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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

Webinar Series on GSTAT

Organised by GST & Indirect Taxes Committee

Understanding of show cause notice and approach towards it

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Background

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- Without admitted liability, payment of tax will be contrary to law
- Without finalized demand, recovery of tax will be contrary to law
- Until time to appeal passes, demand in any order will not be finalized
- Recovery without liability, liable to be refunded (RFD1 within 2 yrs.)
- Suspicion about liability, not sufficient to attempt recovery:
  - GSTR1 > 3B, requires DRC1B to be issued before recovery action
  - Interest on belated payment (3B or DRC3) requires DRC1D to be issued
  - Late fee for belated returns also requires DRC1D to be issued
- DRC13 (attachment/3rd party recovery) cannot be generated without DRC7 (or AP4) as per law

Responsibility of Proper Officer

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- Initiate proceedings, carry it to conclusion and ensure DRC7 is issued
- Without DRC7, limitation will result in forfeiture of demand
- DRC7 requires demand to be initiated *via* DRC1
- ASMT10 or ADT2 (or even INS1-4) do not directly authorize DRC1
- DRC7 cannot be issued without DRC1
- ASMT10 or ADT2 (or even INS1-4) required to arrive at findings
- Findings in underlying proceedings leads to notice of demand and DRC1
- Erroneous RFD6 requires APL2 and APL4 before recovery.

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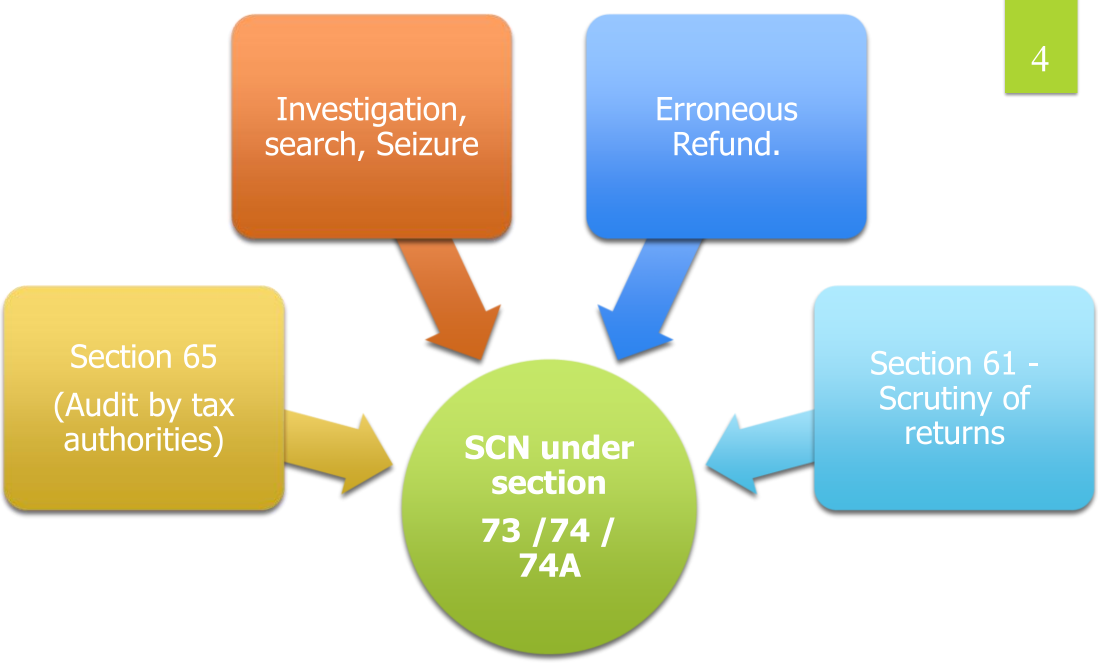

SHOW CAUSE NOTICE –SECTION 73 & 74. (Till Fy 2023-24)

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Section 73: Applicable in case	Section 74: Applicable in case
- Tax has not been paid or short paid - Erroneous refund or - Input tax credit has been wrongly availed or utilized for any reason - without fraud or willful-misstatement or suppression of facts to evade tax. - Penalty is 10% of tax. - Shorter Time limit to issue SCN and pass order	- Tax has not been paid or short paid - Erroneous refund or - Input tax credit has been wrongly availed or utilized for any reason - With fraud or willful-misstatement or suppression of facts to evade tax. - Penalty is 100% of tax. - Longer Time limit to issue SCN and pass order.

