' of regulation.

However, even if one accepts the inevitability of such harsh penalty measures considering the rampant tax frauds, particularly relating to ITC, being witnessed in the country, it is essential that the penal provisions are clear and unambiguous. Unfortunately, the penal provisions of the GST laws leave much to be desired on this count.

"A severe king (meting out unjust punishment) is hated by the people he terrorises, while one who is too lenient is held in contempt by his own people. Whoever imposes just and deserved punishment is respected and honoured".

[Kautilya in "The Arthashastra"]

8. Appeals:

8.1 Introduction:

The term 'appeal', in legal context, is generally understood so as to mean proceeding or application preferred by an aggrieved party before the higher judicial forum for review of a decision of the lower court.

Certain dictionary meanings ascribed to the term 'appeal' are extracted below:

a. **Black's law dictionary**: *'Appeal' means to resort to a superior court to review the decision of an inferior (i.e. trial) court or administrative agency.*

b. **Oxford Dictionary:** Volume I, Page 398 – *'Appeal' means the transference of a case from an inferior to a higher court or tribunal in the hope of reversing or modifying the decision of the former.*

In *V. C. Shukla vs. State through CBI – AIR 1980 SC 962,* the Supreme Court observed that an appeal, in substance, is in the nature of a judicial examination of a decision by a higher court of a decision of any inferior court. The purpose is to rectify any possible error in the order under appeal.

In *State of Gujarat vs. Salimbhai Abdulgaffar Shaikh – AIR 2003 SC 3224,* the Supreme Court observed:

"*………though the word 'appeal' is used both in Code of Criminal Procedure and Code of Civil Procedure and in many other Statutes but it has not been defined anywhere. Over a period of time, it has acquired a definite connotation and meaning which is as under:*

- *A proceeding undertaken to have a decision reconsidered by bringing it to a higher authority, specially for submission of a lower Court's decision to higher court for review and possible reversal.*

- *An appeal strictly so called is one in which the question is, whether the order of the Court from which the appeal is brought was right on the material which the Court had before it.*

- *An appeal is removal of the cause from an inferior to one of superior jurisdiction for the purposes of obtaining a review or retrial.*

- *An appeal generally speaking is a rehearing by a superior Court on both law and fact."*

8.2 Right of appeal is a creature of statute:

In the case of *Anant Mills Co.Ltd. vs. State of Gujarat – AIR 1975 SC 1234*, the issue that arose for consideration was the meaning and scope of the provisions contained in S.406 (2)(e) of the Bombay Provincial Municipal Corporation Act, 1949 relating to the deposit of amount of tax before the party's appeal could be entertained was violative of Art. 14 of the Constitution of India. Dismissing this challenge, the Court observed and held as under:

"….The right of appeal is the creature of a statute. Without a statutory provision creating such a right the person aggrieved is not entitled to file an appeal. We fail to understand as to why the Legislature while granting the right of appeal cannot impose conditions for the exercise of such right. In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions….. … Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in section 30 of the Indian Income-tax Act, 1922……….Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for discharge of that liability or the fulfillment of that condition in case the party concerned seeks to avail the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it."

8.3 Right to appeal is a vested right:

In *Garikapati Veerayya v. Subbiah Choudhary – AIR 1957 SC 540,* an issue for consideration had arisen before the Court asto whether an appeal to the Supreme Court was barred because of new monetary limits when the party had filed an appeal before the Federal Court and the Federal Court was replaced with the Supreme Court consequently introducing new monetary limits. Construing the constitutional provisions, the Bench observed that the right of appeal being vested at the time of commencement of the *lis,* such right cannot be taken away unless there is an express enactment. Therefore, the appeal was held to be valid.

The Court, in this case, has made some scintillating observations which, for the benefit of the readers, are produced below:

"(i) That the legal pursuit of a remedy, suit appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior Court accrues to the litigant and excise as on and from the date the liscommences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

In another celebrity judgment delivered in the case of *HooseinKasam Dada (India) Ltd. vs. State of MP – 1983 (13) ELT 1277 (SC)*, the Court held:

"………right of appeal is not merely a matter of procedure but is a substantive right which becomes vested in a party. Such vested right cannot be taken away except by express enactment or necessary intendment. The preexisting right is not destroyed by the amendment if the amendment is not made retrospective by express words or necessary intendment. Since, the pre-existing right of appeal continues to exist, that old right law must be given the exercise and enforcement of that right and there can be no question of the amended provision preventing the exercise of that right."

8.4 **Statutory provisions relating to appeals:**

As explained above, 'right of appeal' is a creature of statute and without enabling statutory provision creating such right, the person aggrieved cannot file an appeal. Generally all laws, and more particularly, the tax laws contain the provisions providing for such right to appeal to the aggrieved person against an adverse decision or order of a lower authority or Court. GST laws are not exception to this. The CGST Act contain elaborate provisions relating to 'Appeals and Revision' and the same are contained in Ss. 107 to 121 of Chapter XVIII of the Act. The provisions can be grouped as under:

i. First appeal before the 'Appellate Authority' [S.107 r/w S.115 and S. 116];

ii. Provisions relating to Revisionary Authority [S.108];

iii. Second appeal before the Appellate Tribunal [S.109 to 114 r/w. S.115 & S.116];

iv. Appeal to High Court [S.117];

v. Appeal to Supreme Court [S.118];

vi. Other miscellaneous provisions [Ss.119 to 121].

