Background Material on GST Demands & Appellate Remedies

The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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GST Demands

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Foreword

In the intricate world of taxation, the advent of the Goods and Services Tax (GST) has marked a profound shift. It has simplified, streamlined, and modernized the way taxes are collected and managed. It has significantly transformed the way businesses operate and has brought greater transparency and efficiency in the collection of indirect taxes. Government's diligence efforts in promptly addressing the industry's diverse challenges and public concerns by making necessary amendments to the law and issuing timely clarifications as needed, are noteworthy. ***Referring to the GST as the "Tryst with Modernity"***, the Hon'ble Vice-President of India Shri Jagdeep Dhankhar remarked at the Global Professional Accountants Convention organized by the ICAI at Ahmedabad ***that it stands as the largest tax reform since independence, completely transforming the country's indirect taxation landscape. He also praised the Chartered Accountants fraternity for their role in shaping Goods and Services Tax into the user-friendly 'Good and Simple Tax.'***

The Institute of Chartered Accountants of India (ICAI) through its GST & Indirect Taxes Committee has been playing a vital role in implementation of GST in India by providing suggestions to the Government at each stage of development of GST. The GST & Indirect Taxes Committee of ICAI has consistently played an active role in offering essential assistance to its members and in enhancing their skills by organizing various courses, conferences and programmes, live webcasts, e-learning etc. on various aspects of GST. Additionally, the Committee has been regularly bringing out useful technical publications covering a wide array of GST related topics.

I am happy to note that the GST & Indirect Taxes Committee of ICAI is bringing out one more publication **'Background Material on GST Demands & Appellate Remedies'** to cover various legal and procedural aspects related to handling of GST demands and what are the available appellate remedies. The publication explains the concepts/procedures relating to Assessment, Audit and Show Cause Notices - Approach and Reply thereto in an easy-to-understand language and it is aimed at enhancing the knowledge base of members in a simple and concise manner.

I congratulate CA. Sushil Kumar Goyal, Chairman, CA. Umesh Sharma, Vice-Chairman and other members of GST & Indirect Taxes Committee for coming out with this publication and for taking active steps in providing regular guidance to the members and other stakeholders at large.

I am sure that members will find this publication very useful in discharging the statutory functions and responsibilities in an efficient and effective manner.

CA. Aniket Sunil Talati
President, ICAI

Date: December 04, 2023
Place: New Delhi

Preface

In the complex and ever-evolving world of taxation, the implementation of the Goods and Services Tax (GST) in the country has brought about a significant shift in the way we understand and manage taxation. GST is a highly dynamic tax as it continually evolves to suit the needs of the businesses in the changing economic conditions of the country.

Tax authorities issue GST demands for a wide range of matters including assessments, audits, reversals of input tax credits etc. Taxpayers are required to reply to such demand notices and take appropriate steps for conclusion of the proceedings. When the taxpayers want to contest the unfavourable demand orders, they prefer an appeal before the Appellate Authority. Recently, the Government has constituted 31 State benches of the Goods and Services Tax Appellate Tribunal (GSTAT), the second Appellate Authority in GST. With this step, the Government has moved closer to having a full-fledged GST Appellate Tribunal which will expedite the dispute resolution process.

The GST & Indirect Taxes Committee of ICAI, being entrusted with the responsibility of knowledge dissemination, has taken an initiative to prepare 'Background Material on GST Demands & Appellate Remedies' for those navigating the intricate web of demands and appeals. This comprehensive guide is a vital resource for professionals seeking clarity and guidance for replying to GST demands and preferring the appeals.

We sincerely thank CA. Aniket Sunil Talati, President, ICAI and CA. Ranjeet Kumar Agarwal, Vice-President, ICAI for their encouragement to the initiatives of the GST & Indirect Taxes Committee. We express our gratitude for the untiring effort of CA. A Jatin Christopher for sharing his intellectual expertise in this publication. We place on record the technical and administrative support provided by CA. Smita Mishra, Secretary to the Committee and CA. Ayushi Aggarwal in finalizing this Background Material. We trust this material will be of practical use to all the members of the Institute and other stakeholders.

We welcome suggestions at *gst@icai.in* with a request to visit our website *https://idtc.icai.org* and provide valuable inputs in our journey to make GST truly a good and simple tax.

CA. Umesh Sharma
Vice – Chairman
GST & Indirect Taxes Committee

CA. Sushil Kumar Goyal
Chairman
GST & Indirect Taxes Committee

Date: December 04, 2023
Place: New Delhi

Contents

Readers may make note of the following while reading the publication:

Reference to the Central Goods and Services Tax Act, 2017 ("the CGST Act"), wherever stated, must be understood to mean and include the respective State Goods and Services Tax Act, 2017/ Union Territory Goods and Services Tax Act, 2017 ("the SGST Act/ UTGST Act") and relevant provisions, where required, of Integrated Goods and Services Tax Act, 2017("the IGST Act").

Unless otherwise specified, the section numbers and rules referred to in this publication pertain to Central Goods and Services Tax Act, 2017 and Central Goods and Services Tax Rules, 2017.

Chapter 1
Introduction

1. Introduction

The word 'representation', in the context of indirect tax litigation, would mean the act of appearing in a Client's cause to offer explanation, information or defence in relation to proceedings before the authorities or Tribunal.

Representation (discussed in detail later), is a legal right that upholds one's right to personal liberty which has been granted by various statutes including taxation related statutes, to provide the Client (the person represented) the benefit of professional assistance in presenting his defence. But for the specific provisions in the taxing statutes permitting appearance through a representative, the party or assessee has to appear in person, which may not be very effective due to reasons like lack of knowledge of the subject, lack / absence of legal and communication skills, inadequate time at disposal etc.

Deep insights into the working of each business sector that CAs have developed over the years, enable them to grasp the facts independent of the data available in financials, bank statements, contractual documents and other records. Knowledge of accounts or GST law alone without domain understanding would be deficient to determine the treatment applicable in each case. Unlike welfare legislations, tax laws must be interpreted strictly; even tax laws are not free from legal fiction that needs special attention.

2. Importance

Representation in tax litigation proceedings before the authorities or Tribunal is an important service which a CA can provide to his Client. Having used the services of the CA in compliance function, they would also look forward to assistance by the same CA in case of litigation later. In fact, representation can also be a stand-alone assignment undertaken by a CA and he can specialize in handling litigation matters up to the Tribunal level. If the matter advances to High Court or Supreme Court, although a CA cannot legally represent the Client before the higher judiciary, the CA can provide valuable assistance to lawyers in handling the matters before such forums.

GST disputes involve either question of fact or question of law or both. GST Appellate Tribunal being the last fact-finding authority, it is important to note

that CA is authorized to represent questions of fact before such final authority. And for this reason, services of CA in pre-notice and post-adjudication proceedings can bring invaluable benefit to taxpayers and tax authorities in uncovering the facts reliably.

GST travels beyond books of accounts in so far as transactions carried out where consideration takes non-monetary form or where consideration is absent and yet treated to be a taxable supply in terms of Schedule I of the CGST Act. These transactions do not appear in the financial statements but are exposed to appropriate treatment in GST. There are transactions that are disclosed in the financial statements in a certain manner that it may appear to be incongruous with the provisions of the CGST Act such as accounting of leased assets in the books of lessor at historical cost and also in the books of the lessee at NPV of future lease payments (as per Ind AS-116) or revenue accounted on completed contract method in financials (as per AS-9) but accounted as revenue for income-tax purposes (as per ICDS-III). Yet GST incidence is dictated based on 'time of supply'. Even though such differences exist, none of these records are erroneous. It is here that CA is best suited to unravel the apparent incongruity, present the information harmoniously and explain the correctness of self-assessment carried out by taxpayer.

3. Opportunities for CAs

Conventionally, apart from audit and accounts functions, CAs have been practicing in the area of income tax for decades. For income tax purposes, a CA would provide various services ranging from assisting the Client in filing returns, advising on critical issues, assistance in assessment, drafting and filing replies to notices and appeals and representing before authorities and Tribunal. Most of the litigation under income tax up to the Tribunal level is being handled by CAs.

With changing economic scenario leading to increase in manufacturing and service activity and widening of tax base under the GST regime, the scope for CAs under indirect tax as a whole has enlarged. The Institute of Chartered Accountants of India (ICAI) has been making efforts to empower the CAs with knowledge of indirect taxes covering GST in a significant way including customs and other earlier laws like central excise, service tax, VAT where there are still pending disputes to be redressed. In this regard, a certification course on indirect tax was introduced by the ICAI in early 2018 and has been conducted successfully across the country. More recently, the certificate courses are being conducted with a specialization in the field of indirect tax i.e. Certificate Course on GST.

It is thus felt that CAs could have enormous opportunities in handling indirect tax litigation. In general, CAs can provide assistance to their Clients in the following areas:

(a) Assisting the Client to prepare for Departmental audit and due diligence audits.

(b) Advising the Client during audit and investigation and providing assistance in clarifying the issues raised by the audit/investigation team, preparation of statements/ reports to be submitted to audit/ investigation team, preparation and submission of documents requested by the Department, drafting of letters, correspondence and reply to audit observations.

(c) Advising the Client on the course of action to be adopted i.e. whether to litigate or not on the issues raised by the Department in the course of audit/ investigation.

(d) Representing Clients in adjudication proceedings by drafting reply to show cause notice, submissions and attending hearings and post-hearing filing of submissions/evidence (if needed).

(e) Representing Clients in appellate proceedings before the First Appellate Authority or Tribunal. The professional assistance would encompass drafting of appeal including statement of facts and grounds and appearance before the authority or Tribunal.

(f) Support functions in (a) and (b) supra, by assisting the other Counsel (CA or Advocate) in the above areas including preparation of notes and briefing other Counsel.

(g) Assisting Advocates in matters before the High Court/Supreme Court including understanding facts for preparation of grounds for appeal, counter, rejoinder and legal research.

4. Who can represent?

The relevant statutes contain specific provisions for representation by authorized representatives, which have been elaborately dealt with later. Only if a CA is authorized by a particular statute, he can act as an authorized representative in litigation proceedings and not otherwise.

5. Purpose of representation

Representing a Client in an investigation is neither generally permitted nor advisable, as the representative becomes a witness. Attending summons on

behalf of a Client and giving statements should be avoided, as the CA is not integrally involved in the operations of the Client, and as such, may not possess the required first-hand information and the expertise to provide evidentiary statements.

The purpose of representation is to present the facts without any supposition or imagination about facts. Facts refer the state of affairs that are either undisputed or sufficiently supported by reliable evidence. Facts are exposed to the treatment in law to arrive at any liability that is to be demanded. Representation is to act under the 'instructions' of the taxpayer. Authorized Representative who is the CA, cannot and will not travel beyond the scope of those 'instructions'. The manner of presenting the outcome of law within the confines of those 'instructions' is the craft of the CA.

Taxpayer always bears 'authorship' of the tax positions taken, even if they were taken after availing the advice and consultations of CA or other experts. CA will only present the tax position authored by the taxpayer and as such stands at a certain distance from the consequences that arise. Revenue is welcome to accept or reject the tax position taken by the taxpayer. CA will neither guarantee the outcome of any *quasi*-judicial proceedings nor indemnify the taxpayer for the outcome of those proceedings.

6. Skills and knowledge required

(a) Knowledge of concerned tax laws is a *sine qua non* for effectively representing the Client in litigation.

(b) Knowledge of basic rules of evidence and administrative law is necessary.

(c) Communication skills should be an area of strength.

(d) Law is expressed in language and hence, there is a need to develop both speaking and writing skills. Knowledge of literature (legal and English) would enhance such skills.

(e) Thorough knowledge of the case law relating to the concerned issue in dispute helps in keeping abreast of current interpretations by Courts and Tribunal.

7. Ethics and integrity

Unethical practices and lack of integrity bring disgrace not only to the profession but also harms society. Maintaining high standards of professional integrity and ethics is a must for professionals like CAs.

8. Different forms of representation

(a) **Representation in pre-adjudication proceedings:** A CA may coordinate with the Proper Officer in preliminary proceedings such as audit under section 65 or investigation under section 67 of the CGST Act, 2017. But here, the CA acts merely as a channel of communication and does not represent the taxpayer. All communication needs to flow from the taxpayer to the Proper Officer *albeit* by the hands of CA. It is advisable and common for the CA to instruct that written correspondence (letters or emails) be sent from the taxpayer's end (letterhead or email id) to the Proper Officer. Any correspondence directly by the CA may be prefixed with *"under instructions of Client M/s……."* and any assertions on facts in CAs correspondence be prefixed with *"it is the position of Registered Person that……"*.

(b) **Representation in adjudication proceedings:** A CA is expected to provide assistance by advising the Client on the course of action to be adopted, drafting the reply to show cause notice and additional submissions and entering appearance before the Adjudicating Authority.

(c) **Representation in post-adjudication proceedings**: A CA can render professional assistance in (i) revisionary proceedings under section 108 or (ii) appellate proceedings under section 107 and 112 of the CGST Act by drafting rebuttals by way of objections or appeal with statement of facts, grounds and prayer, and appearing before the revisionary authority, Appellate Authority or Tribunal and filing additional submissions, if any.

9. Conclusion

At this juncture, it would also be relevant to refer to the Constitution of India, which is the supreme law of the land. Articles 14 and 21 of the Constitution have been interpreted by the Courts to confer the right of being heard in any of the proceedings. In *Maneka Gandhi v. UoI 1978* [AIR 597 (SC)], the Hon'ble Supreme Court had interpreted these Articles and stated that the right of being heard is part of the principles of natural justice and the procedure established by law should be followed.

Chapter 2
General Principles

1. Principles of Natural Justice

It warrants that the person, against whom an allegation is levelled or made, should be given a reasonable opportunity of being heard before taking any action. In a tax proceeding, the Officer is required to hear the other side before proposing any action and to do so, the said person must be served with a Notice detailing the allegations and the basis on which certain actions are proposed or compliance demanded.

2. Contents of Notice

The Notice should not be vague and should clearly spell out the charges against the noticee. It should draw reference to the relevant statutory provisions that are allegedly contravened by the noticee. This would enable the noticee to admit or rebut the allegations and charges contained in the Notice. Further the Notice should be served on the person chargeable to tax.

3. Contents of Order

The Order should contain findings on the issues raised in the Notice and contentions and submissions made by the noticee. The Order should specifically address the contentions urged by the noticee including judicial decisions cited. The Adjudicating Authority should apply their mind to the facts, issues, contentions urged by the noticee and evidence on record and reach a finding which forms the substance of his responsibility before passing the Order.

4. Hearing

Indirect tax laws specifically contain provisions for conduct of hearing. Hearing is mainly granted to understand, in person, the contentions of the noticee and identify the reasons for differences. If a personal appearance by the noticee or through Counsel aides in this exercise, that must be facilitated. It is not an empty formality as it enables the noticee to place on record his submissions (in oral or in writing) and to lead evidence and cite precedents. The process of appeal is not concluded until the last forum hears the matter.

5. Duties / Powers of the Investigating Authority

The main intention of the investigating authority (DGGI in case of GST) is to unearth certain facts and muster evidence to prove evasion of tax, if any. The investigating authority has no powers to collect tax or compel the person, whose affairs are investigated, to pay taxes. During the course of investigation, the authority may summon witnesses and record statements, search the premises and seize documents. The information collected is thereafter used as a basis to issue show cause notice and not to conclude the process of tax recovery without giving the noticee the opportunity of being heard.

No administrative power can exist unsupervised. Any authority having investigative powers necessarily comes under the administrative supervision of a designated person who has finite powers specified in law. Infinite powers or unspecified powers are impermissible. Administrative law is a salutary development in a society that operates on the basis of 'rule of law'. Restrictions in the powers of investigative authorities are not only expressive but also implicit based on the purpose for which those powers have been conferred. And no such power can be conferred by excluding judicial review.

Illustration 1. Officers of Central Tax Administration visited the premises of a Registered Person who was under administrative control with State Tax Administration. The Registered Person informed the Officers that unless the current proceedings are under section 67, there was no authority to continue the proceedings.

Illustration 2. Audit authorities had visited the registered premises of Registered Person and sought information about the business activities, details of taxable value of services, input tax credit availed and output tax paid etc., for the past six years. The Registered Person submitted records only for the previous five years since even a valid demand beyond five years is time-barred.

6. Duties / Powers of Adjudicating Authority

The Adjudicating Authority exercises quasi-judicial powers and is expected to act in a fair manner while conducting adjudication proceedings. He is supposed to grant a reasonable opportunity of being heard to the noticee. He conducts the hearing before passing the Order. The Adjudicating Authority allows cross-examination of witnesses, if requested, by the noticee. The adjudicator is expected to consider the facts, allegations, submissions and evidence in a holistic manner and pass a speaking Order. The proceedings

culminate in an Order fully or partially accepting the submissions of the noticee or all the proposals in the Notice may be confirmed. The Adjudicating Authority cannot proceed beyond the parameters of the allegations levelled in the Notice and make out a new case against the noticee.

Illustration 3. FORM GST ASMT-10 notice was issued calling for input tax credit register to verify correctness of reversal under rule 42. The Registered Person politely but firmly declined in FORM GST ASMT-11 that there is no authority to call for records as this request implies insufficient information to identify any discrepancy in returns. Proceedings under section 61 are to demand explanation about discrepancies detected and not to discover discrepancies.

7. Duties / Powers of the First Appellate Authority

The First Appellate Authority (Joint Commissioner or Commissioner (Appeals) as recognized under each law) is expected to look into the grounds of appeal and pass a speaking Order either accepting or rejecting the case made out by the Appellant. The Department also has the right to appeal before the First Appellate Authority. The First Appellate Authority can permit submission of new grounds or evidence, if there is sufficient justification for not producing it earlier. The First Appellate Authority hears the appeal and then proceeds to pass an Order. Any delay in filing an appeal can be condoned only up to a limited extent if sufficient cause is shown.

Illustration 4. Intimation for personal hearing was issued by the First Appellate Authority directing the Registered Person to produce books of accounts for verification. The Registered Person objected to the validity of 'verification' exercise attempted by the First Appellate Authority. Only the Order of adjudication is 'at large' before the First Appellate Authority and not the entire books of accounts.

Illustration 5. Proper officer intercepting consignment found documents in Order but disputed the valuation of the consignment and proposed to confiscate the goods under section 130. The Registered Person demanded release of goods and on refusal offered to execute bond under rule 140 and collected the goods. The Proper Officer issued a show cause notice in MOV-10 whereafter objections were made by the Registered Person which were upheld (later) by the First Appellate Authority and the demand dropped for lack of authority in law.

8. Duties / Powers of the Tribunal

The Tribunal functions under the aegis of the Ministry of Finance and has Benches in each State and at additional places as approved. Matters are heard by the Division Bench (two Members) or Single Member Bench. The Tribunal has both Judicial Members and Technical Members. The Tribunal's functions are described as quasi-judicial functions. The Appellate Tribunal is the final 'fact finding' authority. Any delay in filing an appeal can be condoned if sufficient cause is shown. The Orders passed by the Tribunal are appealable either before the High Court or the Supreme Court.

9. Reference to Indian Penal Code provisions

At this juncture, it would be relevant to refer to certain provisions of the Indian Penal Code with respect to matters involving interaction with public servants to understand offences against public servants or offences by public servants. It may be noted that avoiding summons or obstructing public servants in discharging their duties would invite punitive consequences including imprisonment as stated in the table below. Further, the officers conducting adjudication or investigative functions can be liable for punishment if they act beyond the scope of the powers conferred on them.

Sections of IPC	Description of Offences	Punishments
166	Public servant disobeying law with intent to cause injury to any person	Simple imprisonment for a term up to one year, or with fine, or with both. ***Illustration 6.*** *Quite often we find excesses committed by Tax Officers, acting according to their whims and fancy. Such excesses, if proved to be not done in good faith, can be punished.*
167	Public servant framing an incorrect document with intent to cause injury	Imprisonment of either description for a term up to three years, or with fine, or with both. ***Illustration 7.*** *During the course of investigation if the tax officer frames an incorrect document with a view to implicate a taxpayer, then this provision may be invoked.*

Sections of IPC	Description of Offences	Punishments
169	Public servant unlawfully buying or bidding for property	Simple imprisonment up to two years, or with fine, or both and the property, if purchased, shall be confiscated. ***Illustration 8.*** *A property is auctioned and there is a* condition *that the officer should not buy it directly or indirectly. In case of such violation, this provision can be invoked.*
170	Impersonating a public servant	Imprisonment of either description for a term up to two years, or with fine, or both. ***Illustration 9.*** *If a person poses himself as a tax officer or impersonates as officer, he would be punished under this section.*
171	Wearing a garb or carrying token used by public servant with fraudulent intent	Imprisonment of either description, for a term up to three months, or with fine up to Rs.200 or with both. ***Illustration 10.*** *A person wears a garb of a CGST or SGST/UTGST or Customs* Officer *or carries some token which makes others believe that he is such an officer, would be punishable*
172	Absconding to avoid service of summons or other proceeding	Simple imprisonment up to one month, or with fine up to Rs.500 or with both. If it relates to Court of Justice, with simple imprisonment up to six months, or with fine up to Rs.1000, or with both. ***Illustration 11.*** *An alleged evader of tax or a person who has vital information about a tax case, who absconds to avoid service of summons etc., would be punished under this section.*

Sections of IPC	Description of Offences	Punishments
173	Preventing service of summons or other proceeding, or preventing publication thereof	Simple imprisonment up to one month, or with fine up to Rs.500 or with both. If it relates to Court of Justice, with simple imprisonment up to six months, or with fine up to Rs.1000, or with both. ***Illustration 12.*** *A person prevents in any manner service of summons by refusing to accept delivery or prevents its publication would be punished.*
174	Non-attendance in obedience to an order from public servant	Simple imprisonment up to one month, or with fine up to Rs.500 or with both. If it relates to Court of Justice, with simple imprisonment up to six months, or with fine up to Rs.1000, or with both. ***Illustration 13.*** *Proper Officer issues an order or summons to someone to appear before him and if such person does not respond, he can be punished. Care must be taken to confirm that the Proper Officer is acting under valid authorization to investigate or inquire under section 67 of CGST Act and summons issued are pursuant to such inquiry.*
175	Omission to produce document to public servant by a person legally bound to produce it	Simple imprisonment up to one month, or with fine up to Rs.500 or with both. If it relates to Court of Justice, with simple imprisonment up to six months, or with fine up to Rs.1000, or with both. ***Illustration 14.*** *Taxable person or any other person to whom summons is issued cannot refuse or omit to provide documents to the proper*

Sections of IPC	Description of Offences	Punishments
		officer (except 'for cause' of lack of jurisdiction to issue summons) when the said documents are clearly identified in the summons and is in the knowledge or possession of the said person. Doing so would attract punishment under this section.
177	Furnishing false information	Simple imprisonment up to six months, or with fine up to Rs.1000, or with both. If it relates to Court of Justice, with simple imprisonment up to two years, or with fine, or with both. ***Illustration 15.*** *Pursuant to summons, if a person gives false information to a public servant, then this section can be invoked.*
178	Refusing oath or affirmation when duly required by public servant to make it	Simple imprisonment up to six months, or with fine up to Rs.1000, or with both. ***Illustration 16.*** *This can be invoked while recording statements of Deponent either as the person being investigated or as a witness in an investigation against any other taxable person.*
179	Refusing to answer public servant authorized to question	Simple imprisonment up to six months, or with fine up to Rs.1000, or with both. ***Illustration 17.*** *Questions posed during recording of statements should be answered when such information is within the knowledge of the Deponent. Refusing to answer is an offence. However, silence does not tantamount to acceptance, especially, when leading questions are posed.*

Sections of IPC	Description of Offences	Punishments
180	Refusing to sign statement	Simple imprisonment up to three months, or with fine up to Rs.500, or with both. ***Illustration 18.*** *After recording statement if a person refuses to sign it, this provision could be invoked.*
181	False statement on oath or affirmation to public servant or person authorized to administer an oath or affirmation	Imprisonment of either description for a term up to three years and fine. ***Illustration 19.*** *Statement may be recorded during investigation. If a false statement is made, then this provision can be invoked.*
182	False information, with intent to cause public servant to use his lawful power to the injury of another person	Simple imprisonment up to six months, or with fine up to Rs.1000, or with both. ***Illustration 20.*** *A competitor or disgruntled employee may give false information to a proper officer against another taxable person, which may be used in tax proceedings. This is an offence.*
183	Resistance to the taking of property by lawful authority of a public servant	Imprisonment of either description up to six months, or with fine up to Rs.1000, or with both. ***Illustration 21.*** *While seizing a property or when recovery proceedings are initiated by a tax officer, any resistance by the taxpayer not within the framework of law would attract this provision.*
186	Obstructing public servant in discharge of public functions	Imprisonment of either description up to three months, or with fine up to Rs.500, or both. ***Illustration 22.*** *Proper officers are public servants and while discharging*

Sections of IPC	Description of Offences	Punishments
		their functions, no person could obstruct them. Otherwise, it would invite punishment under this section.
189	Threat of injury to public servant	Imprisonment of either description up to two years, or with fine, or with both. ***Illustration 23.*** *Any threat of injury to a proper officer , while* discharging *his duties would be a punishable offence.*
191-193	Giving or fabricating false evidence	If it is relating to judicial proceedings – imprisonment of either description for a term up to seven years with fine. In any other case - imprisonment of either description for a term up to three years with fine. ***Illustration 24.*** *Giving or fabricating false evidence at any stage of the tax proceedings is an offence.*
195A	Threatening any person to give false evidence	Imprisonment of either description for a term up to seven years or fine or both. ***Illustration 25.*** *Similarly, if any other person such as transporter, supplier, recipient or employee is threatened to give false evidence, that also is an offence.*
196	Using evidence known to be false	If it is relating to judicial proceedings – imprisonment of either description for a term up to seven years with fine. In any other case - imprisonment of either description for a term up to three years with fine ***Illustration 26.*** *Using any evidence in tax proceedings, which the proper officer knows to be false is an offence.*

Sections of IPC	Description of Offences	Punishments
197	Issuing or signing false certificate	If it is relating to judicial proceedings – imprisonment of either description for a term up to seven years with fine. In any other case - imprisonment of either description for a term up to three years with fine. ***Illustration 27.*** *Even a CA giving certificate may be covered under this section, if it turns out to be false. This is in addition to any disciplinary action that may be taken by the Institute.*
198	Using as true a certificate known to be false	If it is relating to judicial proceedings – imprisonment of either description for a term up to seven years with fine. In any other case - imprisonment of either description for a term up to three years with fine. ***Illustration 28.*** *Even the taxpayer who uses such false certificate knowingly would be guilty.*
204	Destruction of document to prevent its production as evidence	Imprisonment of either description up to two years, or with fine, or with both. ***Illustration 29.*** *Destroying any incriminating documents like books of accounts, vouchers etc., to prevent its production as evidence in any tax proceedings, is an offence.*
228	Intentional insult or causing interruption to public servant sitting in judicial proceeding	Simple imprisonment up to six months, or with fine up to Rs.1000, or with both. ***Illustration 30.*** *An authority conducting hearing is intentionally insulted or interrupted by a CA, he can be punished under this section.*

10. Legal Maxims

There are many legal maxims, which are commonly used, some of which are discussed in brief:

(a) *Actio personalis moritur cum persona* – A personal right of action dies with the person.

(b) *Actus curiae neminem gravabit* – An Act of the Court shall prejudice no man.

(c) *Actus non facit nisi mens sit rea* – Action should be accompanied by guilty mind.

(d) *Allegans contraria non est audiendus* – He is not to be heard who alleges things contradictory to each other.

(e) *Audi alteram partem* – No man shall be condemned unheard.

(f) *Contemporanea expositio est optima et fortissimo in lege* – Contemporaneous exposition or interpretation is regarded in law as the best and strongest.

(g) *Cuilibet in sua arte perito est credendum* – Credence should be given to one skilled in his peculiar profession.

(h) *De minimis non curat lex* – The law does not concern itself with trifles.

(i) *Ejusdem generis* – Of the same class, or kind.

(j) *Generalia specialibus non derogant* – General things do not derogate special things.

(k) *Falsus in uno, falsus in omnibus* – False in one aspect is false in all respects.

(l) *Ignorantia facti excusat – Ignorantia juris non excusat* – Ignorance of facts may be excused but not ignorance of law.

(m) *Leges posteriores priores contrarias abrogant* – Later laws repeal earlier laws inconsistent therewith.

(n) *Lex non cogit ad impossibilia* – The law does not compel a person to do that which he cannot possibly perform.

(o) *Nemo debet esse judex in propria sua causa* – No man can be a judge in his own case.

(p) *Nemo debet bis vexari pro una et eadem causa* – A man shall not be vexed twice for one and the same cause.

(q) *Noscitur a sociis* – The meaning of a doubtful word may be ascertained by reference to the meaning of words associated with it.

(r) *Nova constitutio futuris formam imponere debet, non praeteritis* – A new law ought to be prospective and not retrospective, in operation.

(s) *Nullus commodum capere protest de injuria sua propria* – No man can take advantage of his own wrong.

(t) *Res ipsa loquitur* – The thing speaks for itself.

(u) *Ubi jus ibi remedium* – There is no wrong without a remedy.

(v) *Vigilantibus non-dormientibus jura sub venient* – Law aids the vigilant and not the dormant.

Note: There are many legal maxims, which are quite often used in legal proceedings. The above is only an illustrative list of a few important maxims. The participants are advised to read and understand more such maxims from authoritative texts and judicial decisions and use them in appropriate proceedings.

These legal maxims are a concise representation of legal principles that have guided judicial thought for centuries. Undertaking a study of these legal maxims helps CAs to recognize the role, relevancy and authority including the boundaries thereof of the tax administration. There is no room for fear when we recognize that the State, as much as the assessee/ appellant, are bound to operate within the four corners of the law and its implementation is limited by an equitable procedure contained in law.

Chapter 3
Principles of Evidence

1. Introduction

Evidence in the popular sense means "that by which facts are established to the satisfaction of the person enquiring".

2. Importance under Tax Litigation

Litigation under indirect tax laws may be on account of dispute of exigibility to tax of a particular transaction or dispute relating to claim of exemption or claim of credit of duty or tax paid.

At any stage i.e. during audit / investigation or adjudication or at appellate stage, claim for non-taxability or for exemption, etc., must be supported with verifiable proof. Such proof in simple language could be termed as evidence.

The Apex Court has held in *Chuharmal Mohanani v. CIT* [AIR 1988 SC 1384] while quoting with approval the view taken by *Bombay High Court in J.S. Parkar v. V.B. Palekar* [94 ITR 616] held that:

"The High Court of Bombay held that what was meant by saying that the Evidence Act did not apply to the proceedings under the Income Tax Act was that the rigour of the rules of evidence contained in the Evidence Act, was not applicable but that did not mean that the taxing authorities were desirous in invoking the principles of the Act in proceedings before them, they were prevented from doing so. Secondly, all that section 110 of the Evidence Act does is that it embodies a salutary principle of common law jurisprudence which could be attracted to a set of circumstances that satisfy its condition.

We are of the opinion that this is a correct approach and following this principle the High Court in the instant case was right in holding that the value of the wrist- watches represented the concealed income of the assessee."

It is therefore important to understand – who has to prove – what – in the light of section 155 of CGST Act. Key provisions of evidence law that need to be kept in mind are:

(a) *Section 56* – 'judicial notice' can be taken of the current state of law or science or other fact as unassailable truth even if not pleaded in the notice or proceeding;

(b) *Section 58* – 'undisputed facts' do not require proof, as such, allegation left undisputed become facts admitted by taxpayer;

(c) *Section 101* – 'one who asserts' bears the burden to prove the correctness of that which is asserted, whether it is the taxpayer or Revenue and is referred as 'burden of proof';

(d) *Section 102* – 'onus' of proof shifts based on pleading by either side during the course of proceedings;

(e) *Section 103* – 'exclusion' claimed by any person must be proved by such person regarding the ingredients that qualify for such exclusion (that is, exemption);

(f) *Section 106* – information that lies within the 'special knowledge' of any person must be proved by such person.

It is important to understand that the exclusion or immunity that applies under sections 24 to 32 of the Evidence law which states that any statement made before a Police Officer or other person in authority will not be admissible as evidence, is not applicable or available in proceedings under CGST Act. This is affirmed recently in 2020 by the Apex Court in *Tofan Singh v. State of Tamil Nadu (Crl. Apl. No.152/2013)*. It would be most alarming for CAs to learn that information contained in 'books of accounts' are not reliable source of evidence in the absence of corroboration as per section 34.

Illustration 31. Where a service provider claims that his services qualify as exports, he will be required to substantiate this claim by proving the following:

Facts	**Probable documents to be produced**
The recipient of service is located outside India;	Agreement with the service recipient, his usual place of residence/business and invoice would prove such fact.
Place of supply of service is outside India;	Place of supply of service depends on the nature of service and hence documents shall show the nature of service and explain as to why such services fall under a specific rule.
Receipt of consideration in foreign currency;	Produce Foreign Inward Remittance certificate (FIRC) or Bank Realisation Certificate (BRC) duly certified by the Bank.
Provider and recipient of service are two distinct entities.	Invoice / contract /agreement may prove this fact.

