

Issues in Service tax Adjudication (SCNs)



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Organized by: The Chamber of Tax Consultants

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Case Study 1

- 🕒 Jamieson & Co. is an advertising agency who arranges for posting advertisements in various newspapers
- 🕒 The newspaper printing companies provide 15% commission to Jamieson & Co for every advertisement brought by them
- 🕒 If an invoice of Rs. 1,00,000 is raised by Jamieson & Co. to the end customer, Jamieson & Co. retains Rs. 15,000 and remits balance Rs. 85,000 to newspaper printing companies
- 🕒 In the books of accounts, entire Rs. 1,00,000 is credited and Rs. 85,000 is shown as expense in Profit & Loss Account
- 🕒 Jamieson & Co. is paying service tax on commission received of Rs. 15,000
- 🕒 Now, service tax is demanded on differential Rs. 85,000 through a SCN dated 19.10.2021 for FY 2016-17 and FY 2017-18 (upto June'17). The SCN was received by Jamieson & Co. on 01.11.2021

Case Study 1 – Questions 1 & 2

Whether the demand raised by the Department merely on the basis of difference between Income Tax Return and Service Tax Return is correct?

Whether Jamieson & Co. should reply to such SCN or opt to file a writ petition?

Case Study 1 – Question 1

ASHA PHOTO STUDIO 2010 (19) S.T.R. 890 (Tri. - Mumbai)

- ⌚ *On perusal of the record, it is found as per the Profit and Loss Account attached along with Appeal Memo by the appellant, that the total receipts includes the material sale from photography and collection charges which comprises of Rs.6,40,995/- as total turnover of the appellant during the impugned period. **The adjudicating authority has not examined the Account Books and the Sale Invoice of the appellant while passing the impugned order and as per the impugned order it is totally based on the information gathered from the Income Tax authorities as per the Income Tax Returns filed by the appellant. It requires an examination by the adjudicating authority on this aspect from Books of Account and Sale Invoice of the appellant during the impugned period. In these circumstances, it would be proper for me to remand back the case to the adjudicating authority to look into the books of accounts and sale invoice of the appellant and after scrutinizing the same to pass an appropriate order, accordingly***

Case Study 1 – Question 1

- ⌚ ***Alpa Management Consultants P. Ltd. Vs. Commr. Of S.T., Bangalore 2007 (6) S.T.R. 181 (Tri. - Bang.)***

“4.1 In terms of the above order, Service Tax cannot be recovered based on the returns shown in the Income Tax Returns, as the provisions of Income Tax requires declaration of amounts still due from the debtors, while in the case of Service Tax, the same has to be paid when recoveries are made. The appellants have been paying the amounts as and when they are recovering the amounts. They have also not taken the credit as alleged by the Commissioner in his written submission before the Tribunal. Furthermore, there is no suppression of facts and demands are also time barred. Therefore, in terms of the above noted judgments, the impugned order is set aside and appeal allowed with consequential relief, if any.”

- ⌚ The order was challenged before Supreme Court by the Department and Supreme Court dismissed the appeal.

Case Study 1 – Question 1 & 2

Amrish Rameshchandra Shah (WP No. 387 of 2021) (Bom. HC)

- ⌚ 5. *On going through the reply affidavit, we find that the impugned show cause notice was issued on the basis of information retrieved from the Income Tax Department. However, upon verification respondents have now come to the conclusion that activities of the petitioner are not liable to service tax under the Finance Act, 1994 and to this extent, the show cause notice may be withdrawn. However, it is stated that certain clarifications are still needed regarding income from other sources.*
- ⌚ 8. *After hearing learned counsel for the parties and on due consideration, we set aside and quash the impugned show cause-cum demand notice dated 30.12.2020 issued to the petitioner by respondent No.3, clarifying that respondents would be at liberty to pursue with the verification as to income of the petitioner received from other sources and may issue fresh show cause notice in accordance with law if the circumstances so warrant.*

Case Study 1 – Question 2

Assistant Commissioner of State Tax and Others Vs Commercial Steel Limited (Supreme Court) dated 03.09.2021 (Civil Appeal No 5121 of 2021)

A writ petition can be entertained in exceptional circumstances where there is:

- ⊗ (i) a breach of fundamental rights;*
- ⊗ (ii) a violation of the principles of natural justice;*
- ⊗ (iii) an excess of jurisdiction; or*
- ⊗ (iv) a challenge to the vires of the statute or delegated legislation.*

Case Study 1 – Question 2

🕒 ***M/s Radha Krishan Industries Versus State Of Himachal Pradesh & Ors. 2021 (4) TMI 837 (SC)***

“27 The principles of law which emerge are that:

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;

(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;

(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged”

Case Study 1 – Question 2

Union of India vs. Rubber Products Ltd. (SC) 2015 (326) ELT 232

Writ jurisdiction - Maintainability of - Alternate remedy - Writ petition was not maintainable before High Court as alternate remedy of statutory appeal had not been exhausted by petitioner therein - Assessee at liberty to file statutory appeal in respect of orders against which writ petition was filed - Article 226 of Constitution of India

Case Study 1 – Question 3

Can the
Department
invoke extended
period of
limitation in
such cases?

Case Study 1 – Question 3

S. 73 of Finance Act, 1994

Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded - Chapter V of Finance Act, 1994

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of-

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words " thirty months , the words "five years" had been substituted.

Case Study 1 – Question 3

S. 74 of CGST Act, 2017

Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful-misstatement or suppression of facts.

