Practical Guide to GST Disputes

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

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Foreword

The introduction of the Goods and Services Tax (GST) marked a transformative shift in India's indirect tax landscape, streamlining a complex web of Central and State levies into a unified, destination-based tax system. With its wide reach across sectors and a robust compliance framework powered by technology, GST has simplified the indirect tax regime of the country. The dynamic nature of GST law, coupled with evolving jurisprudence, makes continuous learning and professional engagement imperative for all stakeholders.

The Institute of Chartered Accountants of India (ICAI), through its GST & Indirect Taxes Committee, has remained at the forefront of knowledge dissemination and capacity building in the domain of GST. Being entrusted with the statutory responsibility to develop the profession of Chartered Accountancy in India, ICAI has consistently strived to equip its members with the requisite knowledge and practical tools to navigate the dynamic GST landscape.

Interpretational issues, evolving jurisprudence and procedural challenges are among the key factors contributing to litigation under GST. The GST & Indirect Taxes Committee has been working to strengthen the dispute resolution capabilities of the Chartered Accountants through specialized webinars, seminars, workshops and publications. I am happy to note that the GST & Indirect Taxes Committee has now brought out a comprehensive publication titled *Practical Guide to GST Disputes*, designed to equip professionals with in-depth knowledge and practical guidance on handling GST demands, investigations, and appeals—including aspects such as litigation strategy, drafting and pleadings, principles of evidence, revisionary proceedings, ethics in representation, and common challenges faced during adjudication and appellate proceedings.

I would like to appreciate the commendable efforts of CA. Rajendra Kumar P, Chairman, CA. Umesh Sharma, Vice-Chairman; and other members of the GST & Indirect Taxes Committee for conceptualizing and bringing out this publication. I would also like to thank CA. Madhukar N Hiregange, Chairman, and CA. Satish Kumar Gupta, Vice Chairman, and other members of the Committee for Members in Practice for their proactive contributions towards development of this useful publication. The quality and depth of the

content presented in the publication is a testament to the commitment of these leaders to professional excellence and knowledge sharing.

I am confident that the readers would find this publication very useful while discharging their statutory functions and responsibilities in an efficient and effective manner.

CA. Charanjot Singh Nanda
President, ICAI

Date: 05.06.2025
Place: New Delhi

Preface

The introduction of GST has been a landmark reform in India's indirect tax regime, streamlining multiple levies into a unified system, promoting ease of doing business, and enhancing compliance through digitization. As GST approaches its eighth anniversary on July 1, 2025, it has significantly modernized the tax landscape. However, GST-related disputes have also increased, driven by evolving interpretations, procedural uncertainties, legacy practices, and rapid legal and technological changes. The pandemic further intensified these challenges. With the GST Appellate Tribunal (GSTAT) expected to become operational soon, the litigation process is poised to become more structured and accessible.

As GST compliance and litigation grow more complex, the role of Chartered Accountants has become increasingly vital. To support members in navigating disputes and appeals, the GST & Indirect Taxes Committee of ICAI has brought out a comprehensive publication titled *Practical Guide to GST Disputes*. The Guide offers practical insights for handling complex disputes and appeals, including representation before the Tribunal - empowering CAs to advise and represent clients effectively across all stages of GST adjudication and appellate processes. The publication is updated upto 31st May, 2025.

We express our sincere gratitude to CA. Charanjot Singh Nanda, President, ICAI and CA. Prasanna Kumar D, Vice-President, ICAI for their continuous encouragement and support for the various initiatives of the GST & Indirect Taxes Committee. We also gratefully acknowledge the valuable contribution of CA. Madhukar N Hiregange, Chairman, and CA. Satish Kumar Gupta, Vice Chairman, Committee for Members in Practice, in the development of this publication from inception to completion. We acknowledge with our deepest gratitude the collective efforts of CA. A Jatin Christopher, CA. Rajesh TR, CA N R Badrinath, CA. (Dr.) Gaurav Gupta in developing and shaping this Practical Guide. We also thank CA. Ashish Chaudhary and CA. Roopa Nayak M for meticulously reviewing this publication to ensure technical accuracy. Last but not the least, we thank the Secretariat of the Committee for the technical and administrative support provided in editing and finalising the publication.

While due diligence has been exercised to ensure that the contents of this publication are accurate and in conformity with the prevailing law, alternate interpretations and jurisprudential viewpoints may exist on certain matters discussed herein. We encourage the readers to bring to our attention any unintended errors or oversights that they may encounter in this publication at *gst@icai.in*. Your input is valued, and we appreciate your assistance in maintaining the integrity and precision of the content. Additionally, we urge you to visit our website at https://idtc.icai.org to access a wealth of technical and educational resources related to GST.

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

CA. Rajendra Kumar P
Chairman
GST & Indirect Taxes Committee

Date: 05.06.2025
Place: New Delhi

Contents

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

Reference to the Central Goods and Services Act, 2017 ("the CGST Act"), wherever stated, must be understood to mean and include the respective State Goods and Services Tax, 2017/ Union Territory Goods and Services Tax, 2017 ('the SGST Act/ UTGST Act") and the relevant provisions, where required, of the 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 litigation under the GST law is between the Government and the taxpayer, Chartered Accountant being a permitted authorised representative of the taxpayer is empowered to represent the taxpayers before the tax authorities, Appellate Authorities, as well as Tribunal.

In the context of GST litigation, the word 'representation', 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, is a legal right that upholds one's right of being heard granted by various statutes including taxation related statutes, to provide the Client (the person represented) the benefit of professional assistance in presenting his defence and present the case with appropriate factual, legal and technical details and grounds. But for the specific provisions in the taxing statutes permitting appearance through a representative, the party or taxpayer 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 subject 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, created under statute, 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 (GSTAT) 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 (Show Cause Notice (SCN) and Appellate stage) 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 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. Since accounting and disclosure in the financial statements are not synchronised with the taxation aspects under the GST law, it is expected that the CA should go beyond the accounting and apply the statutory provisions to determine the tax liability.

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 taxes 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. Further, 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 SCNs, 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.

In the context of GST law, section 2(15) defines authorised representative as referred to in section 116. Clause (c) of sub-section 2 of section 116 among other covers any chartered accountant, who holds a certificate of practice and who has not been debarred from practice can be an authorised representative.

5. Purpose of representation

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.

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.

While advising Client, CA can present alternatives and the taxpayers has to decide the position to take. 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.

CA though permitted to act under the instructions of the taxpayers, they are not supposed to act under dictation and guidance as CA to work under his professional knowledge and expertise coupled with his professional ethics. Similarly, it is preferrable that CA has to give professional guidance to taxpayer to accept bona fide dues due to errors in self-assessment.

6. 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 SCN 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 sections 107 and 112 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.

7. 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.

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.

8. Skills and knowledge required

Knowledge is gained continuously – some of the aspects of the same are -

(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.

(f) Technological aspects of GST compliance as well as processes involved in GST litigation process.

Knowledge is acquired 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.

The professional should possess sufficient books and other resources, or have access to those books and resources. Further it is also GST law has changed very frequently, the resources as to the prevailing laws during the relevant point in time would become essential as mistaken application of

provision or rule or notification can jeopardise the case. It is also essential that the CA taking up litigation has to continuously keep abreast with the changes, development in the law and precedents. Hence acquisition of knowledge, updation and continued learning becomes a part and parcel for CA taking up litigation practice. Though this is true in all areas of practice of CA but from the GST law perspective it is much more important as it is presently dynamic.

At the same time, GST law is driven by technology and failure to keep-up with the technological advancements in the implementation of GST law will lack effectiveness of understanding of the dispute and may impact the outcome of the case. Further also the procedure to be followed in the process of representation also are technology driven. Hence learning those technological aspects also becomes important for the CAs to follow the same.

9. 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.

10. Etiquette and Ethics

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.

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.

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.

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.

Prima facie, there would be no conflict of interest for a CA to represent and providing litigation services to the Client, if they are related to each other or even if the CA is also an auditor of that Client entity.