The aforesaid provisions and certain principles of law governing the 'appeals and revision' are briefly discussed in the ensuing paragraphs.

8.5 Dual GST and its impact on 'right of appeal':

The federal character of the Indian polity has necessitated that India adopts a 'Dual GST' as is popularly describes, as against a single, uniform GST. Under this dual GST regime, both, Centre and the States are vested with concurrent jurisdiction to levy tax (i.e. GST) on the same tax base. In other words, a taxable supply of the goods or services attract the levy of tax which is leviable by both Centre and the States, in the form of CGST and SGST respectively.

A question, therefore, may arise as to whether a taxpayer, in the event of he being aggrieved by any decision or order of a competent authority, is required to approach both the authorities for exercising his right of appeal? The CBEC has, however, clarified that there are provisions for cross empowerment between CGST and SGST/UTGST officers so as to ensure that if a proper officer of one Act (say CGST) passes an order with respect to a transaction, he will also act as the proper officer of SGST for the same transaction and issue the order with respect to the CGST as well as the SGST/UTGST component of the same transaction. The Act also provides that where a proper officer under one Act (say CGST) has passed an order, any appeal/review/revision/rectification against the said order will lie only with the proper officer of that Act only (CGST Act). So also if any order is passed by the proper officer of SGST, any appeal/ review/revision/ rectification will lie with the proper officer of SGST only.

8.6 First appeal to the Appellate Authority [S.107]:

8.6.1 'Appellate Authority' and 'Adjudicating Authority'- Meaning of

Sub-section (1) of S.107, inter alia, provides that *any person* aggrieved by *any decision* or order passed under the Act or the SGST Act or UTGST Act by an *adjudicating authority,* may appeal to such Appellate Authority as may be prescribed.

The term 'Appellate Authority' is defined in S.2(8) of the Act so as to mean "*an authority appointed or authorized to hear appeals as referred to in Section 107".*

The term 'Adjudicating Authority' is defined in S.2(4) of the Act as amended w.e.f. 01.02.2019 as under:

"S.2. *In this Act, unless the context otherwise requires,–*

(4) "adjudicating authority" means any authority, appointed or authorised to pass any order or decision under this Act, but does not include the Central Board of Indirect Tax and Customs, the Revisional Authority, the Authority for Advance Ruling, the Appellate Authority for Advance Ruling, the Appellate Authority, the Appellate Tribunal and the Authority referred to in sub-section (2) of S.171".

S.171 (2) of the Act provides for Anti-profiteering Authority. Thus, appeal against order of Anti-profiteering Authority cannot be filed before Appellate Authority or Appellate Tribunal.

Rule 109A(1) of the CGST Rules as amended on 30.10.2018 prescribes the 'Appellate Authority' for deciding the appeals filed by the assesse and the department as under:

i. Against the order passed by the Additional Commissioner or Joint Commissioner – Commissioner (Appeals)

ii. Against the order passed by the Deputy Commissioner or Assistant Commissioner – Officer not below rank of Joint Commissioner (Appeals).

8.6.2 Departmental appeal before the Appellate Authority:

Sub-section (2) of S.107 deals with the right of the Department to file an appeal before the Appellate Authority. It is provided that the Commissioner may, on his own motion or upon request from the Commissioner of SGST or the Commissioner of UTGST, call for and examine the records of any proceedings in which an adjudicating authority has passed any decision or order under the Act i.e. CGST Act or SGST Act or UTGST Act for the purpose of satisfying himself as to the legality or propriety of the said decision or order.

The Commissioner may, thereafter, by an order, direct any officer subordinate to him to apply to the Appellate Authority within 6 months from the date of communication of the said decision or order for the determination of such points arising out of such decision or order as may be specified by the Commissioner in his order.

Sub-section (3) provides that where, in pursuance of an order passed under sub-section (2) as above, the authorized officer makes an application to the Appellate Authority, such application shall be dealt with by the Appellate Authority as if it were an appeal made against the decision or order of the adjudicating authority and all the provisions of the Act relating to appeals shall apply to such application.

8.6.3 Time limit for filing the appeal :

Sub-section (1) of S.107 provides that the appeal before the Appellate Authority shall be filed within 3 months of the date of communication of the order or decision to the person concerned.

Sub-section (4) of S.107, however, vests the Appellate Authority with the power to condone the delay in filing the appeal by the assesse or the department.

It is provided that the Appellate Authority may, on being satisfied that the Appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 3 months or 6 months, as the case may be, allow the appeal to be filed within a further period of one month.