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him 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 equivalent to the tax specified in the notice

Case Study 1 – Question 3

Lakshmi Engineering Works vs. Collector of C. Ex. 1989 (44) ELT 353 (Tri.) maintained by Supreme Court reported in 1991 (55) ELT A33 (SC)

🕒 *the Tribunal held that the concept of "suppression" amounts to that which one is legally to state but one **intentionally or deliberately or consciously does not state**. In other words, the term 'suppression' includes a mental element to deliberately omit to state certain things. Therefore, where there was no deliberate action on the part of the assessee to hide the facts from departmental authorities and at each stage of enquiry, if the assessee discloses all material facts and extends co-operation, all requisite details as required are submitted to department from time to time as and when called for, there is no question of invocation of extended period of limitation.*

Case Study 1 – Question 3

- ⌚ ***Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur 2013 (288) ELT 161 (SC)***
 - To invoke extended period of limitation, positive action betraying negative intention of willful/deliberate default is mandatory prerequisite
 - Burden to prove mala fides is on department who makes the allegation

- ⌚ ***Continental Foundation Jt. Venture vs. Commr. Of C. Ex., Chandigarh-I 2007 (216) ELT 177 (SC)***
 - If there was enough scope for entertaining doubt about the view to be taken, extended period of limitation is not invocable

- ⌚ ***Simplex Infrastructures Ltd. vs. Commissioner of S.T., Kolkata 2016 (42) STR 634 (Cal.)***
 - Only on the basis of receiving information at the time of audit, such serious allegation of suppression cannot be made and penalties cannot be levied

Case Study 1 – Question 3

Master Circular No. 1053/2/2017-CX dated 10.03.2017

- *"Extended period can be invoked only when there are ingredients necessary to justify the demand for the extended period in a case leading to short payment or non-payment of tax. The onus of establishing that these ingredients are present in a given case is on revenue and these ingredients need to be clearly brought out in the Show Cause Notice along with evidence thereof. The active element of intent to evade duty by action or inaction needs to be present for invoking extended period*
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- *Power to issue notice for extended period is restricted by presence of active ingredients which indicate an intent to evade duty as explained above. Indiscriminate use of such restricted powers leads to fruitless adjudications, appeals and reviews, inflates the figures of outstanding demands and above all causes unnecessary harassment of the assesseees. Therefore, before invoking extended period, it must be ensured that the necessary and sufficient conditions to invoke extended period exists"*

Case Study 1 – Question 4

- ⌚ Assuming Service Tax demand is crystallised, can Jamieson & Co. take a stand that demand should be calculated inclusive of taxes because no separate service tax had been collected from end customers on Rs. 85,000?

Case Study 1 – Question 4

🕒 SECTION 67. of Finance Act, 1994

Valuation of taxable services for charging service tax. —

(1) Subject to the provisions of this Chapter, where service tax is chargeable on any taxable service with reference to its value, then such value shall, —

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;

(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;

(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

(2) Where the gross amount charged by a service provider, for the service provided or to be provided is inclusive of service tax payable, the value of such taxable service shall be such amount as, with the addition of tax payable, is equal to the gross amount charged.

(3) The gross amount charged for the taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

(4) Subject to the provisions of sub-sections (1), (2) and (3), the value shall be determined in such manner as may be prescribed.

Case Study 1 – Question 4

✓ S. 15 of CGST Act, 2017

Value of taxable supply.

(1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply...

✓ R. 35 of CGST Rules, 2017

Value of supply inclusive of integrated tax, central tax, State tax, Union territory tax.-

Where the value of supply is inclusive of integrated tax or, as the case may be, central tax, State tax, Union territory tax, the tax amount shall be determined in the following manner, namely,-

Tax amount = (Value inclusive of taxes X tax rate in % of IGST or, as the case may be, CGST, SGST or UTGST) ÷ (100+ sum of tax rates, as applicable, in %)

Case Study 1 – Question 4

🕒 **S. 33 of CGST Act, 2017**

Amount of tax to be indicated in tax invoice and other documents.

Notwithstanding anything contained in this Act or any other law for the time being in force, where any supply is made for a consideration, every person who is liable to pay tax for such supply shall prominently indicate in all documents relating to assessment, tax invoice and other like documents, the amount of tax which shall form part of the price at which such supply is made.

Case Study 1 – Question 4

- ⌚ As per the Supreme Court in the landmark decision of ***Commissioner of Central Excise, Delhi v. Maruti Udyog Limited 2002 (141) E.L.T. 3 (S.C.)***, where service tax is not separately collected by the service provider from the service recipient, then the benefit of cum-duty should be extended to such a service provider.
- ⌚ Hon'ble CESTAT in the case of ***The Commissioner of Central Excise v. Prompt and Smart Security 2008 (9) STR 237 (Tri.-Bang.)*** held that: “In the present case, it is seen from records that the *respondents had not collected Service Tax separately*. It is not the case of the Revenue that they collected the Service Tax and did not pay the same to the Government. In these circumstances, *the principle enunciated in the case of M/s. Maruti Udyog Ltd., cited supra, has been followed by the lower authority to grant the Cum-duty benefit to the respondents. We cannot find any strong grounds for differing from the lower authority or the Commissioner (Appeals).*”

Case Study 2

- ⌚ Sumo LLP is engaged in construction services and follows project completion method of accounting. Details of revenue for FY 2015-16 is as under:
 - Amount of Revenue as per Income Tax Return = Rs. 20 crores (project completion method)
 - Amount of Services as per Service Tax Return = Rs. 12 crores
 - Amount reflected in 26AS = Rs. 18 crores
- ⌚ Now, Department has issued SCN via email on 31.12.2020 for payment of service tax on differential amount of Rs. 8 crores (i.e. 20 crores – 12 crores). SCN did not mention the category of service under which Service tax was payable.
- ⌚ Sumo LLP filed a detailed reply providing reconciliation between turnover as per Income Tax Return and Service Tax Return. It also furnished audited financial statements.
- ⌚ While adjudicating the matter, adjudicating authority passed an *ex-parte* order wherein service tax demand on differential figure of Rs. 8 crores was dropped and service tax demand on certain expenses under RCM was confirmed.