Notice only demanding Interest

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SECTION 73 NOTICE – ……. required to show cause as to why he should not pay the amount specified in the notice along with **interest payable thereon** under section 50 and a penalty leviable under the provisions of this Act or the rules made thereunder.

MAHADEO CONSTUCTION CO. 2020 (36) G.S.T.L. 343 (Jhar.) – SCN to be issued.

LC INFRA PROJECTS PVT. LTD. 2021 (44) G.S.T.L. 60 (Kar.) - Show Cause Notice required to be issued to assessee under Section 73 (1) of Central Goods and Services Tax Act, 2017 for recovery of interest payable under Section 50(1) ibid - Principles of natural justice to be complied with before making a demand for interest,

RAJKAMAL BUILDER INFRASTRUCTURE PVT. LTD. 2021 (50) G.S.T.L. 153 (Guj).
Form GST DRC-01 cannot be issued for purpose of recovery of interest on delayed payment of tax - Interest to be recovered in terms of Section 79 of Central Goods and Services Tax Act, 2017 - Notice to be issued in Form GST DRC-07 - Notice should specify amount of tax, interest and penalty payable by person chargeable with tax -

Closure of Proceedings

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Particulars	Section 73	Section 74
Before SCN	Tax + Int + 0% Penalty	Tax + Int + 15% Penalty
Within 30 days of SCN	Tax + Int + 0% Penalty	Tax + Int + 25% Penalty
Within 30 days of order	Tax + Int + 10% Penalty	Tax + Int + 50% Penalty
After 30 days of order	Tax + Int + 10% Penalty	Tax + Int + 100% Penalty

Section 74A

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Sections	**General Cases**	**Cases involving Fraud or Wilful Misstatement**
Section 74A(1) – Issue of notice.	– The proper officer may serve notice to person chargeable with: – Tax which has not been paid or short paid or erroneously refunded – ITC that has been wrongly availed or utilized for any reason. – **Proviso -** No SCN shall be served if the demand amount is less than ₹ 1000.	
Section 74A(2) - Time Limit.	– The notice should be served **within 42 months of:** – Due date of filing annual return for the financial year or – The date of the erroneous refund	
Section 74A(3) – Statement for subsequent period.	- Where a SCN has already been served: - The Proper officer may serve a statement giving details of the tax demand for periods other than those covered in the notice under Section 74A(1).	

Section 74A

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Sections	General Cases	Cases involving Fraud or Wilful Misstatement
Section 74A(4) - Condition for Recurring SCN.	The statement issued u/s 74A(3) will be considered as deemed notice if the grounds of default are the same as covered by the notice u/s 74A(1).	
Section 74A(5) – Penalty	**74A(5)(i) -** 10% of the tax due or Rs. 10,000, whichever is higher.	**74A(5)(ii) -** Equivalent to the amount of tax due.
Section 74A(6) — Determination of Demand	After considering representation, the proper officer to determine the amount of tax, interest, and penalty and issues an order.	
Section 74A(7) - Time limit	Order under Section 74A(6) should be issued within 12 months from the notice issuance date. This period can be extended by a maximum of 6 months with approval.	

Section 74A

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Sections	General Cases	Cases involving Fraud or Wilful Misstatement
Section 74A(8) & (9) – Voluntary Payment and closure of proceedings.	**8(i) Before Notice**: No notice or penalty is charged if tax and interest are paid before notice and informed to the officer. **8(ii) Within 60 days of Notice:** No penalty is charged for tax and interest paid within 60 days of notice.	**9(i) Before Notice:** No notice is served if the taxpayer pays tax + interest + penalty @ 15% of tax before the notice and the officer is informed: **9(ii) Within 60 days of Notice:** No further proceedings are carried on if **tax + interest + 25% penalty of tax** is paid within 60 days of notice. **9(iii) Within 60 days of Order:** No further proceedings are carried out if **tax + interest + 50% penalty on tax** is paid within 60 days of the order.