As per Indian Evidence Act, 1872, meaning of 'fact', 'relevant fact',' facts-in-issue', 'evidence' and certain other terms are as follows:

(a) "Fact" means and includes—

(1) anything, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustration 32.

That there are certain objects arranged in a certain order in a certain place, is a fact.

That a man heard or saw something, is a fact.

That a man said certain words, is a fact.

That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

That a man has a certain reputation, is a fact.

(b) "Relevant fact" – One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

(c) "Facts in issue". —The expression "facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation —Whenever, under the provisions of the law for the time being in force relating to civil procedure, any court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

Illustration 33.

A is accused of the murder of B.

At his trial the following facts may be in issue:-

That A caused B's death;

That A intended to cause B's death;

That A had received grave and sudden provocation from B;

That A, at the time of doing the act which caused B's death, was, by reason of

unsoundness of mind, incapable of knowing its nature.

Illustration 34.

There is an allegation that XYZ Pvt. Ltd. engaged in construction activity has not paid GST on certain constructions undertaken by them. XYZ claims the said transaction relates to construction of a building meant for "other than trade, commerce or business" and is exempt from GST-

Facts	Relevant Fact	Facts in Issue
XYZ is a private limited company;	Trust deed / registration certificate of the trust to whom construction is undertaken.	There is an entry in the notification exempting such transaction.
XYZ is engaged in the activity of construction of buildings or civil structure;	Registration certificate issued by Income tax Department under section 12AA of Income Tax Act	The entity to whom service is provided is a trust registered under section 12AA of Income Tax Act
XYZ is paying GST on its activities	Plan sanctioned by the local authority to construct the particular building.	The building is meant for a purpose other than trade, commerce or business.
XYZ has not paid GST on certain specified transactions	Transaction does not exhibit the ingredients necessary to attract the incidence of tax	Whether (i) transaction is a supply or not; (ii) supply involves non-taxable articles or listed in Schedule III; or (iii) supply is expressly exempt.

Definition Evidence and its types

"Evidence" means and includes—

(1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry.;

Such statements are called oral evidence.

(2) All documents including electronic records produced for the inspection

of the Court.;

Such documents are called documentary evidence.

Indian Evidence Act, 1872 categorizes evidence into two types, oral evidence and documentary evidences. Oral evidence means statements made before Court by a witness in relation to matters of fact. Documentary evidence means all documents produced for inspection of the Court. Documentary evidence include electronic records.

"Documents" means any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustration 35. *(of documents as given in Indian Evidence Act, 1872)*

A writing is a document;

Words printed, lithographed or photographed are documents;

A map or plan is a document;

An inscription on a metal plate or stone is a document;

A caricature is a document.

3. Cursory glance of the provisions of the Indian Evidence Act, 1872

There are three parts in Evidence Act. All evidence shall pass through the following three stages, namely:

(a) **Part I**: To consider any matter or things relevant, it must be *en suite* in the frame of PART-I i.e. sections 5 to 55.

(b) **Part II**: Part II covering sections 56 to 100 provides as to what facts to be proved and facts which need not be proved. Further, it also provides for the manner in which the facts are to be proved.

(c) **Part III:** Remaining provisions i.e. sections 101 to 167 deal with burden of proof, estoppel and provisions relating to witness.

4. Relevance of Electronic Records

With advancement of technology, the Evidence Act has been amended to recognize electronic records also as evidence. Electronic records have been defined in section 2(t) of the Information Technology Act, 2000 to mean, "data, record or data generated, image or sound stored, received or sent in an

electronic form or micro film or computer generated micro fiche".

It should be noted that section 65A and 65B of the Indian Evidence Act provides that notwithstanding any of the provisions of the said Act, electronic record would be admissible as evidence subject to certain conditions as placed under section 65B of the Indian Evidence Act..

The Evidence Act also provides for the manner of verification of digital signature, presumptions as to electronic agreements, electronic gazette, etc.

5. Burden of Proof

'Burden of proof' is a duty placed upon a person to prove or disprove a disputed fact. In terms of section 101 of the Evidence Act, a person who desires any Court to give judgment as to any legal right or liability on the basis of the existence of the facts to which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Burden to prove a particular fact is always on the person who alleges. However, once such burden is discharged, the onus then shits to the other party. In *A Raghavamma v. A Chenchamma,* [AIR 1964 SC 136] – para 15, it was said that *the burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts, which is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title, once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant, it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title.*

Under tax litigation, in disputes relating to classification of goods / services, the burden to prove that the classification adopted by the assessee is wrong, is always on the Department. Similarly, where the Department alleges fraud, misrepresentation or existence of *mens rea* (culpable state of mind) intention to evade, for invoking extended period or imposing penalties, it is the Department which has to prove.

On the contrary, where it comes to claim for an exemption, the burden is on the assessee to prove as to why and how he is eligible for the exemption. However, once the same is proved by the assessee, the onus then shifts to the Department to disprove the same.

It should be noted that, merely because the burden of proof is on the

Department, it does not mean the assessee need not provide the evidences to support his case. Supplying of sufficient evidence would support the case and the deciding authority, whether at the stage of adjudication or appeal , would be able to appreciate and pass Orders judiciously.

6. Degree of Proof

Degree of proof is that extent to which the fact shall have to be proved. It should be noted that in criminal matters, the proof shall be beyond reasonable doubt but the Tribunals have held that in adjudicating proceedings, such degree of proof is not necessary. The adjudication proceedings are to be determined on the facts and circumstances available in the particular case. *[Refer Kashi Prasad Saraff vs. CC,* 1993 (66) E.L.T. 409 (Trib.*)]*

7. Timing of Evidence

The assessee shall have to provide evidences supporting his contentions right from the stage of investigation. However, adducing evidences at the stage of adjudication proceeding in relation to show cause notice is very important and in terms of the rules governing appeal procedures; new/fresh evidences may be rejected by the Appellate Authority or Tribunal. (Rule 112 of CGST Rules, 2017).

Illustration 36. The type and nature of evidence to be produced depends on the nature of the dispute and cannot be generalized. However, the following table illustrates the evidences that could be produced for the nature of dispute listed therein.

Dispute about non-payment of output tax	- Nature of supply involved in transaction - Classification of supply - Taxability of supply - Time and place of supply - Taxable value of supply
Dispute about non-payment of output tax on reverse charge basis	- Taxability of supply - Classification of supply - Inapplicability of exemption - Fact of non-payment by Recipient
Dispute on classification of goods	- Description of the goods - Chemical composition of goods

	- Technical literature about the goods
Dispute on classification of services	- Explanation about the nature of activities - Agreement with the customer which details the scope of services
Eligibility to avail input tax credit	- Copy of the invoice / bill on the basis of which input tax credit is availed. - Explanation as to usage of the said input or input service
Short payment / non-payment of tax or duty (which is already paid but not considered by the Department)	- Provide copy of challans (DRC-03)

8. Expert Advice

Section 45 of the Evidence Act provides that when the Court has to form an opinion on a point of foreign law, or of science, or art, or has to identify handwriting or finger-impressions, the opinions of persons specially skilled in such foreign law, science or art, or in identification of handwriting or finger impressions are relevant.

Under tax litigation, opinions of experts may be relevant on the composition of goods manufactured or imported for the purpose of classification of goods.

Further, such expert opinion would be relevant to defend the case where the assessee has taken certain legal position based on the expert opinions.

9. Admission of Certain Facts in the Statement or during Investigations

Where facts are admitted by the assessee either during investigations or during recording of statement by the Proper Officer under GST, then such facts need not be proved by the Department. (Refer section 58 of Indian Evidence Act). Silence does not establish guilt. GST is a self-assessment based tax regime where the Revenue has to prove the taxpayer's guilt if the self-assessment carried out is to be impeached. Revenue cannot raise a suspicion and expect the taxpayer to disprove Revenue's allegation. Burden of proof rests on one who makes the allegation. But when allegation is levelled and the

same is not disputed, the allegation stands proved implicitly. Further, to dispute the allegation, justification is not required. Taxpayer merely needs to make a pleading that "allegation is disputed" and give Revenue opportunity to make out a *prima facie* case based on evidence that support the allegation.

Statements made on oath are presumed to be made truthfully. But accuracy is truthful statement coupled with competence of the person making the statement. Usually, taxpayer's statement about taxability of a transaction, HSN classification or other matters involving interpretation of law are not admissible as correct as taxpayer is neither an expert in GST nor the final authority to make this determination. The principles outlined in Articles 246A, 265 and 300A of the Constitution of India are salutary that not even a willing person can be made liable to pay tax unless he is liable as per law. Additionally, the State is liable to refund the amount that has been collected unlawfully.

However, where the admission was under coercion, fraud or through misrepresentation, then in such cases, the admission will be unreliable and lack evidentiary value. The person whose statement is recorded must firstly, disclose that the said statement is being withdrawn due to the extenuating circumstances and secondly, declare that no reliance may be placed on the said statement and lastly, provide corrected factual position that may be considered as an alternate to the statement recorded.

10. Privileged Communication

It should be noted that in terms of section 126 of the Evidence Act, no Barrister, Attorney, Pleader or Vakil, shall, at any time, be permitted, except with his Client's express consent to disclose any communication made to him in the course and for the purpose of his employment as such Barrister, Pleader, Attorney or Vakil, by or on behalf of his Client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment or to disclose any advice given by him to his Client in the course and for the purpose of such employment.

Further, section 127 of the Evidence Act provides that provisions of section 126 of the Evidence Act above shall equally be applicable to interpreters and the clerks or servants of Barristers, Pleaders, Attorneys and Vakils. Similarly section 129 of the Evidence Act provides that no one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness; in which case he may be compelled to disclose any such

communication as may appear to the Court necessary to be known in order to explain any evidence which he has given, but not others.

It should be noted that the above privilege would not apply to communications leading to illegal activity or committing a fraud, etc.

Coming to the professional communications between CA and his Client, the professional ethics guidelines issued by the Institute of Chartered Accountant provides for non- disclosure of information of the Client obtained during his professional appointment. The disclosure of information of Client obtained during professional appointment is a misconduct as held by the High Court in the case of *Council of Institute of CA vs. Mani S Abraham* [AIR 2000 Ker 2012]. However, the question that arises is whether communication between a CA and his Client, whom a CA is representing in tax litigation, would fall under section 126/127/129 of the Evidence Act. It is possible that the CA could well fit within the ambit of the term 'Pleader' which is defined to mean as below under CPC and CrPC.

Section 2(15) of CPC: "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court.

Section 2(q) of CrPC: "pleader", when used with reference to any proceeding in any Court, means a person authorised by or under any law for the time being in force, to practice in such Court, and includes any other appointed with the permission of the Court to act in such proceeding.

It may be noted that since appearance by a CA before any Adjudicating or the Appellate Authority or the Tribunal would not amount to appearance before any "Court", immunity under sections 126 or 127 of the Evidence Act would not be available to the communications between the said CA and his Client. Apart from the above, the communications between CA and his Client in relation to rendering legal advice could fall under section 129 of the Evidence Act.

11. Affidavits

Affidavits are written statement of facts voluntarily made by an affiant under an oath or affirmation administered by a person authorized to do so by law. Affidavits shall be confined to such facts as the deponent is able to prove on his own account. Affidavit shall contain facts and grounds and not inferences or submissions.

There are conflicting views on the aspect as to whether affidavits, in themselves, are an evidence in the Court of law. (Source: Order XIX CPC)

12. Application of CPC to GST issues

Section 70 of CGST Act which grants powers to the Proper Officer to summon a person and record his statement, provides that exemption from personal appearance given to certain persons under the Civil Procedure Code would equally apply to appearance under this section.

The provisions relating to non-cognizable offence (section 132(4) of the CGST Act, 2017), power to arrest (section 69 of the CGST Act, 2017), power of search and seizure (section 67 of the CGST Act, 2017), enquiry of arrested persons, would refer to the provisions of Code of Criminal Procedure. Therefore, while dealing with such provisions or issues, the respective provisions under Code of Criminal Procedure,1908 shall also be examined.

Chapter 4
Setting the Law in Motion

1. Self-assessment Tax Regime

GST is a self-assessment tax and the mandate in section 59 makes this explicit. Liability that is self-assessed covers:

(a) determination of taxability of supply, categorization as goods or services, classification under tariff including claims of exemption, computation of final liability; or

(b) determination of non-taxability of supply or availability of exemption along with satisfaction of with conditions to exemption including applicability of exclusion from registration under section 23(1) or 23(2).

When there is an assessment, there must be an 'assessment order'. Following the ratio in *ITC Ltd. v. CCE* [(2019) (368) ELT 216] which was rendered relying on *CC v. Flock (India) (P) Ltd.* [(2000) (120) ELT 285 (SC)] reiterated in *Priya Blue Industries Ltd. v. CC* [(2004) (172) ELT 145 (SC)], the invoice issued under section 31 bears the outcome of determination in self-assessment.

Liability determined on self-assessment basis is 'disclosed' in the return filed under section 37. Liability disclosed in section 37 is 'discharged' in return filed under section 39. And if the Revenue has objections to liability determined on self-assessment basis in terms of section 59, the burden lies on the Revenue under section 155 to challenge and impeach self-assessment carried out by the Registered Person.

2. Provisional Assessment

Provisional assessment is not a substitute for Advance Ruling. Provisional assessment is a remedy available to the taxable person in cases where he is unable to determine the value of goods or services or both or determine the rate of tax applicable thereto as where some facts necessary to carry out self-assessment is required but not available at the 'time of supply'. It is sought in cases where supply cannot be delayed and inaccurate liability cannot be discharged. It is in these circumstances that the Registered Person is permitted to:

(a) make an application to the Proper Officer explaining the circumstances that renders self-assessment inaccurate due to deficient information at

the present time and the time and steps required for the relevant information to become available and finalize the liability;

(b) request permission to make supplies on payment of tax determined on 'provisional' basis;

(c) undertake to discharge any shortfall in tax along with interest, in case, tax is provisionally discharged.

The Proper Officer accords permission after the Registered Person executes a bond. The Proper Officer will monitor the finalization steps taken by the Registered Person and conclude the proceedings by collecting any shortfall in tax discharged provisionally.

Illustration 37. Metal alloys containing certain proportion of one of the mixtures is taxable at a higher rate and at a lower rate when that constituent is of lesser proportion. This may warrant use of provisional assessment until a test report is obtained from an independent lab to determine the composition of the constituents in that alloy.

3. Scrutiny

Scrutiny is not a linear comparison of data appearing in two documents. Scrutiny is also not an enquiry based on suspicion such as (i) excess credit build-up or (ii) inadequate reversal of credit or (iii) objection to output tax discharged by utilization of credit. Such an enquiry would be akin to audit permitted under section 65 for which the Proper Officer is not the officer enjoined with authority to conduct scrutiny of returns under section 61. Inquiry in cases relating to evasion of tax is permitted by section 67 which is also not within the scope of scrutiny under section 61.

Scrutiny is therefore something else, where there is incongruity between (i) returns filed and (ii) information in possession, that Proper Officer can demand 'explanation' by issuing FORM GST ASMT-10. The Registered Person is required to offer explanation in FORM GST ASMT-11 and where the explanation is found to be 'satisfactory', the proceedings must be concluded by issuing FORM GST ASMT-12. Where the explanation is not found to be satisfactory, there is no authority to call for books and records or engage in personal hearing to resolve the reasons for dissatisfaction. The Proper Officer is obliged to refer the matter for (i) audit, special audit or inspection; (ii) raise a demand by issuing notice under section 73 or 74 of Chapter XV.

Illustration 38. Differences in credit appearing in FORM GSTR-2A and that availed in FORM GSTR-3B may be a matter of 'discrepancy' to be scrutinized under section 61.

Illustration 39. Non-payment of GST on reverse charge basis during the entire financial year in spite of goods being sold after being transported from factory in one city to sale location in another city is not a 'discrepancy' but a 'suspicion' and not suited for scrutiny under section 61.

While this is the mandatory due process, scrutiny of returns is not a pre-condition to issue Notice of demand under Chapter XV. There is no such pre-requisite in section 73, 74 or 76. Scrutiny of returns followed by unsatisfactory explanation or omission to offer explanation, may lead to Notice of demand but each Notice of demand stands on its own merits to support the allegation (and consequent demand) whether the infraction arises from scrutiny or otherwise.

4. Best-Judgement Assessment for Non-filers of Return

Non-filers of returns are notified under section 46 by issuing FORM GSTR-3A on the common portal to file their returns within fifteen (15) days. After lapse of this time, the Proper Officer is empowered to determine liability on 'best judgement' basis under section 62 and issue Order in FORM GST ASMT-13 accompanied by summary in GST DRC-07. Necessary administrative guidance to Proper Officer is available in *Circular 129/48/2019-GST dated 24 Dec, 2019*.

Given the very nature of this method of determination of liability and the default of Registered Person in filing returns, the burden of proof is on the Revenue to substantiate the determination of liability on best judgement basis is very limited and can be faulted only if it shocks the conscious of a reasonable person even if it is seemingly excessive. Authority to use 'best judgement' demands that it must not show the use of 'worst judgement' in arriving at the liability.

The Registered Person is allowed a remedy to file 'valid returns' within sixty (60) days and this Order will automatically be withdrawn. If the Registered Person does not furnish valid returns within 60 days of the service of assessment Order, he may furnish the same within a further period of 60 days on payment of an additional late fees of Rs. 100 for each day beyond the sixty days of service of Notice. In case, he submits all the valid returns, then the assessment Order shall be deemed to be withdrawn.

But if either no such returns are filed or returns are filed but after this time limit, then the demand raised in the Order will remain and go into recovery (see summary in DRC-07 issued) unless overturned in an appeal filed under section

107(1) and favourable Order is passed under section 107(11) in view of the returns having been filed with applicable dues discharged. If the Proper Officer is not satisfied with the liability discharged in the returns filed, the Proper Officer is welcome to take up those returns for scrutiny under section 61.

5. Best-Judgement Assessment in case of Unregistered Person

Unlike section 62 where an Order is directly to be passed, proceedings under section 63 involve a Notice to be issued proposing a demand on best judgement basis. This Notice is to be issued in FORM GST ASMT-14 accompanied by summary in FORM DRC-01 when the Proper Officer is aware about some tax liability for the relevant tax period but the taxable person:

(a) was registered previously but that registration stands cancelled under section 29(2); or

(b) was liable to register but has not obtained registration.

When the demand proposed (*vide* notice) is on best judgement basis, the burden of proof on the Revenue is to merely show plausible liability to tax. Unlike Notice of demand under Chapter XV, the burden of proof is far lesser in cases of Notice under section 63. It is important to note that this Notice must be in respect of the same grounds on which the exceptional powers under this section were invoked. The Proper Officer cannot conduct investigation after issuing FORM GST ASMT-14 nor can demand new documents and information to be submitted to drop this demand. The Order must be passed in FORM GST ASMT-15 and if it confirms the demand then it must be accompanied by summary in FORM GST DRC-07.

Illustration 40. An Advocate who has agricultural income (from sale of goods not generally exempt) will be liable to best judgement assessment in respect of such income reported in income-tax returns.

Illustration 41. Landowners who have not discharged GST on supply of development rights in a commercial real estate project even though none of the units (falling to their share in a joint development project) are offered for sale prior to the date of completion of project. All relevant data is available on RERA website about the project.

Once a taxable person is registered, the Proper Officer is barred from invoking this section because the Notice is to be issued to 'unregistered person' and not to the currently Registered Person who was previously unregistered. The Proper Officer is not authorized to demand pre-registration information to issue

FORM GST ASMT-14 at the time or after grant of registration. It is not uncommon for registration to be kept pending unless pre-registration documents such as bank statements, ITR, etc., are submitted to examine whether any liability of earlier period existed. This is observed when reason for seeking registration is stated as 'crossing threshold' and not when it is 'voluntary'.

6. Summary Assessment Order

Although Registered Persons are assigned their respective Proper Officer, if a Proper Officer, duly authorized, has 'evidence in possession' that indicates that those Registered Persons have some liability that is not discharged, without passing this information to jurisdictional Proper Officer(s), section 64 empowers Proper Officer to issue an Order in FORM GST ASMT-16 accompanied by FORM GST DRC-07.

The taxable person (who is registered in a different jurisdiction) is permitted to seek withdrawal of this summary Order and accept Notice of demand under Chapter XV. This application is to be made in FORM GST ASMT-17 to the Joint Commissioner who granted permission to the Proper Officer which may be accepted or declined in FORM GST ASMT-18.

Such taxable person must be mindful that the time spent in reconsideration of the summary Order can prejudice the appellate remedy under section 107(1). Reply to application for withdrawal of summary Order is 'with prejudice' to the appellate remedy.

7. Audit Assignment

Selection of Registered Persons to be subject to audit under section 65 is based on Commissioner's insights into risks. Registered persons can neither request that they be audited nor excuse themselves if selected for audit. There is a clear procedure for audit selection and process of conducting such audit.

Audit may be conducted without engaging the Registered Person based on documents available on the common portal. Where certain additional information is required, request is made in FORM GST ADT-01. Based on reply by the Registered Person, audit is continued and if there is any requirement to visit the premises to validate the findings already reached (in desk audit), intimation is given at least fifteen (15) days in advance. There is no element of surprise while initiating audit of Registered Persons. There is no requirement to disclose the basis for selection for audit. There are no limits as to the areas of enquiry permitted in audit.

Information already available on common portal cannot be requested from the Registered Person in FORM GST ADT-01. Information that is to be 'specially prepared' are also not to be requested from the Registered Person because that is part of audit exercise to prepare computations based on source data. Only the information that is contemporaneously maintained can be demanded from the Registered Person. Where information or computations are specially prepared and provided, reliability of such information will be in doubt and is likely to be 'with prejudice' to the Registered Person.

An instance of specially prepared information would be FORM GSTR-2A v. FORM GSTR-3B reconciliation which would not be readily reliable without further validation of (i) exclusion of inadmissible credits such as rateable reversal under section 17(2) or blocked credits under 17(5) and (ii) inclusion of credits mis-reported by suppliers but confirmed in a certificate permitted under *Circular 183/15/2022-GST dated 27 Dec, 2022*.

8. Inspection and Search

Inspection is permitted only in matters involving 'evasion of tax'. Inspection cannot be undertaken to discover evasion but to validate matters of evasion which are already known and form the reasons for this belief that inspection is necessary to establish evasion and to make a demand in accordance with law. The safeguard for the taxpayer is that the inspection must be pre-authorized by the Proper Officer, not lower in rank than Joint Commissioner, and this authorization must be founded on material taken on record that indicate evasion of tax by:

(a) suppressing supply of goods or services or both;

(b) suppressing stock;

(c) claiming credit more than entitlement; or

(d) contravention of GST laws to evade tax.

Illustration 42. Proper Officer acting under authorization to inquire into evasion of tax cannot enquire into mismatch of FORM GSTR-1 v. FORM GSTR-3B or FORM GSTR-2A v. FORM GSTR-3B or reversals under rule 42 or 43 as that would be within the scope of section 65 and beyond the scope of section 67.

Power of inspection under section 67 does not overlap with audit under section 65. However, the scope of audit can extend into areas of evasion of tax although audit is not aimed at identifying evasion of tax. Although "to evade tax" appears in the fourth area within the scope of inspection of taxable person

under section 67(1)(a), evasion of tax is inherent in the rest of the scope of inspection. Evasion of tax is a *sine qua non* to exercise authority under section 67. Unless the area of inquiry touches evasion of tax, the proceedings will be without jurisdiction.

Evasion of tax is not mere non-payment of tax howsoever obvious it may be. Evasion of tax requires:

(i) non-payment of tax (or excess claim of input tax credit)

(ii) knowledge about liability to pay tax

(iii) non-disclosure or concealment of information and

(iv) gains derived from indulging in these activities.

Unless there is any benefit to the taxable person, non-payment of tax could simply be a case of error in self-assessment. A good indicator of absence of evasion is where relief under rule 35 is allowed in computing demand. Every non-payment of tax does not *ipsi dixit* become evasion.

Illustration 43. Collecting 18 per cent tax but depositing 12 per cent would be a case of evasion of tax.

Illustration 44. Omitting to collect any tax under misinterpretation about the applicability of exemption is not likely to be evasion but error of interpretation in the absence of any other gains from such misapplication of exemption.

Search requires new and incremental reasons to believe that (i) goods liable to confiscation (determined as per section 130(1)) or (ii) documents, books and things (necessary for further inquiry), are secreted by taxable person or any other person. Search requires these offending articles to be 'secreted'. If these are not secreted, they cannot be seized.

Section 67(10) provides opportunity to raise the questions as to the legality and validity of circumstances needed to invoke these exceptional powers by the Proper Officer. Exercise of powers contrary to legislative mandate and safeguards will taint discovery of any demand made. It is important to raise these questions and agitate them at the right time. Not even a willing taxpayer will admit liability that is beyond the terms of the statute and no tax can be demanded based on guesswork and estimation. Use of guesswork and estimation is permitted only in a Notice issued under section 63 and not in section 73 or 74.

Powers of the Proper Officer

The Proper Officer has been entrusted with the following powers also:

(i) Provisional Attachment

Attachment of property (bank account or other property) provisionally and recovery of overdue liability (by taking away funds of taxable person) are two entirely different things. Provisional attachment leaves funds with taxable person except that they are encumbered (i) when proceedings are underway and (ii) up to one (1) year only. Limited opportunity to file objections in FORM GST DRC-22A are allowed under rule 159 and there is no remedy of appeal in case objections are not accepted. It is the opinion of Commissioner to provisionally attach property when there is risk of flight or alienation to defraud revenue. Refusal to withdraw provisional attachment is not appealable since provisional attachment is not the same as recovery of demand and such provisional attachment will stand withdrawn at the end of inquiry or within one (1) year.

(ii) Credit Blocking

Where intelligence is gathered that credit is claimed in respect of 'bogus invoices', the Commissioner is empowered to authorize an Officer not below the rank of Additional Commissioner to 'block' amounts in respect of specific inward supplies in Electronic Credit Ledger ("ECrL"). The Proper Officer authorised having reasons to believe can block the input tax credit available in the ECrL for the following reasons:

(a) supplier is non-existent;

(b) supply (of goods or services) is non-existent;

(c) tax amount is non-existent (or not paid to Government);

(d) taxpayer (claiming credit) is non-existent; or

(e) tax invoice (for claiming credit) is non-existent.

Since ECrL does not have individual line items of credit availed, based on individual inward supplies identified to be bogus, an equivalent amount will be blocked in the ECrL balance.

There is no opportunity for prior notice or personal hearing as this is an exceptional power not in the nature of adjudication proceedings. In fact, adjudication proceedings must commence after a Notice of demand is duly issued under Chapter XV. Credit blocked under rule 86A must be 'unblocked' within one (1) year.

Demand and Recovery

A. Demand in Normal Circumstances

Demand for tax not paid or short paid, erroneous refund claimed or input tax credit wrongly availed or utilised must be made by issuing a Notice under section 73 stating clearly:

a) facts and allegations;

b) evidence in support of the allegations;

c) choice of actionable cause which is taken cognizance in the Notice;

d) quantum of demand of tax or input tax credit and interest and penalty.

No demand can be raised based on suspicion. Demand cannot be confirmed based on taxpayer's silence. Allegations cannot be made without evidence to establish a *prima facie* case of demand as burden of proof rests on one who makes the allegation. It is important to note that the Revenue may have more than one alternate course to follow, that is, the given non-compliance that is alleged can be treated as violation of more than one provision of law. The Revenue needs to choose which violation to be made the basis of the proposed action (cause-of-action or actionable cause). When 'A' is chosen, then 'B' must be abandoned. Reply from taxpayer will be based on the cause -of-action chosen.

B. Demand in Special Circumstances

Where any demand for tax not paid or short paid, erroneous refund claimed or input tax credit wrongly availed or utilised is due to 'evasion of tax' then the demand must be made under section 74. This demand arises specifically in cases of:

(a) fraud

(b) wilful-misstatement

(c) suppression

It is important that this active ingredient – fraud, wilful-misstatement or suppression – must be (i) deliberate and (ii) results in gain to the taxpayer. Indulging in this misadventure without gain tantamount to misunderstanding of law and mistaken self-assessment but not evasion of tax. Every non-payment of tax does not result in evasion of tax unless there are any resultant gains accruing to taxpayer, whether or not intended but necessarily derived and retained.

Determination of these special circumstances involves added responsibility to (i) make allegations (ii) adduce evidence and (iii) prove objectively. This is in

addition to the responsibility of substantiating the demand (as required under section 73).

C. Demand in Extraneous Instances

Where no tax is to be levied but an amount representing 'tax' is collected by the Registered Person or tax to be levied is less than the applicable tax levied and a higher amount representing 'as tax' is collected by the Registered Person, then the whole of the amount collected by representing 'as tax' must be remitted to the Government. In such instances, Notice of demand is issued under section 76 stating the exact extraneous circumstances where tax is found to have been collected when not due (or not due to the extent collected). Notice is *sine qua non* to make a demand because Notice sets the law in motion. When a Notice is issued, it must bear all ingredients of a valid Notice, namely:

(a) allegation about liability;

(b) evidence to support the allegation;

(c) infraction of statutory provision;

(d) cause-of-action invoked; and

(e) opportunity to appear in adjudication proceedings.

D. Recovery

Only when there is a 'final demand' that is crystallized by-

(i) a demand based on due process of law and

(ii) appeal dismissed or limitation to file appeal is passed,

there can be any recovery action. And any attempt at recovery without a 'final demand' would be without authority of law with the exceptions:

a) payment by Registered Person *vide* FORM GST DRC-03 challan; or

b) collection from bank *vide* FORM GST DRC-13 garnishee Notice due to non-response within seven (7) days to Notice in DRC-01B issued by jurisdictional Proper Officer to the Registered Person under rule 88C.

It is not uncommon for a Registered Person to be induced to make voluntary payments vide FORM GST DRC-03 challan. Where payments are made under inducement and without any 'final demand', the Registered Person is required by law to file a refund application under section 54 within two (2) years from the date of payment to recover the amount paid *sans* any liability.

Chapter 5
Appellate Relief

1. Introduction

No person acting as a functionary of the Government who commences any proceeding can be vested with authority to make determination about any treatment of law, especially, involving liability to tax, credit, refund, interest, penalty or late fee – on a taxpayer or other person with absolute finality. Authority to make a determination is not the same as such authority "being subject" to a process of remediation in the event taxpayer or other person is aggrieved with either the due process followed, or the conclusion reached while making such determination.

Legislative scheme of the Act must be implemented by the Executive. Passion to protect the interests of Revenue does not authorize by passing the 'due process' in the law. And if protecting the interests of Revenue is to be the overarching justification for Departmental action then the Legislative scheme of providing a procedure – due process – for conducting audit enquiry or investigative inquiry and then making a formal demand by issuing Notice with remedy to appeal will be brought to nought. Judicial authorities have made this clear, especially, where the due process for each Departmental action provided in the statute in sufficient detail such as in GST, it would be fair to say that every stakeholder must "follow the procedure, justice will take care of itself". If any functionary were to assume the duty to deliver justice, then discretion and all the ill-effects of such discretion will result in the Executive stepping into the shoes of the Legislature.

2. Person Aggrieved

Anyone who is 'unhappy' with an Order of determination of some liability cannot rush to file an appeal. Unhappiness may be due to disappointment on account of incorrect expectation about the outcome of a Departmental proceeding. One who is entitled to prefer an appeal is that person who has suffered an adverse outcome in a proceeding and qualifies to prefer appeal. The entire purpose of this material is to learn this concept – qualifying to prefer appeal.

A taxpayer who has suffered an adverse Order must prefer an appeal to remedy the outcome in such adverse Order. `The Proper Officer who has passed such adverse Order cannot 're-adjudicate'. And once the Order of adjudication is passed, the Proper Officer exhausts his authority and is without authority to 'review' the Order, except to correct any apparent errors as permitted by section 161. Correcting errors apparent does not authorize 'reappreciation of evidence' already considered while passing the Order. The Proper Officer who has passed the Order of adjudication is also referred to as *functus officio* qua the adjudication proceeding that stands concluded.

The taxpayer who is unhappy is not the same as the taxpayer who is aggrieved by the Order of adjudication. Being aggrieved is to have a valid basis to seek remedy in law. Being unhappy, on the other hand, is to be dissatisfied with the outcome even without a valid basis to seek remedy. The taxpayers must examine if they qualify for remediation in law or must accept the outcome of the Order of adjudication. Government can also be aggrieved by an Order of adjudication. It is common that all Orders of adjudication favourable to the taxpayer go through an internal process of 'review'. Not to overturn the Order but to independently consider if the Order which is favourable to taxpayer (and hence, adverse to Revenue) must be accepted or remedied in the manner provided by law. The Government has time limit of six (6) months to make this determination if the Order must be appealed against under section 107(2)/(3) and three (3) years to make a determination if the Order must be revised under section 108(1).