Case Study 2 – Question 1

Is
Department
correct in
issuing SCN
via email?

DELIVERY OF SCN VIA EMAIL...

Section 83. of Finance Act, 1994

Application of certain provisions of Act (1 of 1944).

The provisions of the following sections of the Central Excises and Salt Act, 1944 (1 of 1944) as in force from time to time, shall apply, so far as may be, in relation to service tax as they apply in relation to a duty of excise:-

*sub-section (2A) of section 5A, sub-section (2) of section 9A, 9AA, 9B, 9C, 9D, 9E, 11B, 11BB, 11C, 12, 12A, 12B, 12C, 12D, 12E, 14, 15, 15A, 15B, 31, 32, 32A to 32P (both inclusive) 33A, 34A, 35EE, 35F, 35FF TO 35-O (both inclusive), 35Q, 35R, 36 36A, 36B, 37A, 37B, **37C**, 37D, 38A and 40.*

...DELIVERY OF SCN VIA EMAIL...

Section 37C. The Central Excise Act, 1944

Service of decisions, orders, summons, etc. —

(1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served, -

(a) by tendering the decision, order, summons or notice, or sending it by **registered post with acknowledgment due [or by speed post with proof of delivery or by courier]** approved by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)] to the person for whom it is intended or his authorised agent, if any;

(b) if the decision, order, summons or notice cannot be served in the manner provided in clause (a), **by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person** for whom such decision, order, summons or notice, as the case may be, is intended;

(c) if the decision, order, summons or notice cannot be served in the manner provided in clauses (a) and (b), **by affixing a copy thereof on the notice board of the officer or authority** who or which passed such decision or order or issued such summons or notice.

(2) Every decision or order passed or any summons or notice issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post [or courier referred to in sub-section (1)] or a copy thereof is affixed in the manner provided in sub-section (1).

...DELIVERY OF SCN VIA EMAIL...

Section 169. of CGST Act, 2017

Service of notice in certain circumstances.

(1) Any decision, order, summons, notice or other communication under this Act or the rules made thereunder shall be served by any one of the following methods, namely:-

(a) by giving or tendering it directly or by a messenger including a courier to the addressee or the taxable person or to his manager or authorised representative or an advocate or a tax practitioner holding authority to appear in the proceedings on behalf of the taxable person or to a person regularly employed by him in connection with the business, or to any adult member of family residing with the taxable person; or

(b) by registered post or speed post or courier with acknowledgement due, to the person for whom it is intended or his authorised representative, if any, at his last known place of business or residence; or

(c) by sending a communication to his e-mail address provided at the time of registration or as amended from time to time; or

(d) by making it available on the common portal; or

...DELIVERY OF SCN VIA EMAIL...

Section 169. of CGST Act, 2017

Service of notice in certain circumstances.

(e) by publication in a newspaper circulating in the locality in which the taxable person or the person to whom it is issued is last known to have resided, carried on business or personally worked for gain; or

(f) if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence and if such mode is not practicable for any reason, then by affixing a copy thereof on the notice board of the office of the concerned officer or authority who or which passed such decision or order or issued such summons or notice.

(2) Every decision, order, summons, notice or any communication 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 provided in sub-section (1).

(3) When such decision, order, summons, notice or any communication is sent by registered post or speed post, it shall be deemed to have been received by the addressee at the expiry of the period normally taken by such post in transit unless the contrary is proved.

...DELIVERY OF SCN VIA EMAIL...

Rule 142. of CGST Rules, 2017

Notice and order for demand of amounts payable under the Act.-

(1) The proper officer shall serve, along with the

*(a) notice issued under section 52 or section 73 or section 74 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130, a summary thereof **electronically** in FORM GST DRC-01,*

*(b) statement under sub-section (3) of section 73 or sub-section (3) of section 74, a summary thereof **electronically** in FORM GST DRC-02, specifying therein the details of the amount payable.*

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

...DELIVERY OF SCN VIA EMAIL...

Rule 142. of CGST Rules, 2017

Notice and order for demand of amounts payable under the Act.-

(2) Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act, whether on his own ascertainment or, as communicated by the proper officer under sub-rule (1A), he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04.

(2A) Where the person referred to in sub-rule (1A) has made partial payment of the amount communicated to him or desires to file any submissions against the proposed liability, he may make such submission in Part B of FORM GST DRC-01A.

...DELIVERY OF SCN VIA EMAIL...

Rule 142. of CGST Rules, 2017

Notice and order for demand of amounts payable under the Act.-

(4) The representation referred to in sub-section (9) of section 73 or sub-section (9) of section 74 or sub-section (3) of section 76 or the reply to any notice issued under any section whose summary has been uploaded electronically in FORM GST DRC-01 under sub-rule (1) shall be furnished in FORM GST DRC-06.

*(5) A summary of the order issued under section 52 or section 62 or section 63 or section 64 or section 73 or section 74 or section 75 or section 76 or section 122 or section 123 or section 124 or section 125 or section 127 or section 129 or section 130 shall be **uploaded electronically** in FORM GST DRC-07, specifying therein the amount of tax, interest and penalty payable by the person chargeable with tax.*

(6) The order referred to in sub-rule (5) shall be treated as the notice for recovery.

*(7) Where a rectification of the order has been passed in accordance with the provisions of section 161 or where an order uploaded on the system has been withdrawn, a summary of the rectification order or of the withdrawal order shall be **uploaded electronically** by the proper officer in FORM GST DRC-08.*

...DELIVERY OF SCN VIA EMAIL...