8.6.4 Form and manner of filing the appeal:

S.107(5) of the Act read with R.108 and 109 of the CGST Rules prescribe the following procedure for filing the appeal or application, as the case may be:

i. Appeal by the assesse and the application by the department shall be filed in Form GST APL-01 and Form GST APL-03 respectively along with the relevant documents, either electronically or otherwise as may be notified by the Commissioner.

ii. On such filing, a provisional acknowledgement shall be issued to the appellant immediately.

iii. The grounds of appeal and the form of verification shall be signed in the manner as specified in R.26.

iv. A certified copy of the decision or order appealed against shall be submitted within 7 days of filing of the appeal or application, as the case may be. Thereupon, a final acknowledgement indicating the appeal number shall be generated and issued in Form GST APL-02 by the Appellate Authority or an officer authorized by him.

v. If the certified copy of the decision or order under challenge is submitted within 7 days as prescribed, the date of filing appeal shall be the date of provisional acknowledgement. However, if the certified copy of the impugned decision or order is submitted after 7 days, then the date of filing appeal shall be the date of submission of such copy.

   Explanation to R.108 states that for the provisions of this rule, the appeal shall be treated as filed only when the final acknowledgement, indicating the appeal number, is issued.

8.6.5 Requirement of pre-deposit and stay against the balance amount:

Sub-section (6) deals with the pre-deposit of the disputed amount to be made by the Appellant before filing of the appeal. The quantum of pre-deposit prescribed under the provision is as under:

a) **Full deposit** of that part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, **as is admitted by the Appellant;**

b) **A sum equal to 10% of the remaining amount of tax in dispute,** arising from the impugned order, ***subject to a maximum of 25 crore rupees,*** in relation to which the appeal has been filed.

Sub-section (7) provides that where the Appellant has paid the amount as specified under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed.

8.6.6 Hearing of the Appeal:

Sub-section (8) enjoins upon the Appellate Authority to provide an opportunity of hearing to the Appellant. Though, grant of such hearing, in any case, would be essential in adherence to the principles of natural justice, the statutory mandate shall put the matter beyond any doubt.

Sub-section (9) provides that on being shown a sufficient cause, the Appellate Authority may grant time to the parties or any of them and adjourn the hearing of the appeal for the reasons to be recorded in writing.

However, the proviso to sub-section (9) restricts the powers of the Appellate Authority togrant adjournments. It is provided that no such adjournments **shall** be granted more than three times.

8.6.7 Additional grounds:

Sub-section (10) empowers the Appellate Authority to allow, at the time of hearing of an appeal, an appellant to add any ground of appeal not specified in the grounds of appeal, if it is satisfied that the omission of that ground was not willful or unreasonable.

It is pertinent to note here that the provision speaks of only raising of '*additional ground*' but not placing on records '*additional evidence'.*A question therefore may arise as to whether an appellant is entitled to bring on records any additional evidence in support of his contentions where such evidences were not presented before the adjudicating authority whose order is being challenged by him. Strangely enough, R.112 of the Rules provides that the Appellate Authority may allow the Appellant to produce additional evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority under certain circumstances as specified therein.

8.6.8 Order of the Appellate Authority:

Sub-section (11) provides that the Appellate Authority shall, after making such further inquiry as may be necessary, pass such order as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against **but shall not refer the case back to the adjudicating authority that passed the said decision or order.**

Thus, the power of the Appellate Authority to remand the matter to the adjudicating authority for re-adjudication has apparently been taken away. The question still arises as to whether notwithstanding such absence of powers in him, can the Appellate Authority remand the case back to the adjudicating authority for de-novo consideration if the circumstances warrant such remand? [Refer para 8.12.3 (infra) for further discussion].

First proviso to sub-section (11) states that if the Appellate Authority proposes to pass an order enhancing any fee or penalty or fine in lieu of confiscation or confiscating goods of greater value or reducing the amount of refund or input tax credit, a reasonable opportunity of showing cause against the proposed order shall be granted to the appellant.

Second proviso to sub-section (11) vests some additional powers in the Appellate Authority with regard to the determination of the liability of the appellant. It states that where the Appellate Authority is of the opinion that any tax has not been paid or short paid or erroneously refunded or where ITC has been wrongly availed or utilized, no order requiring the appellant to pay such tax or ITC shall be passed unless the appellant is given a show cause notice and the order is passed within the time limit specified under S.73 or S.74.

Sub-section (12) mandates that the order of the Appellate Authority shall be in writing and shall state the points for determination, the decision thereon and the reasons for such decision.

Sub-section (13) requires the Appellate Authority to hear and decide every appeal, **where it is possible to do so,** within a period of one year from the date on which it is filed.

Proviso to sub-section (13), however, states that where the issuance of order is stayed by an order of a Court or Tribunal, the period of such stay shall be excluded in computing the period of one year.

The phrase '*where it is possible to do so*' clearly indicates that the time limit of one year for disposal of the appeal is only suggestive but not mandatory.

Sub-sections (14) and (15) provides for the communication of the order by the Appellate Authority to the appellant, respondent and to the adjudicating authority as well as the jurisdictional Commissioner or the authority designated by him and the jurisdictional Commissioner of State Tax/Union Territory Tax or an authority designated by him, as the case may be.