3. Qualify to Appeal

It is common that taxpayers rush to file appeals simply because the outcome is not to their liking and the common portal permits filing an appeal. Permitting a person to file an appeal is not the same as qualifying to prefer appeal. Appeal must not be filed merely because:

(a) the taxpayer cannot afford to bear the burden of demand confirmed;

(b) demand confirmed cannot be passed on to earlier customers to recoup this incidence;

(c) the taxpayer does not like the basis or grounds on which the demand is confirmed;

(d) the common portal permits filing of the appeal.

These are wrong reasons to prefer an appeal. A demand Order qualifies for filing an appeal where:

(a) the demand confirmed is based on an erroneous understanding of facts while arriving at the tax treatment applicable under the law;

(b) the demand confirmed is based on erroneous application of law to extant facts;

(c) the demand confirmed is based on erroneous application of law to facts understood erroneously;

(d) the demand confirmed is contrary to judicial decisions and Executive instructions.

Great insight and understanding is required to make this determination – whether to appeal or accept the Order – because interest under section 50 continues to run even during the time when the matter is pending in appeal. In fact, interest is payable from the date when the correct amount of tax ought to have been discharged until the date it is actually discharged, whether by admitting liability or exhausting all appellate remedies. It would be a great disservice to the taxpayer that an Order of adjudication that does not qualify to prefer appeal is misguided into filing an appeal where the demand will eventually be confirmed.

4. First Appeal

Any "decision or Order" by a Proper Officer is appealable. Appeal is not only in respect of Orders of adjudication involving a liability to tax or credit or refund. Decision not to grant registration is also a "decision or Order" that is appealable. While it may be true that time spent in appealing a decision declining registration may make it unviable to prefer appeal but such a decision is appealable nonetheless.

This brings to focus on the meaning of the expression "decision or Order". It is one where (i) facts have to be admitted (ii) statute requires application of law to those facts to reach a conclusion (iii) taxpayer is entitled to 'be heard' before the conclusion is reached and (iv) the outcome has some civil consequence to the taxpayer. Judicial authorities have firmly established that any proceeding that results in civil consequences must follow the principles of natural justice and this requirement applies even when there is no express provision to the effect that these principles must be followed in the course of the said proceedings. Reference may be made to ICAIs "Handbook on Inspection, Search, Seizure and Arrest in GST" for additional discussion on the principles of natural justice.

Every decision or Order is appealable to the First Appellate Authority under section 107(1) within three (3) months from the date of communication of the

said decision or Order. Belated appeals may be admitted by up to one (1) month for good and sufficient reasons and not as a matter of right or routine. Appeals will be admitted if and only if (i) the undisputed demand is discharged in full and (ii) 10 per cent of the disputed tax or credit subject to maximum of Rs. 50 crores (Rs.25 crores each) or 25 per cent of disputed penalty against Order under section 129(3) is deposited. Non-payment or short-fall in payment of either of these amounts voids the appeal.

Skill required in determining whether the Order qualifies for appeal is more important than the skill required to identify and draft the grounds on which to prefer such appeal. After all, grounds of appeal turn on (i) misunderstanding of facts (ii) misapplication of law or (iii) omission to adhere to authorities (judicial or administrative). While there may be appeals with many grounds raised, they all refer to one of these three aspects only. Just because an appeal is filed with many grounds neither assures a favourable outcome nor can be considered to be of better quality.

Grounds (of appeal) strive to expose the failure of adjudication and then seek intervention of the First Appellate Authority to prevent miscarriage of justice by way of 'prayer' for relief. Grounds of appeal must not be argumentative and this is the key for drafting of pleadings in appeal. Another objective of this material is to bring out the differences between 'arguments' and 'grounds'. Procedure of disposal of appeal by First Appellate Authority is another aspect to consider separately.

5. Pre-deposit

The words in sections 107(6) and 112(8) are very significant where it is stated *"No appeal shall be filed……unless….."* and proceed to make requirement to

(i) discharge undisputed tax, interest, fine, fee and penalty

(ii) 10 per cent (or additional 20 per cent) of disputed tax or credit or refund (without interest or penalty) and

(iii) 25 per cent of penalty if appeal is to be filed against Order under section 129(3),

subject to a maximum of Rs. 50 crores (Rs.25 crores each) in case of appeal to First Appellate Authority and Rs. 100 crores (Rs. 50 crores each) in case of appeal to GSTAT).

Pre-deposit must be made *via* FORM GST APL-01 or FORM GST APL-05. However, in case payments are made involuntarily in pre-notice stage of

proceedings, the taxpayers assert that payments made be considered as 'deposit' towards appeal. When Orders are not uploaded on common portal along with ARN assigned, appeals have to be filed offline and pre-deposit have to be made *via* DRC-03. Another instance is where penalty imposed under section 129(3) is disputed, no further deposit will be required and payment made against MOV-09 must be considered as sufficient compliance with the requirement for making pre-deposit for appeal to be admitted. Presently, there is no provision in FORM GST APL-01 module to file appeal without pre-deposit by considering payments made earlier to be admitted as pre-deposit. In such instances, appeals are listed for disposal as under defects cause list (discussed below).

6. Non-appealable Decisions or Orders

Section 121 lists decisions or Orders that are non-appealable. That is the Legislative will and there is no occasion to object to the finality in these matters. Careful consideration of the instances listed show that pre-emptive powers of implementing the law requires that Departmental functionaries enjoy this limit but absolute power. Considering that these instances are not in respect to any eventual demand but relate to interim administrative powers, the balance seems to be well-founded.

There is no requirement that the right to appeal must be available in 'all' instances. Provisional attachment under section 83 or pre-emptive blocking of credit under rule 86A or early recovery action under *proviso* to section 78 are also not appealable even though they are not listed in section 121. When there is any civil consequence to taxpayer and right to appeal is barred, such provisions are illegal and *ultra vires* because they allow arbitrariness in the administrative authority. Any statute that permits arbitrariness is also unjust due to inequality inherent in such action. The right to appeal must be tested on the anvil of consequences to taxpayer from any proceeding and not on the inconvenience of being subject to a proceeding, without any recovery action does not *ipsi dixit* make the proceeding arbitrary and illegal.

Legislature has provided ample safeguards for the taxpayer in the provisions. For instance, provisional attachment in section 83 does not permit taking away property of the person but only to keep it safe and under an encumbrance when the said proceedings (in Chapter XII, XIV and XV are underway) and that will be vacated as soon as proceedings end and appeal is filed against the proceedings or lapse of a period of one (1) year. Similarly, pre-emptive blocking of credit under rule 86A does not require reversal of such credit and will get unblocked on the expiration of one (1) year.

7. Payment 'Under Protest' not enabled

There is no procedure prescribed for taxpayer to deposit the entire disputed demand and continue to agitate the matter to secure an authoritative interpretation and binding precedent from a competent forum. While payment 'under protest' did not exist under the earlier law initially and came out of judicial authorities that refused to uphold demand for interest when taxpayers had pre-paid the disputed demand. Later it became common practice for taxpayers to deposit disputed demands 'under protest'.

When this experience is jettisoned in GST, it cannot be considered to be oversight but deliberate policy decision to make self-assessment real and complete in the hands of the registered taxpayer. Amount deposited in Cash Ledger will not be accepted as discharge of liability. Balance available in Credit Ledger will only excuse interest (on reversal) and not discharge any extant liability. Payment *via* DRC-03 challan and 'intimation' to Proper Officer are not sound advice because there is no provision of law whereby the Proper Officer is obliged to 'accept' such intimation and act upon it one way or the other. Such advice, if any, is based on equitable considerations outside the statutory provisions. When taxpayers can demand the proper officer to adhere to the due process in this law, taxpayers cannot be permitted to travel outside the law and make payments 'under protest' and expect to be accorded special treatment for interest or penalty.

8. Grounds versus Arguments

Grounds of appeal must not be argumentative. Grounds form the basis on which the outcome is found unacceptable and appeal is preferred. Great care must be taken to draft the grounds accurately. Grounds are the lens from which the Appellate Authority is requested to view the adjudication Order. The Appellate Authority is not an Adjudicating Authority of higher rank. As such, appeal is not to re-do the adjudication once again.

Grievance: Order passed has not relied upon the terms of contract for relevant facts but travelled beyond the terms of contract presented by the Appellant	
Wrong ground: Impugned Order has misinterpreted the facts but failing to understand the clause……. of contract dated……. and proceeded with	**Suggested ground:** Impugned Order is contrary to facts in so far as it fails to derive facts forthcoming from contract taken on record but has proceeded to introduce

the understanding that …….. to be the real facts to reach the conclusion in support of the allegation which is erroneous and contrary to facts. As such, the demand confirmed is liable to be set aside.	alternative facts alien to impugned transaction to foist an unjust demand. As such, the demand confirmed is liable to be set aside.
Explanation: As to what are relevant facts is itself a question of fact to be determined in appeal. To state the operative portions of the contract will limit full consideration from being given to the contract taken on record. Instead, the ground should agitate that Impugned Order has travelled beyond the contract to look for facts and this will bring the Appellate Authority to enquire into the entire contract and make a determination about the correctness of the impugned Order.	
Order of Appellate Authority (if detailed consideration of facts and verification of documents necessary): Ground no……. wherein…… facts introduced by Appellant require examination of …….. and other documents to determine treatment applicable. As such, matter is remanded with directions to……	**Order of Appellate Authority (if facts are undisputable, treatment to be applied will be inevitable):** Ground no……. wherein applicable contract taken on record has been overlooked and extra-contractual terms have been assumed to be facts, is not sustainable. As such when the facts in the contract are…… it is therefore imminent that …….. treatment is applicable. As such appeal is allowed.

Grievance: Order passed has not relied on the applicable law but applied some other provision	
Wrong ground: Impugned Order has applied Entry no…. to notification ……. which is erroneous since the facts of the case fall within Entry……which is erroneous and contrary to facts. As such, the demand confirmed is liable to be set aside.	**Suggested ground:** Impugned Order is contrary to law in so far as it proceeds on the misunderstanding of facts forthcoming from contract taken on record and has proceeded to reach an erroneous conclusion about the applicability of contrary

	tariff entries. As such, the demand confirmed is liable to be set aside.
Explanation: Inquiry in appeal will now be opened up to examine all facts and evidence produced to arrive at the relevant facts, to reach the correct tax treatment instead of limiting the scope of appeal to the Entry assailed to be erroneous.	
Order of Appellate Authority (if Tariff Entry in support of demand *prima facie* admissible and confirmed in adjudication alternate tariff would require proof): Ground no……. pleading applicability of alternate entry by Appellant has resulted in shifting of onus of proof and in the absence of satisfactory proof to assail the admissibility of entry adopted in impugned Order, appeal is dismissed.	**Order of Appellate Authority (if admissibility of Tariff Entry in notice doubted and evidence relied upon is unreliable, it requires re-examination):** Ground no……. demanding reliability of contract taken on record, it is incumbent that original authority give this fresh consideration. As such when the facts in the contract are……. appeal is allowed by way to remand with directions that…….

Grievance: **Order passed is not following the decision of higher authority**	
Wrong ground: Impugned Order is contrary to the decision in the case of ……. wherein it is held as…….. and in view of this interpretation of law provided by higher authority, the treatment of law applicable to the admitted facts of the Appellant should be……. not ……. which is erroneous interpretation of law. As such, the demand confirmed is liable to be set aside.	**Suggested ground:** Impugned Order is contrary to judicial authorities in so far as it has overlooked the binding decision of higher authority resulting in contempt of such authority whose decisions provide the interpretation to be followed scrupulously by all subordinate authorities. As such, the demand confirmed is liable to be set aside.
Explanation: Between the date of filing of the appeal and the date of hearing of appeal, there may be new decisions which may be (i) contrary to and overrule the one relied upon or (ii) more authoritative than the one relied upon. A ground cannot normally be amended. As such, grounds must not	

be limited by one decision available at that time and forfeit the benefit of subsequent decisions.	
Order of Appellate Authority (if decision relied upon is overruled subsequent to the date of appeal): Ground no……. wherein……decision relied upon is inadmissible since the said decision stands overruled by……	**Order of Appellate Authority (if decision relied upon is overruled subsequent to the date of appeal):** Ground no……. wherein applicable judicial authorities are relied upon, current decision of …… appears to support Revenue's case which the Appellant has sought to distinguish in personal hearing held on …….. The grounds on which the current decision in…… is sought to be differentiated and appear to be well-founded and consequently …..……
Explanation: *Same as above*	

Reference must be made to GSTAT (Procedure) Rules when they will be notified to grasp the exact nature of the restriction. But it is well established that grounds of appeal are not points of argument. Points of argument are built based on the grounds urged. Grounds urged will give the respondent -department to counter. Grounds not urged cannot be argued during hearing. Grounds enable arguments. Grounds by themselves should not be argumentative.

Illustration 45. Impugned Order is bad in law in so far as it has confirmed the demand beyond the period of limitation. For this reason…….

Illustration 46. Impugned Order is contrary to facts in so far as it has confirmed the demand for reverse charge under section 9(4) when the said supplies are made to the Registered Persons. For this reason……

Illustration 47. Impugned Order is contrary to law in so far as it has confirmed the demand for output tax on supply of goods when the underlying transaction is to be treated as supply of services in terms of Schedule II of CGST Act. For this reason ……

Illustration 48. Impugned Order is erroneous in so far as it has confirmed the demand at a rate which is not within those listed in notification ……. said to be relied upon. For this reason……

Illustration 49. Impugned Order is illegal in so far as it has failed to adhere to binding precedent of judicial authority of the jurisdictional High Court. For this

reason …….

Illustration 50. Impugned Order is erroneous and illegal in so far as it has failed to adhere to the interpretation contained in administrative instructions issued under section 168 of the CGST Act, 2017 without any contrary judicial authorities that require discard of the said instructions. For this reason …….

9. Caselaw Precedent

Rule of law means that the law rules or governs the society. Law is that which is knowable and not mysterious. Statute Law is that made by the Legislature. But the source of law may be by Courts also. *'Stare decisis'* means that 'in like circumstances, treatment of law must be alike'. It is for these reasons that decided cases have precedent value so that when facts are similar the treatment is not dissimilar.

Use of caselaw in appellate proceedings is not to outsource case presentation to the precedent. It is common place that existence of an authoritative decision nearly prevents any independent thinking. The perils of this imprudence is that between the date of filing of the appeal and the date of its hearing, precedents relied upon could be overturned and if caselaw formed the basis of grounds in appeal, then the Appellant-taxpayer will be left without grounds to argue when the matter is listed for hearing.

Caselaw is relevant only after the grounds put forward have been argued. When the grounds argued are so compelling, an unfavourable caselaw may be distinguished or referred for review if it has been rendered *sub silentio* or is *per incuriam*.

There is a tendency to overload replies to notices, appeal memo and synopsis with caselaw. A caselaw for every word. A caselaw for every interpretation. A caselaw for every wishful alternative interpretation. If one were to look hard enough, one will be able to find a caselaw, in some context, that bears the indicia of relevance to the present case. It takes great skill to identify if the decision is (i) relevant and (i) binding to the present case. Relevance is a matter of substantial coverage of the facts and statute interpreted. Binding refers to the jurisdiction of the authority which has rendered the decision. Decision of the Andhra Pradesh High Court is a binding authority in Karnataka when there is no decision on that point from Karnataka High Court. But if there is a contrary decision of Karnataka High Court, then the decision of the Andhra Pradesh High Court will not even have persuasive value in proceedings in Karnataka.

10. Condonation of Delay

Appeal must be filed within three (3) months by taxpayer and six (6) months by the Revenue. Section 107(4) allows one (1) month delay to be condoned. Condonation is not a matter of right that taxpayer can demand from the First Appellate Authority. The First Appellate Authority is not obliged to condone the delay in every belated appeal. Condonation requires 'sufficient cause' to be shown. Sufficiency of cause comprises of (i) pleading and (ii) evidence. That is, the cause must be pleaded (or stated clearly) and evidence adduced to support the truth of the pleading. Merely stating that the proprietor was unwell will not be 'sufficient' but only be the 'cause' for delay. Evidence is proof and proof must be (i) independent and competent (ii) genuine or truthful (iii) verifiable and (iv) sufficiently explaining all days of delay. A proprietor cannot issue affidavit of ill-health and expect the First Appellate Authority to admit it as sufficient cause. The proprietor is competent to file a truthful affidavit of ill-health but the request for condonation requires that this pleading be supported by evidence. A certificate from a medical practitioner could be such evidence. If this certificate were to describe the (i) date of first presentation (ii) brief listing of symptoms (iii) diagnosis and treatment (iv) duration of care advised, it would add to the reliability (or probative value) of the certificate.

The First Appellate Authority is free not to condone the delay due to insufficiency of cause or unreliability of evidence adduced. Taxpayers cannot assume that the First Appellate Authority must condone delay, especially, when the merits of the case in appeal are heavily in favour of the taxpayer. Merits of the case has nothing to do with the preliminary proceedings when it is yet to be determined if the appeal must be dismissed for being delayed within the limitation prescribed or that the cause and its sufficiency demand the exercise of limited discretion allowed in the statute which First Appellate Authority must exercise in order for taxpayer to avail the appellate remedy, when the delay was *bona fide*.

11. Belated Appeal

Every appeal filed after the statutory limitation period of three (3) months (or six (6) months in case of Departmental appeal) must be dismissed. Use of discretion to condone delay is the exception. Exceptions require exceptional nature of the circumstances causing delay to be reliably brought out.

The First Appellate Authority cannot demand explanation as to why the appeal was not filed within the statutory limitation. He can only demand an explanation for the days of delay beyond the last date of the statutory limitation. The

taxpayer is not obliged to explain what was going on during the statutory limitation period. The taxpayer must only explain the misadventures from the last date of filing appeal and thereafter until the actual date of filing of the appeal.

Delay beyond the condonable time of one (1) month cannot be extended by the First Appellate Authority, not even in meritorious cases. The First Appellate Authority cannot exercise authority that Legislature has not conferred. He must dismiss appeals filed beyond condonable time. Not giving opportunity of hearing may not be violative of principles of natural justice because dismissal is not by exercising authority conferred on him but on the ground of absence of authority to entertain fatally belated appeals.

Filing appeal before wrong forum like (i) appeal filed before Central Appellate Authority against State Order or *vice versa* or (ii) appeal filed before Deputy Commissioner (Appeals) instead of Commissioner (Appeals) who are both appointed under rule 109A, will not be fatal to the appellate remedy availed by the taxpayer. It is the duty of the First Appellate Authority who has received the appeal to (i) return the appeal to taxpayer to file it before the right forum or (ii) redirect and forward the appeal to the right forum under intimation to the taxpayer. Time spent in reaching the appeal filed within time but before the wrong forum cannot impair the remedy available to the taxpayer. This remedy is available to taxpayer as a matter of right and not a resolution only for sufficiency of cause shown. However, the taxpayer cannot claim this remedy by filing appeal before an unintelligible forum such as CESTAT in respect of GST and assert that it was error of forum.

Certain notable decisions in this regard are *Orient Syntex Ltd. v. AC-CE* [(1990) (47) ELT 321 (Bom.)] and *Zafarullah v. CC* [(1992) (60) ELT 263 (Trib.)], where delay in fatally belated appeals were also admitted on grounds of equity. However, the Apex Court in *Singh Enterprises v. CCE* [(2008) (221) ELT 163 (SC)] authoritatively held that limitation ends all proceedings. Reference may also be made to *Ramlal & Ors. v. Rewa Coalfields Ltd.* [AIR 1962 SC 361 (SC)] where it was held that:

(i) only days of delay beyond the limitation need to be explained;

(ii) omission to file appeal within limitation cannot be questioned as limitation is a 'vested procedural right';

(iii) merits of the case are irrelevant while explaining delay;

(iv) lapse of limitation gives the counter-party a vested right that cannot be lightly disturbed or overturned;

(v) while explaining delay, first date of misadventure (causing delay) must be before the expiration of limitation and not after, but may run continuously through the delay and

(vi) there can be a series of *bona fide* reasons running one after another adding up to explain the entire duration of delay without a single day going unexplained.

Reasonable delay includes remarkable but not unexplainable and impossible delay. More remarkable the delay, more compelling must the evidence in support of the plea (of reasons) taken to explain it.

12. Date of Service of Order

In view of the seriousness and severity of consequences 'date of service' of the Order of adjudication must be carefully tracked. Columns 7 and 16 of FORM GST APL-01 highlight the special emphasis given to 'date of service' of Order. Taxpayer must not declare 'date of Order' as 'date of service' of the Order. Section 169 provides several different modes of service of Notice, Order or any other communication. But choice of mode of service is itself a decision made by Proper Officer to complete the process of adjudication.

Service by e-mail and service on common portal are recognized modes of service but the Proper Officer cannot be rest assured of having completed the duty of service of Order by choosing the most inexpeditious mode available in law to serve the Order. Proper Officer's choice of mode will be tested on the anvil of fairness in adjudication if the mode chosen is least likely to reach a given taxpayer.

Non-service of Order requires taxpayer to make a pleading and does not require any proof. Burden of proof (of service of Order) rests on the Proper Officer. Discharging this burden must show (i) application of mind based on facts of taxpayer (ii) choice of mode from available alternatives in law (iii) collecting affirmative proof of service. The standards are quite high. The First Appellate Authority is not the one to support assertion by the Proper Officer about the validity of service lightly.

Actual date of service will be the date stated by the taxpayer in column 7 of FORM GST APL-01. And in column 16 if the taxpayer states "no delay" then the First Appellate Authority must admit the appeal and leave it for the respondent-department to raise objections as to the date of service. When appeal appears to be fatally belated but the taxpayer claims non-service of

Order, steps taken by the Proper Officer under section 78 to recover demand that became final (on lapse of statutory limitation to appeal) will be a good indicator of validity of pleadings by the Proper Officer regarding date of service of Order. Section 107(1) is clear in stating *"within three months from date of communication of Order"* and not from '*date of passing of Order'*.

With the online filing procedure, it is expected that ARN number for FORM GST APL-01 must be counted from date reported by Appellant in column 7 and not the date of Order obtained within the common portal as legal remedies are tied to 'date of service' of Order. Determination of 'date of service' of Order is itself a question of law and facts that the First Appellate Authority will first need to determine.

13. Defective Appeal

Appeal filed with defects is no appeal at all. Defects are fatal to the appellate remedy. Defects in appeal are those that render the appeal itself *void ab initio*. Appeal filed (i) without making pre-deposit of disputed tax (ii) without verification by Appellant and (iii) not in prescribed form, render the appeal *non est* in law. The First Appellate Authority is required not to take cognizance of such appeals.

Principles of natural justice demand that the First Appellate Authority issue a 'defect notice' in respect of defective appeals filed so that taxpayer gets an opportunity to be heard. It is not uncommon for taxpayers to request the appeal to come up before the First Appellate Authority as a defective appeal and argue their position. For instance, appeal filed against an Order under section 130 does not require any pre-deposit, but this Order may include an amount of demand under section 129 also. Another instance may be where pre-deposit is made *via* DRC-03 challan against Order under section 129(3) to release the goods but appeal is filed in FORM GST APL-01 disputing the entire payment made. Listing appeals with defects is very common in Tribunal.

The common portal generates ARN in respect of appeals filed with defects but where appeals are filed online, pre-deposit table in FORM GST APL-01 is a stopping parameter that does not allow the taxpayer to proceed further without making the deposit. It is expected that ARN will be generated in all appeals filed, with or without defects.

Appeals filed with defects can be requested to be presented by the Registrar (filing section attached to the First Appellate Authority or GSTAT) to be listed before the First Appellate Authority or GSTAT as 'defective appeal'. For

instance, amounts paid involuntarily or to secure release of consignment *via* DRC-03 would not require pre-deposit to be made once again along with FORM GST APL-1 / APL-5. Appeals listed under defects cause list will be taken up for (i) disposal by way of admission of appeal or (ii) dismissal of appeal, when defects are attributable to functionalities on common portal and not actual non-compliance by taxpayers.

14. Impugned Order or Notice

The First Appellate Authority is not an adjudicating authority of higher rank. In fact, section 2(4) and section 5(4) make it explicit that the First Appellate Authority cannot carry out adjudication functions. For this reason, the Order of adjudication is 'at large' before the First Appellate Authority and not the Notice which was adjudicated upon. While the First Appellate Authority is free to look into the Notice, but the boundaries for appellate proceedings is laid down by the Order of adjudication.

Impugned (*pro: imp-yooned*) refers to the Order that is assailed in appellate proceedings. If the Order of adjudication is bad, it must be struck down and demand that was confirmed be set aside. The First Appellate Authority should not set aside the demand in the Order of adjudication and then take up the issue raised in the Notice and recast the Notice to confirm the demand on better grounds. These boundaries to appellate proceedings are explicit in section 107(11) where the *"decision or Order"* appealed against may be *"confirmed, modified or annulled"*. Inherent power to "make such further inquiry as may be necessary" does not authorize the First Appellate Authority to re-do the audit or investigation by calling for the records to be submitted in the guise of *"making further inquiry"*. When officers who hold adjudication responsibilities are transferred to carry out appellate responsibilities as First Appellate Authority, they must demarcate their previous role with the current role. The taxpayer must be alert to object if material called for by the First Appellate Authority does not exceed the boundaries of appellate proceedings laid down in the statute. It is not imprudent to make written submissions that inquiry by the First Appellate Authority appears to be travelling beyond the impugned Order.

Erroneous grounds in Notice cannot be cured in appeal. In fact, adjudication itself must be confined to the grounds in Notice and any errors in the Notice will be fatal to the demand. It is the Order of adjudication that is 'at large' and available for being taken up for consideration in the appeal. The First Appellate Authority must examine the (i) conclusion in the Order of adjudication (ii) based on findings-on-facts reached during adjudication on the basis of contentions

by both sides. The First Appellate Authority must show independence and cannot appear to be biased. There are limitations on these aspects in the role of the First Appellate Authority since he is a firstly a Departmental functionary selected to take up this appellate role and will go back to Executive roles after completing his tenure as First Appellate Authority. But the role of a Departmental functionary acting as First Appellate Authority is significant due to the specialized nature of GST and the assistance the First Appellate Authority can offer in the fact-finding process to evaluate the Order of adjudication and refine the facts that are carried before the Appellate Tribunal in the next step.

15. Second Appeal

Appeal to the GST Appellate Tribunal (GSTAT) is the second forum of appeal and unlike central excise, there is no procedure to file first appeal directly to GSTAT. Without repeating the aspects discussed earlier, suffice to state that (i) statutory limitation is three (3) months (ii) condonable delay is another three (3) months (iii) cross-objections and cross-appeals are both allowed (discussed later) and (iv) additional 20 per cent of disputed tax or credit or refund (excluding interest and penalty) (subject to maximum of Rs. 100 crores (Rs 50 Crores each)) must be deposited for admission of the appeal.

Aspects such as belated appeal, condonation of delay, date of service, defective appeals, grounds v. arguments, etc., apply to GSTAT also and the earlier discussions may be referred once again. There are other matters that need to be understood in the context of GSTAT that will be discussed.

Order of the First Appellate Authority (Order-in-appeal) is 'at large' before GSTAT. Similar to the First Appellate Authority, GSTAT is not an adjudicating authority and therefore, findings reached in Order-in-appeal alone may be carried before GSTAT based on good and sufficient grounds. Grounds are not arguments (discussed earlier). Grounds form the basis on which the Appellant claims relief in the prayer. Grounds contain the position being taken by the Appellant in respect of the Order-in-appeal.

16. Inherent Powers

Section 111(2) refers to 'inherent powers' of GSTAT and these powers are available to the First Appellate Authority too for *"making inquiry"* in the course of conducting appellate proceedings, namely:

(a) Summon for examination on oath – To establish the truth assertions made by either party are not routinely relied upon or relied upon

unverified. Summons under section 70 is in pre-notice stage of an inquiry and it is conducted under statutory powers of the Proper Officer. But the power to summon within the inherent powers is not limited to inquiry but extends to the entire proceedings before the GSTAT. Statements made in summon proceedings bear the liability of perjury if the deponent made false or misleading statements. Consequences of evading summons and non-appearance in response to summons also befall on the deponent. GSTAT may exercise this power *suo motu* or on request by the respondent before admitting the validity of any assertion made by the Appellant.

(b) Discovery and production of documents – Disclosure of information or documents to the other side is necessary before GSTAT entertains such information or documents during appellate proceedings. Discovery is a word of significant import and a parallel can be found in section 165(5) of the Code of Criminal Procedure made applicable to GST proceedings under section 67(10). Reference may be made to ICAIs "Handbook on Inspection, Search, Seizure and Arrest in GST" for additional discussions on this aspect. GSTAT may call upon either party to disclose material considered relevant in the proceedings.

Demanding production of documents is a direction to the person making any assertion for substantiating the assertion if the same arises from any documents such as contracts, test reports, certificates, etc. and in the absence of compliance, the assertion flowing from the said documents is disregarded. This does not authorize the GSTAT to call for books and records to restart audit enquiry or investigative inquiry, but GSTAT is permitted for call for documents 'relied upon' to substantiate any assertion made on the grounds urged in appeal.

GSTAT is not obliged to entertain assertions without verification. If verification requires redoing original proceedings, GSTAT will not permit it but if verification is necessary to admit the validity and reliability of any assertion made then, this inherent power will be exercised.

(c) Receiving evidence on affidavit – Not all evidence requires third-party proof. Some matters may be admitted on affidavit. After all, statements made *via* affidavit attract the consequence of perjury if it is false. Demanding affidavit is itself a check against making misleading statements during the proceedings. Additional check exists by way of respondents challenging the correctness of statements made in affidavits. When one submits an affidavit, statements made therein are

less likely to be false than statements made verbally. Also, when persons participating in appellate proceedings are not those involved in original proceedings, affidavits are a more reliable mode of collecting relevant information that must be furnished based on internal records or instructions from persons involved earlier.

One may wonder, if evidence can be admitted on affidavit, what is the purpose of demanding production of documents (previous point). These overlapping and seemingly reductant powers are included in the inherent powers with good reasons.

(d) **Requisition of public records –** Information held by a bank or a PSU or a regulator may be requisitioned by GSTAT to prove or disprove an assertion canvassed by parties to the appeal. Power of collecting information directly is a bulwark against producing documents said to be secured from such public records that may have defects or discrepancies. In fact, this inherent power makes it incumbent on other authority to comply with directions issued by GSTAT.

(e) **Issuing commission –** Often it may become necessary to visit a particular location to collect current status about certain things or event or state of affairs of those things or events. Inherent power to issue commission is also to appoint an expert to examine and report certain things or state of affairs of those things. Such mode of evidence collection is to ascertain independently the reliability of assertions made by the parties. For instance, a CA may be commissioned to examine the books and records to confirm whether the (i) disputed amount of input tax credit on capital goods has been claimed as depreciation (ii) disputed amount of refund has been recovered and burden passed on to customer or such other matter where expert opinion is required in an esoteric subject matter. Within these inherent powers witness may be examined by an independent commission and the transcript from examination can be taken up for consideration during proceedings by GSTAT.

(f) **Examination of representation –** Parties may make representation through an application which may be examined for its (i) maintainability and (ii) grant of relief prayed therein, including disposal of such application on merits or dismissal on *ex parte* basis. Applications include miscellaneous application for condonation, adjournment, rectification, restoration or issuing commission, requisition

of records, or issuing other process.

(g) Setting aside any order passed – Parties who have suffered dismissal may make yet another application for restoration in view of dismissal being on *ex parte* basis. GSTAT has the power to allow application 'on terms' such as payment of costs to be deposited with National State Legal Aid Services Authority.

(h) Any other matter prescribed – Rules of procedure permit GSTAT to undertake various specific procedures and inherent powers will include the power to carry out those matters. It is expected that GSTAT will be modelled on e-Court system currently practiced by High Courts.

These are instances about 'inherent powers' of GSTAT but section 151 of Code of Civil Procedure extensively addresses on inherent powers and practical understanding that must be gained in identifying matters falling within these powers.

17. Rules of Procedure

GSTAT is expected to have e-enabled filing procedure within GSTN common portal to ensure seamless flow of documents such as Notice, reply, Orders of adjudication, DRC-07, first appeal APL-01 memo, APL-04, Orders-in-appeal, second appeal memo FORM GST APL-03/05, related applications, etc. A quick look at CESTAT (Rules of Procedure), 1982 is considered to be a reliable guide as to how the GSTAT Rules of Procedure are likely to be modelled with improvements in respect of workflow and document flow including sharing of copies with respondent, Appellant and their Authorized Representatives, listing of matters, adjournment and other miscellaneous applications.

18. Cross Appeals

When both sides – taxpayer and the Revenue – decide to appeal against an Order of adjudication or Order-in-appeal, it is referred as 'cross appeal'. Taxpayer will appeal on points that are adverse to him and Revenue will appeal on points that are adverse to it. Both appeals will be 'tagged' and listed for disposal together as they both arise from the same impugned Order.