Ratan Coal 2015 (322) ELT 548 (Tri.-Del.)

- 🕒 *“8. From the above said provision the order is to be sent to the assessee through the registered post. In this case admittedly order was not communicated through registered post or any other method prescribed under Section 37C of the Central Excise Act, 1944. Therefore I hold that communication to the appellant for cancellation of registration certificate dated 30-4-2010 as defective.”*

...DELIVERY OF SCN VIA EMAIL...

Ru's Marketing and Creative Unit vs. Commissioner of Service tax, Coimbatore 2018 (11) GSTL 113 (Mad.)

- ⌚ Appeal to Appellate Tribunal - Limitation - Certified copy of appellate order not served, either on assessee or their authorised representative in manner as contemplated under Section 37C(1)(a) of Central Excise Act, 1944 - *HELD* : Computation of time for filing appeal starts from date of service of certified copy of order, and it was not served, there was no delay in filing of appeal - Section 83 of Finance Act, 1994

...DELIVERY OF SCN VIA EMAIL

***Commr. Of Cus. (Import & General), New Delhi vs. Buhariwal Logistics 2016 (332)
ELT 278 (Del.)***

- 🕒 Investigation - Summons - Non-delivery due to their being sent to address from which that person had shifted - Department not making case that he attempted to evade summons or that any coercive action was required to procure his presence - In such case, no adverse inference could be drawn against that person. *[para 20]*

Case Study 2 – Question 2

Can Department
issue SCN without
specifying the
category of service?

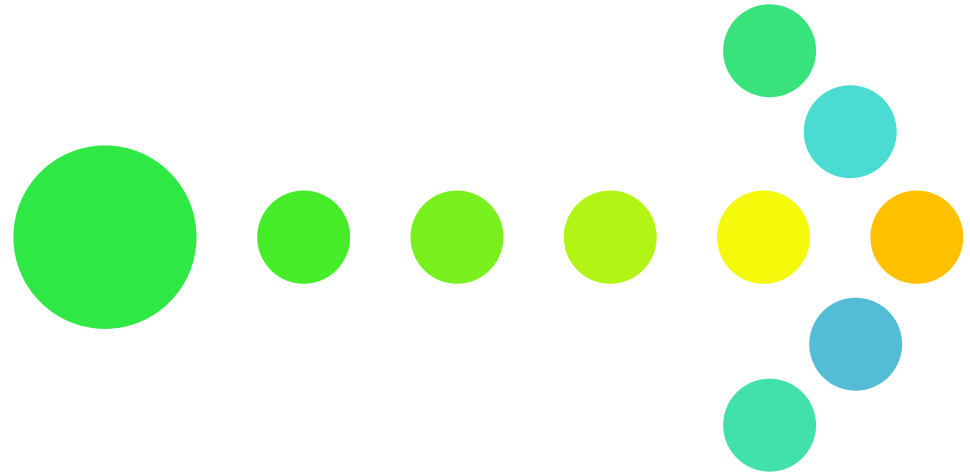
Case Study 2 –Question 2

BRINDAVAN BEVERAGES (P) LTD. 2007 (213) E.L.T. 487 (S.C.)

10. *There is no allegation of the respondents being parties to any arrangement. In any event, no material in that regard was placed on record. 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 the instant case, what the appellant has tried to highlight is the alleged connection between the various concerns. That is not sufficient to proceed against the respondents unless it is shown that they were parties to the arrangements, if any. As no sufficient material much less any material has been placed on record to substantiate the stand of the appellant, the conclusions of the Commissioner as affirmed by the CEGAT cannot be faulted.*

Case Study 2 – Question 3

Can Department
pass an order
confirming
service tax
demand on
RCM basis?



Case Study 2 – Question 3

🕒 **Commissioner of Customs, Mumbai vs. Toyo Engineering India Limited MANU/SC/3625/2006 (SC)**

*“11. Learned Counsel for the Revenue tried to raise some of the submissions which were not allowed to be raised by the Tribunal before us, as well. We agree with the Tribunal that the revenue could not be allowed to raise these submissions for the first time in the second appeal before the Tribunal. Neither adjudicating authority nor the appellate authority had denied the facility of the project import to the respondent on any of these grounds. **These grounds did not find mention in the show cause notice as well. The Department cannot be travel beyond the show cause notice.** Even in the grounds of appeals these points have not been taken.”*

Case Study 2 – Question 4

**Can Department
pass an order
without providing
an opportunity of
being heard?**

Case Study 2 – Question 4

ORYX FISHERIES PRIVATE LIMITED 2011 (266) E.L.T. 422 (S.C.)

- ⊗ 31. *It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.*
- ⊗ 32. *Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show cause notice.*
- ⊗ 33. *The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it.*

Pre-consultation before issuing SCN

🕒 **C.B.I. & C. Circular No. 1076/02/2020-CX., dated 19-11-2020**

*“4. Due to the above change in monetary limits of adjudication and to lend clarity on this issue, it is hereby clarified that **“Pre-show cause notice consultation with assessee, prior to issuance of SCN in case of demands of duty is above Rupees 50 Lakhs (except for preventive/offence related SCN’s), is mandatory and shall be done by the Show Cause Notice issuing authority”.**”*