Sub-section (16) provides that every order passed under S.107 shall, subject to the provisions of Ss.108 or 113 or 117 or 118, be final and binding on the parties.

8.7 Powers of Revisional Authority [S.108]:

8.7.1 S.108 deals with the powers of Revisional Authority to undertake the revision of order passed by any officers subordinate to him under certain circumstances. The term '***Revisional Authority***' is defined in S.2(99) of the Act so as to mean '*an authority appointed or authorized for revision of decision or orders as referred to in section 108'.*

8.7.2 Sub-section (1) provides that *subject to the provisions of S.121 and any rules made thereunder,* the Revisional Authority may, on his own motion, or upon information received by him or on request from the Commissioner of State Tax/UT Tax, call for and examine the record of any proceedings and if he considers that any decision or order passed under the Act or SGST Act or UTGST Act by any officers subordinate to him, he may, if necessary, stay the operation of such decision or order for such period as he deems fit under the following circumstances:

- if such order is erroneous in so far as it is prejudicial to the interest of revenue and is illegal or improper; or

- if such order has not taken into account certain material facts, whether available at the time of issuance of the said order or not; or
- in consequence of an observation by the CAG of India.

It is further provided that the Revisional Authority, after giving a hearing to the person concerned and after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, including enhancing or modifying or annulling the said decision or order.

8.7.3 Sub-section (2), however, provides that the Revisional Authority shall not exercise anypower under sub-section (1) if –

a) the order has been subject to an appeal under S.107 or S.112 or S.117 or S.118; or

b) the period specified under S.107(2) has not yet expired or more than three years have expired after passing of the decision or order sought to be revised; or

c) the order has already been taken for revision under this section at an early stage; or

d) the order has been passed in exercise of the powers under sub-section (1).

The proviso to sub-section (2) states that the Revisional Authority may pass an order under sub-section (1) on any point which has not been raised and decided in an appeal referred to in clause (a) of sub-section (2), before the expiry of a period of one year from the date of the order in such appeal or before the expiry of period of three years referred to in clause (b) of the said sub-section, whichever is later.

8.7.4 Sub-section (3) states that every order passed in revision under sub-section (1) shall, subject to the provisions of Ss.113 or 117 or 118, be final and binding on the parties.

8.7.5 Sub-section (4) provides that if the said decision or order involves an issue on which the Appellate Tribunal or the High Court has given its decision in some other proceedings and an appeal against such decision is pending before the High Court or the Supreme Court, the period spent between the date of the decision of the Appellate Tribunal and the date of the decision of High Court or the date of the decision of the High Court and the date of decision of the Supreme Court shall be excluded in computing the period of limitation referred to in clause (b) of sub-section (2) where proceedings for revision have been initiated by way of issue of notice under this section.

Sub-section (5) provides that where the issuance of an order under sub-section (1) is stayed by the order of a Court or Appellate Tribunal, the period of such stay shall be excluded in computing the period of limitation referred to in clause (b) of sub-section (2)

8.8 Second appeal before the Appellate Tribunal [S.112]:

8.8.1 Appeals to Appellate Tribunal by the Assessee:

Sub-section (1) of S.112 provides for the filing of an appeal by any person before the Appellate Tribunal if he is aggrieved by the following types of order viz:

i) Order passed by an Appellate Authority under S.107 of the CGST Act or the SGST Act or UTGST Act;

ii) Order passed by a Revisionary Authority under S.108 of the CGST Act or the SGST Act or UTGST Act.

8.8.2 Departmental appeal before the Appellate Tribunal:

Sub-section (3) of S.112 deals with the right of the department to file an appeal before the Appellate Tribunal.

It is provided that the Commissioner may, on his own motion or upon request from the Commissioner of SGST or the Commissioner of UTGST, call for and examine the records of any order passed by the Appellate Authority or the Revisionary Authority under CGST Act or SGST Act or UTGST Act for the purpose of satisfying himself as to the legality or propriety of the said order.

The Commissioner may, thereafter, by an order, direct any officer subordinate to him to apply to the Appellate Tribunal within 6 months from the date on which the said order has been passed for the determination of such points arising out of such order as may be specified by the Commissioner in his order.

Sub-section (4) provides that where, in pursuance of an order passed under sub-section (3) as above, the authorized officer makes an application to the Appellate Tribunal, such application shall be dealt with by the Appellate Tribunal as if it were an appeal made against the order under S.107(11) or S.108(1) of the Act and all the provisions of the Act shall apply to such application, as they apply in relation to appeals filed under sub-section (1).

8.8.3 Filing of Cross-objections:

Sub-section (5) provides that on receipt of the notice of filing of an appeal under this Section by the party against whom such appeal has been preferred, may, notwithstanding that he may not have appealed against such order or any part thereof, file, within 45 days of the receipt of notice, a memorandum of cross-objections duly verified, against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (1).

Interestingly, such filing of cross-objection by either of the parties is not provided for in case of appeals before the Appellate Authority filed under S.107 of the Act.