However, normally conflict of interest would arise (i) if the Client and the CA are related to each other; (ii) if the CA is disengaged from providing services to any group entities of that Client; (iii) if the CA is associated or working with

the Government on similar issues / very same matter; (iv) if the CA is also the auditor who has to express an opinion on the financial statements; (vi) if the CA is also representing the other party in a contract negotiation engagement; (vii) CA having a financial or pecuniary interest in the business of the Client; (viii) if the CA has accepted any favours such as gifts, hospitality or honorarium or the like; (xi) if the CA holds any place of office in the Client's business or associates.

Acceptable practice for the CA would be to recuse one-self from continuing on that engagement when there is conflict of interest. Whether the conflict is identified at the beginning of the engagement or after the engagement is accepted would not make a difference. Recusing one-self would be next logical step once the conflict is identified; and, as a good practice, it would reflect well on the CA if he is able to identify and recommend another person who could do the representation for the Client.

Additionally a midway acceptance or transfer of engagement would arise in a situation of death of the person representing and hence a new person having to accept or professional disagreement between the Client and the CA or the person representing having to accept an appointment with the Government (such as, being appointed by the Government for representing it on this / similar matter, accepting appointment as a member of the Tribunal) or circumstances of similar nature.

As a good practice, In a case of other than death of the person representing, due to which another CA is having to accept the engagement, it would augur well for the incoming CA to (i) ask for an no-objection-certificate from the CA previously representing; (ii) obtain a confirmation that the cancellation of the contract is not due to any misrepresentation or fraud; (iii) obtain a confirmation that no fee is due to the previously representing CA; (iv) share the reason for non-continuation by the previous CA on this engagement. The incoming CA may also request for a briefing of the case and all the original documents from the CA previous representing.

As CAs, we stand for highest professional conduct. Involving in unethical transactions should be a clear NO. Having said that, recusing oneself from working on that engagement would be the most appropriate action to take in case where any unethical actions by the Client are discovered. Such situations may arise due to conflict of interest or for any other reasons keeping in mind the principles of ethics and integrity. Further also it would be

important in situations where the risk of not-recusing one-self would be (i) professional mis conduct charges (ii) loss of Client trust (iii) legal liabilities.

11. 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.

12. Limited liability of CA

With respect to GST representation, the liability of the CA would be limited by the arrangement / agreement with the Client. The liability may arise from negligence, misrepresentation, breach of confidentiality clauses or failure to comply with statutory or ethical obligations, which would be unlimited. While engagement letters, indemnity clauses and professional indemnity insurance policies can provide for partial protection, it does not completely eliminate the risk.

It is normal practice to limit the liability for any reason, whatsoever to the extent of the amount of fee paid / payable for that engagement. This would any ways have to be contained in the terms of engagement between the Client and the CA.

One specific aspect to note is also that historically and conventionally, the penal provisions under the fiscal statutes are attached, to and charged on, the person who commits the offence. However, as a deviation,

section 122(3)(a) provides for levy of penalty on any person who abets / aids any offence under section 122(1). Nonetheless, even this liability, if and when fastened will be limited to Rs. 25,000/- each under CGST and SGST/UTGST Act.

13. 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.

14. 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.

15. 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, be served a 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. The principles of natural justice comprise three further principles-

A. Audi Alteram Partem (Hear the Other Side)

B. Nemo Judex in Causa Sua (No One Should Be a Judge in Their Own Cause)

C. Reasoned Decision (Decisions are made with proper reasoning)

The same has been held in the following case laws:

- K. L. Tripathi v. State Bank of India (1984) 1 SSC 43
- Ashwani and Associates v. Commissioner of Central Excise, New Delhi (2000 118 ELT 57)
- Suraj rattan Mohta v. CCE Calcutta-I (1999 113 ELT 260)
- TVS Motors Company Ltd. v. Assistant Commissioner (2018 (16) G.S.T.L.17 (Mad.):TS(DB)-GST-HC(MAD)-2018-276)

2. Contents of Notice

The Notice should not be vague and should clearly spell out the facts of the case, 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 under section 75(4). 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 is to unearth certain facts and muster evidence to prove the allegation against the tax payers including the allegation of 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 goods, things and documents. The information collected is thereafter used as a basis to issue SCN 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 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 SCN 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. Delay in filing an appeal can be condoned if sufficient cause is shown if it is within the condonable limit set out in section 112(6). The Orders passed by the Tribunal are appealable either before the High Court or the Supreme Court.

9. Reference to Bharatiya Nyaya Sanhita, 2023 Provisions

At this juncture, it would be relevant to refer to certain provisions of the Bharatiya Nyaya Sanhita, 2023 (BNS, 2023) (formerly, Indian Penal Code (IPC)) 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	Sections of BNS, 2023	Description of Offences	Punishments
166	198	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.
166A	199	Public servant disobeying direction under law	Rigorous imprisonment for a term which shall not be less than six months, but which may extend to two years, and shall also be liable to fine.
167	201	Public servant framing an incorrect document with intent to cause injury	Punished with imprisonment of either description for a term up to three years, or with fine, or with both. ***Illustration 6.*** *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.
169	203	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 7.*** *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	204	Impersonating a public servant	Imprisonment of either description for a term which shall not be less than six months but which may extend to three years and with fine ***Illustration 8.*** *If a person poses himself as a tax officer or impersonates as officer, he would be punished under this section.*
171	204	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. 500 or with both.

			Illustration 9. *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	206	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, with simple imprisonment up to six months, or with fine up to Rs. 10,000, or with both. ***Illustration 10.*** *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.*
173	207	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 11.*** *A person prevents in any manner service of summons by refusing to accept delivery or prevents its publication would be punished.*
174	208	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 12.*** *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	210	Omission to	Simple imprisonment up

		produce document to public servant by a person legally bound to produce it	to one month, or with fine up to Rs.5,000 or with both. If it relates to Court, with simple imprisonment up to six months, or with a fine up to Rs.10,000, or with both. ***Illustration 13.*** *Taxable person or any other person to whom summons is issued cannot refuse or omit to provide documents to the proper 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	212	Furnishing false information	Simple imprisonment up to six months, or with fine up to Rs.5,000, or with both. If it relates to Court of Justice, with simple imprisonment up to two years, or with fine, or with both. ***Illustration 14.*** *Pursuant to summons, if a person gives false*

			information to a public servant, then this section can be invoked.
178	213	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. 5000, or with both. ***Illustration 15.*** *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	214	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 16.*** *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.*

180	215	Refusing to sign statement	Simple imprisonment up to three months, or with fine up to Rs. 3000, or with both. ***Illustration 17.*** *After recording statement if a person refuses to sign it, this provision could be invoked.*
181	216	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 18.*** *Statement may be recorded during investigation. If a false statement is made, then this provision can be invoked.*
182	217	False information, with intent to cause public servant to use his lawful power to the injury of another person	Simple imprisonment up to one year, or with fine up to Rs. 10,000, or with both. ***Illustration 19.*** *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	218	Resistance to the	Imprisonment of either

		taking of property by lawful authority of a public servant	description up to six months, or with fine up to Rs.10,000, or with both. ***Illustration 20.*** *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	221	Obstructing public servant in discharge of public functions	Imprisonment of either description up to three months, or with fine up to Rs. 2000, or both. ***Illustration 21.*** *Proper officers are public servants and while discharging their functions, no person could obstruct them. Otherwise, it would invite punishment under this section.*
189	224	Threat of injury to public servant	Imprisonment of either description up to two years, or with fine, or with both. ***Illustration 22.*** *Any threat of injury to a proper officer, while* discharging *his duties would be a punishable offence.*