Opportunity of being heard – GST

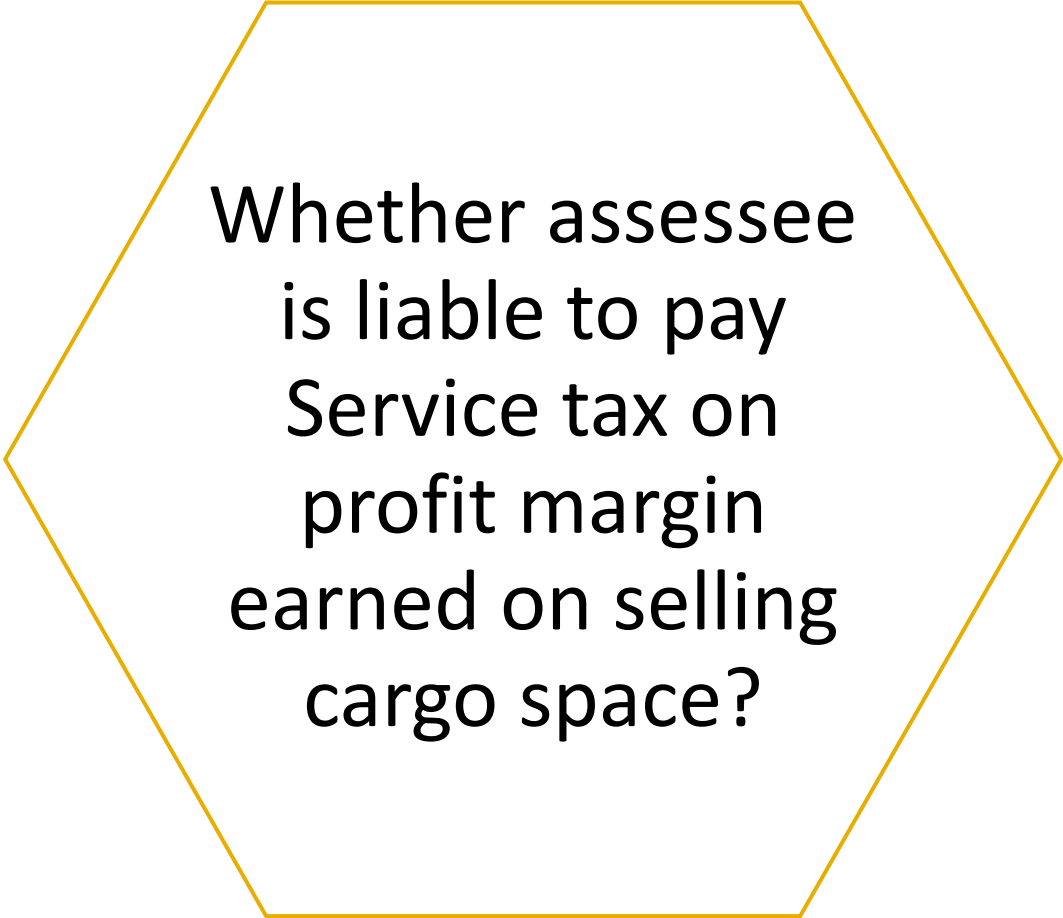
Section 75 of CGST Act, 2017

(4) An opportunity of hearing shall be granted where a request is received in writing from the person chargeable with tax or penalty, or where any adverse decision is contemplated against such person

Case Study 3

- ⌚ M/s. Jammed Freight Forwarders Private Limited (JFFPL) is engaged in booking cargo space on ships. It books cargo space on vessel and sells such space to its customers who intend to transport their goods from India to abroad
- ⌚ Vessel operators raise invoice on JFFPL and JFFPL further raise invoice on customers after adding its margin
- ⌚ Department had conducted search and seizure proceedings on JFFPL. During the proceedings, Department took a statement of Director under oath wherein Director stated that JFFPL earns margin in cargo space booking and agreed to pay service tax
- ⌚ Therefore, in view of statement recorded, JFFPL is issued a SCN demanding Service tax on margin earned from selling cargo space alongwith interest and penalties
- ⌚ Since statement of Director was recoded, personal penalty was also proposed in SCN on the Director.

Case Study 3 – Question 1



Whether assessee
is liable to pay
Service tax on
profit margin
earned on selling
cargo space?

Case Study 3 – Question 1

Surya Shipping vs. Commissioner of Central Excise & ST, Rajkot 2020 (2) TMI 282 - CESTAT AHMEDABAD

- 🕒 “4. We find that there is no dispute about the activity being carried out by the appellant i.e. they are engaged in purchase and sale of space on ocean going vessels. In the transaction of purchase and sale of space, they earn some profit for the reason that in some cases, the sale price of the space to various exporters is more than the purchase price of the space paid to shipping companies. *In our considered view, there is no service involved in such transaction as the purchase and sale of the space is an activity of sale and purchase and hence, not liable to service tax. This issue has been considered by various judgments time and again and this Tribunal held that since the activity of sale and purchase involves no service hence the profit earned on sale of space is not liable to service tax.*”

Case Study 3 – Question 1

Greenwich Meridian Logistics Vs Commissioner of Service Tax 2016 (43) STR 2015 (Tri-Mum)

- ⊗ *“12. The appellant takes responsibility for safety of goods and issues a document of title which is a multi-modal bill of lading and commits to delivery at the consignee’s end. To ensure such safe delivery, appellant contracts with carriers, by land, sea or air, without diluting its contractual responsibility to the consignor. Such contracting does not involve a transaction between the shipper and the carrier and the shipper is not privy to the minutiae of such contract for carriage. The appellant often, even in the absence of shippers, contract for space or slots in vessels in anticipation of demand and as a distinct business activity. Such a contract forecloses the allotment of such space by the shipping line or steamer agent with the risk of non-usage of the procured space devolving on the appellant. **By no stretch is this assumption of risk within the scope of agency function. Ergo, it is nothing but a principal-to-principal transaction and the freight charges are consideration for space procured from shipping line. Correspondingly, allotment of procured space to shippers at negotiated rates within the total consideration in a multi-modal transportation contract with a consignor is another distinct principal-to-principal transaction. We, therefore, find that freight is paid to the shipping line and freight is collected from client-shippers in two independent transactions.**”*