Section 74A

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Sections	General Cases	Cases involving Fraud or Wilful Misstatement
Section 74A(10) – Shortfall.	If the amount paid u/s 74A (8)(i) is less than the payable amount, notice for the shortfall will be served in the due course.	If the amount paid u/s 74A (9)(i) is less than payable amount, notice for shortfall will be served in the due course.
Section 74A(11) – No benefit of waiver in penalty	Overriding all clauses of Section 74A (8), the penalty will be charged if tax collected or self-assessed tax is not paid within 30 days from due date of tax payment.	Not Applicable

Monetary limit to issue SCN and pass orders

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1. Circular No. 31/05/2018- GST, dated 09-02-2018

Sl. No.	**Officer of Central Tax**	**Monetary limit of the amount of CGST (including cess) for issuance of show cause notices and passing of orders under sections 73 and 74 of CGST Act**	**Monetary limit of the amount of IGST (including cess) for issuance of show cause notices and passing of orders**	**Monetary limit of the amount of CGST + IGST (including cess) for issuance of show cause notices and passing of orders**
(1)	**(2)**	**(3)**	**(4)**	**(5)**
1.	Superintendent of Central Tax	Not exceeding Rupees 10 lakhs	Not exceeding Rupees 20 lakhs	Not exceeding Rupees 20 lakhs
2.	Deputy or Assistant Commissioner of Central Tax	Above Rupees 10 lakhs and not exceeding Rupees 1 crore	Above Rupees 20 lakhs and not exceeding Rupees 2 crores	Above Rupees 20 lakhs and not exceeding Rupees 2 crores
3.	Additional or Joint Commissioner of Central Tax	Above Rupees 1 crore without any limit	Above Rupees 2 crores without any limit	Above Rupees 2 crores without any limit

Constructing SCN

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- SCN must be constructed in accordance with law:
  - Underlying proceedings must be authorized as per law
  - Proceedings must conclude with findings of revenue leakage
  - Ingredients to attract incidence of tax must be located
  - Evidence in support of findings must be documented
  - Cause-of-action must be carefully selected
  - Noticee must be correctly identified and served as per law
- SCN must be issued (i) within limitation (ii) under correct provision

ERRORS & INSIGHTS

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- Multi-year SCN issued without examining whether ingredients of default exist for each period.
- SCN issued under Section 74 merely because demand is high, without pleading/ establishing fraud, wilful misstatement or suppression.
- Reliance on portal data / annual return figures without supporting evidence from books and records.
- A valid SCN must answer: who is liable, for what default, under which provision, on what evidence, for which period, and how much.
- Distinguish between revenue leakage, procedural lapse, data mismatch and oversight

Evidence in SCN

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- Contemporaneous evidence more reliable than specially prepared records
- Statements-on-oath weakest form of evidence to establish wrongdoing
- Electronic evidence admissible subject to strict compliance with IT Act
- Factual assertions before regulatory in Allied Laws *in pari materia* relevant
- Opportunity to cross-examine improves reliability of evidence collected
- Refusal to permit cross-examination impairs reliability of evidence
- Without showing comparable facts, over-dependence on case law perilous
- Choice of mode of service must not leave room for defence of unfairness

ERRORS & INSIGHTS

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- Allegation treated as evidence.
- Statements relied upon without testing voluntariness, retraction, corroboration or cross-examination.
- If evidence is not supplied, reply should reserve the right to file additional submissions after complete RUDs are provided.
- Where statements are relied upon, seek cross-examination specifically and explain prejudice if denied.