8.8.4 Time limit for filing the appeal :

Sub-section (6) of S.112 provides that the Appellate Tribunal may admit an appeal within 3 months after the expiry of the period referred to in sub-section (1) or permit the filing of a memorandum of cross-objections within 45 days

after the expiry of the period referred to in sub-section (5), if it is satisfied that there was sufficient cause for not presenting it within that period.

Curiously enough, the provisions are silent in so far as the powers of the Appellate Tribunal to condone the delay in filing the application/appeal by the Department under sub-section (3) of S.112 is concerned.

8.8.5 Form and manner of filing the appeal:

S.112(7) of the Act read with R.110 and 111 of the CGST Rules prescribe the following procedure for filing the appeal or application, as the case may be:

i. Appeal by the assessee and the application by the department shall be filed in Form GST APL-05 and Form GST APL-07 respectively along with the relevant documents, either electronically or otherwise as may be notified by the Registrar.

ii. On such filing, a provisional acknowledgement shall be issued to the appellant immediately.

iii. The grounds of appeal and the form of verification shall be signed in the manner as specified in R.26.

iv. A certified copy of the decision or order appealed against along with fees as specified in sub-rule (5) shall be submitted to the Registrar within 7 days of filing of the appeal by the assessee, as the case may be. Thereupon, a final acknowledgement indicating the appeal number shall be generated and issued in Form GST APL-02 by the Registrar.

v. If the certified copy of the decision or order under challenge is submitted within 7 days as prescribed, the date of filing appeal shall be the date of provisional acknowledgement. However, if the certified copy of the impugned decision or order is submitted after 7 days, then the date of filing appeal shall be the date of submission of such copy.

Explanation to sub-rule (4) of R.110 states that for the provisions of this rule, the appeal shall be treated as filed only when the finalacknowledgement, indicating the appeal number, is issued.

8.8.6 Requirement of pre-deposit and stay against the balance amount:

Sub-section (8) deals with the pre-deposit of the disputed amount to be made by the Appellant before filing of the appeal. The quantum of pre-deposit prescribed under the provision is as under:

a) **Full deposit** of that part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, **as is admitted by the Appellant;**

b) **A sum equal to 20% of the remaining amount of tax in dispute, in addition to the amount paid under S.107(6),** arising from the impugned order, ***subject to a maximum of 50 crore rupees,*** in relation to which the appeal has been filed.

Sub-section (9) provides that where the Appellant has paid the amount as specified under sub-section (8), the recovery proceedings for the balance amount shall be deemed to be stayed.

8.8.7 Discretionary powers of the Appellate Tribunal to not admit an appeal:

Sub-section(2) of S.112 provides that the Appellate Tribunal may, in its discretion, refuse to admit any such appeal where the tax or ITC involved or the difference in tax or ITC involved or the amount of fine, fee or penalty determined by such order, does not exceed Rs.50,000/-.

8.8.8 Procedure before Appellate Tribunal:

Sub-section (1) of S.111 provides that the Appellate Tribunal shall not, while disposing of any proceedings before it or an appeal before it, be bound by the procedure laid down in the Code of Civil Procedure but shall be guided by the principles of natural justice. It is further provided that subject to the other provisions of the Act and the Rules made thereunder, the Appellate Tribunal shall have power to regulate its own procedure.

Sub-section (2) provides that the Appellate Tribunal shall, for the purpose of discharging its functions under the Act, have the same powers as are vested in a Civil Court under the CPC while trying a suit in respect of the matters specified under the said sub-section.

Sub-section (3) empowers the Appellate Tribunal to enforce its order in the same manner as if it were a decree made by a Court in a suit pending therein. It shall be lawful for the Appellate Tribunal to send for execution of its orders to the Court within the local limits of whose jurisdiction, in case of a Company, the registered office of the Company is situated or in case of any other person, the person concerned voluntarily resides or carries on business or personally works for gain.

Sub-section (4) contains a deeming fiction and provides that all the proceedings before the Appellate Tribunal shall be deemed to be judicial proceedings within the meanings of S.193 and 228 (***of CPC?)*** and for the purposes of S.196 of the IPC and the Appellate Tribunal shall be deemed to be a Civil Court for the purposes of S.195 and Chapter XXVI of the CPC.

8.8.9 Hearing of the Appeal:

Sub-section (1) of S.113 enjoins upon the Appellate Tribunal to provide an opportunity of hearing to the Appellant.

Sub-section (2) provides that on being shown a sufficient cause, the Appellate Tribunal may grant time to the parties or any of them and adjourn the hearing of the appeal for the reasons to be recorded in writing.

However, the proviso to sub-section (2) restricts the powers of the Appellate Tribunal to grant adjournments. It is provided that no such adjournments **shall** be granted more than three times.

8.8.10 Order of the Appellate Tribunal:

Sub-section (1) of S.113 provides that the Appellate Tribunalmay, after granting hearing to the parties to the appeal, pass such order as it thinks just and proper, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the Appellate Authority or Revisionary Authority or to the original Adjudicating Authority, with such directions as it may think fit, for a fresh adjudication or decision after taking additional evidence, if necessary.