191-193	227-229	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 up to 10,000/5,000. ***Illustration 23.*** *Giving or fabricating false evidence at any stage of the tax proceedings is an offence.*
195A	232	Threatening any person to give false evidence	Imprisonment of either description for a term up to seven years or fine or both. ***Illustration 24.*** *Similarly, if any other person such as transporter, supplier, recipient or employee is threatened to give false evidence, that also is an offence.*
196	233	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 25.*** *Using any evidence in tax proceedings, which the proper officer knows to be false is an offence.*
197	234	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 26.*** *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	235	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 27.*** *Even*

			the taxpayer who uses such false certificate knowingly would be guilty.
204	241	Destruction of document to prevent its production as evidence	Imprisonment of either description up to three years, or with fine up to Rs. 5000, or with both. ***Illustration 28.*** *Destroying any incriminating documents like books of accounts, vouchers etc., to prevent its production as evidence in any tax proceedings, is an offence.*
228	267	Intentional insult or causing interruption to public servant sitting in judicial proceeding	Simple imprisonment up to six months, or with fine up to Rs. 5.000, or with both. ***Illustration 29.*** *An authority conducting hearing is intentionally insulted or interrupted by a taxpayer or any other person, 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 is the cornerstone any judicial proceeding, as it forms the basis upon which the legal rights, liabilities and duties are determined. The Latin maxim *"ei incumbit probatio qui dicit, non qui negat"* that means "the burden of proof lies upon him who affirms, not he who denies" showcases how vital evidence is in a judicial system. 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 chargeability/ exigibility to tax of a particular transaction or dispute relating to claim of exemption or claim of credit of input tax.

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. Key provisions of Bharatiya Sakshya Adhiniyam, 2023 (BSA, 2023)/ The Indian Evidence Act, 1872 (IEA, 1872), evidence law that need to be kept in mind are:

(a) *Section 51 of BSA, 2023 (Section 56 of IEA, 1872)* – '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 53 of BSA, 2023 (Section 58 of IEA, 1872)*– 'undisputed facts' do not require proof, as such, allegation left undisputed become facts admitted by taxpayer;

(c) *Section 104 of BSA, 2023 (Section 101 of IEA, 1872)* – '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 105 of BSA, 2023 (Section 102 of IEA, 1872)*– 'onus' of proof shifts based on pleading by either side during the course of proceedings;

(e) *Section 106 of BSA, 2023 (Section 103 of IEA, 1872)*– 'exclusion' claimed by any person must be proved by such person regarding the ingredients that qualify for such exclusion (that is, exemption);

(f) *Section 109 of BSA, 2023 (Section 106 of IEA, 1872)*– 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 22 to 26 of BSA, 2023 (24 to 32 of Indian Evidence Act) 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 28 of BSA, 2023 (section 34 of Indian Evidence Act).

Illustration 30. 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 BSA, 2023 / Indian Evidence Act, 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 31.

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 32.

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 33.

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.

The BSA, 2023 / Indian Evidence Act categorizes evidence into two types, oral evidence and documentary evidence. 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 34. *(of documents as given in BSA, 2023 / 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 Bharatiya Sakshya Adhiniyam, 2023 and the Indian Evidence Act, 1872.

There were 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.

Bharatiya Sakshya Adhiniyam, 2023 replaces Indian Evidence Act, 1872. Principally the law is same with addition of certain aspects to suit the developments like technology, international transactions etc., Similar to Indian Evidence Act, there also there are three relevant parts. All evidence shall pass through the following three stages, namely:

(a) **Part II**: To consider any matter or things relevant, it must be *en suite* in the frame of PART-II i.e. sections 3 to 50.

(b) **Part III**: Part III covering sections 51 to 103 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 IV:** Remaining provisions i.e. sections 104 to 170 deal with burden of proof, estoppel and provisions relating to witness.

4. Relevance of Electronic Records

With advancement of technology, the Evidence Act was 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 sections 65A and 65B of the Indian Evidence Act provided 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.

However, in the BSA, 2023, these aspects are included within the statutory provisions at the relevant places.

Further Section 145 of CGST/SGST Act, considers certain electronic form of documents and output of electronic form as a document and admissible evidence even without production of original for the purpose of proceedings under the GST law.

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 104 of BSA, 2023 (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.

As mentioned in the introduction, burden to prove a particular fact is always on the person *"qui ducit"* i.e., 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 evidence 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 evidence supporting his contentions right from the stage of investigation. However, adducing evidence at the stage of adjudication proceeding in relation to SCN 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).

Illustration 35. 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.

Illustration 36.

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 - 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 39(1) of BSA, 2023 (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 53 of BSA, 2023/ 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, and in terms of sections 132(1) & 132(2) no Advocate 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,/Advocate 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 / service or to disclose any advice given by him to his Client in the course and for the purpose of such employment.

Further, section 132(3) of BSA, 2023 (corresponding to section 127 of the Evidence Act) provides that provisions of sections 132(1) & (2) of BSA, 2023 shall equally be applicable to interpreters and the clerks or employees of advocates. Under section 127 of the Indian Evidence Act, the provisions of Section 126 were extended to interpreters and to the clerks or servants of barristers, pleaders, attorneys, and vakils. Similarly section 134 of BSA, 2023 (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/legal 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 Accountants of India 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 section 132 of BSA, 2023 / sections 126 or 127 of the Evidence Act would not be available to the communications between the said CA and his Client.

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 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), power to arrest (section 69 of the CGST Act), power of search and seizure (section 67 of the CGST Act), 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, shall also be examined.

Chapter 4

Scope of Assessment, Audit, Investigation and Demand

1. Introduction

Assessment under section 2(11) of the CGST 2017 means determination of tax liability under this Act and includes-

(a) self-assessment,

(b) re-assessment,

(c) provisional assessment,

(d) summary assessment and

(e) best judgment assessment.

Assessment is a quasi-judicial proceeding which is adopted in fixing the liability to pay a tax.

2. 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 conditions with respect 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 statement of the details of outward supplies 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.

3. 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 under section 60 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 within 6 months from the date of order issued for allowing provisional payment which may be extended to a period of 4 years upon sufficient cause being shown.

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.

4. 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 or 74A 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, 74A 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.

5. 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.

6. 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. After issuing the Notice, the Proper Officer allow a time period of fifteen days to the person concerned to furnish a reply, if any. After considering the reply, the Proper Officer is required to pass an order in FORM GST ASMT-15 and a summary thereof shall be uploaded electronically 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'.

7. 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, with the previous permission of Additional Commissioner or Joint Commissioner.

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.

8. Audit Assignment

Audit under section 2(13) of the CGST Act 2017 means the examination of records, returns and other documents maintained or furnished by the registered person under this Act or the rules made thereunder or under any other law for the time being in force to verify the correctness of turnover declared, taxes paid, refund claimed and input tax credit availed, and to

assess his compliance with the provisions of this Act or the rules made thereunder.

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 section 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*.

9. 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 as held in the case of RJ Trading Co., 2021(55) GSTL 277(Del). 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.

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.

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 or 74A.

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) recipient (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 [*Actori incumbit probation*]. 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).

The above distinction between Section 73 and 74 would not be relevant from the financial year 2024-25 as section 74A which is added will be the provision which empowers issue of SCN. Essentially in the new section the concept of time limit to pass order is changed to time limit to issue Notice and there will not be different time limit for cases involving intention to evade and not involving such intent. But the above discussion would be relevant even after the introduction of new section 74A as the quantum of penalty imposable will be different in those two scenarios.

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

Aspects of Investigation and Summons

1. Introduction

In any tax administration, provisions are made to safeguard Government's legitimate dues. Thus, the provisions of Inspection, Search, Seizure and Arrest act as a deterrent and by checking evasion provide a level playing field to genuine taxpayers.

At the same time, the options of Inspection, Search, Seizure and Arrest are exercised, only in exceptional circumstances and as a last resort, to protect the Government Revenue.

Therefore, to ensure that these provisions are used properly, effectively and the rights of taxpayers are also protected, law provides that Inspection, Search or Seizure can only be carried out when an officer, of the rank of Joint Commissioner or above, who has reasons to believe the existence of such exceptional circumstances.

The action initiated by the authority in the form of an investigation is to finally demand tax along with interest and imposing penalties for violation of law. Further in applicable cases to initiate confiscation of goods and also prosecution proceedings against the errant.