19. Cross-objections

When a taxpayer has enjoyed partial relief in appeal before the First Appellate Authority but further appeal before Second Appellate Authority (SAA) has not been preferred but the Revenue has preferred appeal before SAA, the taxpayer is entitled to file a MOCO (Memorandum of Cross Objections) which

is an appeal by taxpayer within forty-five (45) days before the GSTAT. MOCO is an appeal in respect of unfavourable points in the Order of the First Appellate Authority that was left uncontested until it was discovered that Revenue is attempting to overturn the partial relief that the taxpayer has received from the First Appellate Authority.

20. Mistakes Apparent

When there are mistakes apparent on the record, then the taxpayer or Revenue may make an application which may be heard and allowed by way of rectification of Order within the 'inherent powers'. Similar provisions are available under section 161 in respect of Orders of Proper Officer(s).

Mistakes apparent may include typographical errors, computational errors, misstatements, etc. Mistakes apparent do not include request for reappreciation of evidence, revise the conclusion reached, rectification of interpretation adopted, etc. Once impugned Order is passed and is without mistakes apparent, then the officer or authority is rendered *functus officio* and is barred from entering upon the matter again.

21. Power of Review

Where reappreciation of the conclusion reached is permitted, that would be 'power of review'. That is, to take a relook at the conclusion reached either based on a rethink about the interpretation adopted or alteration of the ratio applied. Inherent powers do not include power of review except in the case of higher Courts.

The Proper Officer who has passed an Order may change his mind about the correctness of the conclusion reached and hence the outcome of that Order, does not have the authority to set right the error. To do so would be to exercise the 'power of review' which is not allowed by Legislature under the GST law. Where there is any such slip that is prejudicial to the taxpayer, then the taxpayer's remedy is to prefer appeal against such Order. And where it is prejudicial to the interests of the Revenue, then either Departmental appeal must be preferred under section 112(3) or revisionary proceedings must be initiated under section 108(1). Rectification of mistakes apparent by GSTAT does not fall within power of review.

Chapter 6
Revisionary Proceedings

1. Introduction

For an executive officer to enjoy power to overturn the Orders of the First Appellate Authority (and any other subordinate officer) is not harmonious with first principles of administrative law and rubs against the grain of separation of judicial and executive functions, the power of revision is here to stay in GST. The Commissioner or an officer authorized is empowered to 'revise' the Orders passed by any officer lower in rank to such officer, subject of course, by putting the taxpayer at notice before overturning the impugned Order.

Revisionary proceedings do not offer curative power over defective Notices or Orders passed by subordinate officers. If that were the case, then taxpayers will be prejudiced no matter what they were to offer in defence against demands. Demand can be made only by issuing a Notice under Chapter XV but provisions relating to revisionary proceedings are contained in Chapter XVIII.

2. Prejudicial Orders v. Adverse Orders

Every Order that is favourable to taxpayer does not *ipsi dixit* become 'prejudicial' to the interests of the Revenue. That would make the Order 'adverse' to Revenue. It is important to understand the difference between prejudicial versus adverse. It is only those Orders that are (i) prejudicial to the interests of Revenue and (ii) on account of specified factors – illegal, improper, omitted to consider material facts or CAG observations, that can be taken up in these revisionary proceedings. If Orders that are adverse but not prejudicial are taken up in revisionary proceedings, that itself becomes a question of jurisdiction that can be carried before GSTAT and the findings reached in revisionary proceedings will be irrelevant.

Orders that are not prejudicial but adverse to the Revenue can only be agitated in Departmental appeal under section 112(3) and not in revisionary proceedings under section 108(1). Erroneously entertaining revisionary proceedings without examining whether the Order is (i) prejudicial or adverse to the Revenue and (ii) precision with which any one of the factors specified have been asserted to invoke this exceptional jurisdiction, would do disservice to the interests of taxpayer. Replying to notice in revisionary proceedings

without challenging the validity of jurisdiction – prejudicial to the interests of the Revenue – would be the first error that taxpayers are seen to commit in their approach.

3. Proper Officer

Commissioner or a delegate will be the Proper Officer to conduct revisionary proceedings. Additional Commissioner and Joint Commissioner are appointed under section 108(1) to act as Revisionary Authority in cases where the Order is passed by the Deputy Commissioner/ Assistant Commissioner / Superintendent. Obviously, Orders passed by officers subordinate of certain 'rank' will be 'at large' before the Revisionary Authority to be taken up on these proceedings.

The First Appellate Authority being an officer holding the rank of Joint Commissioner or Additional Commissioner Orders of Additional Commissioner cannot be taken up on revisionary proceedings since Additional Commissioner is not considered to be 'subordinate' to Commissioner by an officer who holds 'co-extensive' rank with some differences. As an analogy, a Judge of a High Court is not 'subordinate' to the Chief Justice of that High Court because all are judges of the High Court, but the Chief Justice has additional and exclusive duties while being the senior most judge of that Court. Fatal errors are known to be committed on the question of 'Proper Officer'.

4. Notice and Stay

No proceeding that potentially has adverse consequences can be undertaken without 'putting at notice' the taxpayer. As such, Notice is prescribed to be issued in FORM RVN-01 which is to address (i) jurisdiction (ii) area of prejudice (iii) evidence or material to support claim of prejudice (iv) proposed action (v) opportunity to reply, in respect of the impugned Order.

Correctness and completeness of this Notice is *sine qua non* for the rest of the proceedings to be considered lawful and proper. If the Notice contains defects, the proceedings will be void. Whether a defective Notice left undisputed or acquiesced and replied on merits by taxpayer will be 'with prejudice' is a question that remains to be tested in the Court of law but appears to be so, from the language of section 160.

Notice cannot claim to be prejudicial to the interests of the Revenue in a routine manner. The election to invoke jurisdiction on the factor of illegality of the impugned Order operates as election to reject other three factors (see four factors listed earlier) and *vice versa*. Any error of election of factor becomes a

basis to question the validity of this Notice. After all, precision is essential to allegation, especially, when a decision already reached following due process of law is sought to be overturned.

Notice in revisionary proceedings involves two stages, (although the format of FORM RVN-01 does not bring this out) which comprises of (i) staying the operation of the impugned Order and (ii) putting the taxpayer at notice to answer the proposal to overturn the impugned Order. Stay from operation of the relief secured in impugned Order is important as it ceases to operate as a precedent for subsequent tax periods where similar proceedings may be underway. For instance, refund sanctioned by the First Appellate Authority must first be stayed when the basis on which the refund was sanctioned is illegal (say, due to interpretation which is contrary to a circular that was issued subsequently) so that refund applications for subsequent tax periods may be rejected by jurisdictional Proper Officer until conclusion of the revisionary proceedings.

5. Further Inquiry

Original proceedings (impugned in revisionary proceedings) canvassed a certain interpretation of law that came to be dropped in adjudication or set aside in the first appeal by a Proper Officer. Having once examined the allegation and response of the taxpayer to reach a finding in favour of taxpayer, to invoke exceptional power of revision subsequently to overturn apparent prejudice to the interests of the Revenue requires exposing the utter failure of adjudication or appellate proceeding.

Without the wherewithal of time, resources and access to information as in the original proceedings (now impugned), Revisionary Authority will not be able to re-do those original proceedings but only locate (one out of four) factors specified in section 108(1) that make this exceptional jurisdiction available to the Revenue. The Revisionary Authority will have access to taxpayer's (i) reply during adjudication proceedings and / or (ii) grounds, arguments and additional submissions in appellate proceedings which usually contain a wealth of information due to the tendency of taxpayers to make elaborate binders - full of information even when the same may not be necessary to defend the short points in the notice or appeal.

Where it is provided that the Revisionary Authority may *"after making such further inquiry as may be necessary"* does not permit 'second round' of original proceedings. The scope of revisionary proceedings may be identified from the

scope of FORM RVN-01 whether it (i) calls for new information or material or (ii) canvasses a more accurate interpretation based on existing information or material. Care must be taken not to expand the scope of these proceedings and this discretion lies with the taxpayer. Some instances where the scope of original proceedings is expanded through revisionary proceedings would be changing HSN code to fasten a new demand, rejecting or doubting evidentiary material taken on record (and relied upon earlier), introducing a different criteria to arrive at the time or place of supply to support demand, etc.

6. Limitation

Revisionary proceedings cannot be undertaken (i) before the time available to file appeal under section 107 (including Departmental appeal) or 112, 117 or 118 has lapsed or (ii) after three years since the date of the impugned Order.

Original proceedings may be (i) adjudication Order or (ii) Order-in-appeal passed by the First Appellate Authority. When revisionary proceedings are initiated, care must be taken to locate which of these is 'impugned' (or taken up for consideration). Every Order-in-appeal will have an underlying adjudication Order. When an Order-in-appeal is taken up for consideration in revisionary proceedings, the material available on record will include adjudication Order but that adjudication Order is not 'impugned' in these proceedings. For this reason, taxpayers must not confuse themselves that revisionary proceedings are barred by limitation since the time to file appeal against the underlying adjudication Order has lapsed because Order impugned is not the adjudication Order but the Order-in-appeal.

Limitation gets extended indefinitely by section 108(4) in cases where a nebulous issue is agitated by the Revenue in some other taxpayer's case. FORM RVN-01 can be issued to all other taxpayers and Orders passed in their favour may be stayed indefinitely pending disposal of that case. Only after that case is decided, limitation runs to overturn Orders in each taxpayer's case.

7. Further Appeal

In view of the limitation falling within two classes namely (i) appeals under section 107 and (ii) all other appeals, it was a strategy under VAT regime for appeals to be filed before the Tribunal so that Orders-in-appeal are barred from revisionary proceedings, even if the Tribunal were to dismiss it for any reason including non-appearance by taxpayer and non-prosecution of the appeal.

As such, limitation in 108(2) is further refined in the *proviso* that makes revisionary proceedings apply to (i) impugned Order and (ii) for each issue decided (favourable to taxpayer) in the impugned Order. Taxpayers may not have appealed in respect of any issue which is now taken up in revisionary proceedings, even though the other issues (not taken up for revision) in the impugned Order may be pending before an appellate forum.

It becomes very complex if an issue were to be carried by the taxpayer in further appeal and dismissed on the question of maintainability and the limitation to take up the same issue in revisionary proceedings were to lapse. And if revisionary proceedings were to be taken up pre-empting non-maintainability if that issue were agitated by taxpayer in further appeal. Without insights from GSTAT Orders, it would be early to arrive at any definite conclusion on this complex point but taxpayers must stay alert, to avoid any misapplication of law due to enthusiasm on both sides.

8. Revisionary Order

Revisionary proceedings must follow the principles of natural justice and culminate in an Order. Summary of demand must be issued in FORM GST APL-04. Where demand is not issued in DRC-07, no recovery action can arise out of FORM GST APL-04. As such, FORM GST APL-04 contains the revised liability that will step into the place of (i) DRC-07 issued in adjudication Order or (ii) FORM GST APL-04 issued in original Order-in-appeal, now impugned in these proceedings.

There is a long-standing judicial line of thinking that 'demand requires notice' and any appellate proceeding cannot create a demand. *Circular 423/56/98-CX dated 22 Sep, 1998* contains the judicial background to this principle. But the law is not well developed under the earlier tax regime since revisionary proceeding is the remnant of VAT regime and not central excise regime. A recent decision of the Apex Court in *CCE v. Morarjee Gokuldas Spg. & Wvg. Co. Ltd.* [CA 3039/2011 dated 24 Mar, 2023] has addressed this question – whether demand can only be made *via* a show cause notice – and reached a different conclusion but without referring to the above circular or the authorities referred therein. As such, demand arising out of revisionary proceedings need further judicial consideration.

9. GSTAT

Revisionary Orders under section 108(1) are also appealable to GSTAT (apart from Orders-in-appeal passed under section 107(11)). In case of appeal

against revisionary Orders, taxpayers must identify whether the appeal to GSTAT is in respect of (i) validity of jurisdiction exercised in revisionary proceedings or (ii) findings reached in revisionary Order or (ii) both. Care must be taken not to proceed with "routinely both" because exercise of jurisdiction is more fruitful than for GSTAT to re-enter on merits. After all, the respective Adjudicating Authority or First Appellate Authority has applied his mind and reached a finding in the impugned Order and this cannot lightly be taken in revisionary proceedings as revision proceedings are not to be exposed to any (i) attempt of 'second round' of original proceedings impugned in revision and (ii) or attempt at expansion of demand.

Very often taxpayers rush to offer rebuttal, in their reply to FORM RNV-01, before examining the validity of jurisdiction. More prejudice will be caused to taxpayer if the reply to FORM RVN-01 is limited to jurisdiction allowing Revisionary Authority to overstep the original proceedings. Offering reply on merits on the new view canvassed in FORM RVN-01 would definitely be 'with prejudice'. Merely stating that reply is 'without prejudice' does not provide the immunity from prejudice discussed in section 23 of Indian Evidence Act.

Appeals to High Court under section 117 or Supreme Court under section 118 arise from Orders of GSTAT involving substantial questions of law. Orders of GSTAT against revisionary Orders regarding jurisdiction involve substantial questions of law. Since GSTAT enjoys power of remand, the taxpayer needs to consider whether the relief to be prayed in appeal against revisionary Orders should be (i) remanded with directions and to which authority after determining validity of jurisdiction or (ii) for determination of question of jurisdiction and enter into determination of merits also.

Chapter 7
Drafting and Pleadings

1. Introduction

Conveying information that is adequate to state a fact or observation or question about an action taken or anticipated without deficiency or overuse of words is a skill that will come by practice. However, this Chapter lays down the variants that may be at play in communicating with various authorities in indirect tax laws.

Drafting refers to the manner of presenting / communicating that best fulfils the twin objectives of 'audience' and 'message'. That is, the communication must be commensurate with the office of its recipient in language, detail and precision while passing on the desired understanding in its essence and form for verification.

Pleading means a plaint or a written statement. Understanding these requires a detailed study of this subject but broadly refers to the precise and purposive writing of the communication where only relevant facts are brought into consideration seeking a particular action by the addressee. Any relief sought in a Departmental communication is with a purpose for seeking exercise of authority vested with the addressee based on facts or data supplied. Hence, clarity in communication is imperative.

Communication in general must convey:

(a) Clear and unambiguous statement of facts about the assessee or transaction;

(b) Polite yet firm statement of assessee's position about any direct or indirect, assertion;

(c) Awareness of the limits to the power to seek information and the extent of duty to supply the same;

(d) Transparency about availability of documents and the contemporaneous nature; and

(e) Promptness in being available or accessible to attend to requirements.

2. Investigation

By its very nature, investigation is secretive as to the 'object and reason for 'suspicion'. Confidential, yes, but conveys a certain degree of mutual lack of confidence between the investigator and the person being investigated. That one cannot be made a witness against himself is not a one-way street because the investigation cannot be compromised by allowing the person investigated to supply evasive response.

Correspondence received from investigating authorities is generally brief and seeks a number of documents and records. Refusing to supply information attracts punitive provisions and it is not offensive to express inability to prepare new information not ordinarily available and / or maintained except in order to supply contemporaneously available documents and records. In other words, data available in the ordinary course of operations or those prescribed in law can be provided and details required in a new form / format of reports may not be able to be provided instantaneously.

It is important to verify the following:

(a) Provisions of the law that authorize the said investigation;

(b) Authority (officer) empowered to conduct the said investigation;

(c) Jurisdiction of the said authority over the assessee; and

(d) Nature of information called for and duration of time permitted to supply the same.

Illustration 51.

"To,

……..

This is in reference to the telephonic request seeking the following information:

a) …..

b) …..

In order to correctly understand the nature of information required and to obtain necessary approval to provide the same, we respectfully urge your goodself to provide a written request in this regard. This would greatly help us in promptly providing you with reliable information without any misunderstanding or error on our part.

……."

Illustration 52.

"To,

……..

With reference to your above referred letter, we are pleased to submit the following information for your kind perusal:

a) …..

b) …..

However, in view of the ongoing statutory audit / upcoming annual general meeting of shareholders / any other event scheduled to be held on _____, we are unable to devote the time required to prepare information in the form requested by your goodself. Hence, we request you to kindly grant us __ weeks time from the date of completion of the said event to provide the information as requested above.

……."

Illustration 53.

"To,

……..

With reference to your above referred letter, we have been directed to prepare and provide the following information:

a) Sales register in respect of sales contracts concluded in each office of the company within the State of …..

b) Details of input tax credit availed segregated based on payment made to supplier(s) from each bank account of the company for the period …..

c) …..

In view of the fact that the said information is not required to be maintained by us in accordance with the extant Rules, we do not have this information and regrettably we do not have the said information prepared contemporaneously. Hence, we are unable to reliably prepare and provide the same for verification.

……."

3. Audit

Audit is undertaken based on certain criteria such as revenue or risk in a unit. Departmental officers perform the audit. Sometimes audit is conducted by the

CAG or special audit is conducted at the behest of the Department by CAs. Audit as envisaged under the Chartered Accountant's Regulations is distinct and cannot be used as an appropriate comparison to appreciate the nature of this exercise undertaken by the Departmental audit officers.

It is usual to receive a request for information in standardized forms / formats. Hence, it is important to bear in mind that the response must be in line with the information available in returns filed and annual financial statements. For example, where AS-7 is followed for reporting revenues in financial statements and sale of fixed assets are also considered in the financial statements, it is not acceptable that reconciliation is not available with the value of taxable supply of goods or services or both disclosed in GST returns.

The scope of an audit correspondence may be bifurcated into two parts:

(a) Categorization of transactions for purposes of levy of GST– Here contractual arrangements are inquired into and copies of agreements / contracts are called for to verify that the transaction constitutes a supply and after that the tax positions followed to identity whether it constitute supply of goods or services or both. As regards, general business overview or any equivalent non-specific language used to seek information that categorizes the business operations, it is important to ensure that in the enthusiasm to provide such information the note / submission does not travel beyond the scope of the words used in actual agreements / contracts. Use of sweeping description can lead to misunderstanding or misinterpretation. It is advisable to restrict the information to words from contracts or tax positions determined after internal consultations.

Illustration 54.

"General Business Overview

The company is engaged in the business:

Not Advisable	Suggested Alternative
….. of software development and customization, sale of software licenses of its own products namely, ……. And annual maintenance contracts	*….. of information technology software services and trading of goods (packaged software, namely, …..)*
….. of real estate development	*….. of works contracts for construction of residential apartment under a scheme involving*

	transfer of undivided share of land (owned and otherwise) along with amenities and facilities
….. of operating a restaurant	*…. of operating air-conditioned restaurant serving food and non-alcoholic drinks and outdoor catering services*
….. of operating dealership of XYZ (brand) cars including service station	*….. of trading of goods (motor cars and parts) as authorized dealer and providing maintenance and repair services*

…… Reproduce words from the financial statements (notes to accounts) ……."

(b) Compliance with discharge of the levy – Here the date and time of payment of taxes and their disclosure to the tax Department is inquired. Explanations in textual form allow room for misunderstanding. Hence, workings may be confined to computations and reconciliations. In these workings, clear references to source of each of the values would be beneficial.

4. Adjudication

While it is in one sense correspondence, more precise expressions are employed to describe correspondence with adjudicating authorities. Interaction with an Adjudicating Authority has the show cause notice (SCN) as the starting point. Not only that, the SCN provides the framework or boundaries for correspondence.

SCN must be met with a reply that may be filed by the noticee or a duly authorized representative. The authority to appoint a representative is a statutory right and the law lays down a list of qualifications that such a representative needs to possess in order to be eligible to provide such representation.

Reply to SCN must contain the following parts:

(a) Background facts relating to the noticee;

(b) Identification of facts and facts-in-issue to point to the purpose of the SCN;

(c) Preliminary objections concerning the SCN – authority and jurisdiction, timing and valid service and request for adjournment;

(d) Clear statement of acceptance or rejection, wholly or in part, of each para(s) forming the issues raised in the SCN. Arguments, corroborative or rebuttal evidence and supporting decisions need to be provided;

(e) Alternative plea may also be contained in order to rebut the issues raised in the SCN; and

(f) Prayer containing the nature of relief sought including whether opportunity for personal hearing is required or waived.

Adjudication is not an exercise to continue audit or investigation but to adjudicate upon the findings in audit or investigation after allowing the taxpayer to answer specific cause-of-action invoked in respect of the allegations and infraction of statutory provisions contained in the Notice. As such, after Notice is issued, audit or investigation cannot be continued. Any attempt to continue would tantamount to 'improving' the Notice. It must be noted that the Revenue is satisfied based on their findings in audit or investigation that a certain liability exists and Notice is issued to raise a demand for the same.

Introducing new material or taking on record new material that is not forming part of the Notice would convert the current Notice into an altogether new Notice. That is not the purpose of adjudication. This principle is well laid down in decisions of the Apex Court and recognized in section 75(7).

Reply to Notice is not to 'prove innocence' but to expose the failure of 'proof of guilt' contained in the Notice. There is a great deal of difference between proving one's innocence and questioning the Revenue's case. Notice requires taxpayers to answer the allegations. Taxpayers are therefore required to 'accept' or 'reject' the allegations. Taxpayers are not required to justify the stand taken in the reply. When the allegation is accepted, the demand must be discharged. And when the allegation is rejected, the taxpayer has the following options to consider:

a) If a *prima facie* case has not been made out by the evidence relied upon in the light of the cause-of-action invoked, nothing further need be done but allow Adjudicating Authority to consider taxpayer's stand and pass a speaking Order showing how the allegation is successfully proved in the Notice (without adding any new material, not already forming part of the Notice). This Order is subject to challenge in appeal; or

b) If a *prima facie* case has been made out by reliable quality of evidence obtained to support the allegation corresponding to cause-of-action invoked, the taxpayer needs to impeach the case so made out by introducing rebuttal material to disprove the Revenue's case.

Replying to the notice requires determination of this first, that is, whether a *prima facie* case has been made out or not. All too often, taxpayers are seen jumping to disprove Revenue's case even when the Notice only contains empty allegations presented with great conviction and at other times, data differences are presented as if that by itself is sufficient in law to support the demand.

5. Revisionary Authority

Power of revision is a supervisory power conferred by the statute to inquire into the propriety of Orders passed by any specified authority. Correspondence with revisionary authority occurs when opportunity is being given to the noticee before passing adverse Orders.

The fact that such a revisionary proceeding is initiated itself indicates that the underlying Order is considered to be warranting re-examination on some ground that is prejudicial to the interests of the Revenue. Hence, it is important for such noticee to ensure accuracy of facts being referred or relied upon. Hence the correspondence may be directed towards the following:

(a) Firstly, confirm the validity of exercise of jurisdiction under section 108;

(b) Secondly, examine the grounds on which the earlier Order is sought to be overturned;

(c) Lastly, approach the proceedings without causing prejudice to the remedy available when adverse Order, if any, is to be carried to Appellate Tribunal.

6. Authority for Advance Ruling (AAR)

The binding nature of the rulings of AAR requires very precise line of communication by the applicant. The applicant must ask a specific question based on the intended facts or proposed action. It, therefore, goes without saying that the ruling will have its binding force only if the transaction is carried out exactly the same way in which it was stated in the application.

"If the facts are as follows" is a presumption in the application. Exactly for this reason, "if the facts were altered as follows" is impermissible in the application. AAR is not a forum to seek legal opinion for various hypothetical scenario in which a certain transaction could possibly be carried out.

Ruling pronounced by the AAR will be binding even if there is a different interpretation to the corresponding statutory provisions by a Court or in a circular. Certainty of tax treatment is the assurance in advance ruling,

accuracy is the endeavour but not assurance. Applicant must accept perils of an adverse ruling which will also be binding even when the Court decisions or interpretation in a later circular are favourable.

7. Appeal

While provisions of CPC do not apply to appeal proceedings before statutory authorities such as Joint Commissioner or Commissioner (Appeals) and Tribunal, it is important to fully grasp the Appellate Procedure Rules that are prescribed by the statute. Diligence in the adherence to the form and presentation is essential.

The format prescribed may be referred from the statute. It is important to note that the Appellate Authority's familiarity with the form of appeal guides them to look for relevant information in specific columns or pages in this form. Hence, strict adherence to the prescribed form is essential.

Completeness is also of equal importance where different parts of the form of appeal such as facts, grounds, prayer and verification are not deviated from. Deviation can be fatal to the appeal itself.

Well-drafted appeal does not mean a very lengthy appeal. In fact, it is encouraging to note that under the Income-tax law and also GST law, e-filing of appeals has just commenced where there are limits to the number of words for each of these parts. Hence, the area of skill in filing appeal is not in elaborate language but in precision without leaving out any potential ground for substantiating the relief prayed for.

Illustration 55.

"…….. the learned Commissioner has permitted himself to be misled by relying upon unverified information that is nothing more than hearsay and as such reached an erroneous finding at para no ….. of the impugned Order which is unlawful and for this reason the demand for tax deserves to be set aside."

Illustration 56.

"……..the impugned Order is not legal and proper in as much as it seeks to regard the services rendered by the Appellant contrary to the express language of rule ….. by introducing extra-legislative tests and criteria not contained in the extant Rules and thereby causing great injustice to the Appellant which does not enjoy legislative sanction or pleasure of support from authority of judicial pronouncements holding field and for this reason the demand for tax deserves to be set aside."

Illustration 57.

"…having cited a circular issued by the Board as to the interpretation that the words in rule ….. are to be supplied and to this end, the impugned Order demonstrates eagerness to fasten unsubstantiated liability and a pre-determined mind which is violative of the principles of natural justice and for this reason the demand of tax deserves to be set aside."

8. Additional Evidence

Evidence is that which advances the cause asserted by the Appellant. The Appellant is free to mount a barrage of evidence that may prevail upon the Appellate Authority. Use of additional evidence must not be to exhaust the authority. Instead, it must be such that each one of them throws new light or advances the case asserted by the Appellant.

Appeal is a process of 'putting to test' the 'reasons' for the adjudication finding in favour of Revenue's case in the Notice. Availability of evidence is essential to support the allegation in the Notice. Without evidence, allegations are merely imagination or assumption. New evidence cannot be introduced by the Revenue during adjudication or appeal. But the taxpayer is welcome to introduce new evidence in support of rebuttal.

Rule 112 that places an embargo is limited to new evidence and not new grounds and related evidence which can be introduced at appropriate stages. New evidences that were not available on record cannot be introduced in later stages of the proceedings, which were not available to the authorities in the earlier stages, to assail the correctness of Orders passed at those stages. However, rule 112 must be viewed as a saving provision which permits new evidence where:

a) they were not admitted but ought to have been considered (even if rejected on merits);

b) they could not be introduced earlier by sufficient cause when called upon to submit;

c) they could not be introduced earlier by sufficient cause but it pertains to any ground of appeal;

d) sufficient opportunity to produce the said evidence was not made available during earlier proceedings.

9. Additional Grounds

Generally, the Appellate Authority does not encourage use of additional grounds after the appeal has been filed, the reason being that the respondents would have been served with a copy of the appeal and put at notice about the grounds urged by the Appellant. Hence, if after filing the appeal additional grounds are permitted, then the respondents will be in the dark without any occasion to prepare a suitable rebuttal. This could also be misused by withholding an important ground only to be introduced later as an additional ground leaving the respondents unaware. Although this is the principle, Courts have allowed this to the Appellant to urge a *bona fide* ground that was omitted at the time of filing the appeal.

Additional or new grounds must show the purpose to advance the cause of the Appellant and *prima facie* be those which could not have been urged in the appeal itself. Suitable opportunity will be granted to the respondents to consider this additional or new ground and prepare rebuttal.

10. Number of Copies

All correspondence must be submitted in requisite number of copies. Copies of appeals and miscellaneous applications must be such that each Member of the Tribunal is provided with one copy and one copy is filed / separately served on each respondent .

11. Formats

All documents are to be in clear and legible font with adequate margin and line spacing. One-inch margin and double-line spacing on legal-size paper is a safe format to follow. Relevant Procedure Rules of the appellate forum may be referred.

All submissions are to be bound with index and page numbering legibly marked uniformly in all copies. Where documents are voluminous, the same may be separated into multiple volumes marked distinctly but with continuity in the page numbers.

12. Do's

(a) Always ask for written requests before submitting any information and collect acknowledgement for written replies submitted.

(b) While filing enclosures, identify the same with description in the title of the document. If there are too many enclosures, then pagination and indexing it is advisable to facilitate quick reference.

(c) Record the 'date of service' of every communication including Notice(s) or Order(s) received from the tax department. If it is not available, it can be sourced under Right to Information Act.

(d) Address all communication to the specific authority and provide relevant references of documents, letters, visits, etc., that 'this communication is in relation to or is in furtherance of…….'.

(e) Updating the address on common portal for serving the Notice during the course of any proceeding by letter or a specific application.

(f) Ensure politeness in all communications with tax authorities. Politeness does not mean reverence to the authority because as an authorized representative, loyalty is towards the law and not to the officer enforcing or administering the law.

(g) When extracts of statutory provision are being submitted, ensure that photocopy from an official publication is provided and not a print-out of a reproduced version from a computer. Photocopy from an official publication displays authenticity.

(h) Subscribe to more than one law journal for reference including electronic versions.

(i) Develop and maintain a good library in the office.

(j) Before citing any authority ensure that it is current and has not been overruled by a superior authority / Court.

13. Don'ts

(a) Do not deviate from prescribed forms and formats. Use additional enclosures to submit charts and pictorial presentation of relevant information / data

(b) Do not forget to do page numbering after printing and binding the final version of documents and submissions to tax authorities

(c) If any information is not available, make a clear statement to this effect and do not offer any alternatives because it dilutes the clarity about the earlier statement – that the said information is not available

(d) Do not make spelling mistakes in the title / designation of authorities before whom submissions are being made

(e) Avoid using short forms / acronyms for the title of any authority such as 'Supdt.' for Superintendent, 'AC' for Assistant Commissioner, etc. Instead, mention their full and complete title.

(f) As an authorized representative, do not encourage telephonic communication with the office of any Adjudicating or Appellate Authority. Client is free to maintain telephonic contact with jurisdictional / range authorities.

(g) Avoid typographical errors in statements or replies.

(h) Do not submit incomplete or erroneous enclosures to be included in the submissions.

(i) As a practitioner, do not discard books / publications of the relevant Act and Rules when the next year's editions are notified. In representation matters, reference is to be made to the law 'as it then was' and not as on the date of current proceedings.

14. Errors (common or otherwise)

(a) Excess or unsolicited information – Often in the eagerness to supply information or to lay emphasis on the diligence exercised, assessees may volunteer to provide unwarranted information without any purpose being served.

Illustration 58.

"UNSOLICITED INFORMATION –

……..as such the applicable taxes have been deposited regularly. In fact, there have been occasions where the company has voluntarily deposited taxes determined as due and payable from internal audit verifications of tax compliance even though the same is beyond the period of limitation specified in section ….. of …. Act."

(b) Non-specific description of business overview – In order to be cautious, it is not uncommon to find the company supplying information that is non-specific and vague and instead of supplying clarity, this itself triggers further queries. All communication, as stated earlier, must be clear, precise and presented in simple language.

Illustration 59.

"NON-SPECIFIC INFORMATION –

……..as the company has been established to undertake real estate development in accordance with applicable foreign investment guidelines of

Government of India, the company has undertaken contracts for conducting site survey and preparation of feasibility studies for evaluating and prospecting opportunities. Based on these studies, the company determines which projects to implement and which ones not to. The actual activity of construction is outsourced with full accountability with the vendors / contractors and the company markets the project to customers. Revenue from operations refers to sale of apartments and developed plots. Cost of operations relates to actual construction work undertaken on behalf of the company by various third parties. Cost of feasibility studies is shared with ……. who is an associate concern."

(c) Caustic remarks – However much the Order passed may cause grief to the assessee, there is no justification for making caustic remarks against the said authority in appellate submissions.

Illustration 60.

"PERSONAL AND UNCHARITABLE REMARKS –

……..in doing so, the learned Commissioner has taken leave of his senses and made a mockery of the discretion vested in him under …..section/ rule of the ….. Act/Rules ……"

Chapter 8
Appearance

1. Appearance

Appearance before Government / Departmental authorities, is an art and one of the most important functions in any litigation proceedings. It requires skills that showcase the grasp of knowledge about the law on a particular matter and the understanding of the facts of the case. With practice, one can perform this art skillfully. While a well prepared ground can ease the task of the person representing, the representation skills are often brought to test when either the grounds are weak or lack precedence or can be decided either way.

Appearance, either as appellant, or as a respondent, is a formal representation on behalf of the Client in the proceeding before the Adjudicating Authority / Appellate Authority so as to lend assistance in discovering the facts and the interpretation of law and the application of law to the facts of the case. The outcome is a by-product of this exercise.

Depending on the matter, an appearance, may be before:

(a) **Adjudicating Authority**, that is, pursuant to a notice issued by the lower authority which considers that the assessee has either not paid or short paid any tax, interest or penalty due to the Government or availed/utilized excess input tax credit and who has either issued a SCN or desires to issue a SCN.

(b) **Appellate Authority** such as Joint Commissioner (Appeals), Commissioner (Appeals), where an adjudicating Order has been passed and the assessee is aggrieved.