Case Study 3 – Question 1

Circular No. 197/7/2016 – Service Tax dated 12.08.2016

- ⌚ *“2.2 The freight forwarders may also act as a principal who is providing the service of transportation of goods, where the destination is outside India. In such cases the freight forwarders are negotiating the terms of freight with the airline/carrier/ocean liner as well as the actual rate with the exporter. The invoice is raised by the freight forwarder on the exporter. In such cases where the freight forwarder is undertaking all the legal responsibility for the transportation of the goods and undertakes all the attendant risks, he is providing the service of transportation of goods, from a place in India to a place outside India. He is bearing all the risks and liability for transportation. In such cases they are not covered under the category of intermediary, which by definition excludes a person who provides a service on his account.”*

Case Study 3 – Question 2

Can JFFPL
seek cross-
examination
of the
Director?

Case Study 3 – Question 2

Circular No. 1053/2/2017-CX., dated 10-3-2017

14.9 Corroborative evidence and Cross-examination : Where a Statement is relied upon in the adjudication proceedings, it would be required to be established through the process of cross-examination, if the noticee makes a request for cross-examination of the person whose statement is relied upon in the SCN. During investigation, a statement can be fortified by collection of corroborative evidence so that the corroborative evidence support the case of the department, in cases where cross-examination is not feasible or the statement is retracted during adjudication proceedings. It may be noted retracted statement may also be relied upon under given circumstances. Frivolous request for cross-examination should not be entertained such as request to cross examine officers of CERA

Case Study 3 – Question 2

Jet Unipex vs. Commissioner of Customs, Chennai 2020 (373) ELT 649 (Mad.)

Certain statements of petitioners seems to indicate admissions regarding undervaluation and cash transactions in past to evade Customs duty - Also, several documents recovered during course of investigation which form basis of proposals in show cause notice - Confirmation of demand solely based on statements recorded under Section 108 of Customs Act, 1962 would require cross-examination by petitioner

Case Study 3 – Question 3

Whether SCN
issued on
company with
personal penalty
on Director is
valid?

Case Study 3 – Question 3

Section 73 (1A) of Finance Act, 1994

- ⌚ *Notwithstanding anything contained in sub-section (1), (except the period of thirty months of serving the notice for recovery of service tax) the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, **on the person chargeable to service tax**, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices.”*

Case Study 3 – Question 3

S. 73 of CGST Act, 2017

Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for any reason other than fraud or any wilful-misstatement or suppression of facts.

*(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded, or where input tax credit has been wrongly availed or utilised for any reason, other than the reason of fraud or any wilful-misstatement or suppression of facts to evade tax, he shall **serve notice on the person chargeable with tax** which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him 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.*

- Section 73(1A) of Finance Act, 1994 requires issuance of SCN to the person (not the Company)

Case Study 4

- ⌚ Kamalkanth Society entered into a development agreement with ABC Private Limited for redevelopment of the society. As per the agreement, ABC Private Limited agreed to provide flats free of cost in the newly constructed building to the members of society. Kamalkanth Society allowed ABC Private Limited to use the development potential of land by loading FSI/TDR and redevelop the building. ABC Private Limited can recover the cost of project by selling additional flats to prospective buyers. A SCN was issued to ABC Private Limited alleging that redevelopment of society is liable to service tax. Also, Department issued a letter to Kamalkanth Society demanding service tax on transfer of development rights alongwith interest and penalties?

Case Study 4 – Question 1

In view of pendency of decision of ***Vasantha Green Projects 2019 (20) GSTL 568 (Tri.-Hyd.)*** in Supreme Court, whether assessee should respond to such SCN?

Case Study 4 – Question 1

Vasantha Green Projects [2018 (5) TMI 889-CESTAT Hyderabad] dated 11th May, 2018 (pending in Supreme Court)

- ⊗ *“7. It has to be construed, in the above factual matrix, that construction of villas for the land owners is a consideration towards the land on which villas were constructed and offered for sale to prospective customers. It would not be a rocket science to understand that the value which has been arrived at for sale of villas to prospective customers, would include the consideration paid or payable for acquisition of land. **It is not a case that appellant has not discharged the service tax liability on the value received for the villas from prospective customers. In our view, if the consideration towards the acquisition of the land has been included in the value of the villas sold to prospective customers and appropriate service tax liability has been discharged the same value, it cannot be again made liable to service tax under the premise that sale value of the villas given to land owners is a consideration on which service tax liability was not discharged.**”*

Case Study 4 – Question 2

Whether
department can
recover service tax
on transfer of
development
rights merely by
issuing a letter?

Case Study 4 – Question 2

- ⌚ Adjudication without SCN can not sustain
 - *Gokak Patel Volkart Limited v. CCE 1987 (28) ELT 53 (S.C)*
 - *CCE, Ludhiana v. Dinesh Kumar 2006 TIOL 84 (CESTAT-Del)*
- ⌚ No demand without proper SCN
 - *BSNL 4 STT 67 (Tri-Chennai)*

Case Study 4 – Question 3

Can Kamalkanth Society opt to pay service tax under protest to save on interest cost? Can Kamalkanth Society discharge service tax through balance of ITC of CGST?

Case Study 4 – Question 3

Rule 233B of Central Excise Rules 1944.

Procedure to be followed in cases where duty is paid under protest.-

(1) Where an assessee desires to pay duty under protest he shall deliver to the proper officer a letter to this effect and give grounds for payment of the duty under protest.

(2) On receipt of the said letter, the proper officer shall give an acknowledgement to it.

(3) The acknowledgement so given shall, subject to the provisions of sub-rule (4), be the proof that the assessee has paid the duty under protest from the day on which the letter of protest was delivered to the proper officer.