Such actions cannot be unilateral and have to follow the principles of natural justice, giving appropriate opportunity of defending their case. In that direction, it becomes essential for the tax authorities to collect relevant evidence in support of their allegations in the case and prove the default/ evasion/ action of the persons involved.

In this context the law empowers the Departmental authorities an authority to summon for production of documents/ records and also take deposition of any person connected with the transaction.

2. Possible sources for investigation and Nature of information

All investigations will have a source of information as an origin point. The information sources can be internally generated within the Department or received from external sources. Internal sources can be compilation or comparison of data available in the GST portal and different reports generated through those; information collected during the audit; exchange of information between Central and State authorities; etc., whereas external sources can be information from other Govt. Departments; general issues in the trade; members lists from associations; audit of customer/suppliers; roving enquiries/ fishing expeditions; complaints of competitors or employees or others.

The nature of information required to initiate an investigation should be such that it should be to the extent of creating a 'reason to believe' as to reasons to invoke an investigation.

However, in an investigation, the investigator will collect the required information and supporting evidence to substantiate the Department's case against the alleged defaulter in the subsequent adjudication proceedings. Section 70 enables the authority to summon any person to give evidence or produce a document.

3. Summons and its Procedure

Summons is an integral part of an 'inquiry' and it was held in the case of *Baleshwar Bagarti v. Bhagirathi Dass* (1909) ILR 35 Cal. 701 that "the traditional distinction between the verbs 'enquire' and 'inquire' is that enquire is to be used for general senses of 'ask', while inquire is reserved for uses meaning 'make a formal investigation'". For this reason, summons cannot be issued during proceedings under section 61 or 65 as these provisions involve 'enquiry' and not 'inquiry'. Important to note that CBIC *Instruction No.3/2022-23 [GST-Inv.] dated 17 Aug 2022 ("Instruction No.3/2022-23") (para 2)* brings out this aspect.

Summons must be understood whether it is a (i) first Party summons, that is, person who is being investigated is summoned or (ii) third-Party summons, that is, person who is summoned is being considered as a witness in investigation against another person. Reference to 'offender(s)' in para 3(iv)

of *Instruction No.3/2022-23*, makes it clear that 'inquiry' can be only in respect of offences.

During the course of any 'inquiry' under the Act, the Proper Officer is empowered to summon persons to (i) give evidence or (ii) produce a document or any other thing. It is important to note that summons is not the end of investigation but a step in the course of investigation. There is no provision that deals with 'inquiry' so it must be understood as part of every 'process of discovery' in any investigative proceeding such as section 67, 129 or 130 leading to a Notice under section 74/ 74A or 76 including proceedings under section 132.

Based on the provisions of law, given below is an overview of the steps involved that one may anticipate being carried out by departmental officers and discharge their statutory duties validly in accordance with the requirements of law:

Step 1: Proper Officer carrying out 'inquiry' proceedings is empowered by law to issue summons to 'any person' who is considered necessary to (i) give evidence or (ii) produce document or any other thing, during any investigation arising from inspection-cum-search under the provisions of GST law.

Note: No proceeding under any other provision in the CGST Act describes the discharge of duties by the Proper Officer with the expression 'inquiry'. And 'inquiry' is to investigate and 'enquiry is to ask. It is important to record on file about the nature of 'inquiry' which justifies issuance of summons.

Step 2: 'Any person' (not limited to taxable person only) may be summoned to depose which must be conducted in a courteous manner. Summons Notice must be issued to a specific person, for a specific purpose, that is, to give evidence or produce document or any other thing (either or both) and on a specified date and location.

Note: Disclosure whether the summons is to (i) first party (likely offender) or (ii) third party (witness against another offender) must be disclosed.

Step 3: Where 'document or any other thing' is to be produced, the same may be acknowledged, if produced and the same must be duly noted on the files and where not so produced, that too may be noted on the file.

Step 4: Where 'evidence' is to be given, it may be in the manner deemed fit by the Proper Officer and 'question and answer' mode is common method which may be adopted (details of this method discussed later).

Step 5: After deposing, the person summoned will be permitted to exit from the said location.

4. Validity and scope of summon proceedings

Care must be taken in understanding the nature of proceedings initiated to avoid submitting to invalid proceedings, as the exceptional powers vested in section 70 routinely matters (opening words in para 1 of *Instruction No.3/2022-23)*. A reliable test is to look at 'who' is exercising these powers and verify if this exceptional power is being exercised by Authorized Officer under section 67 (discussed earlier) or by other Proper Officer vested with powers under section 61 to 65.

Care must be taken in ensure that summons cannot be issued in a routine manner and non-specific documents such as books of account for the FY or all invoices and receipts or input tax credit register, etc., cannot be called for in summons proceedings and particularly documents that are available on the Common Portal (para 3(v) of *Instruction No.3/2022-23*). Section 160(2) bars taxpayers from entertaining improper Notice (to appear) issued under section 70. Such summons is improper as 'roving inquiry' cannot be made under section 70.

Persons expected to have knowledge pertinent to the investigation or inquiry may be summoned. It is a matter of careful consideration as issuing summons to MD of the company may not serve the ends of the investigation as MD may not be the right person to make statements about tax payments and compliance (see para 3(vi) of *Instruction No.3/2022-23*). And equally, accountant in the company may also not be the right person. There is no rule that may be followed in this regard. It all depends on the nature of information sought to be collected in summons proceedings. Persons are not barred in law to refrain from answering after entering appearance. Self-implication cannot be enforced upon any deponent.

In particular, CBIC *Instruction No.3/2022-23* states in para 2 that "Officers are also advised to explore instances when instead of resorting to summons, a letter for requisition of information may suffice". Care must be taken not to misread this provision that even when no 'inquiry' is underway, Officers may

'call for' documents or information which may fall foul of intervention by exception that is the hallmark of GST when tax liability is to be determined on self-assessment basis. Also consider that when 'evasion of tax' is involved, there are safeguards to taxpayer in the form of pre-conditions and grant of authorization before any intervention, it is inconceivable that in proceedings that are far lesser than 'evasion of tax' powers that are far wider would be sanctioned by Parliament. With these safeguards in the law that are reiterated in *Instruction No.3/2022-23,* summons in a routine manner will become a rarity in practice.

Summons must state a specific document or thing to be produced. Non-specific and vague summons with an exhaustive list of documents is also liable to be unsuccessful. Summons can also call a person to enter appearance and record a statement on oath. Statements on oath are a weak form of evidence and questions must be simple and straight-forward when posed to the deponent. Care must be taken to consider if statements being made by deponent are based on (i) personal knowledge of facts or (ii) records and documents inspected. Opinions and interpretation will not be tenable.

Care must be taken that 'books of accounts' are not called for, by issuing summons. Summons being a very significant proceeding, it should not be resorted to in routine matters but only in matters of investigation and after much thought and consideration as to the exact information required. It is important to note that when summons calls for production of certain specific documents, it must be those that are contemporaneously available in the normal course of business. It is not harmonious with the provisions of section 70 to direct persons to 'prepare statements or reports' and submit them in summons proceedings. Reliability or probative value of such 'specially prepared' documents are lacking, to be used in supporting allegations later when Notices are issued.

It would not be incorrect to decline (in writing) when documents that are not contemporaneously available in the normal course of business are being called for on the grounds that a broad and non-specific inquiry is being attempted through summons proceedings. The Proper Officer must invoke section 67 to initiate 'inquiry' and then collect books and records under section 71 instead of calling for documents under section 70.

Issuance of multiple summons is another indicator that a 'roving inquiry' without any specific area of 'evasion of tax' is under investigation. Multiple summons do not go well in adjudication or appellate proceedings, where the validity of summons is objected in an application under section 67(10) (discussed earlier). It is important to consider that statements recorded under section 70 are not perfect evidence in the light of questions about its reliability raised expressly by the deponent by filing a retraction (discussed later) or by showing them to be made involuntarily while replying to the Notice.