(c) **Appellate Tribunal**, where the Order is passed by Appellate Authority under section 107 or Revisionary Authority under section 108 of the CGST Act, or in case of a Departmental appeal, as respondent.

(d) **Appeal to High Court or the Supreme Court** of India.

2. Authority of Persons to Represent

In terms of section 116 of the CGST Act, any person unless required to appear personally, may appear through an Authorized Representative. A CA is one of the persons who is authorized to represent on behalf of the Client.

3. Dress code

The dress code for appearance by an Authorized Representative is prescribed only for appearances before the Tribunal in Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982. However, no such dress code is prescribed under GST laws. The recommended dress code for appearance is given in the following table :

Represented before	**Prescribed dress code**	**Recommended dress code**
Adjudicating Authority	Not specified	Recommended to be formal
First Appellate Authority	Not specified	Recommended to be formal
Appellate Tribunal	The dress code is prescribed in Rule 48 of Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982: If prescribed by professional body to which the representative is attached, the said prescribed dress code, else the following: (I) For male: A close-collared black coat, or in an open-collared black coat, with white shirt and black tie; (ii) For female: A black coat over a white sari or any other white dress. It is expected that the above dress code would be prescribed under GSTAT (Rules of Procedure) when notified.	When representing in person: Formal dress with blazer and tie. Ladies also must wear a blazer (there are ladies' blazers that are suitable to be worn over Indian attire).

4. Preparations before the Hearing

Personal hearing is an opportunity afforded in ensuring that in adjudicating matters, the authorities are given full perspective from both parties, on their version of the matter. It is a well-known fact that spoken words are more expressive and have more value than written literature, due to the greater impact of non-verbal elements like body language, stress etc. in speech.

Accordingly, personal appearances before Adjudicating Authorities should not be regarded as a mere formality and the best use of the said opportunity should be made to ensure favorable rulings. Certain precautions that may be taken before appearing in front of the authorities are listed below:

(a) Block your calendar for the scheduled dates of personal hearing.

(b) In case the hearing is scheduled before Tribunal, it is customary for the Tribunal to issue a cause list. As and when issued, the same may be checked to ensure the listing and the serial number / time at which the case would be called.

(c) Know the Adjudicating / Appellate Authorities – this may be done by reading about his / her previous judgments, if any. This would give the person appearing a better perspective of the authorities and would aid in representing in a manner the authorities would understand or get convinced.

(d) Visit the location of the forum of hearing before the actual date of hearing, to familiarize yourself with the place.

(e) Review the file, to acquaint yourself with the facts and legal grounds taken.

(f) Check for judicial decisions not considered earlier and having relevance to the matter. It is advisable to have printed copies of the judicial decisions relied upon and in case the same are to be presented, sufficient copies be made available to the Adjudicating Authorities and the other party.

(g) Prepare a summary / synopsis to be presented before the Adjudicating Authority / Appellate Authority which will help them to know about the entire case in about 3-4 pages. This also saves time and gives all the parties involved a better understanding of the facts of the case.

(h) Prepare short notes that would help you while appearing before the Adjudicating Authority / Appellate Authority.

5. Precautions during Appearance

Right to be heard, being an opportunity, limited, however, by time it is important that adequate preparations are made to ensure proper representations are made before the Adjudicating Authority / Appellate Authority. Rules, wherever prescribed, should be followed while appearing.

In case the matter is listed before Adjudicating Authorities / First Appellate Authority:

(a) Meeting the Superintendent assisting the Adjudicating Authority / Appellate Authority may be advisable. While meeting, it may be ensured that the Department file is available and that the personal hearing record is printed and kept in the file.

(b) In case, letter to represent the matter was not filed earlier, the same may be provided to the Superintendent to be placed in the file.

(c) While addressing the Adjudicating Authority, it is important to be courteous. It is advisable to address the Adjudicating Authority / Appellate Authority as 'Sir' or any respectful salutation / title that is customary.

In case the matter is listed before Tribunal:

(a) Meeting the Court Master before the Tribunal commences may be advisable. It will make him know about your presence. Further, it is important that you are polite in your interaction with them. Meeting the Departmental Representatives will also help. Basic courtesies go a long way in building professional rapport.

(b) In case the letter of authorization to represent the matter is not filed earlier, the same may be provided to the Court Master to be placed in the file.

(c) The Members on the Bench should be addressed as 'My Lord' or 'Your Honour'.

(d) Parties must remain quiet so as not to disturb the hearing. Disrupting Court hearings may amount to contempt of Court and can result in punishment.

(e) Stand whenever the Members on the Bench enter or leave the Court room and bow your head to acknowledge them.

General etiquettes:

(a) Smoking, eating, drinking or chewing gum is strictly not permitted.

(b) Audio or video recording or photography is not allowed.

(c) Usage of mobile phones is prohibited.

(d) Children under the age of 14 are not allowed in the Court room unless they are present to give evidence or have the Court's prior approval;

(e) While sitting in the Court hall or before the Adjudicating Authority / Appellate Authority, the posture should be courteous. For instance, sitting with crossed legs may be taken as being disrespectful to the authorities.

6. Representing before Adjudicating Authority / First Appellate Authority

When the matter is called upon, the following may be considered for effective representation:

(a) **Nature of Hearing**

There may be various scenarios for which the hearing is called upon. The methodology to represent varies with the type of hearing.

(i) Early Hearing

It would be important that the reasons for early hearing are clearly illustrated. The right to grant early hearing would be that of the Adjudicating Authority / Appellate Authority. Principally, matters with dispute no longer being *res integra* or involving high stakes (financial implications) are some of the reasons for early hearing.

Illustration 61. Appellant filed an application for early hearing stating that the appellate proceedings be taken up for disposal in view of identical question of law based on similar facts already having been decided by the Apex Court, the question of law involved is no longer open for examination by the Appellate Authority and also the prejudice being caused to the Appellant on account of blockage of the working capital due to rejection of refund or issue of periodical notices.

(ii) Clubbing or Tagging

Similar matters may be prayed to the Adjudicating Authority / Appellate Authority to be clubbed for hearing. In case the matters in different appeals have common cause, the Adjudicating Authority / Appellate Authority may list

the same together for speedy disposal. This would also reduce the litigation costs.

Illustration 62. The Appellant filed an application for clubbing of multiple appeals involving substantially similar questions. The Appellate Authority heard the application but found that only some of the questions were similar and recognized that there were other significant dissimilar issues and by clubbing the various appeals, there would be occasion to attend to the dissimilar issues out of turn. As such, the application was dismissed as rejected.

Illustration 63. The Appellant filed an application for clubbing of multiple appeals involving substantially similar questions. The Appellate Authority heard the application and though other dissimilar issues were involved, they were considered not substantial and as therefore allowed the application as the substantial questions involved in all appeals being identical, merited consideration together.

Illustration 64. The Appellant filed an application for clubbing of multiple appeals where some were cross-appeals and some were appeals by the Appellant. The Appellate Authority heard and allowed the application so that appeals by the Appellant and Department could receive consideration together.

(iii) Condonation of Delay

Filing an appeal within time is a limitation provided in the law for seeking redressal and the condonable period is ordinarily stated. In case of delay, the applicant will have to furnish the reasons that account for the delay and if the Adjudicating Authority / Appellate Authority considers the same to be fit for condonation and is within the extendable period and the reasons offered are satisfactory, then the delay may be condoned and the appeal accepted and proceeded with. The applicant will have to bring a compelling case for condonation and every day of delay must be explained. The application should also be supported by an affidavit and other documentary evidence to substantiate the reasons adduced.

There may also be delay in filing Departmental appeals, which are viewed little more leniently due to Government procedures/processes involved in seeking approval for filing and other administrative reasons. Condonation is not a matter of right. Sometimes costs are imposed by the Tribunal and Court for entertaining a condonation application.

Illustration 65. The Appellant filed application for condonation of delay of more than 1000 days and being a PSU, clearance to file the appeal from their Committee of Disputes was cited as the reason for the delay. When the Appellate Authority found that each day of delay was explained and if the time taken by the Committee were excluded, the appeal would have been within time, the application was allowed. The CA for the Appellant made successful submissions on the strong and *prima facie* merits of the case and the Appellate Authority noted that need to do justice on the merits of the case, further supported the plea for condonation of the delay.

Illustration 66. The Appellant filed an application for condonation of 35 days' delay before the First Appellate Authority *where* the condonable delay was a month and there were *bona fide* reasons that prevented the applicant from filing the appeal within this extended time limit. The First Appellate Authority dismissed the application and also the appeal stating that there is no statutory power to condone delay beyond the time limit of one month. Though the cause for delay was found to be genuine and verifiable the delay of 35 days being beyond the statutory time limit for condonation, as the law does not vest the First Appellate Authority with the power to condone, the application was rejected.

An appeal was filed in respect of dismissal of the condonation application and the *appeal* itself (as in the above illustration) before the Appellate Tribunal. In law, the Appellate Tribunal has the power to condone delay up to three (3) months. The Appellate Tribunal found that this appeal was filed in time and held that the scope of the this appeal is to inquire into the propriety of the Order of the First Appellate Authority and not to entertain appeal against the Adjudication Order passed originally. As such this appeal was dismissed by the Appellate Tribunal stating that there was nothing improper in the Order passed by the First Appellate Authority. The Appellant was left to consider whether writ petition can be filed against the Order of the Appellate Tribunal in view of the fact that the merits of the case never came up for consideration and that justice eluded the Appellant on account of technicalities of procedure.

(iv) Regular Hearing

(*a) Time limitations on arguments:* Ordinarily, there are no limitations on time for presenting the arguments at regular hearings. This is for the reason that the Adjudicating Authority/ Appellate Authority provides full opportunity to the parties to present their version in a manner, which enables justice to prevail. However, we need to value the time of the Adjudicating Authority / Appellate

Authority and the matter presented would need to be precise and adequate as the context requires. Where additional grounds are to be pleaded, then application for amendment of grounds originally filed must be filed and respondents provided with an opportunity to file their objections. When this application is allowed admitting all (or any) of those additional grounds then they may be argued during disposal of the appeal.

(b) *Proper way to address the Bench:* Addressing the Bench as 'Your Honour' is advisable. It is seen that in recent times some Courts have advised litigants to let go of this form of address and it remains to be seen if the Appellate Tribunal makes any specific rules of procedure in this regard. Presentation of the case itself is based on litigation strategy adopted by CA in each case and to make a recommendation about it would be limiting. But it would suffice to state that each ground must be argued along with substantiation based on updated decisions applicable. It is advisable for CAs to attend live proceedings before CESTAT, ITAT or even High Courts and witness CAs, Advocates and other professionals presenting their cases. There will be many takeaways, both good and bad, that young CAs can learn from and refine their own approach to case presentation.

Illustration 67. The CA for an Appellant once opened his submissions by stating *"Your Honour, the facts of the case are covered by the decision in the case of ……."*. The Bench replied *"So, do you mean to say that you will not bother to explain the facts to us and want us to take your word for it and allow your appeal?"* and the Bench added *"Kindly, submit the facts and present your arguments.And then you may show how exactly is this argument covered by the decision in the case of ….. which you are seeking to rely upon. We will then be able to apply our minds to such case presentation and if it is in fact acceptable in our view, we will pass suitable Orders"*. The CA accordingly made his submissions and the Bench eventually ruled in favour of the Appellant.

(c) *Speak slowly, softly and clearly:* A calm and persuasive voice will exude more confidence and command more attention in the Court.

Illustration 68. Representatives are advised not to use any accent while speaking in English. It is a known fact that English is not our natural language even if we have studied in English as the medium of *instruction*. Use of artificial accent in English can cause difficulty for the Appellate Authority to register the points being submitted. Therefore, speaking in a clear voice and softly pre-empts nervous interruptions that could come from use of any accent.

Illustration 69. CAs are advised not to overcompensate for any influence of their native accent. Understand that if there is any real influence of native accent, the Appellate Authority may find it difficult to comprehend certain pronunciations. Therefore, speaking slowly and clearly will convey the submissions without the interference of native accent.

Illustration 70. CAs should not imitate influence of native accent of the Members on the Bench as it may be taken as 'mocking' and 'disrespectful'.

Illustration 71. Once a CA stood up to make submissions when the Bench was distracted by the sound of mobile phone from another person present in the Court Hall. Speaking to that person sternly, the Bench directed him to immediately stop the disturbance. The Bench seemed to carry some of the annoyance of the distraction while returning to hear the submissions of the CA. And being aware of the possible effects of that distraction and that no such disadvantage was affordable in the case, the CA very skillfully made a statement commending the patience and tolerance that the Bench displayed in the instance. At this, the Bench quickly took a moment's pause and attentively listened to the submissions that the CA went on to make on the merits of the case.

(d) *Questions raised by the Adjudicating Authority / Appellate Authority:* Very often the Adjudicating / Appellate Authorities ask questions. It is important to satisfactorily address the question raised and not to launch a counter question or debate over it. It is important to address the questions fully and by making references to the (i) documents submitted in paper-book (likely to be applicable in Appellate Tribunal) or (ii) documents carried out in a compilation of decisions or synopsis of arguments.

(e) In case a synopsis of arguments is requested to be submitted or the summary is to be presented, sufficient copies must be provided to the Adjudicating Authority / Appellate Authority as each Member on the Bench and the respondent should be provided with a copy of the same.

(f) Each ground should be submitted and supported with facts and/or law.

(g) While proceeding from one submission to another, you may address the bench as *"Your honour, if there are no more questions, I will now then move to my second submission…"*

(h) In case the matter requires, it may be appropriate to provide photographs, video recordings, proto-types of the articles, wrapper, technical brochure, copies of contracts, extracts of ledgers, etc., as part of the submissions, which can strengthen the arguments.

(i) In case you have made a mistake and you realize the same, do not defend the same or make excuses. You should own the mistake by stating "Pardon me" and while apologizing for the same, state to the Adjudicating Authority / Appellate Authority that it was inadvertent and reassure that it would not occur again.

(j) Never interrupt an Adjudicating Authority / Appellate Authority. This may annoy the Adjudicating Authority / Appellate Authority and adversely impact his / her perception.

(k) In cases where the respondent is presenting his version of the matter, allow him to complete the submission and in case you desire to intervene, the permission of the Bench is to be sought before countering the respondent's arguments.

(l) In case the matter is posted for another date, the record of the next hearing be made as the Bench may not serve a Notice considering that the date has been communicated in person during the proceedings.

(m) Whenever matters are heard partly, it would be important to summarize the submissions made in the previous hearing before proceeding with the fresh submissions.

(n) In case of pass-over (shifted further down in the list of cases to be heard for the day) of the matter for specified reason, it is important to adhere to the same before the appointed time.

(o) In case the Bench or Adjudicating Authority / Appellate Authority has sought compliance to any stipulation such as pre-deposit or adducing evidence, the same be made before the appointed date and in case otherwise, permission of the Adjudicating Authority / Appellate Authority be sought.

(p) While concluding the submissions, you may state as *"Your Honour if there are no further questions, I would now like to close the submissions and thank the Bench for the attention."*. It is more appropriate to say *"Much obliged"* or *"Most obliged"* instead of "Thank you".

(q) The CA should keep all relevant documents, statutory provisions, circulars and case laws, which he intends to rely upon during arguments. A compilation of such documents with proper indexation is preferable and adequate number of copies should be available.

(r) It is important to use appropriate language, which is polite, humble and draws the needed attention. Depending on the situation, one may consider using the following terms:

- I would like to emphasize that...
- If I may draw your attention to the fact that...
- I submit that....
- As already pointed out...
- As a consequence...
- Let me read from the decision the words of...
- It is a rule that...
- With your permission, I doubt that the Revenue would accept...
- I would like to explain why...
- With your permission, I quote...
- The principles we invoke, etc.
- I respectfully disagree with the learned respondent…

7. After the Hearing

In case the matter is before an authority lower than Tribunal, the Adjudicating Authority / Appellate Authority would record the proceedings of the matter. It may be appropriate to read the summary of the record of personal appearance and sign the same as token of acknowledgment. It would be important to carry a copy of the same and retain as record of adjudicating proceedings. The same may be relevant in future proceedings of the matter. In case there is a need to file further submissions/evidence in the light of the discussions during the hearing, then leave of the authority should be sought to file it within the agreed time.

In case the matter is before Tribunal, it would be important to ensure that the registry has sent an official copy to the address mentioned in the memorandum of appeal/ cross-objections or a copy of the same is provided to the Authorized Representative or party in person, which is duly acknowledged. In case it is picked up in person, it is important that the date of receipt is written on the Order and duly initialled. It is advisable to file synopsis of facts and submissions during final hearing. This is more so when the issues are complex and no direct precedents are available.

Chapter 9
Ethics and Etiquette

1. Introduction

The purpose of enriching one's knowledge is to bring justice to a Client who is neither obliged to pay excessive or higher taxes nor unlawfully lower than what is imposed under the law. While ethics and integrity serve as guiding principles of the role one adores, etiquette is the tool at one's disposal in effectively discharging that role.

This Chapter in sum is a recollection of visible signs that a learned Member of this Institute has come to personify. A few areas where this recollection may be required are briefly discussed.

2. Code of Conduct

All Members are required to refer to an updated publication of ICAI "Code of Ethics" to be mindful of the continuous recommendations brought about by the Ethical Standards Board *(https://www.icai.org/post/ethical-standards-board).* The Code of Conduct not only refers to the written code but also the underlying essence that serves as a guide post for conducting oneself as a Member of this august Institution.

Conduct, as it is said, is contagious and articled assistants and new Members learn by watching other Members. It helps the process of training if the considerations weighing on the various decisions being taken are shared transparently. Code of conduct is both the written and practiced approach in the course of work that is chosen as a path to follow. It comprises various aspects from knowledge to methodology.

3. Knowledge

Knowledge is gained continuously – some from books and some from observing those exercising its teachings. Those who produce work of great skill and expertise have long been contemplating every interpretation that a provision may expose itself to. A Client's engagement only provides an opportunity and creates an occasion to display and put into action the expertise and experience gathered by a practitioner over a long period of time involving study, observations and assimilation of knowledge.

Reading and updating is a sign of being amenable to teaching and training. 'Those who have worked closely with some of our Members who are acclaimed in their field of expertise would agree that such Members are found to devote significant time and energy on this aspect than freshers. Embracing technology to access most recent information advances the cause of Clients by allowing you to lay hands on most current decisions or changes in law.

Knowledge is valuable when shared. Hence, develop an environment of learning and imparting the learning to all associates even if it is expected that some of them may leave the firm. Plagiarizing is self-humiliation. Those who leave the firm with the knowledge gained go on to become ambassadors in the world. Hence, it is advisable to be magnanimous in imparting knowledge to all who can embrace it.

4. Style and Approach

Representation is an art and an amalgam of various styles and approaches observed, applied and customized. No two persons are alike in their manner of delivering their representational prowess. Polite but not timid, firm but not abrasive and perceptive but not presumptuous – this sums up the goal that all aim towards striving for excellence in representational skills. Years of practice is required to develop expertise and this begins with setting our sights on the right goal.

Visible manifestation in the form of spoken words, their composition, tone of voice, posture and native influences all represent the individual's thoughts and perceptions. Understanding these thoughts and perceptions by observing these visible manifestations is an important aspect of skill developed with years of practice. These thoughts and perceptions of a person are really a response to visible communication that we put out by our own words, their composition, tone of voice, posture, etc. Dress and presentation are discussed in detail in the preceding Chapter, but style and approach can be brought into these areas, too.

It is easy to see if a representative is imitating another person in style and approach during arguments. This is not desirable and it is advisable to avoid imitation or copycat approach. One may be inspired but he should develop his own style and approach. Follow natural manner of speaking including choice of words and diction. Unnatural approach leads to loss of content due to concentration on unfamiliar words and pronunciation. Develop a good vocabulary, and there is no substitute for reading and more reading. While reading decisions, attention is paid to the ratio laid down by the Courts, but

attend to the manner in which a complex set of facts are unravelled by identifying relevant considerations only and discarding irrelevant ones. And then see how the law is applied to those relevant considerations. Also, see how any view taken or deviated from is substantiated without allowing the weight of the Court to prevail but its wisdom relied upon to discover and declare the meaning and interpretation. Do not ignore poor decisions as it provides scope for learning as to how a judgment should not be.

5. Integrity

This is an overused expression but is visible and apparent in the day-to-day practice. Clients seeking representational assistance always believe they are right and come with an expectation of a favourable outcome immediately. A Member well-entrenched in litigation services knows the value of setting right expectations and where deserving, advise Clients to accept the tax demanded. In his /her zeal to serve more Clients, a CA should not give any false assurance or fail to indicate the serious impediments in a case. Service of a Member in litigation is not just to support the cause of the Client but also to maintain unbiased loyalty to the law and not to the litigating parties.

Allowing one's actions to be guided by fear of adverse consequence or favour of unmerited benefits does not augur well for a Member and particularly one who is providing representational services. Corruption is the cloak that hides incompetence and it deserve no further mention that appears to lend respect. Maintain firm demeanour during interaction with tax authorities. Often polite and submissive demeanour may be interpreted as lacking integrity. Be cautious and avoid the perils of being misread.

A Member should continuously update his knowledge and experience to develop pleadings suited for different kinds of matters. Pleadings cannot be copied and recycled because it may have been developed for a certain approach in the Notice issued and may not be suitable for another case. Refer pleadings prepared as a guide to draft fresh pleadings. As explained in a preceding Chapter, develop check-lists to ensure completeness of all submissions going out of the office. Follow relevant Appellate Procedure Rules regarding form, format and content of each submission before the Appellate Authority. Diligence in this area goes a long way in conveying the attention expected of the authority in hearing the matter.

6. Methodology

This refers to an organized, systematic and predictable manner of undertaking work and carrying it out until completion. One possible methodology could include the following:

(a) Documented approach

(b) Objective assessment of facts (or case)

(c) Transparency in process-of-law

(d) Disclosure of all submissions

(e) Regular communication of progress

(f) Prompt attendance to case

(g) Handing over documents and Orders

Setting unrealistic expectations or supporting unsubstantiated tax positions is one of the key areas where Members need to be firm and objective. *If surgery is necessary, medicines alone will not suffice.*

Meticulousness is not an act but a habit. It cannot be found in certain areas, and missing in others. Ensure consistency in being meticulous in all areas of Client handling. Convene meeting with Clients with both a 'start' and an 'end' time. Have an agenda for discussion or interviewing for preparation in a case. Regularly update Client about the progress including where there may be long intervals of time when no update is available.

Clients come with their experience with other experts and hence this requires to be reset / realigned and it may be necessary to educate them about the approach that they should expect. In all new relationships, this must be started immediately so that there is no confusion or gap due to no fault of either party.

7. Do's

(a) Obtain written mandate for all representational engagements with specific reference to the period of dispute or notice. Hence, develop standard mandate forms / templates.

(b) In case of *bona fide* tax default, advise admission of default availing concessional penalty instead of pursing litigation.

(c) Follow all amendments/changes in law closely.

(d) Develop and preserve good library of reference material and commentaries.

(e) Maintain continuity of subscription to journals.

(f) Verify print out with authenticated version of law or decision before using in submissions.

(g) Encourage associates to be present during hearings, if permitted, to witness proceedings 'live' .

(h) Maintain case-file and supply copies of all Notices and submissions to Client.

(i) Maintain acknowledgement of filing of copies of all appeals and submissions to the Appellate Authority and Departmental representation.

(j) Maintain respectful arm's length distance from Department Representatives and staff in Registry.

(k) Verify cause-list hosted in website of Tribunal regularly to avoid *ex-parte* disposal of matters.

(l) Ensure prompt and reliable process of receiving Notices and intimation at office that reaches the Member representing the Client. Large establishments are likely to have mis-delivery within the office.

(m) Adjournment applications to be filed as early as the intimation of hearing is served.

(n) Carry books / journals to hearing and not just photo-copies. Photo-copies are for submission.

(o) Strive to make continuous improvements in the representation style and approach.

8. Don'ts

(a) Do not assume unwritten authorization to represent. Have standard form of 'power of attorney'.

(b) Do not entertain requests to support unlawful tax positions.

(c) Do not advise pursuit of litigation when deviation from law by Client is evident.

(d) Do not skip reading and updating your knowledge with latest decisions.

(e) Do not use unauthenticated version of law or decisions.

(f) Do not rely on head-notes of decisions without cross-checking with the relevant paras in the decision from which those head-notes may be prepared by the publisher of journal.

(g) Do not indulge in personal communication with Adjudication / Appellate Authorities.

(h) Do not 'cut and paste' pleadings, better to draft afresh.

(i) Do not plagiarize pleadings out of the work of other Members / counsels.

(j) Do not imitate the style of representation of others; instead you can watch, learn and develop your own style and approach.

(k) Do not follow a standard style in representation; align it to suit the authority and nature of matter because representation is also a form of verbal communication.

(l) Do not allow legal writing to spill into Client communication which is to be simple and suited to this kind of reader-group who are not Adjudicating / Appellate Authorities.

Chapter 10
Litigation Strategy

1. Introduction

One of the key concerns of a tax management team in an organization is to avoid tax disputes. A tax management team of an organization takes many steps to ensure that the company does not get into tax disputes. However, even after adequate precautions and care being taken, disputes may crop up, which may be mainly because of lack of clarity and simplicity in the laws. Hence handling litigation assumes importance and the tax management team in consultation with their Counsel would think of strategies to handle litigation, where the pros and cons of litigating are analysed and the impact of outcome of litigation is also weighed, keeping in mind various factors like unique facts, availability of binding precedents, risk involved, litigation costs, precedent value, time span etc.

Litigation strategy enables analysis of various factors, which enable to arrive at a decision as to whether to litigate a particular issue or not and to what extent. This exercise would give an insight into the issue as well as information about the risks involved. It would serve as a tool for the assessee to decide as to whether the matter shall be litigated or not. Some of the factors considered are analysed in the ensuing paragraphs.

Also, as the quantum of tax payments increases over the years, it should be considered common for tax authorities to review the returns filed and examine the tax positions taken, particularly exemptions, concessions, deductions and input tax credit. Hence, ongoing compliances must be aligned to defend all possible questions that may be posed in any audit inquiry.

2. Gathering and Understanding facts

Gathering and understanding of facts relating to the issue is a very crucial step in litigation. It is important for a legal representative to have complete control over the facts and analyse them. Wrong facts / wrong understanding of facts would be a major reason for setback in litigation.

Further, as a representative, there is a risk of losing credibility in Court or other legal proceedings, in case the facts are not properly presented. It is important

to differentiate between facts that are taken on record in the Notice and those that are not. Facts that are relevant to throw light on the issue involved must be taken on record. And where the Notice is silent, inclusion of new facts must be done so as not to cause prejudice to taxpayer's interests.

Assertions by taxpayer cannot be readily admitted unless they are substantiated. It is for this reason that facts omitted from the Notice must be examined whether their inclusion in the reply would be relevant or not, for the eventual outcome of proceedings.

Without corroboration, not even books of accounts are reliable. The positions taken under allied laws before other regulators will have great persuasive value while including the said facts in the adjudication or appellate proceedings.

Illustration 72. Commission paid to Director will not attract GST on reverse charge basis when TDS is deducted under section 192 of Income Tax Act.

Illustration 73. Title given to the head of a department as 'Director' does not attract GST on reverse charge basis without the said person being given seat on the Board of Directors of the company.

3. Legal provisions Invoked and Involved

The legal provisions based on which the audit party / investigation team has asked the assessee to pay additional tax or a SCN has been issued should be understood. It must be noted that the tax provisions are dynamic and not static and are prone to frequent changes and amendments. To illustrate, a notification granting or withdrawing exemption or changing the rules and procedures would be issued at the end of the day making these applicable from the very next day itself. There could be instances where the Department might be referring to provisions or notifications, which may not be applicable to the period in dispute.

Hence the legal provisions on the basis of which the SCN has been issued shall have to be analyzed and understood as the Department may invoke the wrong provisions. It is not uncommon for demand to be raised without considering the relevant provision containing the cause-of-action in law or where more than one cause-of-action exists and the Notice invokes one of them. Defects in a Notice can be fatal to the demand if the defect is incurable and an attempt to cure the defect can render the adjudication illegal.

Illustration 74. Notice issued demanding output tax without specifying HSN code but demand confirmed in adjudication Order after including missing ingredients fall foul with section 75(7).

Illustration 75. Notice demanding interest on inadmissible transition credit availed and reversed cannot be issued under section 73 or 74 due to limitations in these provisions. Rule 121 cannot supply the missing authority to demand such interest.

4. Advising the Client on Litigation

Risk involved – The CA would be required to analyse the risk involved in litigating. Some of the important aspects to be considered are:

(a) Jurisdiction of underlying proceedings and compliance with C*ircular 31/5/2018-GST dated 9 Feb, 2018* as amended by *Circular 169/1/2022-GST dated 12 Mar, 2022*.

(b) Validity of Notice and election of actionable cause to support the demand.

(c) Merits of the case and whether statutory provisions support the Client's case.

(d) Existence of evidence in support of allegations.

(e) Whether the interpretation adopted is backed by precedent decisions.

(f) Impact of losing the case (in terms of outflow of tax + interest + penalty)

(g) Benefits of accepting demand in pre-notice consultations under section 73(5) or 74(5).

(h) Opportunity to avail concessional penalty under section 73(8) or 74(8).

(i) Possibility of issues on input tax credit availability / availment and utilization, where the Client accepts the liability and pays it along with interest and penalty.

(j) Impact on other existing litigations.

(k) Impact on tax position adopted under other taxing statutes/statutory compliance.

(l) Cost of litigation and the level up to which the matter may go up in litigation i.e. up to Tribunal or High Court or Supreme Court.

Assurance about possible outcome – While a CA is expected to put in his best efforts in effectively handling litigation for his Client, he is not required to give any assurance or commitment about a favourable outcome of the case. However, the Client ought to be informed about the legal position and the possible outcome (adverse or otherwise).

Illustration 76. Where a Client enquires about the probability of winning the case, rather than assuring him of certainty of winning, one could explain the

(i) key issues involved (ii) findings reached in the case so far (iii) grounds taken in appeal (iv) interpretation applicable, and then express confidence about being able to present the case effectively before the Appellate Authority.

Illustration 77. CA may also make the Client aware that the issue is pending at a higher stage (Supreme Court or High Court) and any view is possible.

5. Writ as Alternative Remedy

In adjudication proceedings, while replying to the Notice on merits it is also advisable to explore the following alternative options .

(a) **Payment of tax along with interest and availment of credit by the recipient of goods or services or both**: Where the buyer is willing to accept the supplementary bill for the goods or services or both and if the demand is not issued under section 74 (refer section 34 read with 17(5)(i) barring credits only under section 74), the possibility of using the credit by the buyer/service recipient could be explored.

(b) **Writ:** Where the demand appears to be patently wrong or beyond the scope or powers of the issuing authority or if there is a requirement to challenge the legal provisions or rule or notifications or circulars, then the Client should be advised to file a writ challenging the SCN itself on lack of jurisdiction / competence or validity of provisions invoked in the Notice. This is because the Adjudicating or Appellate Authorities can only implement the law and cannot express their views on validity of provisions / rules etc.

Illustration 78. Where the transaction is in the nature of sale of goods (fact is accepted by Department) and the Department issues a Notice proposing to tax the transaction as supply of service, challenge could be made before by filing a writ.

Care must be taken to examine and explain all remedies available in law whether in statutory appeal or writ petition. Approaching Courts through writ petition run towards risk that findings may be reached while 'moulding relief' that is beyond the statute or *in obiter* that may bar alternate remedy on questions of fact or application of law to facts. Reference may be made to ICAIs publication titled "Handbook on Inspection, Search, Seizure and Arrest in GST" for supplementary discussion on writ remedy.

6. Payment Under Protest

Payment under protest could possibly reduce the burden of interest in case of unfavorable outcome in future, where the issues are debatable. Thus the interest amount gets limited till the date of payment of duty/ tax under protest.

Considering the high rates of interest prevalent in the indirect tax system and as the litigation may take many years to conclude, this option can be looked at. However, there is no express provision in GST to make payments 'under protest'. There is also no provision for pre-deposit more than that prescribed for filing appeals.

7. Refund Matters

In cases involving refund, whether refund of duties or taxes excess paid or refund/rebate arising out of export of goods or services etc., the following aspects are to be considered:

(a) Compilation of the relevant documents and submission of such documents.