(4) An endorsement "Duty paid under protest" shall be made on all copies of the gate pass, the Application for Removal and Form R.T.12 or Form R.T. 13, as the case may be .

(5) In cases where the remedy of an appeal or revision is not available to the assessee against any order or decision which necessitated him to deposit the duty under protest, he may, within three months of the date of delivery of the letter of protest, give a detailed representation to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise.

Case Study 4 – Question 3

Duty under protest under GST?

🕒 ***GTL Infrastructure Ltd. Vs. State Of Chhattisgarh 2020 (37) G.S.T.L. 414 (Chhattisgarh)***

*“4. Perused the documents. Considering the same and also considering the prayer made by the petitioner that at this stage **he submits that he may be allowed to deposit the difference amount of tax under protest** as also file an application for consideration which may be decided and the registration may be restored so that timely the return can be filed and the petitioner can continue with the business. **Taking into such fact since the petitioner is fair to deposit the difference amount under protest, it is directed that the petitioner may deposit the difference of tax amount under protest** within a period of two weeks before respondents No. 2 & 3 then in such case, petitioner’s application for re-registration may be considered within a further period of two weeks keeping in view the factual aspect which has happened in this case. It is further directed that the amount so deposited shall be subject to the order which may be passed by respondent No. 2.”*

Case Study 4 – Question 3

M/s. Jyoti Construction vs. Deputy Commissioner of CT & GST, Barbil Circle, Jajpur and another (Orissa HC)

🕒 “14. The Court does not find the above decision to be helpful to the Petitioner. *It is not possible to accept the plea of the Petitioner that “Output Tax”, as defined under Section 2(82) of the OGST Act could be equated to the pre-deposit required to be made in terms of Section 107 (6) of the OGST Act. Further, as rightly pointed out by Mr. Mishra, learned ASC, the proviso to Section 41 (2) of the OGST Act limits the usage to which the ECRL could be utilised. It cannot be debited for making payment of pre-deposit at the time of filing of the appeal in terms of Section 107 (6) of the OGST Act. It is not therefore possible to accept the plea Section 107 (6) of the OGST Act is merely a “machinery provision”.*”

Case Study 5

- ⌚ Department had issued SCN on 30.12.2020 against K. Mehta Private Limited demanding Service Tax of Rs. 50 crores for the period 2015-16 to 2017-18 (upto June'17). Department had delivered the said SCN via speed post. However, postman handed over the SCN to K. Neta Private Limited instead of K. Mehta Private Limited. Also, there was no DIN on SCN.

Case Study 5 – Question 1

Whether such delivery of SCN to another person is valid delivery of SCN?

Case Study 5 – Question 1

🕒 ***Ru's Marketing and Creative Unit 2018 (11) GSTL 113 Madras HC***

- *“...it is evident that the certified copy of the appellate order dated 08.05.2013 has not been served, either on the assessee or the authorised representative, as the case may be, in the manner as contemplated under Section 37C(1)(a) of Central Excise Act, 1944 made applicable to Service Tax, as per Section 83 of Finance Act, 1994.”*

🕒 ***Shagird Decorators - Unreported judgement (Appeal No. 85809 of 2019)- Tribunal Mum.***

- *“There is no doubt that the impugned order has been dispatched by speed post but that does not necessarily imply service on the addressee as the signature of delivery manifest does not bear any resemblance to the names of the employees listed in the certificate of Chartered Accountant. **It would appear that the mail intended for the applicant had been delivered to an individual whose connection with the applicant is not decipherable. While dispatch suffices to evidence service, it is open to the addressee to rebut the presumption with circumstantial evidence of non-delivery”***

Case Study 5 – Question 2

What if
DIN is not
quoted on
SCN?

Case Study 5 – Question 2

- ⊗ As per **Section 83 of Finance Act, 1994** certain provisions of Central Excise Act, 1944 is made applicable to Finance Act, 1994 which includes Section 37B of Central Excise Act, 1944
- ⊗ Further vide Circular: 122/41/2019-GST dated 05.11.2019 quoting of 'DIN' was made mandatory in the communication made to the taxpayer. The relevant extract is reproduced below:

*“2. The Board in exercise of its power under section 168(1) of the CGST Act, 2017/**Section 37B of the Central Excise Act, 1944** directs that **no search authorization, summons, arrest memo, inspection notices and letters issued in the course of any enquiry shall be issued** by any officer under the Board to a taxpayer or any other person, on or after the 8th day of November, 2019 **without a computer generated Document Identification Number (DIN)** being duly quoted prominently in the body of such communication. The digital platform for generation of DIN is hosted on the Directorate of Data Management (DDM)’s online portal “cbicddm.gov.in”.”*

Case Study 5 – Question 2

- 🕒 Further vide Circular: 128/47/2019-GST dated 23.Dec.2019 it was further clarified that:
*“2. Vide the aforementioned Circular, the Board had specified that the DIN monitoring system would be used for incorporating a DIN on search authorisations, summons, arrest memos, inspection notices etc. to begin with. Further, a facility was provided to enable the recipient of these documents/ communications to easily verify their genuineness by confirming the DIN online at cbic.gov.in. In continuation of the same, **the Board has now directed that electronic generation and quoting of Document Identification Number (DIN) shall be done in respect of all communications (including e-mails) sent to taxpayers and other concerned persons by any office of the Central Board of Indirect Taxes and Customs (CBIC) across the country. Instructions contained in this Para would come into effect from 24-12-2019.”***
- 🕒 From the above discussion, it can be observed that quoting of ‘DIN’ has been made mandatory even for Finance Act, 1994 and even for email communications w.e.f **24.12.2019**

Case Study 6

- ⌚ Mr. Darpan has a residential house containing ground plus 2 floors. It had given flat on ground floor on rent to Mr. Chunawala who used it as office and remaining 2 floors were used by Mr. Darpan himself. Mr. Darpan was of the view that no service tax is applicable on renting of residential property therefore, neither service tax was collected from Mr. Chunawala nor service tax was deposited to the Government. A SCN was issued to Mr. Darpan stating that service tax is applicable on renting of residential premises if such premises is used for a purpose other than residence. Thus, service tax of Rs. 50 Lakhs was demanded by issuing SCN.