Cause-of-Action

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- Purpose of cause-of-action to disclose basis of claim (alleged *via* SCN)
- Taxpayer liable to answer in adjudication allegation of infraction of law
- Choice of cause-of-action (or correct one, if alternates exist) is key to SCN
- Essentially, SCN is to put Party sufficiently at notice to answer his accusers
- SCN also sets the (process of demand and recovery) in motion
- Cause-of-action is 'infraction accused of' that was unearthed in enquiry
- Accusation requires (i) pleading ingredients (ii) evidence adduced
- Ingredients are legislated and evidence is unearthed by Proper Officer

Ingredients of Infraction

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- Data differences in returns or records is by itself not infraction of law
- Infraction is actions (i) contrary to mandate in law (ii) prohibited in law
- Every compliance (or infraction) has one or more ingredients
- Enquiry must expose non-compliance to attract cause-of-action
- Every tax position taken will have to be reported in returns filed online
- Revenue must adduce proof for action and proof for inaction
- Taxpayer must respond to (ii) allegation (ii) proof or (iii) both
- Without evidence, allegation will be guesswork

ERRORS & INSIGHTS

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- Treating every data difference as tax evasion.
- Demanding tax merely because income appears in financial statements.
- Denying ITC without identifying which condition of Section 16 / 17 is violated.
- Invoking Rule 37 without verifying nature of creditors, date of invoice, date of payment and ITC eligibility.
- wrong availment of ITC- it must identify whether the dispute is eligibility, possession of invoice, receipt of goods/services, tax payment by supplier, return filing or blocked credit.

Conclusion of SCN

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- Facts brought on record must be correct and complete
- View to be canvassed by be clear and evidence adduced adequate
- Cause-of-action invoked must correlate with view canvassed in SCN
- Brief explanation of non-compliance (or infraction) of law alleged
- Noticee correctly identified and mode of service properly documented
- Identity Adjudicating Authority assigned to preside with independence
- Limitation v. urgency of SCN (extension of limitation section 168A)

ERRORS & INSIGHTS

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- Advising payment merely because SCN is issued.
- Treating SCN as final demand – Pre-meditated demand
- Ignoring limitation because liability appears possible on merits.
- Not building the record for appeal at the adjudication stage.
- Full merits should be argued without prejudice to fatal preliminary defects.

Case Study 1

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- Taxpayer registered and supplying goods taxable at 28%
- Audit noted ‘other income’ in financials on which tax was not discharged
- SCN issued demanding 28% tax on other income
- Allegation of fraud/ suppression –SCN under Section 74

Case Study 2

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- Taxpayer registered and supplying goods taxable with full input tax credit
- Audit noted 'other income – discount allowed by Suppliers' in financials
- SCN issued demanding 18% tax on other income
- Periodical SCN issued for F.Y. 2024-25 citing Section 73

Case Study 3

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- SCN (s.74) issued denying credit to 'Start-Up' citing non-existence of business until date of monetization (start of revenues) and customer acquisition costs incurred charged off as period cost and disallowed in income-tax (final order)
- Demand for Interest & Penalty raised in SCN

Case Study 4

- ASMT10 for non-reversal of credit on exempt TO FY 2020-21
- SCN issued u/s 73 after ASMT-10
- SCN alternatively treats exempt income as taxable if evidence is not presented by taxpayer

Case Study 5

- Audit finding of non-reversal of credit due to non-payment to Suppliers
- SCN issued demands reversal at 18% of creditors balance on 31 Mar 2023
- SCN issued u/s 74
- Interest u/s 50(1) and penalty u/s 122 demanded

Case Study 6

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- SCN issued by Audit Officer denying credit availed on invoices from 'Sunrise Hotels Ltd' is blocked credit – food and beverage (f&b)
- HSN declared by Sunrise Hotels in their GSTIN is for F & B

- SCN issued based on expense appearing in Repair & Maintenance alleging ITC for Works contract not available after retrospective amendment of Section 17(5).

Case Study 7

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- Taxpayer is executing composite works contracts.
- Department issues SCN alleging short payment of tax on free-of-cost material supplied by recipient.
- SCN does not examine contractual terms, valuation mechanism, whether FOC material is consideration, or whether value is includible under Section 15.
- Demand computed by applying 18% on estimated market value of material.

Thank You

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