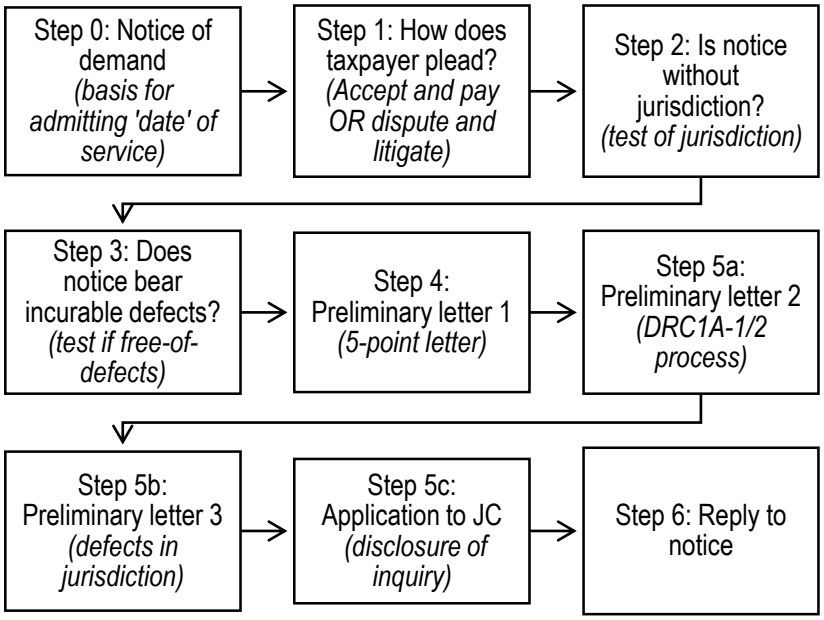
(b) Principle of unjust enrichment.

(c) Time limit within which the refund claim should be filed. If duties or taxes are paid under protest no limitation would apply.

(d) Interest on delayed receipt of refund.

8. Checklist – SCN Stage

It is advisable to prepare and follow a check list for the activity of drafting and filing reply to SCN/ filing appeal before Joint Commissioner (Appeals)/ Commissioner(Appeals)/ Appellate Tribunal. This would ensure effective drafting and all vital aspects would be considered.



Obtain copy of SCN and check whether complete set of SCN along with documents relied upon has been served by the Department. If the relied upon documents are not provided along with SCN, write to the Department asking them to make available the relied upon documents.

Obtain proof of the date of service of SCN. This would be useful for contesting the matter on limitation, as the SCN should be issued within the stipulated time .

Obtain complete set of correspondence between the Client and Department in connection with the said issue or in connection with other issues but having impact on the current issue.

Understand the facts from the Client, obtain (if necessary) documents such as agreements, work orders, purchase orders, invoices etc.

Analyse and understand the facts, issues raised and quantifications in the SCN.

(a) Allegations in the SCN should be specific and not vague.

(b) It should be based on evidence and documents not on the basis of assumptions.

(c) It should quantify the proposed demand.

(d) It shall not pre-judge or conclude the issue but it should contain only the allegations.

Check whether officer issuing SCN has the power to issue it.

Check whether the reply to SCN is to be addressed to an officer other than the officer who has issued it. To illustrate, Officers of DGGI and Audit Commissionerate are permitted to issue SCN but the reply has to be submitted to the Proper Officer in the Executive Commissionerate.

In case you cannot submit the reply within the time granted in SCN, write a letter to the concerned officer seeking time.

Drafting reply to the SCN:

A. Background

(a) Give a brief background of the assessee.

(b) State the background (audit or investigation etc.) leading to the issue of present SCN.

(c) Briefly mention the issue in dispute.

(d) Amount proposed to be demanded in the SCN along with period and relevant provisions.

B. Reply

(a) Address each of the allegations and provide evidence to support the contention.

(b) In cases where the facts are in dispute, narrate the facts, provide documentary evidence to support the actual facts as against the facts assumed by the Department.

(c) In cases where the issue relates to interpretation of provisions, state the Client's interpretation supported by circulars, decisions and other relevant material.

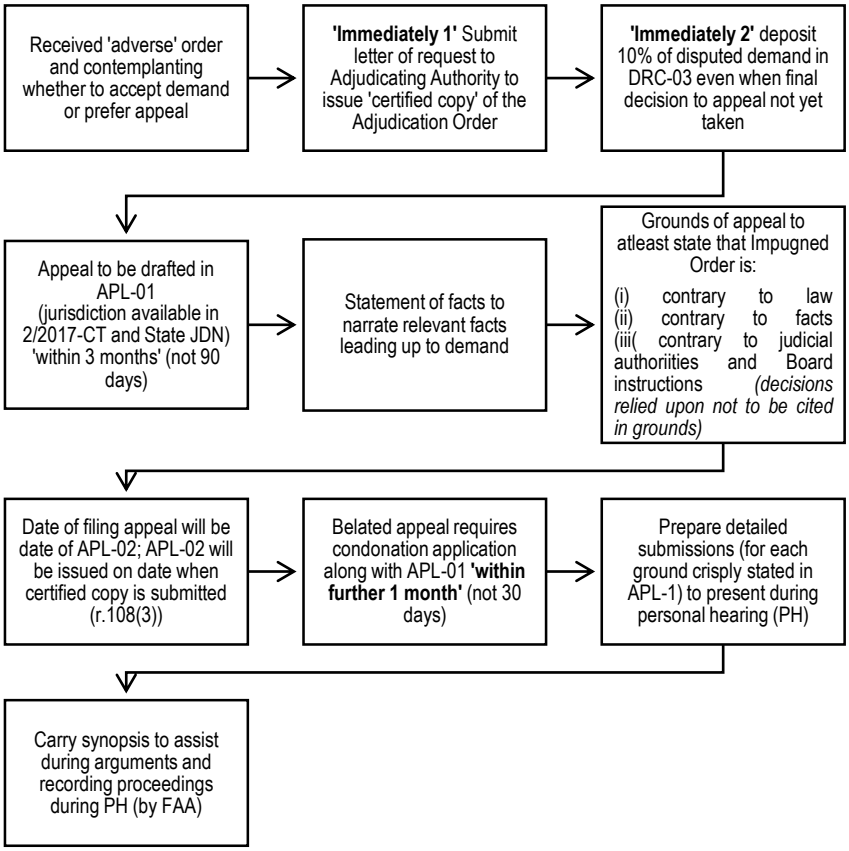
(d) Address the limitation (if extended period is invoked) issue and provide sufficient supporting evidence to dispel the allegation and cite the relevant decisions.

(e) Reply to the proposals to impose penalty and support the reply with decisions.

(f) *Prayer :* The reply should conclude with a prayer, which should be carefully drafted *inter-alia* to drop the proceedings and also to provide opportunity to explain the case during the course of hearing.

9. Check list – Appeal stage

Obtain the copy of the Order along with supporting evidence as regards date of service of Order. The time limit to file an appeal starts from the date of receipt and the evidence of date of receipt may have to be produced before the Commissioner (Appeals) / Appellate Tribunal while filing the appeal. The following flowchart briefly sums up the procedure to be followed:



Note that the Commissioner (Appeals) has limited powers to condone delay.

Summarize the Order giving break up of demands confirmed (or refund rejected) and the demand dropped.

Advise the Client as to the options available where the demands are confirmed (or refunds are rejected). Also inform the Client on the time limit within which the appeal needs to be filed.

Based on the confirmation received from the Client for filing of appeal, prepare the appeal by considering the following aspects:

(a) Read through and understand the provisions relating to appeal and the rules issued there under.

(b) Appeal shall be filed in specific form and format as notified. Select the proper form.

(c) If the appeal is being filed before the Appellate Tribunal, ensure that the appeal filing fee is computed properly and payment discharged in (i)

FORM GST APL-05 or (ii) DRC-03 in case of involuntary payments admitted as deposit.

(d) Provide correct information as required under the form of appeal.

(e) Don't leave any of the questions in the form unanswered.

(f) Prayer for grant of relief shall be specific.

(g) Verification shall be completed properly and signed by the authorised person

Drafting of appeal memorandum:

(a) Give a brief background of the assessee and the issues involved.

(b) Chronological events prior to issue of SCN (if relevant) may be stated and the relevant documents be enclosed.

(c) Summarize the allegations in the SCN, your reply and the findings in the impugned Order. Enclose copy of each of the document.

(d) Grounds of appeal:

  (i) State the grounds of appeal in a precise and concise manner. Link such grounds to the reply to SCN and the evidence relied upon, which apparently were not considered in the impugned Order.

  (ii) Counter the findings of the respondent if he has dealt with the ground taken before him. If the respondent has not dealt with such ground, state that the respondent has not considered the said ground.

  (iii) The findings in the Order cannot traverse beyond the proposals in the SCN. In case the Order has made out a new case then it should be mentioned in the grounds (Example: Allegation in the SCN that the services provided fall under 'marketing services' but the tax demand is confirmed under 'support services' in the Order).

Preparation and presentation of appeal memorandum

(a) Refer CESTAT Appellate Tribunal Procedure Rules (until GST Appellate Tribunal Rules are notified), regarding the manner of printing, presentation, attestation of document etc.

(b) Number of copies of Appeal Memorandum: 2 sets before Commissioner (Appeals), 4 sets in case the appeal is to be filed before Appellate Tribunal.

(c) The Appeal Memorandum shall be signed and verified and shall be indexed

(d) One copy of the Order impugned shall be signed as TRUE COPY.

(e) The Appeal Memorandum along with the annexure shall be stitched like a booklet.

Therefore, it is imperative that CAs should strive for the enhancement of their representational skills by getting conversant with administrative law, jurisprudence and allied laws. With this understanding we trust the need to practice and develop this art of representation before various tax authorities will be well appreciated.

Lastly, litigation is understood as not a reply to the notice issued but a strategy that CAs must evaluate and thoughtfully consider the approach in responding to the process of law initiated by tax authorities.

Annexure A

Select Statutory Provisions of Allied Laws

1. Basis for Legal Remedies

1.1 Parliament has powers to make any law for any part of India not comprised in a State, notwithstanding that such matter is included in the State List. Part XII of the Constitution of India, contains matters related to "Finance, Property, Contracts and Suits" in the Articles 264 to Article 300A. Article 265 states that "no tax shall be levied or collected except by authority of law".

1.2 It has been held by the Supreme Court in *Kunnathat v. State of Kerala* [AIR 1961 SC 552], that the term "authority of law" means that tax proposed to be levied must be within the legislative competence of the Legislature imposing the tax.

1.3 The law must not be a colorable use of or a fraud upon the legislative power to tax. It must not also violate the fundamental rights such as those guaranteed by Articles 14,19 etc.

1.4 The Supreme Court in the case of *Vijaylakshmi Rice Mills* (2006) *(201 ELT 329* has distinguished the words 'tax' and 'fee' and has held that 'tax' is compulsory exaction of money for public purposes by State whereas 'fee' is charge for service rendered by governmental agency.

1.5 A few Articles of the Constitution relevant to the taxation have been referred to below:

(a) Article 13: Laws inconsistent with or in derogation of Fundamental Right

(b) Article 14: Equality before Law

(c) Article 15: Prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth

(d) Article 20: Protection in respect of conviction for offences

2. Writ Jurisdiction

2.1 'Writ' has been defined as a written command or formal order issued by Court directing person(s) to do or refrain from doing some act specified therein.

The Constitution of India provides writ jurisdiction under Article 32 and Article 226 for the enforcement of Fundamental Rights and other legal remedies. A petitioner can approach the Supreme Court under Article 32 and High Court under Article 226 of the Constitution.

2.2 The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. The Supreme Court shall have power to issue directions or Orders or writs, including writs in the nature of the following:

(a) ***Habeas Corpus*****:** *Habeas Corpus* is a Latin term which means "you may have the body". The writ is issued to produce a person who has been detained, whether in prison or in private custody, before a Court and to release him if such detention is illegal. The writ provides a prompt and effective remedy against illegal detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detenu.

(b) ***Mandamus:*** *Mandamus* is a Latin word, which means "We Command". *Mandamus* is an order from the Supreme Court or High Court to a lower court or tribunal or public authority to perform a public or statutory duty. The writ of *mandamus* would be to issue an Order to cancel an Order of an administrative or statutory public authority or the Government itself where it violates a fundamental right.

(c) ***Prohibition:*** The writ of prohibition means to forbid or to stop and it is popularly known as 'Stay Order'. The writ of prohibition would be issue of Order to prevent or prohibit a quasi-judicial authority from proceeding to act in contravention of a fundamental right such as ex-jurisdiction, violation of natural justice, unconstitutional etc. After the issue of this writ, proceedings in the lower court etc. come to a stop.

(d) ***Certiorari:*** *Certiorari* means "to be certified". The writ of *certiorari* can be issued by the Supreme Court or any High court for quashing the Order already passed by an inferior court, tribunal or quasi- judicial authority.

(e) ***Quo Warranto:*** The word *quo warranto* means "what is your authority". It is a writ issued with a view to restrain a person from holding a public office to which he is not entitled. The writ requires the concerned person to explain to the Court by what authority he holds the office.

2.3 In addition to the above specific writs for the enforcement of fundamental rights and other constitutional rights, a petition can also be filed

in cases where the vires of the law has been challenged or where the principles of natural justice has not been followed or against the validity / enforceability of circular / rule / notification or against any Order / Notice issued without jurisdiction or where the alternate remedy is inadequate. Writs are subjected to rejection when any efficacious alternate remedy is available or if it involves a disputed question of fact.

2.4 There is no prescribed time limit for filing writ petition in the Supreme Court or High Court. However, writ can be dismissed on grounds of unreasonable delay.

2.5 Only the person aggrieved can file a writ in the Supreme Court or jurisdictional High Court. However public interest litigation or enforcement of *habeas corpus* or *quo warranto* are some exceptions where writ can be filed by a person other than the aggrieved person.

3. General Clauses

3.1 Any exercise on interpretation of law is incomplete without due consideration being given to the provisions of General Clauses Act, 1897. States too have their own laws on General Clauses. This Act provides the 'rules' for interpretation and the provisions of this Act burns into every legislation to which it applies. The Constitution of India also does not fall outside the scope of the rules laid down in this Act. Some key provisions of the Central law on General Clauses are discussed here.

3.2 Section 5 - Coming into force – when a Central Act is to 'come into force' from the date it receives the assent of the President of India, it shall come into force from 'end of day preceding' its commencement.

3.3 Section 6 - Effect of repeal – when any Act is 'repealed', it shall not:

(a) revive anything not in force;

(b) affect anything already done;

(c) affect any right, privilege obligation or liability vested previously;

(d) affect any penalty, forfeiture, punishment incurred previously;

(e) affect any investigation, legal proceeding or remedy in respect of the above.

3.4 Section 8 - References to repealed enactments – when any law refers to the provisions from other laws which undergo amendment, then reference to those provisions will have to be applied along with those amendments while enforcing the law.

3.5 Section 9 - Commencement and termination of time – when referring to a series of days with 'from' it excludes the first of those days and 'to' includes the last of those days.

3.6 Section 17- Functionaries – for indicating a person executing certain functions, it is sufficient to mention the official title of the person and every successive incumbent in that office will continue those functions.

3.7 Section 20- Construction of notification – words and expressions used in a notification issued under an enactment must be interpreted according to the meaning available to those words and expressions in the enactment itself.

3.8 Section 21- Scope of power – when power is given to issue notifications or Orders, then it includes the power to add, amend, vary or rescind those notifications or Orders but the procedure prescribed must be followed without any deviation.

3.9 Section 23 - Laying down – when power is delegated with a condition that exercise of such delegated power must be 'laid' before Parliament or 'published' in Gazette or after any other similar procedure of supervision (with or without affirmative action) then, unless the said procedure is followed, the exercise of delegation is void.

3.10 Section 24 - Continuation after repeal – when any notification or Order is issued under a law which is repealed and re-enacted, then those notifications or Orders (unless inconsistent with the re-enacted law) will continue to apply as if issued under the re-enacted law until superseded.

3.11 Section 27 - Meaning of service by post – when service is required in respect of any due process, it is sufficient if the said process, properly addressed and stamped with all necessary contents included, is put into dispatch which would reach the addressee in the normal course of delivery by post.

4. Limitation

4.1 Assistance from the State is available to everyone whose rights are violated. If not, those rights will be illusory. However, such assistance is available only to those who are vigilant about enforcing their rights. *Vigilantibus et non dormientibus jura subveniunt*–- the law assists those that are vigilant with their rights and not those that sleep thereupon.

4.2 Limitation is provided in every enactment and where it is missing, recourse may be had to the Indian Limitation Act, 1963. Certain matters, in the

wisdom of law maker, do not have any limitation or have a very large period of limitation.

4.3 Limitation is not that the underlying right abates but it merely states that the assistance of the State is not available if the step to avail such assistance is not taken within the said period of limitation. For example, section 25 of Indian Contract Act recognizes the payment of a time barred debt.

4.4 Prescription, on the other hand, is the state of affairs where after the expiration of the period specified, the underlying right itself evaporates.

4.5 Identifying whether it is a case of limitation or prescription would greatly advance the litigation strategy to be adopted. Reference may be made to the illustrations given above where it is claimed by the Revenue that the right to appeal abates after lapse of the time permitted for its filing, whereas assessee pleads that it is unjust and the time limit must not be treated as a prescription but as a limitation which can be cured by intervention of higher judiciary.

4.6 Timelines of limitation can be interrupted by supervening events that can suspend the clock. Such events could be war, lunacy, etc. Examination of expiration of limitation must also take into account whether any supervening events may have occurred.

Annexure B
Landmark Decisions

i. General Principles

1.1 Natural Justice

(a) Oryx Fisheries Private Limited v UOI [(2011) (266) E.L.T. 422 (SC)]

Issue before the Hon'ble Supreme Court was whether the authority who issued show cause notice proposing cancellation of the registration certificate of the appellant acted fairly and in compliance with principles of natural justice and also whether such authority acted with an open mind.

It was held that quasi-judicial authority, while acting in exercise of its statutory power must act fairly and with an open mind while initiating a show cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

*(b) Kothari Filaments v. CC (Port), Kolkata, [(*2009*) (233) E.L.T. 289 (SC)]*

The Customs Department, based on the enquires conducted and information collected, passed an order of confiscation of goods and imposed penalties. The said information was not supplied to the assessee.

The Supreme Court held that when a document is relied upon by the Department in passing an order or coming to certain conclusions, the same cannot be done without supplying the relied upon documents or information to the assessee.

1.2 Contents of Notice

(a) CCE v Brindavan Beverages (P) Ltd. [(2007) (213) ELT 487 (SC)]

The allegation in the show cause notice was that the assessee wrongly availed the benefit of SSI exemption.

Though the Department's case was that the assessee had arranged their transactions to erroneously avail the benefit of exemption, the allegation in show cause notice was not clear and specific.

The Supreme Court observed that 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.

(b) Oudh Sugar Mills Ltd. v UOI [(1978) (2) E.L.T. J172 (SC)]

The show cause notice alleged clandestine removal of dutiable goods based on sample testing of raw materials and machinery usage.

The Supreme Court held that the show cause notice issued on the basis of assumption and presumption and the findings based on such show cause notice are without any material evidence and are based only on inferences involving unwarranted assumptions and are vitiated by an error of law. In the absence of tangible evidence of clandestine activity the notice was held to be invalid.

1.3 Jurisdiction of the Officer

(a) CC v. Sayed Ali, [(2011) (265) E.L.T. 17 (SC)]

Whether Commissioner /Collector of Customs (Preventive), Mumbai has jurisdiction to issue show cause notice when imports have taken place at Bombay Custom House.

The Supreme Court held that Customs officers assigned with specific functions of assessment and re-assessment in jurisdictional area where goods imported, are competent to issue show cause notice under section 28 of Customs Act, 1962 as 'Proper Officer'. Such officer alone can adjudicate the matters. Since Collector of Customs (Preventive) is not shown as officer assigned with such functions under section 28 as 'Proper Officer', such officer is not competent to adjudicate the matters.

1.4 Extended Period of Limitation

(a) Cosmic Dye Chemicals v. CCE, [(1995) (75) E.L.T. 721 (SC)]

The assessee did not include value of certain clearances, in the information supplied to the Department, on the basis of *bona fide* belief that these were exempted and need not be included.

The issue before the Court was whether non-supply of information without intent to evade could also be a reason to invoke the extended period.

Each of the words (fraud, wilful misstatement, collusion, contravention of any provisions) used in the statute allowing invocation of extended period of limitation, requires to prove the existence of intent to evade payment of duties. Without providing existence of intention to evade, no extended period could be invoked.

(b) Tamil Nadu Housing Board v. CCE, Madras [(1994) (74) E.L.T. 9 (SC)]

The assessee, a statutory body engaged in manufacture of concrete and wood in two different units, did not pay duty on wood on the basis of the belief that the wood products are not sold but are used in the construction activity.

When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word `evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word `intent'. In other words, the assessee must deliberately avoid payment of duty which is payable in accordance with law.

(c) Maruti Suzuki India Ltd., v. CCEx., Delhi, [(2009) (240) ELT 641(SC)]

The issue here relates to interpretation of the definition of phrase 'inputs' and eligibility to avail credit on inputs used in power generation.

Huge litigation in the country stands generated on account of repeated amendments in CENVAT Credit Rules; hence penalty is not leviable, particularly on account of conflict of views expressed by various Tribunals/ High Courts, in large number of other cases where assessees also succeeded.

1.5 Presence of Counsel during Deposition

(a) Poolpandi v Superintendent [(1992) (60) E.L.T. 24 (SC)]

The Supreme Court held that a person being interrogated did not have the right to insist on the presence of his lawyer.

The Court observed that there is no force in the arguments of Appellant's Advocates that if a person is called away from his own house and questioned in the atmosphere of the customs office without the assistance of his lawyer or his friends, his constitutional right under Article 21 is violated.

(b) Senior Intelligence Officer v Jugal Kishore Samra [(2011) (270) ELT 147 (SC)]

In this case, the applicability of the decision in Poolpandi's case (supra) to Narcotic Drugs and Psychotropic Substances Act, 1985 was examined and it was held that the decision referred to above would be applicable and the Advocate could not be part of the investigation. However, considering poor medical conditions of the party, interrogation was allowed to be done in the presence of a lawyer.

1.6 Act v. Rule

(a) Bimal Chandra Banerjee v. State of M.P. and Ors., [(1971) (81) ITR 105]

No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it.

(b) *L. CHANDRA KUMAR vs. UoI, [(1997) (92) E.L.T. 318 (SC*)]

Tribunal is competent to test the vires of subordinate legislations and rules but not the vires of their parent statutes because being a creature of an Act it cannot declare the very Act as unconstitutional.

1.7 Alternative Remedy

(a) Union of India v. Vicco Laboratories, [(2007) (218) E.L.T. 647 (SC)]

Where a show cause notice is issued either without jurisdiction or by abuse of process of law, the writ Court would not hesitate to interfere even at the stage of issuance of show cause notice

(b) Baburam Prakash Chandra Maheswari v. Antarim Zilla Parishad, [AIR 1969 SC 556]

Rule of alternate remedy as a bar to exercise writ jurisdiction is not a rule of law but is a self-imposed restraint by the Courts. The Apex Court further observed that in proper cases, it is open to the High Courts to exercise writ jurisdiction even in cases where alternative remedy may be available.

1.8 Retrospective Operation of Laws

(a) Ujagar Prints v UOI [(1988) (38) ELT 535 (SC)]

A competent legislature can always validate a law which has been declared to be invalid by courts, provided the infirmities and vitiating factors noticed in the declaratory-judgment are removed or cured. Such a validating law can also be made retrospective. No individual can acquire a vested right from a defect in a statute and seek a windfall from the legislature's mistakes. Validity of legislations retroactively curing defects in taxing statutes is well recognised and courts, except under extraordinary circumstances, would be reluctant to override the legislative judgment as to the need for and wisdom of the retrospective legislation. In testing whether a retrospective imposition of a tax operates so harshly as to violate fundamental rights under Article 19(1)(g), the

factors considered relevant include the context in which retroactivity was contemplated such as whether the law is one of validation of taxing statute struck-down by courts for certain defects; the period of such retroactivity, and the degree and extent of any unforeseen or unforeseeable financial burden imposed for the past period, etc.

(b) Chhotabhai Jethabhai Patel & Co. v UOI [(1999) (110) ELT 118 (SC)]

The Supreme Court held that it is within the legislative competence of the Parliament to impose excise duty retrospectively, and it cannot be challenged on the ground that the same is incapable of being passed on to the buyer or under Article 19 or 31.

ii. Evidence

2.1 Burden of Proof

(a) State of Maharashtra v. Wasudeo Ram Chandra Kaidalwar [AIR 1981 SC 1186]

Burden of proof has two aspects (i) legal burden – to bring forth an assertion about something and (ii) evidential burden – to lead evidence to establish that assertion. The former is burden and later is onus. Burden does not shift but onus shifts. An issue poorly defended does not prove the allegation unless the allegation itself is proved satisfactorily. No benefit of an assertion accrues unless burden of proof is discharged. Burden to prove lies on the person who asserts (*onus probandi*).

A substantive point not contested during adjudication but contested only in appeal misleads the adjudication process. Party entitled to contest is estopped from questioning admitted or uncontested assertion.

Onus permits adducing counter-evidence to displace the proof adduced to establish the assertion. Once proof of assertion is displaced, the assertion, while still true, is rendered without force during remainder of proceedings.

Burden of proof and onus of proof are not synonymous. Refer *res ipsa loquitur.*

2.2 Degree of Proof

(a) Mah. State Board of Secondary & Higher Education v. KS Gandhi [(1991) 2 SCC 716]

Strict rules of Evidence Act do not apply to domestic Tribunals. It is open to receive all necessary, relevant, cogent and acceptable material facts though not strictly proved. Inference from evidence and circumstances must be carefully distinguished from conjectures or speculation. The mind is prone to

take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole. The standard of proof is not proof beyond reasonable doubt but the preponderance of probabilities tending to draw an inference that the facts must be probable. Probative value of evidence must be gauged from facts and circumstances of the case. Incriminating facts incompatible with innocence – is the degree to which an assertion is to reach to be disproved.

Seriousness of offence and evidence in support must be proportionate. As a matter of ordinary human experience, a person is less easily satisfied that a serious allegation is made out than that a trivial one is made out.

Severity of consequences inherently discourages deviation. Fraud is less likely than negligence. Courts are to try the case, not the moral rectitude of an assessee. Doubt about innocence is not adequate to establish guilt.

2.3 Presumption

(a) Sodhi Transport Co. v. UOI [AIR 1985 SC 1099]

A presumption is not in itself evidence but only makes a *prima facie* case for party in whose favour it exists. It indicates the person on whom the burden of proof lies. When presumption is conclusive it obviates the production of any other evidence. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has provided evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of presumption is over.

'Proved' means the evidence adduced establishes the assertion. 'Disproved' means evidence has failed to establish the assertion adduced.

2.4 Expert Opinion

(a) Ramesh Chandra Agarwal v. Regency Hospital Ltd. [AIR 2010 SC 806]

An 'expert' is one who has devoted time and study to a special branch of learning and thus specially skilled on those points on which he is asked to state his opinion.

Occurrence of an accident is information that a witness can provide. Negligence of driver being cause of accident is opinion which only an expert can provide.

2.5 Mens rea

(a) RS Joshi v. Ajit Mills [AIR 1977 SC 2279]

Prohibition from collecting tax in excess of that leviable was made punishable without having to establish *mens rea*. The principle of *'no mens rea no crime'*

had no application in economic offences – *actus non facit reium nisi mens sit rea* – the act itself creates no guilt in the absence of a guilty mind.

Question in taxing statutes is whether proof of *mens rea* is dispensed with or presence of *mens rea* is irrelevant. This can be known from the words of the statute.

Being aware of the existence of a risk of tax demand, if the party proceeds to follow a course involving lower tax payment, it is a case of 'wilfulness' in the non-payment.

iii. Interpretation

3.1 Per incuriam

(a) Central Board of Dawoodi Bohra Community v. State of Maharashtra, [(2010) (254) E.L.T. 196 (SC)]

Review of earlier judgment. Doctrine of precedents.

"*Per incuriam*" means a decision rendered in ignorance of a previous binding decision such as decision of its own or of a Court of coordinate or higher jurisdiction. It may also mean decision rendered in ignorance of terms of a statute or of a rule having force of law.

(b) State of UP v. Synthetics and Chemicals Limited, [(1991) (4) SCC 139]

'*Incuria*' literally means 'carelessness'. In practice *per incuriam* appears to mean *per ignoratium*. The 'quotable in law' is avoided and ignored if it is rendered, 'in *ignoratium* of a state, or other binding authority'.

3.2 Sub Silentio

(a) Municipal Corporation of Delhi v. Gurnam Kaur [(1989) 1 SCC 101]

Under Delhi Municipal Corporation Act, 1957, there was a bar on Illegal encroachment on public land. A question arose whether the Commissioner can exercise authority to remove encroachment.

A decision is *sub silentio* when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio*.

(b) Security Printing & Minting Corpn of India Ltd v. Gandhi Industrial Corporation, [(2007) (217) E.L.T. 489 (SC)]

Job work was done for gumming and super-calendering of stamp paper for Appellant-security press. Impugned papers brought by Appellant after paying excise duty and gate passes issued evidencing payment thereof. Issue was whether Appellant was entitled to MODVAT benefit.

The principle of *sub silentio* is not applicable when the terms and conditions are well known and clearly understood between the parties.

3.3 Res Judicata

(a) M.J. Exporters P. Limited v. UOI, [(2015) (325) ELT 216 (SC)]

The Appellant had challenged the demand of interest claimed by the Department on the amount of duty paid belatedly. The High Court rejected the prayer of the Appellant and gave partial relief for recalculating the interest.

Settled law is that principles of constructive *res judicata* are applicable in writ proceedings also. Accordingly, while undoubtedly a question of law can be raised at any time of *lis*, Appellant is not permitted to raise fresh argument on law point on a foreclosed issue.

(b) CC v. Texcomash Export, [(2015) (322) E.L.T. 601 (SC)]

The respondent had exported children's garments to Russia under the claim of drawback. Value for drawback purpose was fixed by the Assistant Collector of Customs, which was challenged in earlier proceedings and concluded by higher authority. Fresh show cause notice was issued by alleging fraud against the respondent and on that basis, the entire issue was sought to be reopened.

Show cause notice for drawback recovery was not issuable by Commissioner, when the issue had already been settled by higher authority viz., Joint Secretary (Review). Even if certain additional material had come to notice, the proper course was to challenge the order of Joint Secretary (Review) before the appropriate forum. No infirmity in Tribunal's order setting aside demand arising out of impugned show cause notice.

3.4 Promissory Estoppel

(a) Shrijee Sales Corpn v. UOI, (1997) (89) ELT 452 (SC)

Appellant had imported PVC resin, which was sought to be taxed. Whether time bound customs exemption can be removed prior to its expiry.

The principle of promissory estoppel is applicable against the Government but in case there is a supervening public equity, the Government would be allowed to change its stand. It would then be able to withdraw from representation

made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. However, the Court must satisfy itself that such a public interest exists.

(b) Kasinka Trading v. UOI, (1994) (74) ELT 782 (SC)

Courts would not interfere with fiscal policy unless there is fraud or lack of *bona fides* on the part of Government.

(c) UOI v. Dharampal Satyapal Ltd, [(2015) (319) ELT 6 (SC)]

Industries set up in North-Eastern Region were exempt from excise duty. The exemption on tobacco product was sought to be withdrawn. Whether it was hit by promissory estoppel.

Withdrawal of exemption did not violate the principle of promissory estoppel.

3.5 Lex Non Cogit Impossiblia

(a) Indian Seamless Steel & Alloys Ltd v. UOI, (2003) (156) ELT 945 (Bom.)

Prescribed period for making payment of tax expired on a holiday. Whether there was a default in tax payment when the tax was paid on the next working day.

Law cannot compel a person to do the impossible. Unforeseen circumstance beyond control of assessee resulting in non-payment of duty would not mean that there was failure to pay the duty by due date.

(b) Hico Enterprises v. CC, [(2005) (189) E.L.T. 135 (T-LB)]. Affirmed by SC in [(2008) (228) E.L.T. 161 (SC)]

Export obligation under *Notification No. 203/92-Cus.* was fulfilled by original licence holder. Department alleged that endorsement of transferability made on licence was obtained by fraud or misrepresentation. Satisfaction arrived at by DGFT that exporter had discharged export obligation without availing input credit is binding on the Customs Department at all times.

Maxim *lex non cogit ad impossiblia* to be read from the point of view of performance of an act by transferee of licence to fulfil the condition, which is allegedly not discharged by the transferor but not from the point of view of applicability of *Notification No. 203/92-Cus*.

3.6 Ratio decidendi

(a) Bharti Airtel Ltd v. State of Karnataka, [(2012) (25) STR 514 (Kar.)]

Competence of the State to levy Sales Tax/VAT on telecommunication service. Interpretation of constitutional and statutory provisions and upholding the rule of law.

Ratio decidendi is the reason assigned in support of conclusion. It must be ascertained and determined by analyzing all material facts and issues involved in the case.

3.7 Obiter Dicta

(a) Municipal Corporation of Delhi v. Gurnam Kaur [(1989) 1 SCC 101]

Under Delhi Municipal Corporation Act, 1957 there was a bar on illegal encroachment on public land. A question arose whether the Commissioner can exercise authority to remove encroachment.

Quotability as to law applies to the case, its ratio the only thing binding on an authority is the principle upon which the case was decided. Statements which are not part of the *ratio decidendi* are distinguished as *obiter dicta* and are not authoritative.

(b) Mohandaas Issardas v. CC, [(2000) (125) E.L.T. 206 (Bom.)]