Sub-section (3) empowers the Appellate Tribunal to amend any order passed by it under sub-section (1) so as to rectify an error apparent on the face of the records, if such error is noticed by it on its own accord or is brought to the notice by either party to the appeal within a period of three months from the date of the order.

Proviso to sub-section (3) states that no such amendment as aforesaid which has the effect of enhancing an assessment or reducing a refund or ITC or otherwise increasing the liability of the other party shall be made under this sub-section unless the party has been given an opportunity of being heard.

Sub-section (4) requires the Appellate Tribunal to hear and decide every appeal, **where it is possible to do so,** within a period of one year from the date on which it is filed.

The phrase '*where it is possible to do so*' clearly indicates that the time limit of one year for disposal of the appeal is only suggestive but not mandatory.

Sub-sections (5) provides for the communication of the order by the Appellate Tribunal to the Appellate Authority or the Revisionary Authority or the original Adjudicating Authority, as the case may be, the appellant and the jurisdictional Commissioner or the Commissioner of State Tax/Union Territory Tax.

Sub-section (6) provides that save as otherwise provided in S.117 or S.118, orderspassed by the Appellate Tribunal shall be final and binding on the parties.

8.9 Appeal to High Court [S.117]:

8.9.1 An appeal by an any person against orders passed by the State Bench or Area Benches of the Appellate Tribunal shall lie to the High Court and the High Court may admit such appeal, if it is satisfied that the case involves a substantial question of law. *[Sub-section (1) of S.117 refers.]*

8.9.2 The appeal shall be filed in Form GST APL-08 within a period of 180 days from the date on which the order appealed against is received by the aggrieved person. However, the High Court can condone the delay in filing the appeal without any limit *[sub-section (2) refers.]*

8.9.3 The appeal before it shall be heard by a Bench of not less than two judges of the High Court *[sub-section (3) refers.]*

8.10 Appeal to Supreme Court [S.118]:

8.10.1 An appeal to the Supreme Court shall lie from any order passed by the National Bench or Regional Benches of the Appellate Tribunal or from any judgement or order passed by the High Court in an appeal in any case, on its

own motion or on an application made by or on behalf of the party aggrieved, immediately after passing of the judgement or order, the High Court certifies to be a fit case for appeal to the Supreme Court [*sub-section (1) refers.]*

8.11 Non-appealable decisions or orders [S.121]:

Following orders are specified as non-appealable orders under this provision and therefore, the Assessee shall not be entitled to challenge such order by way of an appeal:

a) an order of the Commissioner or other authority empowered to direct transfer of proceedingsfrom one officer to another officer; or

b) an order pertaining to the seizure or retention of books of account, register and other document; or

c) an order sanctioning prosecution under this Act; or

d) an order passed under S.80 [i*.e.order permitting the payment of tax or other amount in instalments]*

8.12 Judicial pronouncements laying down certain principles of law relating to appeals:

8.12.1Order is final and binding if not appealed against:

An order would attain finality if any order has not been contested or challenged in superior courts and in such circumstances, the party is precluded from taking a different stand in similar orders.

In *State of Kerala vs. M. K. Kunhikannan Nambiar – 1996 (1) SCC (435),* it was held that even a wrong order can become final and binding, if not appealed against. Even a void order does not become non-existent. 'Void' means only illegal or invalid. An invalid or void order subsists till it is set aside by competent authority.

In *Birla Corporation Ltd. vs. Commissioner – 2005 (186) ELT 266 (SC) and later in, Boving Fouress Ltd. vs. CCE – 2006 (202) ELT 389 (SC),* the Supreme Court observed that as has been held in a catena of decisions that where the department accepts the principle laid down by the Tribunal in one case and allows it become final, then the department would not be entitled to raise the same point in other cases. The department cannot pick and choose.

However, in *C.K. Gangadharan vs. CIT – 2008 (228) ELT 497 (SC),* it was held that mere fact that in some cases, the revenue had not preferred an appeal does not operate as a bar for the revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for pronouncement by the higher court when divergent views are expressed by the Tribunals or the High Courts.

Similarly, in *CIT vs. J.K. Charitable Trust – 2008 (232) ELT 769 (SC),* it was observed that if the assessee takes the stand that the Revenue acted *malafide*in not preferring appeal in one case and filing the appeal in other case, it has to establish such alleged *mala fides.* It was also noted that there may be certain

cases where no appeal was filed because of the small amount of revenue involved. Policy decisions may have been taken not to prefer appeal where the revenue involved is below a certain amount. Similarly, where the effect of the decision is revenue neutral, there may not be any need for preferring the appeal. All these certainly provide the foundation for making a departure.

8.12.2 **condonation of delay in filing appeal:**

The Appellate Authority and the Appellate Tribunal, as will be observed, are given restricted powers to condone the delay in filing the appeal before it by the aggrieved party with specific period of condonation laid down in the statutory provision. On the other hand, the High Court and Supreme Court can condone delays without time limit in relation to the appeals filed before it. The delay may be condonable if the party is able to show the sufficient cause for not filing the appeal within the statutory time limit.