Case Study 6 – Question 1

Whether Mr.
Darpan can claim
exemption
relating to renting
of residential
property?

Case Study 6 – Question 1

🕒 **Section 66D of Finance Act 1994.**

🕒 *Negative list of services.*

The negative list shall comprise of the following services, namely:-

(m) services by way of renting of residential dwelling for use as residence;

🕒 **Under GST: Notification No. 12/2017- Central Tax (Rate)**

<i>Sl. No</i>	<i>Chapter, Section, Heading, Group or Service Code (Tariff)</i>	<i>Description of Services</i>	<i>Rate (per cent.)</i>	<i>Condition</i>
12	Heading 9963 or Heading 9972	Services by way of renting of residential dwelling for use as residence.	Nil	Nil

Case Study 6 – Question 2

Whether Mr. Darpan would be able to collect service tax from Mr. Chunawala?

Case Study 6 – Question 2

UNION OF INDIA vs. BENGAL SHRACHI HOUSING DEVELOPMENT LIMITED 2017 (6) G.S.T.L. 356 (S.C.)

- ① *“18. It is thus clear, on a conspectus of the authorities of this Court, that service tax is an indirect tax, meaning thereby that the said tax can be passed on by the service provider to the recipient of the service. Being a tax on service, it is not a direct tax on the service provider but is a value added tax in the nature of a consumption tax on the activity which is by way of service. It is settled by various judgments of this Court that, in order to have conceptual clarity, the taxable event and the taxable person are distinct concepts. Thus, in Babu Ram Jagdish Kumar & Co. v. State of Punjab, (1979) 3 SCC 616, this Court made it clear that, in the case of a purchase tax, the “taxable event” is the purchase of paddy, whereas the “taxable person”, who is the person liable to pay the tax, is the purchaser. In the present case, therefore, the “taxable event” is the provision of the service of renting out immovable property, and the “taxable person”, that is the person liable to pay tax, is the service provider, namely the lessor.”*

Case Study 6 – Question 2

- 🕒 ***Satya Developers Pvt. Ltd. vs. Pearey Lal Bhavan Association 2015 (39) STR 429 (Del.) affirmed by Hon'ble Supreme Court in 2015 (39) STR J173 (SC)***

Service Tax, being an indirect tax, capable of a contract between the parties on the subject as to who would ultimately bear the burden of Service Tax imposed - Since as per lease deed in the present case, lessee is liable for payment of all taxes, the Service Tax liability shall be on the lessee

- 🕒 ***Satya Developers Pvt. Ltd. vs. Pearey Lal Bhavan 2017 (3) GSTL 325 (Del.)***

Whether Service Tax liability has been agreed not to be passed on to recipient of service depends on interpretation of clauses entered into between parties

Case Study 6 – Question 3

**Can Department issue
SCN under Service Tax
law even after
introduction of GST
law?**

Case Study 6 – Question 3

Rayala Corporation (P) Ltd. vs. Director of Enforcement 1969 (2) SCC 412 (SC)



General Finance Co. and Others vs. Assistant Commissioner of Income tax, Punjab (2002) 7 SCC 1 (SC)



Case Study 6 – Question 3

JSK Marketing 2021 (46) G.S.T.L. 369 (Bom. HC)

- ⌚ *Finance Act, 1994 to the extent of Chapter V of the said Act have been repealed, subsection (2) of Section 174 states that the aforesaid action shall not affect any investigation, inquiry, verification (including scrutiny and audit) assessment proceedings, adjudication and any other legal proceedings or recovery of arrears or remedy in respect of any such duty, tax, service charge, penalty, fine etc. and other legal proceedings or recovery of arrears or remedy as may be instituted, continued or enforced and any such tax may be levied or imposed as if the aforesaid acts had not been so amended or repealed. Thus it is evident that respondent No. 2 has power and authority to issue summons to the petitioners and more specifically petitioner No.2 under the provisions of the aforementioned statutes to give evidence and produce the relevant documents in inquiry*

Indiscreet SCN – CBIC instruction dated 26.10.21

- ⌚ “2. In this regard, the undersigned is directed to inform that CBIC vide instructions dated 01.04.2021 and 23.04.2021 issued vide F.No.137/472020-ST, has directed the field formations that *while analysing ITR-TDS data received from Income Tax, a reconciliation statement has to be sought from the taxpayer for the difference and whether the service income earned by them for the corresponding period is attributable to any of the negative list services specified in Section 66D of the Finance Act, 1994 or exempt from payment of Service Tax, due to any reason. It was further reiterated that demand notices may not be issued indiscriminately based on the difference between the ITR-TDS taxable value and the taxable value in Service Tax Returns.*
- ⌚ 3. It is once again reiterated that instructions of the Board *to issue show cause notices based on the difference in ITR-TDS data and service tax returns only after proper verification of facts, may be followed diligently. Pr. Chief Commissioner /Chief Commissioner (s) may devise a suitable mechanism to monitor and prevent issue of indiscriminate show cause notices. Needless to mention that in all such cases where the notices have already been issued, adjudicating authorities are expected to pass a judicious order after proper appreciation of facts and submission of the noticee.”*

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