5. Authorized Person to appear

Insertion of section 70(1A) makes to mandatory for person summoned to appear, at least, through an Authorized Person. This amendment does not imply that appearance in summons was optional earlier. It only permits an Authorized Person to appear on behalf of person summoned to depose. However, where the investigating Officer is of the opinion that named person must appear to give evidence, then appearance by Authorized Person would not be sufficient compliance. There is no vested right in the relief available in this sub-section (1A). If the evidence is such that it can be given by Authorised Person, then there is no occasion that the named person must necessarily appear. This would come up where the person summoned is an officer-in-charge of the duties involving the matter of inquiry and the evidence to be given is based on official records and NOT personal knowledge.

This new sub-section should not encourage taxpayers to request CAs to appear on their behalf. CAs have no role during investigation, especially, when it pertaining to business transactions authored by taxpayer. CAs must be mindful of their independence and objectivity. If CAs are summoned in their name and due to their role as auditor or tax advisor, care must be taken to promptly attend and give fact-based and not opinion-based evidence.

It would help to note that financial statements carry an interpretation of the underlying financial transaction. Tax treatment based on disclosure in financial statements is an interpretation of an earlier interpretation. To now affirm that the financial transaction is the most accurate presentation of the tax position is to misplace understanding of the premise on which financial statements are prepared and disclosure is determined. Financial statements, ITR, 26AS, TDS data, etc., are unreliable sources of information, sufficient to start an inquiry and not to conclude the inquiry.

6. Questions and answers

In order to maintain clarity and simplicity, evidence is collected in the form of a 'question and answer' format which is a common method adopted.

Summons proceeding are to be conducted without the anxiety and stress surrounding inspection and search proceedings under section 67. Question answer approach is popular to progress from admitted facts, to transactions under investigation and culminating in admission of facts providing the ingredients to offence. Questions are usually simple and straight-forward. Questions relate to the facts such as their existence or absence. Questions will be short and to-the-point. Essay questions are not very productive in view of the tendency of the response to wander into irrelevant matters.

A logical sequence of questioning is known to be followed while being confined to 'collecting facts'. Deponent's statements which involve expressing an opinion (about any aspect) is not considered to be of much value. Statements comprising 'facts' will be relevant and valuable in furthering the inquiry.

Statements made are 'voidable' proof of the facts and merely a means of collecting information that aids the inquiry. Facts (and not statement, even if when recorded on oath) are required by a Court of law to bring home the allegation; statements on oath point in the direction of facts which can be doubted by a Court of law even when it is not retracted or altered by the deponent. Given the limited extent that statements (even when recorded on oath) are not perfect evidence, care must be taken while invoking this power which, when applied carefully, can be valuable to the inquiry.

7. Withdrawal, modification or denial

Incorrect and false statements are not uncommon, even at the risk of prosecution under sections 229 and 267 of BNS / 193 and 228 of IPC. Statements deposed may also be incorrect due to anxiety about the way these proceedings are conducted or that the deponent may be intimidated. Making incorrect or false statements, for any reason, requires Proper Officer to submit a complaint before a Magistrate under section 210(1)(a) of Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 / 190(1)(a) of Cr. PC which may not be always feasible during the course of an ongoing inquiry. This limitation must be well known to all concerned and care must be exercised to write to the Proper Officer in case:

- Copy of statement recorded is provided to deponent, to verify in calmer circumstances (but not after unreasonable delay) if there are any misstatements which need to be clarified or improve the expressions used in statements previously made;
- Copy of statement recorded is NOT provided to deponent, to request that a copy be furnished to clarify if there were any misstatements inadvertently recorded during summons proceedings; or
- A complete withdrawal of the statement made with the attendant consequences.

Statements made by a deponent in summons proceedings may be challenged by the taxpayer (if Notice was issued based on statements recorded in summons proceedings) that they are either unreliable for any number of reasons or that they are plainly false statements.

Note: 'Deponent' here refers to a supplier or customer or employee and taxpayer refers to the person charged with the liability to additional demand.

Although delay in retracting statements made on oath, may raise presumption of reliability of those statements in favour of Revenue, it is not necessarily the case, especially when the circumstances under which statements are recorded are not intimidating to the deponent or when other evidence corroborate these statements. Where third parties are summoned, their statements are also liable to be doubted by taxpayer for reasons such as any unfriendly relations that may be attributed to the deponent and taxpayer in question.

Statements recorded are not flawless evidence but only an aid to inquiry. There may be inducement or threat at work. The person recording statement may be under a misunderstanding or committing a mistake. The person may be unfriendly to the taxpayer and finds summons to be a vindictive opportunity. There can be any of these or some other reasons that may make the statement recorded lack probative value to rely upon in the inquiry.

8. Evidentiary value of statements

Section 104 of BSA, 2023 (101 of the Indian Evidence Act) places 'burden of proof' on the person making any assertion that is to be relied upon in any proceedings. Except in respect of input tax credit in GST, section 155 places the burden of proof as to 'eligibility to credit' on the taxpayer, the authority of

self-assessment under section 54 of BSA, 2023 (section 59 of Indian Evidence Act) raises a presumption in favour of correctness of taxpayer's determination of the assessment. As in other cases of presumption, it is a rebuttable presumption where the burden to unseat this presumption rests on the Revenue.

Statement on oath is admissible only when it is not disputed in terms of section 58 of the Indian Evidence Act which states that undisputed facts do not need to be proved. Documentary facts in books and accounts are also subject to challenge of their evidentiary value in terms of section 28 of BSA, 2023 (section 34 of the Indian Evidence Act).

Taxpayers should note that statements on oath are not ipso facto reliable unless there is no dispute or challenge to the averments made by the deponent. It has been held in case of *State of Punjab v. Barkat Ram* AIR 1962 SC 276 and again in case of *Illias v. CC* AIR 1970 SC 1065 (decisions under Customs law applicable to GST proceedings as the nature of powers conferred under GST law are heavily drawn from those prevalent under Customs) that confessional statement made before a Customs officer is admissible as evidence in a trial and its contents left to the Magistrate to rely upon having due regard to other attendant facts and circumstances. A contrary view has been expressed in case of *Raja Ram Jaiswal v. State of Bihar* AIR 1964 SC 828 in the context of Orissa and Bihar Excise Act, 1915, where the powers of the investigative Officer was found to be coextensive with those of a police officer. GST has cautiously extended coextensive powers to a very limited extent such that the ratio in Barkat Ram's decision applies to GST proceedings. (See also later discussion in Ramesh Chandra Mehta decision and now affirmed in *Tofan Singh v. State of TN by SC* in 2020 in Cr.APL 152/2013 and further refined in *Radhika Agarwal v. UoI* by SC in 2025 in Cr.APL 336/2018).

9. Show Cause Notice based on statements

Summons is a process in law to call upon a person to (i) give evidence or (ii) produce a document or any other thing, that may aid in inquiry but SCN is an altogether different process in law. The SCN is to set the law in motion about a liability under the law containing charges that a specific person is called upon to answer. Evidence or document or thing secured in summons proceedings neither obligates the Revenue to act upon it and issue the said Notice nor rely upon it while issuing said Notice.

Where such material is secured in summons proceedings and relied upon to support the charges made in the said Notice, the same must be appended and disclosed to taxpayer. Hence, material secured in summons proceedings and SCN DO NOT bear any immediate or direct correlation although the same is involved in furthering the inquiry underway.

Summons is not compulsory or essential for all inquiries or for Notices demanding tax. But the definition of 'suppression' in section 74 / 74A(5)(ii) (for demands pertaining to FY 2024-25 onwards) makes summons proceedings very potent if the taxpayer summoned refuses to depose or deposes and makes false statements. Such evidence (not the deposition itself) could support the special circumstances required to issue Notice under section 74 / 74A(5)(ii) (for demands pertaining to FY 2024-25 onwards). Summons has an important role, as an aid to the inquiry.