Powers of the authority to impose penalty when there is a prohibition or restrictions on importation.

An *obiter dictum* is an expression of opinion on a point which is not necessary for the decision of a case. Two questions may arise before a Court for its determination. The Court may determine both although only one of them may be necessary for the ultimate decision of the case. The question which was necessary for the determination of the case would be *ratio decidendi*. The opinion of the Tribunal on the question which was not necessary to decide the case would be only an *obiter dictum.*

3.8 Binding Precedent

(a) A One Granites v. State of UP & Ors, [AIR 2001 SC 1203]

Issue arose in the context of re-grant of mining leases for following the procedure for giving notice.

A decision which was not express and was not founded on reasons nor it proceeded on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141.

(b) ACCE v. Dunlop India Ltd & Ors, [(1985) (19) ELT 22 (SC)]

Impact of ex parte interim orders

It is inevitable in a hierarchical system of courts that there are decisions of the Supreme Court which do not attract the unanimous approval of all Members of the judiciary, but the judicial system only works if someone is allowed to have

the last word and that last word once spoken is loyally accepted. The better wisdom of the Courts below must yield to the higher wisdom of the Court above; that is the strength of the hierarchical judicial system. In India, needless to say, under Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India, and under Article 144 all authorities civil and judicial in the territory of India shall act in aid of the Supreme Court.

3.9 Judicial Discipline

(a) Pradip Chandra Parija v. Pramod Chandra Patnaik, [(2002) (144) E.L.T. 7 (SC)]

Judicial discipline to be followed by Judges as regards Court decisions.

Judicial discipline requires that a two Judge Bench should follow the decision of a Bench of three learned Judges. If the two Judge Bench concludes that the earlier judgment of three learned Judges is very incorrect and under no circumstances to be followed, the proper course is to set out the reasons why it could not agree with the earlier judgment and refer the matter to a Bench of three Judges and if the Bench of three Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, it should refer the matter to a Bench of five learned Judges.

(b) UOI v. Kamalakshi Finance Corpn. Ltd, [(1991) (55) ELT 433 (SC)]

It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the Appellate Authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the Appellate Authority is not "acceptable" to the Department, in itself an objectionable phrase and the subject-matter of an appeal, can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.

3.10 Doctrine of merger

(a) Kunhyammed v. State of Kerala, [(2001) (129) E.L.T. 11 (SC)]

Doctrine of merger is neither a doctrine of constitutional law nor one statutorily recognized. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. Its underlying logic is that there cannot be more than one operative order governing the same subject matter at a given point of time. The doctrine is not of universal or unlimited application. To attract it, the superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it and it should do so by passing a speaking and reasoned order.

(b) Fuljit Kaur v. State of Punjab, [(2010) (262) E.L.T. 40 (SC)]

Unique case of an influential person having allotment of residential plot in discretionary quota within 48 hours of submission of application and to assert right to have land at throwaway price and not deposit sale price for quarter of a century.

Dismissal of special leave petition *in limine* does not mean reasoning of judgment of High Court stood affirmed or such judgment merges with Supreme Court order. Such dismissal of SLP means case not considered as worthy of examination. Such order does not operate as *res judicata* and is not a binding precedent.

Annexure C

Illustrative Show Cause Notices

Various aspects have been discussed in this background material. To better explain those aspects, certain show cause notices (in the form of draft show cause notices) are provided for reference .

I. Show Cause Notice in case of contravention of section 17(5)

Show Cause Notice

(Summary in Form GST DRC-01 also to be issued separately)

INS-1 No. and date……

INS-2 No. and date……

(In case demand for subsequent period is based on identical grounds raised in earlier SCN)

SCN No. and date……

DRC-01 No. and date……

DRC-01A No. and date……

(Ensure DRC-01A is issued with details of demand in brief)

Tax period from …….. to …….

WHEREAS M/s ……are a limited company incorporated in the State of …….. ('Legal Entity') having their principal place of business at …… are duly holding GST registration GSTIN…… ('Registered Person') apart from …..NUMBER..... separate GST registrations within …… and some in other States.

WHEREAS on conducting scrutiny of returns under section 61 of State GST Act and Central GST Act read together with rule 99 of the State GST Rules and Central GST Rules, notice was issued in FORM GST ASMT-10 on certain matters of relevance to this notice, in respect of which reply was not received / was received in FORM GST ASMT-11 but did not contain discernible details but liability stated therein was NOT admitted and discharged. Copy of the said FORM GST ASMT-10 dated…….. and FORM GST ASMT-11 dated……. are relied upon in issuing this notice and appended as Exhibit A and B respectively. *(Retain this para, if FORM GST ASMT-10 was issued and attach all FORM GST ASMT-10 to SCN. It will support allegation of deliberate claim of ineligible credit)*

WHEREAS, GST being a dual tax, references made to State GST Act in this notice include a reference to corresponding provisions of Central GST Act. And references to Integrated GST Act and GST (Compensation to States) Act draw their interpretation from corresponding provisions borrowed from Central GST Act.

Details of inquiry in present case

1. Now, it is seen that Registered Person has filed FORM GSTR-3B for the following tax period(s) and claimed input tax credit as appearing in the said returns which are extracted below appear to be blocked credits under section 17(5):

Tax Period	Supplier name	Description of inward supplies	ITC Claimed				Clause in section 17(5)
			CGST	SGST	IGST	CESS	
							Clause (a)
							Clause (aa)
							Clause (ab)
							Clause (b)
							Clause(c)
							Clause (d)
							Clause(e)
							Clause (f)
							Clause (fa)
							Clause (g)
							Clause (h)
							Clause (i)
Total							

(Prepare separate tables as above for each FY (month-wise) from FORM GSTR-3B extract)

2. Attention is invited to section 17(5) of State GST Act and Central GST Act, which reads as:

   (Insert relevant clause under section 17(5) which is invoked to support this demand)

3. Details of the nature of inward supplies are forthcoming from the description of supplier and supplies in table above. With the burden of proof falling on Registered Person under section 155 of State GST Act and Central GST Act (discussed later), suffice that a *prima facie* case

be made out as regards the inadmissible of input tax credit in support of the demand herein.

4. As such, it appears that the input tax credit claimed in FORM GSTR-3B returns aggregating to Rs……. is inadmissible ab initio in accordance with law.

5. It is also noted that said extent of inadmissible input tax credit has been utilized and the table below shows that the balance in Electronic Credit Ledger (ECrL) has fallen below the extent of such inadmissible input tax credit attracting interest under section 50 of State GST Act and Central GST Act read with rule 88B of State GST Rules and Central GST Rules, details as follows:

(Insert Table of ECrL balances after the month of claiming inadmissible credit)

Responsibility on Registered Person

6. GST being a self-assessment tax under section 59 of State GST Act and Central GST Act, it is incumbent upon every taxable person to determine the taxability of any transaction, compute applicable tax, discharge such tax applicable and report the same without any interjection by revenue authorities.

7. Further, section 155 of State GST Act and Central GST Act makes it incumbent on every taxable person to discharge burden of proof as to his 'eligibility' to claim input tax credit which is credited to their electronic credit ledger based on self-declaration of eligible amounts of input tax credit in the returns filed in FORM GSTR-3B under section 39 of State GST Act and Central GST Act.

Section 155 reads as under:

"155. Burden of proof. — Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person."

8. Further, in terms of explanation to section 74 of State GST Act and Central GST Act, "suppression" is defined thus:

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.

In view of this self-assessment responsibility under section 59 of State GST Act and Central GST Act read together with statutory definition of 'suppression' along with *prima facie* case leaning in favour of a presumption about the invalidity of said claim on input tax credit given the burden on Registered Person to establish 'entitlement' to the entire amount of input tax credit claimed and dissatisfactory response to notice issued in FORM GST ASMT-10, it appears that the said amount of input tax credit has been claimed in order to evade tax / credit and for these reasons, is liable to be demanded in accordance with law.

Demand involved in the present case

9. Input tax credit claimed in contravention of section 17(5) under the clauses of State GST Act and Central GST Act mentioned earlier is sought to be demanded notwithstanding that said credit may otherwise be admissible in terms of section 16(1) of State GST Act and Central GST Act.

10. Vesting conditions in section 16(2) are not to operate in prejudice to inadmissibility of credit under section 17(5) of State GST Act and Central GST Act. Input tax credit, in GST, is enjoined with pre-conditions and post-conditions. All the conditions are to be satisfied and failure of any of the conditions causes their impeachment.

11. Claim of input tax credit in spite of being expressly blocked is not overturned merely because the other conditions in section 16(2) of State GST Act and Central GST Act are undisputable.

12. Where divesting conditions are shown to occur due to inaction or belated action by Registered Person, credit claimed in spite of the express embargo in section 17(5) of State GST Act and Central GST Act is inadmissible ab initio and liable to be recovered in accordance with law, to be made 'in cash', via DRC-03 challan.

Quantification of demand

13. Details of demand involved are as follows:

Financial Year	SGST	CGST	IGST	Cess	Total

Justification for invoking section 74

14. For the reasons that burden of proof lies on Registered Person, opportunity provided during proceedings under section 61 were not availed, deliberate suppression of information in returns filed by Registered Person that would expose impermissibility of treatment adopted in self-assessment allowed in section 59 and omission to correct any *bona fide* errors voluntarily when additional time was available after the end of financial year when Annual Returns under section 44 was filed, actions of Registered Person clearly establish suppression to evade tax contrary to express provisions of law. *(This para only if SCN is to be issued under section 74)*

Pre-notice consultations with Registered Person

15. Pre-notice consultations were held by undersigned vide summary of demand in FORM GSTR DRC-1A as required under section 74(5) of State GST Act and Central GST Act read together with rule 142(1A) of the State GST Rules and Central GST Rules was served on you vide DRC-01A No……. dated ……. which was served on……

16. This facility allowed in law under section 74(5) was turned down by you vide your letter of rejection dated ……. and the same was received by the undersigned on ……. As a result, concession available thereunder is forfeited.

Registered Person to show cause

17. For these reasons, the Registered Person is hereby called upon to show cause before Deputy Commissioner of Goods and Services Tax, ……, ……, as to why following amounts should not be demanded in accordance with law, namely:

    a) Input tax credit amounting to Rs…… (details in table on 'quantification of demand' as above) under section 73 / 74 of State GST Act and Central GST Act; *(Please see if Notice issued under section 73 or 74 and edit section references in para suitably)*

    b) Applicable interest under section 50 of State GST Act and Central GST Act;

    c) Penalty for deliberately claiming input tax credit contrary to law under section 122(2)(a) / 122(2)(b) of State GST Act and Central

GST Act. *(Please see if notice issued under section 73 or 74 and edit section references in para suitably)*

18. If no reply is received in FORM GST DRC-06 within three (3) months from the date hereof or no appearance is entered by you or your duly authorized representative under section 116 of State GST Act and Central GST Act when the case is posted for hearing, the same will be decided based on merits and records available without any further opportunity.

Issued by …….

Name and Signature……

Enclosed: Relied upon documents as follows:

(i) FORM GST ASMT-10 issued on ……

(ii) FORM GST ASMT-11 received on……

(iii) Statement computing input tax credit for each financial year in FORM GSTR-3B

(iv) Statement of computing fall in ECrL balance to attract interest.

II. FORM GST ASMT-10 for claiming credit after the period specified in section 16(4)

FORM GST ASMT - 10

[See rule 99(1)]

Reference No.:

Date:

To_____

GSTIN:

Name:

Address:

Tax period –

Notice for intimating discrepancies in the returns after scrutiny

This is to inform that during scrutiny of GSTR-3B for tax period(s) referred to in the table below, the following discrepancies have been noticed:

Tax Period	Due date for filing GSTR-3B	Actual Date of filing GSTR-3B	ITC Claimed			
			CGST	SGST	IGST	CESS

As per section 16(4) of SGST Act read with rule 61 of SGST Rules, you are required to file GSTR-3B every month on or before the prescribed due date. And as per section 16(2)(d) of SGST Act, credit must be claimed in such GSTR-3B returns filed provided this return is not filed later than the due date for filing returns for September of the following year as per section 16(4) of SGST Act.

As can be seen from the table above, there is delay in filing returns for the tax period(s) (as above) of FY 2017-18 and actual date of filing of these returns is

beyond September of the following financial year. This delay appears to render the credit (as above) ineligible as per law.

You are hereby directed to submit details the tax period(s) stated above within …… days along with supporting documents.

And where there is any inadvertent violation, you may inform your position regarding liability to be discharged as above along with interest and applicable penalty as per law.

If no explanation is received by the aforesaid date, it will be presumed that you have nothing to say in the matter and proceedings in accordance with law may be initiated against you without making any further reference to you in this regard.

Signature

Name

Designation

EXPLANATION FOR THIS FORM GST ASMT-10:

And where there is any inadvertent violation, you may inform your position regarding liability to be discharged as above along with interest and applicable penalty as per law.

EXPLANATION FOR THIS FORM GST ASMT-10:

Supreme Court has held in AAP & Co's decision [(2021) (55) G.S.T.L. 513 (SC)] that GSTR-3B is a return. Therefore, credit claimed in GSTR-3B returns of previous year but filed after due date of September of current financial year would fail to satisfy the disqualification in section 16(4) of SGST Act.

FORM GST ASMT-10 allows the taxpayer to make a positive assertion about compliance with this requirement and discharge tax voluntarily with interest to avoid or minimize penal consequences.

III. Show Cause Notice in case of contravention of section 16(4)

Show Cause Notice

(Summary in FORM GST DRC-01 also to be issued separately)

Assignment No. and date……

INS-1 No. and date……..

INS-2 No. and date……..

(In case demand for subsequent period is based on identical grounds raised in earlier SCN)

SCN No. and date……

DRC-01 No. and date……..

DRC-01A No. and date……

(Ensure DRC-01A is issued with details of demand in brief)

Tax period from …….. to …….

WHEREAS M/s ……are a Limited Company incorporated in the State of ……. ('Legal Entity') having their principal place of business at ……are duly holding GST registration GSTIN……('Registered Person') apart from …..NUMBER..... separate GST registrations within ……. and some in other States.

WHEREAS on conducting scrutiny of returns under section 61 of State GST Act and Central GST Act read together with rule 99 of the State GST Rules and Central GST Rules, notice was issued in FORM GST ASMT-10 on certain matters of relevance to this notice, in respect of which reply was not received / was received in FORM GST ASMT-11 but did not contain discernible details but liability stated therein was NOT admitted and discharged. Copy of the said FORM GST ASMT-10 dated…..... and FORM GST ASMT-11 dated……. are relied upon in issuing this notice and appended as Exhibit A and B respectively. *(Retain this para, if FORM GST ASMT-10 was issued. Where issued, attach all FORM GST ASMT-10s to SCN. It will support allegation of deliberate claim of ineligible credit)*

WHEREAS, GST being a dual tax, references made to State GST Act in this notice include a reference to corresponding provisions of Central GST Act. And references to Integrated GST Act and GST (Compensation to States) Act draw their interpretation from corresponding provisions borrowed from Central GST Act.

Details of inquiry in present case

1. Now, it is seen that Registered Person has filed GSTR-3B for the following tax period(s) and claimed input tax credit as appearing in the said returns which are extracted below:

Tax Period	Due date for filing GSTR-3B	Actual date of filing GSTR-3B	ITC Claimed			
			CGST	SGST	IGST	CESS
Total						

(Prepare above separate table as above for each FY (month-wise) from GSTR-3B extract)

2. Attention is invited to section 16(4) of State GST Act and Central GST Act, which reads as:

"16. Eligibility and conditions for taking input tax credit.—

(1) ……...

……

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019."

3. As such, it appears that the input tax credit claimed in the GSTR-3B returns have been filed after the time permitted in (i) proviso to section 16(4) of State GST Act and Central GST Act for 2017-18 and (ii) section

16(4) of State GST Act and Central GST Act for 2018-19, 2019-20 and ……., aggregating to Rs……..is inadmissible in accordance with law.

Responsibility on Registered Person

4. GST being a self-assessment tax under section 59 State GST Act and Central GST Act, it is incumbent upon every taxable person to determine taxability of any transaction, compute applicable tax, discharge such tax applicable and report the same without any interjection by revenue authorities.

5. Further, section 155 of State GST Act and Central GST Act makes it incumbent on every taxable person to discharge burden of proof as to their 'eligibility' to claim input tax credit which is credited to their electronic credit ledger based on self-declaration of eligible amounts of input tax credit in the returns filed in Form GSTR-3B under section 39 of State GST Act and Central GST Act. Section 155 reads as under :

"155. Burden of proof.— Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person."

6. Further, in terms of explanation to section 74 of State GST Act and Central GST Act, "suppression" is defined as:

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.

In view of this self-assessment responsibility under section 59 of State GST Act and Central GST Act read together with statutory definition of 'suppression' along with *prima facie* case leaning in favour of a presumption about the invalidity of said claim on input tax credit given the burden on Registered Person to establish 'entitlement' to the entire amount input tax credit claimed and dissatisfactory response to notice issued in FORM GST ASMT-10, it appears that said amount of input tax credit has been claimed in order to evade tax / credit and for these reasons, is liable to be demanded in accordance with law.

Demand involved in present case

7. Input tax credit claimed in contravention of section 16(4) of State GST Act and Central GST Act is sought to be demanded notwithstanding that the said credit may otherwise be admissible in terms of section 16(1) of State GST Act and Central GST Act.

8. Timelines specified in section 16(4) of State GST Act and Central GST Act operate in the nature of 'divesting conditions' that render admissible credits inadmissible for failure of the Registered Person to make claim within the time prescribed for this purpose.

9. Vesting conditions in section 16(2) are not to operate in prejudice to the time limit in section 16(4) of the State GST Act and Central GST Act. Input tax credit, in GST, is enjoined with pre-conditions and post - conditions. All the conditions are to be satisfied and failure of any of those conditions causes their impeachment.

10. Claim of input tax credit in spite of divesting conditions shown to exist in the facts of the present case as evidence by the fatally belated filing of input tax credit in the returns filed under section 16(2)(d) of State GST Act and Central GST Act are undisputable.

11. Where divesting conditions are shown to occur due to inaction or belated action by Registered Person, credit claimed well beyond the time permitted in section 16(4) of State GST Act and Central GST Act is inadmissible *ab initio* and liable to be recovered in accordance with law, 'in cash', via DRC-03 challan.

Quantification of demand

12. Details of demand involved are as follows:

Financial Year	SGST	CGST	IGST	CESS	Total

Justification for invoking section 74

13. For the reasons that burden of proof lies on the Registered Person, opportunity provided during proceedings under section 61 were not availed, deliberate suppression of information in returns filed by

Registered Person that would expose impermissibility of treatment adopted in self-assessment allowed in section 59 and omission to correct any *bona fide* errors voluntarily when additional time was available after the end of financial year when annual returns under section 44 were filed , actions of Registered Person clearly establish suppression to evade tax contrary to express provisions of law. *(Retain this para only if SCN is to be issued under section 74)*

Pre-notice consultations with Registered Person

14. Pre-notice consultations were held by the undersigned vide summary of demand in FORM GSTR DRC-01A as required under section 74(5) of State GST Act and Central GST Act read together with rule 142(1A) of the State GST Rules and Central GST Rules was served on you vide DRC-01A No…… dated …….. which was served on……..

15. This facility allowed in law under section 74(5) was turned down by you vide your letter of rejection dated …….. and the same was received by the undersigned on …….. As a result, the concession made available thereunder is forfeited.

Registered Person to show cause

16. For these reasons, the Registered Person is hereby called upon to show cause before the Deputy Commissioner of Goods and Services Tax, ……, ……,as to why the following amounts should not be demanded in accordance with law, namely:

    a) Input tax credit amounting to Rs…… (details in table on 'quantification of demand' as above) under section 73 / 74 of State GST Act and Central GST Act; *(Please see if Notice issued under section 73 or 74 and edit section references in para suitably)*

    b) Applicable interest under section 50 of State GST Act and Central GST Act; and

    c) Penalty for deliberately claiming input tax credit contrary to law under section 122(2)(a) / 122(2)(b) of State GST Act and Central GST Act. *(Please see if Notice issued under section 73 or 74 and edit section references in para suitably)*

17. If no reply is received in FORM GST DRC-06 within three (3) months from the date hereof or no appearance is entered by you or your duly authorized representative under section 116 of the State GST Act and

Central GST Act when the case is posted for hearing, the same will be decided based on merits and records available without any further opportunity.

Issued by .....

Name and Signature.....

Enclosed: relied upon documents as follows:

(i) FORM GST ASMT-10 issued on .....

(ii) FORM GST ASMT-11 received on.....

(iii) Statement computing input tax credit for each financial year in GSTR-3B filed belatedly extracted from common portal.

IV. FORM GST ASMT – 10 for differences in FORM GSTR-3B, FORM GSTR-1 and E-way bill

FORM GST ASMT-10

[See rule 99(1)]

Reference No.:

Date:

To _____

GSTIN:

Name:

Address:

Tax period –

Notice for intimating discrepancies in the returns after scrutiny

This is to inform that during scrutiny of GSTR-3B for the tax period(s) referred in table below, following discrepancies have been noticed:

Tax Period	Details of Turnover reported in…….			
	GSTR-1	EWB Report	GSTR-3B	Difference

It is seen that the turnover of outward supplies self-assessed is determined in tax invoice issued under section 31 and disclosed in returns filed under section 37 of SGST Act in Form GSTR-1. Data of outward supplies admitted and disclosed in GSTR-1 does not match with data reported in e-way bill ('EWB') issued under section 68 of SGST Act. Further, data of outward supplies where tax discharged in returns filed under section 39 of SGST Act in Form GSTR-3B is also not matching.

You are hereby directed to explain within ……. days, whether tax on outward supplies which is self-assessed under section 59 of SGST Act and undisputed has been discharged through any other mode along with applicable interest in accordance with law and how such interest is computed along with documents in support of your position. Attention is invited to:

a) Section 73(11) where self-assessed tax liability remaining unpaid for more than thirty (30) days would forfeit the benefit of concessional

penalty under section 73(6) or 73(8) as mandated in section 73(11) if notice were issued under section 73 of SGST Act; and

b) section 75(12) wherein it is stated that 'undisputed arrears' of self-assessed tax and interest thereon is liable to recovery action under section 79 of SGST Act.

If no explanation is received by the aforesaid date, it will be presumed that you have nothing to say in the matter and proceedings in accordance with law may be initiated against you without making any further reference to you in this regard.

Signature

Name

Designation

EXPLANATION FOR THIS FORM GST ASMT-10:

Tax is self-assessed in GST under section 59 of SGST Act. Self-assessed tax is assessed in the document issued under section 31 of SGST Act which is the invoice. The taxable value of invoices issued match with turnover as per EWB report.

Further, self-assessed tax liability is 'disclosed' in FORM GSTR-1. Tax liability which is disclosed in FORM GSTR-1 is 'discharged' in FORM GSTR-3B.

Due to the recovery action permitted under section 75(12) read with explanation inserted in 2021, it is clear that the self-assessed tax liability is an 'undisputed arrear'. Seeking information will ensure voluntary compliance to avoid interest and penalty.

Failing which, action may be taken under section 73(11) to recover mandatory penalty of 10%.

V. Show Cause Notice for discrepancy in FORM GSTR-1 and FORM GSTR-3B

Show Cause Notice

(Summary in Form GST DRC-01 also to be issued separately)

Assignment No. and date……

SCN No. and date……..

DRC-01 No. and date……..

DRC-01A No. and date……

(Ensure DRC-01A is issued with details of demand in brief)

Tax period from …….. to …….

WHEREAS M/s ……are a Proprietorship / Partnership concern / Company incorporated in the State of ……. ('Legal Entity') having their principal place of business at …….. are duly holding GST registration GSTIN……('Registered Person') apart from …..NUMBER…... separate GST registrations within …… and some in other States.

WHEREAS on conducting scrutiny of returns under section 61 of State GST Act and Central GST Act read together with rule 99 of the State GST Rules and Central GST Rules, notice was issued in FORM GST ASMT-10 on certain matters of relevancy to this notice, in respect of which reply was received /not received in FORM GST ASMT-11 but did not contain discernible details but liability stated therein was NOT admitted and discharged. Copy of said FORM GST ASMT-10 dated…….. and FORM GST ASMT-11 dated……. are relied upon in issuing this notice and appended as Exhibit A and B, respectively. *(Retain this para and attach all FORM GST ASMT-10 and FORM GST ASMT-11 to SCN. It will support allegation of deliberate claim of ineligible credit)*

WHEREAS, GST being a dual tax, references made to State GST Act in this notice include a reference to corresponding provisions of Central GST Act. And references to Integrated GST Act and GST (Compensation to States) Act draw their interpretation from corresponding provisions borrowed from Central GST Act.

Details of enquiry in the present case

1. The Registered Person is required to carry out self-assessment of liability for each tax period under section 59 of State GST Act. Invoice

is issued under section 31 of State GST Act. Liability so assessed is disclosed in the returns filed under section 37 of State GST Act and the same liability which is self-assessed is discharged in returns filed under section 39 of State GST Act. This is the scheme of the Act.

2. *Instructions 1/2022-GST dated 7 Jan, 2022* very clearly stated that any erroneous data reported in returns filed under section 37 of State GST Act may be rectified in accordance with the provisions therein. And where there are other *bona fide* reasons for mismatch of data in GSTR-1 and GSTR-3B, the same must be explained to the Proper Officer. No such claims have been made in reply received from the Registered Person in FORM GST ASMT-11. For this reason, the exclusion allowed in said instructions of the Board are not applicable to the facts of the case of the Registered Person.

3. Reply furnished by the Registered Person states as follows:

"……..."

From the above it is clear that the underlying outward supplies which are self-assessed and disclosed in GSTR-1 returns remain undisputed.

4. Details of such undisputed turnover intimated in FORM GST ASMT-10 are as follows:

Tax Period	Turnover as per GSTR-3B	Turnover as per GSTR-1	Difference in Turnover	Tax paid as per GSTR-3B		
				Total	Input tax credit	Net tax paid in cash
	90	100	(10)	9	8	1
	90	100	(10)	9	8	1
	120	100	20	12	8	1

** Amounts indicated above are for illustration purposes only.*

5. Without prejudice to the express mandate in the explanation to section 75(12) of State GST Act, this notice is issued in order to adhere to the principles of natural justice.

6. In view of the fact, this mismatch (as above) is left undisputed and this mismatch (as above) being a matter within the 'special knowledge' of the Registered Person, the burden of proof falls on Registered Person

as it pertains to matters in self-assessment and the Registered Person has failed to satisfactorily explain the same in reply in FORM GST ASMT-11.

7. As such, it appears that the Registered Person has deliberately omitted to discharge undisputed arrears of output tax with a clear intention not to deposit the same, which is liable to action in accordance with law.

Responsibility on the Registered Person

8. GST, being a self-assessment tax under section 59 State GST Act and Central GST Act, it is incumbent upon every taxable person to determine the taxability of any transaction, compute applicable tax, discharge such tax applicable and report the same without any interjection by the Revenue authorities.

9. Further, in terms of explanation to section 74 of State GST Act and Central GST Act, "suppression" is defined as:

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.

In view of this self-assessment responsibility under section 59 of State GST Act and Central GST Act read together with statutory definition of 'suppression' along with *prima facie* case leaning in favour of a presumption about the invalidity of the said claim on input tax credit given the burden on Registered Person to establish 'entitlement' to the entire amount input tax credit claimed and unsatisfactory response to the notice issued in FORM ASMT-10, it appears that the Registered Person is fully seized of the facts that are alleged in this notice.

Demand involved in present case

10. Output tax payable under section 9 read with section 7(1)(a) of State GST Act and Central GST Act and section 5 of Integrated GST Act.

11. There is no dispute regarding the following:

a) Classification of supplies admitted in returns;

b) Time of supply;

c) Place of supply; and

d) Valuation of supply.

Quantification of demand

12. Details of demand involved are as follows:

Financial Year	SGST	CGST	IGST	CESS	Total

Justification for invoking section 74

13. For the reason that the burden of proof lies on the Registered Person, opportunity provided during proceedings under section 61 were not availed, deliberate suppression of information in returns filed by Registered Person that would expose impermissibility of treatment adopted in self-assessment allowed in section 59 and omission to correct any *bona fide* errors voluntarily when additional time was available after the end of FY when Annual Returns under section 44 were filed, actions of Registered Person clearly establish suppression to evade tax contrary to express provisions of law. *(Retain this para only if SCN is to be issued under section 74)*

Pre-notice consultations with the Registered Person

14. Pre-notice consultations were held with you by the undersigned as summary of demand in FORM GSTR DRC-1A as required under section 74(5) of State GST Act and Central GST Act read together with rule 142(1A) of the State GST Rules and Central GST Rules was served on you vide DRC-1A No…….. dated ……. which was received by you on……

15. This facility allowed in law under section 74(5) was turned down by you vide your letter of rejection dated ……. and the same was received by the undersigned on ……. As a result, you have opted to forfeit the concession made available thereunder.

Registered Person to show cause

16. For these reasons, the Registered Person is hereby called upon to show cause before Deputy Commissioner of Goods and Services Tax, ……, ……, as to why the following amounts should not be demanded in accordance with law, namely:

a) Output tax amounting to Rs……. (details in table on 'quantification of demand' as above) under section 74 of State GST Act and Central GST Act;

b) Applicable interest under section 50 of State GST Act and Central GST Act; and

c) Penalty for deliberately claiming input tax credit contrary to law under section 122(1)(iv) read with 122(2)(b) of State GST Act and Central GST Act. *(Please see if notice issued under section 73 or 74 and edit section references in para suitably)*

17. Separate show cause notice is issued to …… under section 122(1) or (3) of State GST Act and Central GST Act.

18. If no reply is received in FORM GST DRC-06 within three (3) months from the date hereof or no appearance is entered by you or your duly authorized representative under section 116 of State GST Act and Central GST Act when the case is posted for hearing, the same will be decided based on merits and records available without any further opportunity.

Adjudication

19. Registered Person is directed to show cause before the ……. who is duly authorized under section 5(3) of State GST Act and Central GST Act and will adjudicate this notice and the Registered Person may submit his reply, if any, in writing within three (3) months from the date of this notice.

20. If no cause is shown within this time, adjudication will be concluded in accordance with law and on ex parte basis based on material available on record.

21. Documents relied upon in this show cause notice are Exhibit A to C. Documents not relied upon but submitted or collected, during the enquiry will not prejudice these proceedings.

22. The Registered Person is entitled to be represented competently in accordance with law in these adjudication proceedings.

23. Any mistake, defect or omission, in this notice is saved by section 160(1) of State GST Act and Central GST Act and without suffering prejudice, the Registered Person may promptly bring the same to the attention of the undersigned for suitable remediation. Omission to object to the

same, if any, during adjudication will imply 'no objection' by the Registered Person.

24. Summary in Form DRC-01 under section 142(1)(a) of State GST Rules and Central GST Rules accompanying this show cause notice is appended vide reference no…… dated…….

Issued by:……..

Name and Signature……..

Enclosed: Relied upon documents as follows:

a) FORM GST ASMT-10 issued on ……

b) FORM GST ASMT-11 received on……..

c) Summary of data extracted of turnover where exemption and concessional rate of tax is claimed.

VI. FORM ASMT-10 for differences in input tax credit availed as per FORM GSTR-3B and FORM GSTR-2A

FORM GST ASMT - 10

[See rule 99(1)]

Reference No.:

Date:

To_____

GSTIN:

Name:

Address:

Tax period –

Notice for intimating discrepancies in the returns after scrutiny

This is to inform that during scrutiny of GSTR-3B for the tax period(s) referred in table below, following discrepancies have been noticed:

Tax Period	Description	SGST	CGST	IGST	CESS	Total
	ITC claimed in GSTR-3B					
	ITC available in GSTR-2A					
Difference						

Eligibility to claim input tax credit is dependent on satisfying various conditions laid down in the Act and the Rules, more particularly, section 16(2) of the SGST Act. Input tax credit claimed is provisionally allowed when the said amount is credited to the Electronic Credit Ledger. Burden to prove eligibility to credit rests on you under section 155 of SGST Act.

You are hereby directed to explain within ……. days as to how this burden has been discharged particularly when there is a *prima facie* difference in the amounts appearing in GSTR-2A and that in your returns filed under section 39 in GSTR-3B.

If no explanation is received by the aforesaid date, it will be presumed that you have nothing to say in the matter and proceedings in accordance with law may be initiated against you without making any further reference to you in this regard.

Signature

Name

Designation

EXPLANATION FOR THIS FORM ASMT-10:

Even though FORM GSTR-2A was introduced under rule 36(4) from Oct 2019, matching of credit is a requirement under section 16(2)(c) which is in force from 1st July, 2017. Seeking clarification about mismatch will reveal taxpayer's reply in order to issue notice under section 73 or 74. The question of legal validity of condition in section 16(2)(c) is being contested by taxpayers but by relying on Court decisions under earlier tax regime.

VII. Show Cause Notice for discrepancy in input tax credit claimed as per FORM GSTR-2A and FORM GSTR-3B

Show Cause Notice

(Summary in FORM GST DRC-01 also to be issued separately)

Assignment No. and date……

INS-1 No. and date……..