The landmark decision on the issue of 'condonation of delay' is that of *Collector, Land Acquisition, Anantnag vs. MST. Katiji&Ors – 1987 (28) ELT 185 (SC),* wherein the Court has laid down certain principles and guidelines while considering the application for condonation of delay filed by the applicant.

In *ShrimantJadhavrao vs. DilipBalwantrao – 2002 AIR SCW 2612 (3-Member Bench),* it was reiterated by the Court that delay upto last date of filing is not required to be explained. Only delays subsequent to last date is required to be explained.

In the context of the powers of the Commissioner (Appeals)to condone a delay beyond the specified period, the judgement of the Supreme Court in *Singh Enterprises vs. CCE, Jamshedpur – 2008 (221) ELT 163 (SC)* may be referred to wherein it was held that the Commissioner (Appeals) as also the Tribunal being creatures of Statute were vested with jurisdiction to condone the delay beyond the permissible period provided under the Statute. The period upto which the prayer for condonation can be accepted was also statutorily provided. In the instant case, the provisions of the statute were sufficiently lucid and condonation of delay beyond 30 days would render a specific provision providing for limitation rather otiose. The Supreme Court accordingly held that there was no power to condone the delay after the expiry of 30 days extension.

In an interesting decision of the Larger Bench of the Gujarat High Court in *Panoli Intermediates India Pvt. Ltd. vs. UOI – 2015 (236) ELT 532 (Guj.),* it was, however, held that writ jurisdiction could be invoked even after the period for condonation of delay is over as writ jurisdiction cannot be whittled down by statutory provisions.

8.12.3Powers of Appellate Authority to remand:

As may be noted, S.107 (11) of the Act explicitly excludes the power of the Appellate Authority to remand the case back to the adjudicating authority for de-novo adjudication. Similar restriction was contained in S.35A(3) of the CEA relating to the Central Excise appeals and also as made applicable to service tax appeals by S.83 of the FA.

However, in *UOI vs. Umesh Dhaimode – 1998 (98) ELT 584 (SC),* it was held that Appellate Authority having powers to pass such orders as it may deem fit

confirming, modifying or annulling with the decision appealed against and such powers imply power of remand since an order of remand necessarily annuls the decision which is under appeal.

However, in *CC vs. Enkay (India) Rubber Co. Pvt. Ltd. – 2008 (224) ELT 393 (P&H),* it was held that once power of remand has been expressly taken away by the Finance Act, 2001 which came into operation w.e.f. 11.05.2001, the Commissioner (Appeals) is divested of power to remand the case back to the adjudicating authority.

8.12.4 **Can the Appellate Tribunal dismiss the appeal for non-prosecution?**

In *Viral Laminates Pvt. Ltd. vs. UOI – 1998 (100) ELT 335 (Guj.),* it was held that the Appellate Tribunal is not empowered to dismiss an appeal for default of appearance but has to decide the appeal on merits. The Court, in fact, struck down Rule 20 of the CEGAT (Procedure) Rules, 1982, empowering the Appellate Tribunal to dismiss an appeal for default of appearance being ultra vires the provisions of S.35C(1) of CEA and S.129B (1) of the Customs Act, 1962.

In *Balaji Steel Rolling Mills vs. CCE – 2014 (310) ELT 209 (SC),* it was held that the relevant statutory provisions (as referred to by the Court) do not give any power to the Tribunal to dismiss the appeal for default or for want of prosecution in case the appellant is not present when the appeal is taken up for hearing.

Both the above judgement have recently been followed by the Madras High Court in P*. Ganesh vs. CCE – 2019 (365) ELT 301 (Mad.)*

9. Prosecution:

9.1 The provisions of S.132 of the Act provides for the prosecution for certain criminal offences which are listed hereinbelow:

i) Supply of any goods or services or both without issue of any invoice, with the intention to evade tax.

ii) Issuance of any invoice or bill without supply of goods or services or both leading to wrongful availment or utilization of ITC or refund of tax.

iii) Availing of ITC on invoices mentioned in (ii) above.

iv) Collecting any amount as tax but failing to pay the same to the Government beyond a period of three months from the date on which such payment becomes due.

v) Evading tax, fraudulently availing ITC or fraudulently obtaining refund and where such offence is not covered under clauses (i) to (iv) above.

vi) Falsification or substitution of financial records or producing fake accounts or documents or furnishing any false information with an intention to evade payment of tax.

vii) Submits fake financial records/documents or files fake returns to evade tax.

viii) Obstructing or preventing any officer in the discharge of his duties (for example, hindering the officer during the audit by tax authorities).

ix) Acquiring, transporting, removing, depositing, keeping, concealing, supplying, or purchasing or dealing with any other manner, any goods with full knowledge that there is violation of GST law and goods are liable for confiscation.

x) Receiving or in any way concerning with the supply of services with knowledge or reasons to believe that these are in contravention of any provisions of this Act or the rules made thereunder.

xi) Tampering or destroying any evidence.

xii) Failing to supply any information or knowingly giving false information.

xiii) Attempting to commit or abetting commission of offences mentioned in 1 to 12 above.