SCN cannot be issued on the foundation of statements recorded in summons proceedings from one or more persons. Motive of deponent, unfavourable relations with taxpayer and other factors being open to challenge, support for allegations in SCN may deplete unless other 'clinching evidence' led out of statements recorded, are adduced to support the allegations in SCN.

It is important to carefully examine the extent to which statements recorded on oath support the allegations in the Notice and whether any other corroborative evidence have been brought on record or is the Notice standing merely on statements of deponents. This will guide the approach to be taken in rebuttal of allegations in the Notice.

10. Confession versus admission

Used as synonyms, there are several important differences that need to be considered. Without burdening this Handbook, suffice to motivate further study of the topic by pointing out that 'confession' ends further proceedings in the matter as there remains nothing more to be discovered in adjudication, and 'admission' is in respect of one or more fact which when accepted as undisputed, supplies the ingredients that make up the offence.

Confession given cannot be readily accepted. It must be examined if the party making the confession understands the statutory definition of the offence; for example, it is not made by force or for other reasons. The objective of investigation is to punish the guilty party and not just any willing party.

Admission refers to certain facts, which form the ingredients in the definition of the offence, for example, no understanding of its statutory definition is necessary because the acceptance here is not on the offence but of the ingredients in its definition. Unlike confession, admission of any given fact, its existence or absence, can be by a third-party too.

Admissions made can be due to misunderstanding. Admission must be as a matter of fact and not as a matter of opinion of the accepting party.

Admissions can turn out to be incorrect or false. Other evidence may disprove the admission. Admissions may even be retracted or modified.

Admissions secured forcibly lack probative value. Deep understanding of these aspects is extremely relevant to determine whether the allegations in a Notice are sustainable in law.

11. Replies during the Pre-Show Cause Notice Stage

During the Pre-Show Cause Notice stage especially during investigation proceedings, the reply filed by the person being investigated becomes very important. At this point the professional assisting them should be very cautious in drafting the reply.

Different aspects of inspection, search, summons etc., including draft letters are provided in Handbook on Inspection, Search, Seizure and Arrest under GST published by GST & IDTC of ICAI. It is suggested to refer the same. The same are not again provided in this material.

Chapter 6

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, allegation basis being factual or technical in nature, risk involved, isolated issue or having multi-years or PAN level implications, 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.

To summarize with, the litigation strategy comes into play at two times viz.;

(i) when a taxpayer takes a tax position, it needs to be ascertained as to how much litigative the tax position is going to be; and

(ii) when a taxpayer faces departmental action in the form of an inquiry, investigation etc. At this stage, the taxpayer again revisits the sanctity

of the tax position it had taken earlier and what it needs to do now considering the judicial developments in the issue.

While making a litigation strategy, there are various elements that needs to be taken care off, which are as discussed below.

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.

Further, fact gathering is not limited to understanding the factual position of the Client, but also validating the facts relied upon in the Notice. Any discrepancies in the factual position of the Notice could shade the validity of the Notice from its foundation.

Additionally, the management may willingly/unwillingly be restrained to share the complete facts. In light of this, it is incumbent that the representative has ensured that;

(i) he has understood all the factual aspects that need clarity in a particular case.

For ex., in case of a litigation concerning refund of GST paid on ocean freight, the representative has understood that he has to see the relevant contracts, invoices, incoterms etc.

(ii) he has collated all the facts from the necessary documentations and after discussing with the relevant personnel; and

(iii) he has taken all the facts over E-mail and sought confirmation.

Illustration 45. By taking the above measures, the representative could make sure that there are no new facts which could trouble their litigation strategy in future. Commission paid to Director will not attract GST on reverse charge basis when TDS is deducted under section 192 of Income Tax Act.

Illustration 46. 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.

There could also be cases where the Notice is issued asking for information rather than providing a clear allegation or where allegation has been prepared as per PAN level details from balance sheet or otherwise rather

than validating its linkage with GSTIN. All such Notices could be contested as invalid due to lack of clear allegation and lack of due diligence at the part of the department will issuing Notice.

Illustration 47. 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 48. Notice demanding interest on inadmissible transition credit availed and reversed cannot be issued under section 73 or 74 or 74A due to limitations in these provisions. Rule 121 cannot supply the missing authority to demand such interest.

Illustration 49. Notice issued asking for details of e-way bill issued or the details of trade payables without providing any clear allegation or any tax liability determined in this regard.

Illustration 50. Notice issued asking for non-payment of tax on the difference between revenue disclosed in the financial statements compared with revenue disclosed in GSTR-9C where Client is an MNC with multiple GSTINs.

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* and *Circular 239/33/2024-GST dated 4 Dec, 2024*. Jurisdiction circulars issued by respective state also be looked into.

(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, and future ramifications in terms of subsequent year proceedings or similar proceedings at other GSTINs or other group companies)

(g) Benefits of accepting demand in pre-notice consultations under section 73(5) or 74(5) or 74A(8)(i).

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

(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.

(m) The authority at which the litigation may be resolved;

(n) The impact of tax positions taken in the erstwhile regime and their impact in the GST regime;

(o) Presence of grounds to counter fraud etc. to be alleged by the department for invocation of section 74 or 74A of the CGST Act or a levy of a penalty equivalent to tax under section 122 of the CGST Act.

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 51. 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, (v) stage at which the dispute would likely be solved (vi) Previous experience with regard to similar cases against the officer of the respective state or central GST department and

then express confidence about being able to present the case effectively before the Appellate Authority.

Illustration 52. 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. Similarly, there could be cases where the GST amount has not been paid to the supplier for non-filing of GSTR-3B return. In such cases, decision of reversing such ITC would only lead to additional interest implications.

(b) **Revenue neutral situations: -** When the demand pertains to reverse charge liability or supplies between distinct persons or related parties or procedural lapses which have no negative revenue impact then, the taxpayer could [1] either pay taxes under Section 73 of the GST Act and take credit or [2] take grounds of revenue neutrality and litigate the matter accordingly, Same concept could be applied in cases where IGST has been discharged instead of CGST and SGST or vice versa. The correct tax liability could be discharged while applying refund for the earlier tax payment under section 77 of the CGST Act, 2017.

(c) **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.

Moreover, in situations wherein revenue has issued circulars or instructions which are not favourable to the assessee then, the appropriate remedies to Notices issued basis such circulars and instructions would be to approach writ court since in such cases, it is unlikely that the CBIC's officials would adjudicate fairly by going against the said circular/instruction issued by the CBIC.

Illustration 53. 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 unfavourable 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. But it appears that litigating on a matter after making payment of taxes under protest appears to be a constitutional right of taxpayers and there may not be a requirement of a provision under the GST Act enabling the same.

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 and cases wherein such principles of unjust enrichment are not applicable.

(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. Waiver of interest and penalty u/s 128A

Regarding the initial years, decision to opt for waiver scheme under 128A can also be opted. Factors that could aid in such decision are as follows:

(a) The case has lesser chances of being resolved at subsequent litigation stage.

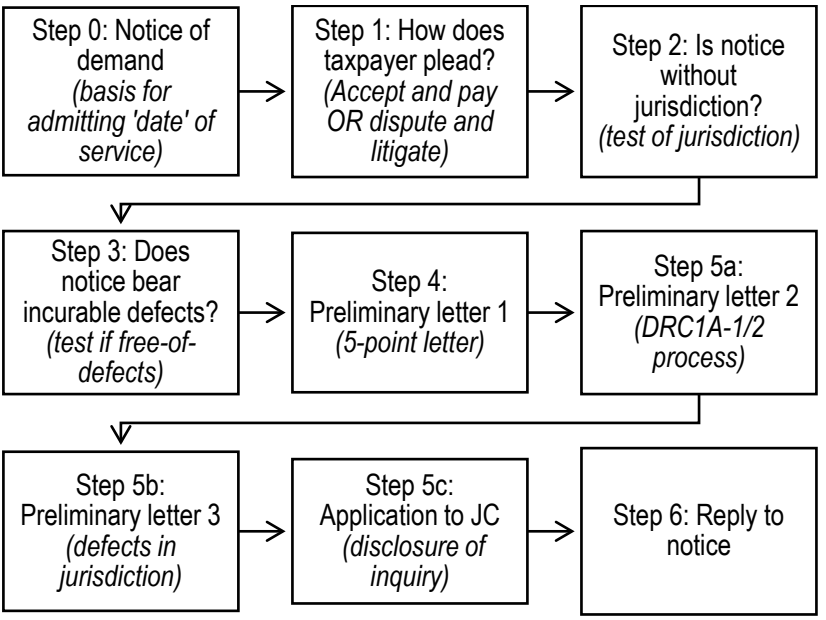
(b) The cost of further litigation would be higher than the possible benefit in terms of demand relief.