INS-2 No. and date……..

(In case demand for subsequent period is based on identical grounds raised in earlier SCN)

SCN No. and date……..

DRC-01 No. and date……..

DRC-01A No. and date……

(Ensure DRC-01A is issued with details of demand in brief)

Tax period from …….. to ……

WHEREAS M/s …… a Limited Company incorporated in the State of …….. ('Legal Entity') having their principal place of business at …… are duly holding GST registration GSTIN……('Registered Person') apart from …..NUMBER..... separate GST registrations within …….. and some in other States.

WHEREAS on conducting scrutiny of returns under section 61 of State GST Act and Central GST Act read together with rule 99 of the State GST Rules and Central GST Rules, notice was issued in Form ASMT-10 on certain matters of relevancy to this notice, in respect of which reply was not received / was received in FORM ASMT-11 but did not contain discernible details but liability stated therein was NOT admitted and discharged. Copy of said ASMT-10 dated…….. and ASMT-11 dated……. are relied upon in issuing this notice and appended as Exhibit A and B, respectively. *(Retain this para, if ASMT-10 was issued. And where issued, attach all ASMT-10s to SCN. It will support allegation of deliberate claim of ineligible credit)*

WHEREAS, GST being a dual tax, references made to State GST Act in this notice include a reference to corresponding provisions of Central GST Act. And references to Integrated GST Act and GST (Compensation to States) Act draw their interpretation from corresponding provisions borrowed from Central GST Act.

Details of inquiry in present case

1. Now, it is seen that Registered Person has filed GSTR-3B for the following tax period(s) and claimed input tax credit as appearing in the said returns and corresponding data appearing on common portal indicates that suppliers (that is, counter-party in this inward supply to Registered Person), appears to be *prima facie* contrary to claim of input tax credit made by the Registered Person. Details are as follows:

Tax Period	Description	SGST	CGST	IGST	CESS	Total
	ITC claimed in GSTR-3B					
	ITC available in GSTR-2A					
Difference						

(Prepare separate table as above for each FY (month-wise) from GSTR-2A report extract)

2. Attention is invited to section 16(2) of State GST Act and Central GST *Act, which reads as under:*

"16. Eligibility and conditions for taking input tax credit.—

(1) ……...

(2) Notwithstanding anything contained in this section, no Registered Person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(b) he has received the goods or services or both.

Explanation.— For the purposes of this clause, it shall be deemed that the Registered Person has received the goods or, as the case may be, services–

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such Registered Person, whether acting as an agent or otherwise, before or during movement of goods,

either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such Registered Person;

(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the Registered Person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

……"

3. As such, it appears that the input tax credit claimed in the GSTR-3B returns have not satisfied the requirements of section 16(2) of State GST Act and Central GST Act.

Responsibility on the Registered Person

4. GST being a self-assessment tax under section 59 State GST Act and Central GST Act, it is incumbent upon every taxable person to determine the taxability of any transaction, compute applicable tax, discharge such tax applicable and report the same without any interjection by revenue authorities.

5. Further, section 155 of State GST Act and Central GST Act makes it incumbent on every taxable person to discharge burden of proof as to

their 'eligibility' to claim input tax credit which is credited to their electronic credit ledger based on self-declaration of eligible amounts of input tax credit in the returns filed in Form GSTR-3B under section 39 of State GST Act and Central GST Act.

Section 155 reads as under :

"155. Burden of proof.— Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person."

6. Further, in terms of explanation to section 74 of State GST Act and Central GST Act, "suppression" is defined 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.

In view of this self-assessment responsibility under section 59 of State GST Act and Central GST Act read together with statutory definition of 'suppression' along with *prima facie* case leaning in favour of a presumption about the invalidity of said claim on input tax credit given the burden on Registered Person to establish 'entitlement' to the entire amount input tax credit claimed and dissatisfactory response to notice issued in FORM GST ASMT-10, it appears that said amount of input tax credit has been claimed in order to evade tax / credit and for these reasons, is liable to be demanded in accordance with law.

Demand involved in the present case

7. Input tax credit claimed in contravention of section 16(2) of State GST Act and Central GST Act is sought to be demanded notwithstanding that the said credit may otherwise be admissible in terms of section 16(1) of State GST Act and Central GST Act.

(Important: Even though demand is based on FORM GSTR-2A vs. FORM GSTR-3B, the Proper Officer might not refer to FORM GSTR-2A in the demand portion of SCN as the taxpayer can prevent by taking the defence that FORM GSTR-2A was not introduced till 2019.)

Quantification of demand

8. Details of demand involved are as follows:

Financial Year	SGST	CGST	IGST	CESS	Total

Justification for invoking section 74

9. For the reasons that burden of proof lies on the Registered Person, opportunity provided during proceedings under section 61 were not availed, deliberate suppression of information in returns filed by Registered Person that would expose impermissibility of treatment adopted in self-assessment allowed in section 59 and omission to correct any *bona fide* errors voluntarily when additional time was available after the end of the FY when annual returns under section 44 were filed, the actions of the Registered Person clearly establish suppression to evade tax contrary to express provisions of law. *(Retain this para only if SCN is to be issued under section 74)*

Pre-notice consultations with Registered Person

10. Pre-notice consultations were held with you by the undersigned as summary of demand in FORM GSTR DRC-01A as required under section 74(5) of State GST Act and Central GST Act read together with rule 142(1A) of the State GST Rules and Central GST Rules was served on you vide DRC-01A No…… dated ……. which was received by you on……

11. This facility allowed by law under section 74(5) was turned down by you vide your letter of rejection dated ……. and the same was received by the undersigned on ……. As a result, you have opted to forfeit the concession made available thereunder.

Registered Person to show cause

12. For these reasons, the Registered Person is hereby called upon to show cause before Deputy Commissioner of Goods and Services Tax, ……., ……, as to why the following amounts should not be demanded in accordance with law, namely:

    a) Input tax credit amounting to Rs…… (details in table on

'quantification of demand' as above) under section 73 / 74 of State GST Act and Central GST Act; *(Please see if Notice issued under section 73 or 74 and edit section references in para suitably)*

b) Applicable interest under section 50 of State GST Act and Central GST Act; and

c) Penalty for deliberately claiming input tax credit contrary to law under
section 122(2)(a) / 122(2)(b) of State GST Act and Central GST Act. *(Please see if Notice issued under section 73 or 74 and edit section references in para suitably)*

13. If no reply is received in FORM GST DRC-06 within three (3) months from the date hereof or no appearance is entered by you or your duly authorized representative under section 116 of State GST Act and Central GST Act when the case is posted for hearing, the same will be decided based on merits and records available without any further opportunity.

Issued by:……..

Name and Signature……

Enclosed: Relied upon documents as follows:

(i) FORM GST ASMT-10 issued on …….

(ii) FORM GST ASMT-11 received on……

(iii) Statement computing FORM GSTR-2A data extracted from common portal.

VIII. FORM GST ASMT-10 in case of mismatch in turnover shown in FORM GSTR-7 and FORM GSTR-3B

FORM GST ASMT - 10

[See rule 99(1)]

Reference No.:

Date:

To_____

GSTIN:

Name:

Address:

Tax period –

Notice for intimating discrepancies in the returns after scrutiny

This is to inform that during scrutiny of FORM GSTR-3B for the tax period(s) referred in table below, following discrepancies have been noticed:

Tax Period	Details of turnover corresponding to data reported in		
	GSTR-7*	GSTR3B	Difference

** turnover computed by dividing TDS credit with rate of output tax*

It is seen that turnover corresponding to TDS credit appearing in GSTR-7 for the above tax period(s) are not matching with or included in, turnover reported in GSTR-3B for the corresponding tax period(s). Therefore, it appears that:

(i) There may be omission in reporting turnover in GSTR-3B returns; or

(ii) There may be a timing difference due to delay in credit of TDS in GSTR-7 filed by counterparty; or

(iii) There is some other reason for this prima facie difference in turnover in respect of the same tax period.

You are hereby directed to explain within ……. days, whether tax corresponding to turnover difference(s) (listed above) is / is not, remaining undischarged due to any reason for the respective tax period(s) along with interest and applicable penalty as per law.

If no explanation is received by the aforesaid date, it will be presumed that you have nothing to say in the matter and proceedings in accordance with law may be initiated against you without making any further reference to you in this regard.

Signature

Name

Designation

EXPLANATION FOR THIS FORM GST ASMT-10:

TDS is deducted under section 51 on 'taxable goods or services' made to Government agencies or entities. TDS deducted is presumed to be deposited in the same tax period by the said deductor.

Turnover may be computed based on TDS credit for each tax period (by dividing the TDS amount / tax rate).

Turnover in FORM GSTR-3B may be equal to or greater than turnover derived from FORM GSTR-7. But where turnover in FORM GSTR-3B is less than the turnover derived from FORM GSTR-7, there is a possibility that it may be-

(i) temporary timing difference where turnover is reported in an earlier or later month, if there is delay in depositing TDS by the respective deductors; or

(ii) permanent difference where turnover is totally omitted to be reported by the taxpayer.

FORM GST ASMT-10 gives an opportunity to the taxpayer to discharge the tax on differential turnover, in case the same is omitted from disclosure in FORM GSTR-3B. Demand for tax, interest and penalty will arise in case of permanent differences and demand will arise only of interest in case of temporary differences.

IX. FORM GST ASMT-10 requiring reasons for issuing debit notes or credit notes

FORM GST ASMT – 10

[See rule 99(1)]

Reference No.:

Date:

To_____

GSTIN:

Name:

Address:

Tax period –

Notice for intimating discrepancies in the returns after scrutiny

This is to inform that during scrutiny of FORM GSTR-9 for the tax period(s) comprised in 2017-18, certain discrepancies have been noticed:

a) Table 4I 'credit notes' contains Rs…… in FORM GSTR-9 for FY 2017-18;

b) Table 4J 'debit notes' contains Rs…….. in FORM GSTR-9C for FY 2017-18.

Credit notes make an assertion that original invoice(s) issued were incorrect for some reason and are revised downwards in accordance with section 34 of SGST Act. Credit notes require a corresponding reduction of input tax credit by the respective recipients. Credit notes issued result in 'refund' of output tax originally discharged on invoices and this liberty allowed in section 59 read with section 34 of SGST Act must be availed with discretion. Use of discretion involves burden to show compliance with limited instances where credit notes are permitted in section 34 of SGST Act.

Debit notes make an assertion that original invoice(s) issued were incorrect for some reason and are revised upwards in accordance with section 34 of SGST Act. Debit notes follow the same HSN and time of supply as original invoice issued and attracts interest under section 50(1) of SGST Act.

You are hereby directed to explain within ……. days details of the reasons for issuing credit notes and debit notes in accordance with section 34 of SGST Act along with documents in support of your position and treatment of GST as applicable.

If no explanation is received by the aforesaid date, it will be presumed that you have nothing to say in the matter and proceedings in accordance with law may be initiated against you without making any further reference to you in this regard.

Signature

Name

Designation

EXPLANATION FOR THIS FORM ASMT-10:

Credit note indicates that conditions stipulated in section 34 are satisfied. Seeking clarifications will require the taxpayer to provide information as to the basis on which each credit note is shown to be satisfying the conditions of section 34.

Debit note indicates that invoice issued was lower and hence tax paid was lesser than applicable. Seeking clarification will allow the taxpayer to discharge interest on debit note along with applicable tax on value of debit note.

X. Show Cause Notice in respect of input tax credit refund on Zero-rated supplies (export and SEZ supplies)

Show Cause Notice

(Summary in Form GST DRC-01 also to be issued separately)

Assignment No. and date……

INS1 No. and date……

INS2 No. and date……

(In case demand for subsequent period is based on identical grounds raised in earlier SCN)

SCN No. and date……

DRC-01 No. and date……..

DRC-01A No. and date……

(Ensure DRC-01A is issued with details of demand in brief)

Tax period from …….. to …….

WHEREAS M/s ……are a Limited Company incorporated in the State of ……. ('Legal Entity') having their principal place of business at …….. are duly holding GST registration GSTIN……. ('Registered Person') apart from …..NUMBER..... separate GST registrations within ……. and some in other States.

WHEREAS the Legal Entity is engaged in the business of …….. and has been regular in filing GST returns including Annual Returns under section 44(2) in Form GSTR-9 along with reconciliation statement duly certified under section 35(5), where applicable, in FORM GSTR-9C. All GST compliances are carried out in the capacity of Registered Person in ……..

WHEREAS the Registered Person has claimed and been sanctioned refund of unutilized input tax credit in respect of zero-rated outward supplies under section 54(3)(I) of State GST Act and Central GST Act made applicable to outward supplies under section 16(1) of Integrated GST Act.

WHEREAS the claim of refund is a serious matter and the liberty of self-assessment under section 59 of State GST Act and Central GST Act must be exercised with even greater circumspection by any taxpayer. As such, it is incumbent upon the Registered Person to stand scrutiny as to the correctness of assertions made in the claim for refund in FORM GST RFD-01/01A due to the prejudice caused by erroneous claim of refund to society at large,

especially, when the law allows greater reliance on taxpayer's diligence and circumspection and the minimal verification conducted at the time of sanction of refund in the automated system of the Government.

WHEREAS, GST being a dual tax, references made to State GST Act and Central GST Act in this notice include a reference to corresponding provisions of Central GST Act. And references to Integrated GST Act and GST (Compensation to States) Act draw their interpretation from corresponding provisions borrowed from Central GST Act.

Enquiry into erroneous refund claimed by the Registered Person

1. The Registered Person has asserted in its their refund claim that full responsibility is accepted and discharged for correctness of the claim in accordance with the extant provisions of the Act and Rules and completeness of the documents furnished in support of those claims.

2. Details of refund claims made, notice issued, reply(ies) filed and refunds sanctioned are as follows:

Tax period	ARN (RFD-01/01A)	Refund claim (Rs.)	ARN (RFD-06)	Refund sanctioned (Rs)

3. RFD-01/01A, RFD-08 and RFD-09 and RFD-05 and RFD-06 in respect of above listed tax period(s) are 'relied upon documents' to this notice and since the same are already available with the Registered Person in those proceedings, the same are not separately appended to this notice as no prejudice will be caused to the Registered Person thereby.

4. When a proceeding is initiated in accordance with law, especially, when it is initiated by taxpayer as in the case of refund claim filed under section 54(1) of State GST Act and Central GST Act, it is unbecoming of any taxpayer to respond cryptically or take advantage of minimal scrutiny of refund claims. Requirements listed in Form GST RFD-01/01A are to be complied by the Registered Person and a presumption operates as to their truth and accuracy. For this reason, Government requires minimal verification at the time of processing of the said refund claims. However, this presumption is rebuttable on detailed review of the files, even after sanction of refund if the reliance placed on

Registered Person's use of discretion and circumspection in making claims truthfully and accurately.

5. Adverting to the self-assessment tax regime in GST as stated in section 59 and the limited matters covered in section 155 of State GST Act and Central GST Act on 'burden of proof', it becomes quite concerning that the Revenue has very limited information and the Registered Person is answerable for the truth and accuracy of the refund claims submitted.

6. Further, the burden of proof in respect of matters lying within the special knowledge of the Registered Person remains on such person to discharge. This is a principle of common law contained in Indian Evidence Act that needs no elaboration. And it will hold field notwithstanding section 155 of State GST Act and Central GST Act.

7. More is expected of taxpayers who are well endowed with resources to understand and comply with the requirements of law such as the Registered Person. Unlike MSME taxpayers, duty of care is greater when taxpayers are corporates and especially multi-national corporates where governance is a key area of attention in the running of their business. Added to this, when there are experts in each subject available, the expectations from Society of such taxpayers are much higher. Similarly, deficient responses from such taxpayers to Departmental enquiry / proceedings attracts the consequences of the law with greater force.

Demand involved in this transaction

8. Above listed refund claims which are sanctioned in respect of unutilized input tax credit under section 54(3)(i) of State GST Act and Central GST Act, contain the following deficiencies:

   a) Input tax credit included in the formula of 'net ITC' under rule 89 of State GST Rules and Central GST Rules does not match with data appearing in FORM GSTR-2A extracted from common portal for the said tax period(s). Mismatch of input tax credit in each tax period(s) claimed in FORM GSTR-3B with data appearing on common portal, raises a presumption that the Registered Person has claimed input tax credit contrary to the conditions in section 16(2) of State GST Act and Central GST Act;

   b) Input tax credit appearing in FORM GSTR-3B for the respective tax period(s) to the extent matched in FORM GSTR-2A must exclude input tax credit relating to inward supplies of capital

goods. No statement showing the exclusion of such credit is submitted even while providing detailed reply to substantiate the correctness and completeness of 'net ITC' amount; and

c) Input tax credit includes capital goods and transition credit in the formula of 'net ITC' under rule 89 of State GST Rules and Central GST Rules which are inadmissible for refund and no supporting document is submitted even while providing detailed reply to substantiate the correctness and completeness of 'net ITC' amount.

9. The burden of proof in respect of the correctness of assertions made in the respective refund claims lies entirely on Registered Person. Failure to exercise necessary discretion and circumspection in making refund claims and attempt to take advantage of minimal verification carried out under 'ease of doing business' initiative of the Government to show greater trust and reliance on Registered Person.

10. For the failure to discharge this burden satisfactorily, following consequences arise:

a) Input tax credit included in arriving at 'net ITC' in accordance with rule 89 of State GST Rules and Central GST Rules are incorrect and consequently, refund sanctioned is erroneous;

b) After excluding the inadmissible and ineligible amounts of input tax credit, only the remainder of input tax credit becomes eligible for computation of 'net ITC' and refund sanctioned in excess of such amounts become liable to be recovered as erroneous sanction of refund in accordance with law.

Classification of such supply

11. Not applicable.

Time of supply

12. Not applicable.

Place of supply and hence, nature of supply

13. Not applicable.

Valuation of said supply

14. Not applicable.

Quantification of demand

15. In view of the above, demand for payment of erroneously sanctioned refund for tax period(s) covered by this notice is quantified as:

Tax period	Amount of 'net ITC' considered in refund claim	Revised 'net ITC' to be considered	Revised refund to be sanctioned	Refund actually sanctioned	Erroneous extent of refund wrongly sanctioned
Total					

(Note: Compute reasonable amount as 'revised net ITC' and arrive at erroneous refund by substituting 'net ITC' in formula (in excel file). Accuracy of 'revised net ITC' is not important. Need to be reasonable based on data available in GSTR-2A.

Any demand for higher amount due to error in computation will not affect the SCN as the party has opportunity to provide the correct data as long as at least one instance of failure (alleged in SCN) exists as per facts.)

Applicability of extended period of limitation

16. While the facts of the present case have all the trappings of evasion of tax and even support attracting the exceptional powers under section 67 of State GST Act and Central GST Act, considering the courtesy which taxpayer are to be extended, undersigned has addressed the question of evasion of tax in the present case on being satisfied that mischievous claim of refund in view of the minimal verification conducted by Revenue is clearly deliberate and by suppression, as defined in Explanation 2 to section 74 of State GST Act and Central GST Act, of facts and information that were always available with the Registered Person to evade payment of tax by claiming ineligible refunds in excess of eligibility.

17. Section 74 of State GST Act and Central GST Act lists certain special circumstances when the demand for output tax or input tax credit (or erroneous refund) may be made during the extended period of limitation and with a demand for higher amount of penalty. For the reasons discussed above, it is evident that the Registered Person has indulged in suppression of facts to claim refund of input tax credit.

18. But for the investigation and the elaborate work conducted by the Commercial Tax Department, Government of …….. the innocuous ways of suppressing the facts would not have come to light. In all the issues raised, it is not a case of an alternate interpretation being canvassed to garner revenue because the interpretation adopted by the Registered Person is plainly not supported by the law as shown in this notice. As a result, the Registered Person's interpretation of the law is *mala fide* and supports the allegation of suppression of facts to evade tax by recoupment of output tax paid on invoices issued earlier.

Summary of demand

19. Tax ……

Financial Year	SGST	CGST	IGST	CESS	Total

20. Demands for tax and input tax credit, is made under section 74 of State GST Act and Central GST Act made applicable to Integrated GST Act also.

21. Interest under section 50 of State GST Act and Central GST Act on the amounts demanded. It may be noted that interest being compensatory in nature is liable to be paid automatically even if the same is omitted in any order in terms of section 75(9) of State GST Act and Central GST Act.

22. Penalty is demanded under section 122(2)(b) State GST Act and Central GST Act from the Registered Person to the extent of the maximum amount stated in the law.

23. Penalty is also imposed under section 122(3) of State GST Act and Central GST Act on …… for being instrumental in this evasion of tax and claim of input tax credit employing mischievous interpretation of law to their advantage, to the extent of the maximum amount stated in the law.

(*Applicable only where any director or officer is involved in refund processing. This also helps in making the party come forward to discharge demand in case any deliberate mischief.)*

Pre-notice consultations and reply by Registered Person

24. Opportunity for pre-notice consultations was granted by issuing Form GST DRC-01A Part A dated……under rule 142(1A) of State GST Rules and Central GST Rules made applicable to demands under

Integrated GST Act. Registered Person replied in DRC-01A Part B dated……. that…….

25. For this reason, this show cause notice under section 74(1) of State GST Act and Central GST Act is issued. The Registered Person is advised to avail the opportunity allowed in section 74(8) of State GST Act and Central GST Act also.

Adjudication

26. The Registered Person is directed to show cause before the …… who is duly authorized under section 5(3) of State GST Act and Central GST Act (JDN…….refers) and will adjudicate this notice and the Registered Person may submit his reply, if any, in writing within three (3) months from the date of this notice.

27. If no cause is shown within this time, adjudication will be concluded in accordance with law and on *ex parte* basis based on material available on record.

28. Documents relied upon in this show cause notice are Exhibit A to H. Documents not relied upon but submitted or collected, during the investigation will not prejudice these proceedings.

29. The Registered Person is entitled to be represented competently in accordance with law in these adjudication proceedings.

30. Any mistake, defect or omission, in this notice is saved by section 160(1) of State GST Act and Central GST Act and without causing prejudice to the Registered Person, the same may promptly be brought to the attention of the undersigned for suitable remediation.

31. Summary in FORM DRC-01 under section 142(1)(a) of State GST Rules and Central GST Rules accompanying this show cause notice is appended vide reference no…….. dated…….

Issued by

Deputy Commissioner of Commercial Taxes

……

Department of Commercial Taxes

Government of State

Relied upon documents:

a) Documents listed as part of refund claim and sanction (available with Registered Person) are not enclosed.

b) Statement of computation (in excel) of erroneous refund (enclosed)

XI. RVN-01 (Notice under section 108)

FORM GST RVN - 01

[See rule 109B]

Reference No.

Date –

To,

……..

……..

GSTIN: …….

Order No. –

Date -

Notice under section 108

Whereas it has come to the notice of the undersigned that decision/order passed under the State Goods and Services Tax Act, 2017 and Central Goods and Services Tax Act, 2017 /the Integrated Goods and Services Tax Act, 2017/ the Union territory Goods and Services Tax Act, 2017/ the Goods and Services Tax (Compensation to States) Act, 2017 by **..**….SEE DETAILS ATTACHED**……..** (Designation of officer) is erroneous in so far as it is prejudicial to the interests of the Revenue and is illegal or improper or has not taken into account certain material facts, and therefore, I intend to pass an order in revision under section 108 on grounds specified in the document attached herewith.

You are hereby directed to furnish a reply to this notice within seven (7) working days from the date of service of this notice. You are hereby directed to appear before the undersigned on ……(DD/MM/YYYY) at …….(HH/MM)

If you fail to furnish a reply within the stipulated date or fail to appear for personal hearing on the appointed date and time, the case will be decided *ex parte* on the basis of available records and on merits.

Place: …….

Date: …….

Additional Commissioner of Commercial Taxes

Division……..,

(Jurisdiction / Office)

Attachment to RVN-01

Tax Period: Sept .....

Financial Year: .....

1. This attachment forms integral part of RVN-01 issued for tax period of Septembe**r .....** in respect of orders passed by Proper Officer (specified below) under section 108 of State GST Act and Central GST Act to .....('Registered Taxable Person')

2. Details of orders involved in these proceedings:

Tax period	Reference no. of Order under Revision	Date of Order under Revision	Amount of Refund Sanctioned
Sept	.....	.....	Rs.....

Adjudication Order(s) passed by ('Proper Officer')	Assistant Commissioner of .....

Point or issue involved in Adjudication Order(s) under revision	Findings in Adjudication Order	Impact on interests of Revenue
1. Inverted rate refund sanctioned where "net ITC" considered is higher than "total ITC" for the tax period as per GSTR-3B	Favourable to the taxable person	Prejudicial to the interests of Revenue
2. Inverted rate refund sanctioned where "turnover of inverted rate supplies" considered is higher than "total taxable turnover" for the tax period as per GSTR-3B	Favourable to the taxable person	Prejudicial to the interests of Revenue

3. Details considered in these revisionary proceedings:

   a) Adjudication Order (listed above) has sanctioned refund under section 54(3)(ii) of State GST Act and Central GST Act applicable in case of 'inverted rate' of tax. However, on a perusal of the said

Adjudication Order, it appears that "net ITC" considered is higher than "total ITC" for the tax period as per GSTR-3B.

b) Application for refund under section 54(3)(ii) of State GST Act and Central GST Act filed involves accumulation of input tax credit and the same is explained to be on account of two factors, namely, (i) rate of tax paid on inward supplies taxable at 12% and 18% but outward supply of fertilizer being taxable at 5% and (ii) on account of credit on input services and capital goods.

c) The Proper Officer appears to have entertained the refund application where the accumulation of input tax credit occurs but without appreciating that more than 81% of the total input tax credit accumulated appears to be eligible for sanction of refund.

d) Output tax payable as per refund application is Rs…….. for the tax period at 5% rate. When output tax payable on inverted rate supplies are reduced in arriving at 'maximum refund amount' (as per formula), the effective extent of refund admissible, even if all inputs (being goods only) are assumed to be taxable at 18%, should result in a refund of 13% (18% minus 5%) of the total eligible input tax credit.

e) Based on the turnover of inverted rate supplies of Rs…… crores, logically refund should not exceed Rs…….. crores (Rs…… / 13% x 100). And if all inputs were considered to be taxed at 12% then, the refund would be Rs……. crores (7% of Rs… crores). As such refund between Rs….. crores and …….crores would be commensurate with the data taken from the Adjudication Order itself. Even though these computations are merely logical and not based on accurate data, nevertheless when actual refund sanctioned is more than double the amount computed logically, it demands careful examination.

f) In a business as in the present case, where net tax payment appears to be rarely 'in cash' due to continuous accumulation of input tax credit, Registered Person should normally claim refund (under rule 89(5)) in every tax period but this does appear to be so. Further, when credit claimed only results in accumulation, there does not appear to be any reason to promptly claim admissible credit in each tax period (even though lawfully credit may be claimed with a lag of many months as per section 16(4)). It is therefore not impossible that tax period when inverted rate

refund is filed to see a spike in claim of credit, whether those inward supplies were in the same tax period or earlier tax period(s). This too, is in the realm of logical reasoning but the burden of proof that lies on Registered Person demands that the *bona fides* of their claim be discharged by them and not by the Proper Officer.

g) The Proper Officer appears to have relied on the *bona fides* of the Registered Person and a small arithmetic exercise being undertaken. Adjudication Order contains no discussion about the substance of the Registered Person's eligibility and the extent of such eligibility.

h) Further, these matters were required to be enquired into while processing the refund applications, no refund application merits to be processed mechanically such that it renders the exercise of adjudication a wooden formality rather than one involving application of mind to reach a conclusion as to the eligibility to sanction refund. Scope of section 54(3)(ii) of State GST Act and Central GST Act does not curtail the matters to be examined in adjudication proceedings which are provided to ensure correctness in administration of the law.

i) As such, it appears that the said Adjudication Order(s) is/are 'prejudicial to interest of revenue', namely:

Order(s) under revision is / are 'prejudicial' because it / they are:		
Illegal	Yes / ~~No~~	Refund appears to have been sanctioned in respect of input tax credit which is greater than that admissible as per formula prescribed in rule 89(5) of SGST Act
Improper	Yes / ~~No~~	Refund appears to have been sanctioned without examining the claim of refund being irregular (once in a while) which may involve excessive inclusion of amounts in "net ITC" for purposes

		of the formula prescribed in rule 89(5) of SGST Act
Not taken into account factors (even if not existing at the time of passing decision or order)	Yes / ~~No~~	Refund appears to have been sanctioned without examining the facts touching reasons for accumulation of input tax credit attributable to outward supplies not involving inverted rate structure.
~~Adverse observations by CAG~~	~~Yes / No~~	~~State 'DAP' *~~

j) Further, refunds for subsequent tax periods continue to be filed by the registered taxable person and sanctioned by Proper Officer in accordance with time prescribed in rule 92 of State GST Rules and Central GST Rules, prejudice to interests of Revenue is not only in respect of the tax periods covered by the said Adjudication Orders but also for subsequent tax periods.

4. In view of the foregoing, it appears that said Adjudication Order (as above) needs intervention under section 108 of State GST Act and Central GST Act in order to protect the interests of Revenue (for reasons stated hereinabove) but after granting reasonable opportunity to the taxable person. To that end, it is necessary to:

a) Stay operation of refunds sanctioned vide the said Adjudication Orders;

b) Put the taxable person to notice to (i) substantiate quantification of "net ITC" included in his claim for refund under section 54(3)(ii) of State GST Act and Central GST Act read with rule 89(5) of State GST Rules and Central GST Rules on outward supplies reported under GSTIN issued in State;

c) Put the taxable person to notice to (i) substantiate the correctness of the eligibility to refund when accumulation of input tax credit involves 'timing difference' due to operation of section 16(4) of State GST Act and Central GST Act and (ii) the fact that refund

applications under section 54(3)(ii) of State GST Act and Central GST Act are *not filed* regularly for all tax period(s) in the financial year to support normalization of effect of said timing difference; and

d) Produce further information / explanation in support of claim of refund on inverted rate of tax under section 54(3)(ii) of State GST Act and Central GST Act.

Issued under my seal

Additional Commissioner of Commercial Taxes (Zone .....)

Revisionary Authority

XII. FORM GST ASMT-10 in case input tax credit is claimed in FORM GSTR-3B but supplier is found to be bogus

FORM GST ASMT - 10

[See rule 99(1)]

Reference No.:

Date:

To_____

GSTIN:

Name:

Address:

Tax period –

Notice for intimating discrepancies in the returns after scrutiny

This is to inform that during scrutiny of GSTR-3B for the tax period(s) referred in table below, following discrepancies have been noticed:

Tax Period	Description	SGST	CGST	IGST	CESS	Total
	ITC claimed in GSTR-3B					
	ITC available in GSTR-2A					

Out of the input tax credit appearing in FORM GSTR-2A which has been claimed in FORM GSTR-3B in the corresponding tax period(s), it is learnt that:

a) Suppliers listed below have *not* submitted FORM GSTR-3B even though FORM GSTR-1 is filed (and appearing in your FORM GSTR-2A):

Tax Period	Name and GSTIN of Supplier(s)	SGST	CGST	IGST	CESS	Total

b) Suppliers listed below have been found to have evaded tax under respective investigations concluded against them:

Investigation document reference	Name and GSTIN of Supplier(s)	SGST	CGST	IGST	CESS	Total

Eligibility to input tax credit is subject to conditions stipulated in section 16(2) of SGST Act. From the data / intelligence as above, it is evident that the said conditions have NOT been satisfied by you. Input tax credit claimed is provisionally allowed when said amount is credited to Electronic Credit Ledger. Burden to prove eligibility to credit rests on you under section 155 of SGST Act.

You are hereby directed to explain within ……. days, how this burden has been discharged particularly when there is prima facie evidence (as above) that input tax credit claimed in your returns filed under section 39 in FORM GSTR-3B had not satisfied the conditions for the vesting of said amounts of credit.

If no explanation is received by the aforesaid date, it will be presumed that you have nothing to say in the matter and proceedings in accordance with law may be initiated against you without making any further reference to you in this regard.

Signature

Name

Designation

EXPLANATION FOR THIS FORM GST ASMT-10:

When FORM GSTR-1 is filed by suppliers, tax amount appears in FORM GSTR-2A of the recipient. And rule 36(4) allows credit when it appears in FORM GSTR-2A. However, the supplier may have filed FORM GSTR-1 but not filed FORM GSTR-3B. Without supplier filing FORM GSTR-3B, the recipient cannot claim to have satisfied the requirements of section 16(2)(c) of SGST Act.

Further, if investigation against the supplier has concluded and there is admission that the supplier has not deposited output tax, input tax credit claimed by the recipient would not have satisfied the condition stipulated in section 16(2)(b) and 16(2)(c) of SGST Act.

FORM GST ASMT-10 gives the taxpayer opportunity to accept and discharge the liability without penalty since the default is by the supplier and not by the taxpayer (who is the recipient of these inward supplies).

GST & Indirect Taxes Committee
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