9.2 The punishment prescribed in respect of the commission of the above criminal offences is as under:

a) in cases where the amount of tax evaded or the amount of ITC wrongly availed or utilized or the amount of refund wrongly taken exceeds five hundred lakh rupees, with imprisonment for a term which may extend to five years and with fine;

b) in cases where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken exceeds two hundred lakh rupees but does not exceed five hundred lakh rupees, with imprisonment for a term which may extend to three years and with fine;

c) in the case of any other offence where the amount of tax evaded or the amount of input tax credit wrongly availed or utilized or the amount of refund wrongly taken exceeds one hundred lakh rupees but does not exceed two hundred lakh rupees, with imprisonment for a term which may extend to one year and with fine;

d) in cases where he commits or abets the commission of an offence of falsification of records or submits false information or obstructs officials, he shall be punishable with imprisonment for a term which may extend to six months or with fine or with both.

9.3 Cognizable/non-cognizable offence:

Sub-section (4) of the S.132 provides that notwithstanding anything contained in the CPC, all offences under this Act, except the offences referred to in sub-section (5), shall be non-cognizable and bailable.

Sub-section (5) states that the offences specified in clause (a) or clause (b) or clause (c) or clause (d) of sub-section (1) and punishable under clause (i) i.e. where amount involved entails punishment of five years, shall be cognizable and

non-bailable. Further, no Court shall take cognizance of any offence punishable under this Act or the rules made thereunder except with the previous sanction of the Commissioner and no Court inferior to that of a Magistrate of the First Class shall try any such offence.

9.4 Presumption of culpable mental state [S.135]:

In any prosecution for an offence under this Act which requires a culpable mental state on the part of the accused, the court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

9.5 Offence by companies [S.137]:

Person who was in charge of the company and was responsible for the conduct of business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. Where consent or connivance to the offence or negligence on part of director, manager, secretary or other officer of the company is established they will also be prosecuted. In case of partnership firm or a Limited Liability Partnership or a Hindu Undivided Family or a trust, the partner or karta or managing trustee are liable to prosecution. It is on concerned person to prove that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

10. Compounding of offences:

GST law also provides for compounding of offences in case the concerned person wishes to avoid litigation. Compounding shall be allowed only after making payment of tax, interest and penalty involved in such offences. However, compounding will not be available for –

(a) A second time offender of cognizable offence specified in clauses (a) to (f) of sub-section (1) of Section 132.

(b) A second time offender where earlier offence had been under any other GST law in respect of supplies of value exceeding one crore rupees.

(c) A person who has been accused of committing an offence under this Act which is also an offence under any other law for the time being in force.

(d) A person who has been convicted for an offence under this Act by a court.

(e) A person who has been accused of committing an offence specified in clause (g) or clause (j) or clause (k) of sub-section (1) of S. 132; and

(f) Any other class of persons or offences as may be prescribed.

10.1 Procedure for compounding of offences:

R.162 has been inserted in Central GST Rules, 2017 vide Notification No.15/2017-CT dated 01.07.2017 prescribing the procedure for compounding of offences under GST laws.

An application in Form GST CPD-01 has to file by concerned person to the Commissioner for compounding of an offence, either before or after the institution of prosecution. A report will be called from concerned jurisdictional officer. If satisfied about true disclosure, Commissioner will pass an order in Form GST CPD-02, allowing the application indicating the compounding amount and grant him immunity from prosecution. However, if not satisfied, he can reject application after affording an opportunity of hearing to applicant. The entire exercise of acceptance or rejection has to be completed within ninety days of the receipt of the application. The application shall not be allowed unless the tax, interest and penalty liable to be paid have been paid in the case for which the application has been made. The compounding fee will be paid within 30 days. The immunity can be withdrawn by the Commissioner, if he is satisfied that such person had, in the course of the compounding proceedings, concealed any material particulars or had given false evidence. Thereupon such person may be tried for the offence with respect to which immunity was granted or for any other offence that appears to have been committed by him in connection with the compounding proceedings and the provisions the Act shall apply as if no such immunity had been granted.

Conclusion:

The various aspects of the tax litigation under GST laws and certain principles of law governing such litigation as discussed in this Paper, by no means, are nor can be exhaustive. At best, the discussion can be taken as a '**curtain raiser'** and is intended to familiarize the readers with the relevant statutory provisions and the intricacies of the litigation process. Since in its short span of hardly 18 months, GST laws are facing a flood of litigation, it paints a very dismal picture for the future. It is, therefore, inevitable for the taxpayers and the tax professionals to be well prepared so as to deal with the varied types of litigations that are likely to arise in future under GST regime.

Nonetheless, having said this, I would like to end the discussion in this Paper with these sage words of **Abraham Lincoln:**

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser – in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

[Abraham Lincoln]