(c) Where demand for interest and penalty with nil or negligible tax amount.

It is important to note that the time limit for tax payment to avail the benefit of the waiver scheme has already passed on 31st March 2025, where the Notices were issued under section 73. However, cases Notices were issued under section 74, the proceedings are converted into section 73 by the Appellate forums, still the benefit can be availed upon passing of the order by the adjudicating authority giving effect to the appellate order.

9. 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.

(e) Relied upon documents are supplied with the SCN.

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) Explain the facts concerning the issue in dispute.

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

(d) Briefly mention the issue in dispute.

(e) 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.

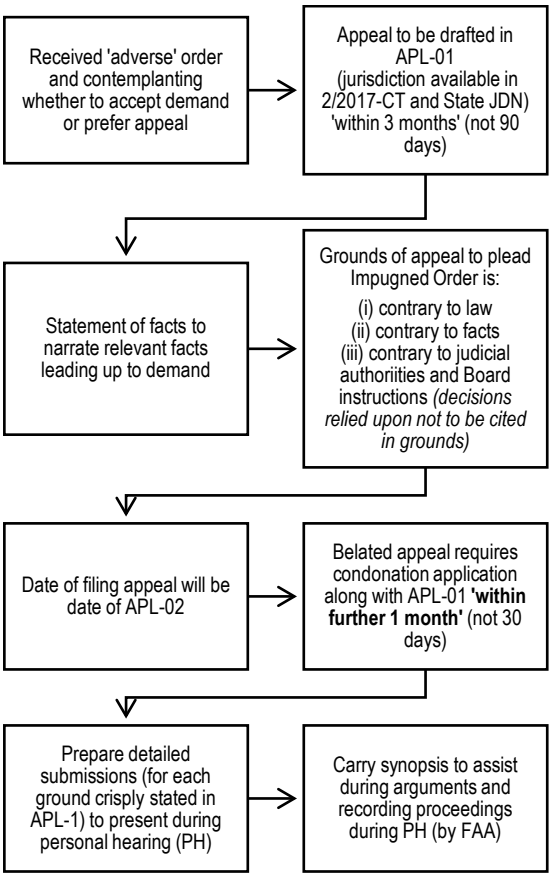
(d) Address the limitation (if extended period is invoked) issue and provide sufficient supporting evidence to dispel the allegation and cite the relevant decisions.

(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.

10. 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) Pre-deposit amount to be calculated and communicated beforehand to Client to ease in fund arrangement. There can be cases having exorbitant demand amount where it may not be possible for the Client to arrange for pre-deposit. In such cases factors leading to such exorbitant amount should be anaylzed from the perspective of possibility of getting relief through writ.

(d) 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.

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

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

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

(h) 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) Factual information concerning the dispute involved.

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

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

(e) 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 GST Appellate Tribunal Procedure Rules, 2025, 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.

Chapter 7

Understanding SCN and Approach

This Chapter is to discuss the practical aspects relating to adjudication proceeding. Readers are hereby informed that the details given in this chapter are based on the practical experience of the some of the professionals and it cannot be taken as complete set of procedures. There is always a scope of improvement and hence, the readers can pick and choose the points as suitable to them and they should explore beyond what is mentioned under this Chapter to improvise the practical method of responding to SCN.

1. Date of Receipt

The date of receipt of the SCN plays a vital role in commencing the decision-making process. The date of receipt can be ascertained from copy of e-mail, postal cover, date in the portal etc. Hence, it is very important that a documentation for the date of receipt of the Notice is created without fail. It is suggested that a one-page print of email/portal or photocopy of the postal cover should be preserved in the file. The calculation of 30 days (mentioned in the Notice, if any) from the date of communication of Notice will start only from the date when you receive the SCN.

At times it is seen that the date mentioned in SCN is different than the date mentioned in the online GST portal. In such case, one may consider the later date, which would, in most cases be the date of the uploading of Notice at the online GST portal.

2. Time limit to reply for Show Cause Notice

Section 73 / 74 / 74A does not prescribe any time limit *per se* within which the person has to respond to the Notice. In many occasions, the date of personal hearing may be specified in the SCN which implies that written response need to be submitted on or before the said date. In certain cases, a particular date may be mentioned within which the taxpayer will have to respond. Hence, that can also be treated as the due date to furnish a reply to a SCN.

It is suggested that one should take a time of 30 days within which the proper officer may start expecting the reply. It is necessary that the taxpayer responds to the Notice within the first 30 days by either submitting the reply that has been prepared or seeking an extension in order to submit a reply.

Further, section 75 also allows a taxpayer to take an extension of the lime limit to submit a response and to seek an adjournment of the date of hearing for a maximum period of 3 times. Thus, taxpayer can use such provisions to seek necessary time for submission of a response or for attending the hearing.

3. Reading of A Show Cause Notice

A SCN should be read line by line and in detail. We need to look for the details which can give us the complete picture of the issue right from the basic details of the assessee including GSTIN, tax period concerned with the issue, the transactions captured in the Notice, details of the sections and rules of the GST Acts referred in the SCN and the alleged violations by the noticee, other allegations made by the Department, manner in which the value has been arrived, the way in which goods or services have been classified, the details of input tax credit being disallowed, the rate of tax considered for arriving at the tax amount, the evidence or the basis on which the invocation of section 74 has been done, other technical incurities such as no or invalid DIN, manner of service etc. This will enable us to get a good grip on the issue which can help us while we draft the reply to SCN.

4. Discussion with Client and Collection of further Details

Many details may come out over a one-to-one discussion on the table. It is suggested that the details gathered by studying the SCN be discussed in detail with the Client and his views on the allegations made in the SCN be sought from him in order to take the case forward.

One should also seek further information by asking questions on the issue viz., date of transaction, what was the input tax credit that is alleged as ineligible, whether invoice was raised properly, whether e-way bill was raised, was there any issue during the said period, whether the applicable taxes were paid on time or with delay, etc. The Client may sometimes come up with a new information which can be relevant for the case on hand.

Further, many a times, in complex cases, it is better to document and seek confirmation on factual understanding, thereby reducing the chances of change in facts in future. Additionally, effort to be made to go beyond the facts immediately in relation to the case and try to understand the background that preceded and continued during the issuance of Notice. There can be cases where any discussion, data submission, or visit before the SCN may have a significant role to play in reading between the lines of the allegation.

5. Preparation for case

The Chartered Accountants' role effectively starts from this wherein he is required to understand the facts, check the allegations, ascertain the provisions invoked, evidence relied upon, evidence supplied by the department, evidences available with the noticee, choose the course of action. These aspects are discussed as below:

5.1. Ingredients of demand (output tax or input tax credit)

SCN issued under section 73/74/74A is to demand tax, which is alleged to be short paid or not paid; input tax credit wrongly availed or utilised; erroneous refund. Additionally, the interest payable thereon as well as imposition of penalty for the same.

It becomes essential to ascertain whether the Notice it is covering one issue or multiple issues. If it is multiple issues, it becomes important to consider the points discussed hereinbelow for each of the issues separately. For example, the allegation of suppression might be there for only one issue but not at all written about other issue/s. In such case invoking of such provisions to all the issues would not be legal.

Further the issue which are being covered is which of those aspects, short payment is different from non-payment. Non-inclusion of additional consideration cannot be a case of non-payment, it is a case of short-payment of tax. Similarly change in classification cannot be non-payment of tax, it has to be short payment of tax. This becomes to counter the allegation in the Notice.

Many a times the facts and allegation will be on one direction whereas the demand proposed will be on different aspect. It is important to ascertain the ingredients of demand to proceed further in adjudication proceedings.

Additionally, there can also be cases where there is no allegation but only information is being asked by way of Notice. Such Notice would be invalid being devoid of a clear allegation.

5.2. Allegations v. Actionable Cause

The statutory mandate of section 75(7) is that the demand confirmed as to be only on the grounds set out in SCN. It cannot be beyond the scope of allegations in the Notice. However, many a times, there will be total disconnect between the facts of the case, allegations made against the noticee, the relevant provisions invoked and the proposal. It is important as a professional to look into the actionable cause, which is referred to in the Notice as against the allegations in the Notice. The allegations should be based on the actionable cause. It cannot be unrelated to the same.

5.3. Grounds in SCN and alternatives to choose

The demand proposed in the Notice based on the grounds mentioned in the Notice can be defended using multiple grounds like questioning the authority, jurisdiction, factual differences, mis-match between facts and the provisions invoked, difference in cause of action and the period covered, non-production of evidence, sufficiency of evidence, exemptions available, quantification difference, applicable jurisprudence etc.,

In most of the cases, multiple defences are available. It becomes important for the professional to suggest depending upon various factors including the risks appetite of the noticee to choose among the alternatives. Some of the defences have to be taken together mentioning without prejudice to each other. Hence, the professional has to list out the available alternatives and, in concurrence with the Client, choose the appropriate grounds to be taken in the reply to the notice. At the same time, it has to be kept in mind that aspect of doctrine of election, wherein once he choose an alternative, then he opts to leave another alternative. For example, if the noticee choose to provide details and submit evidence, then the argument that the SCN has not brought out the facts and evidences on the same cannot be taken as the same becomes merely academical as the facts and documents are now available on record.

Ideally, in a note, the legal submissions are chronologically made in the following manner-

1. Submissions against invalidity of Notice

2. Submissions on merits of the case
3. Submissions against invocation of extended period of limitation
4. Submissions against imposition of penalties
5. Submissions against imposition of interest

5.4. Burden of proof and Evidences

The burden of proof of the short payment or non-payment of tax lies on the department issuing SCN. Thereby it is incumbent upon them to bring out relevant documentary evidence in support of such allegation. The aspect relating to evidences are discussed in Chapter on evidences. Those principles have to be kept in mind.

On the other hand, by virtue of section 155, the burden of proof as to eligibility of input tax credit lies on the registered person who is claiming input tax credit. However, the scope of said section 155 has to be understood whether mere allegation in the Notice that entire credit is ineligible as eligibility of the same is not established even without carrying out any verification or calling for records as permissible under the law.

Further taxpayer is permitted to call for the evidences relied upon, questioning its veracity and genuineness, including an option of cross examination of the witness. Professional has to examine the sufficiency and genuinity of the evidence to defend the case.

6. Drafting of Response

The drafting of a reply to a SCN is an art. It requires regular practice of reading the law and its daily updates along with references to landmark judgements pronounced by various judicial fora.

A good and tasty food though prepared well, will not be attractive unless it is presented well. Similarly, the presentation of response matters a lot when it comes to responding to a SCN.

Further the environment for drafting of response should be calm and quiet without disturbance which will enhance the quality of reply with proper flow of contents.

In addition to the above, the following points need to be covered properly in responding to the Notice.

(a) Coverage of Issues

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

(b) Reference to Provisions of Law:

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

(c) Interpretation Issues

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

(d) Classification Issues

The major contentious issue which is expected to break out will be on classification. The taxpayer would classify certain particular goods or service under a particular HSN Tariff Code / SAC Code. However, the proper officer may have another view on classification of those goods or services. If the rate of taxes of the goods or services in dispute happens to be the same, it may not have much implication. However, when there is a rate difference, the taxpayer may lose his profits, reserves and surplus too if his classification happens to be at a tariff with lesser rate of tax.

Whenever classification issues comes up, please ensure that the product or service in question is explained in detail, Schedule of the Chapter is discussed in detail along with relevant Chapter Notes, references from the decided judicial precedents (foreign as well), references from the Customs

Act, references from the HSN issued by World Custom Organisation also can be quoted in the response.

A clear distinction should be drawn between the tariff followed by the taxpayer and the one referred in the SCN.

(e) Calculation Tables

For issues regarding valuation, tax calculations, or reconciliation between GSTR returns like GSTR-1 vs. GSTR-3B or ITC in GSTR-2A vs. GSTR-3B, use tables to summarize discrepancies in the Notice. Ensure the table provides enough detail for the officer to be satisfied without referring to the annexure.

Further, with respect to case involving valuation, the reply should give the complete basis and method of arriving at a particular value as per the valuation rules based on which the taxpayer has declared the value of taxable supply and calculated the tax liability at appropriate rates.

We should be able to defend the method and the calculation by highlighting what is missed or wrongly considered in the calculation adopted in the SCN.

(f) Annexures

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

(g) Documentation & Submission

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

Under the GST regime, replies should also be uploaded on the portal or sent by email in addition to physical submission. Some state GST departments only accept submissions via the GST portal while not providing acknowledgement of any physical submission. While submission on GST portal is valid, Tribunals and High Courts tend to favour physical submissions with acknowledgements. For sensitive cases, if an officer refuses physical submission, physical submission can be made at the Department's postal counter with appropriate acknowledgement or documents could be sent through registered post.

(h) Pointers to challenge Notice on invalidity

A SCN may be considered invalid on variety of points *interalia* including;

I. If allegations are not properly justified, then it could be vague;

II. If allegations are presumptive then it could lack details;

i. If allegations are based on statements, then it could be invalid without examination in chief;

ii. If allegations contain information not provided with Notice then, it could be a violation of principles of natural justice;

iii. If allegations have been borrowed from some other authority and SCN issuing authority failed to exercise his own judgment then it could be SCN issued with borrowed satisfaction, which is illegal;

iv. The mode of service of SCN could be not in consonance with the law;

v. The allegations concerning invocation of section 74 could be without basis/evidence etc.

vi. Validity of audit/investigation underlying such SCN. For ex. Statements recorded in investigation at Client premises is illegal, summons issued without providing sufficient time to respond is illegal, investigation conducted without issuance of panchnama is illegal, investigation conducted with witnesses located from afar places is illegal etc.

6.1 Points to remember for drafting of a Response

The following points should be kept in mind for drafting of a proper response;

(a) An ideal flow of a particular submission should be (i) Conclusion, (ii) Factual background, (iii) provision of law, (iv) application of law in the factual background, (v) support through circulars etc., and (vi) conclusion again;

(b) The drafting should be done in active language and passive language should be avoided;

(c) wherever required, complex facts, numbers, processes etc. should be explained by way of tables, flow charts and such other tools;

(d) The drafting should contain a proper natural flow of the submissions so as to ensure that the department understands it without any further explanation;

(e) The draft should be free from grammatical mistakes, which can be ensured by using tools such as Grammarly etc.;

(f) tools such as bullet points, numbers etc., should be used to make sure that the draft is well organised and bifurcated into various parts.

Chapter 8

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 subject to maximum of Rs. 40 crores (Rs.20 crores each) is deposited. In cases where the order involves a penalty without involving any tax demand, the appeal will be admitted upon deposit of 10% of the penalty amount. Non-payment or shortfall 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) deposit 10 per cent (or additional 10 per cent in case of appeal to GSTAT) of disputed tax (without interest or penalty) subject to a

maximum of Rs. 40 crores (Rs.20 crores each) in case of appeal to First Appellate Authority (additional Rs. 40 crores (Rs. 20 crores each) in case of appeal to GSTAT).

(iii) deposit 10 per cent (or additional 10 per cent in case of appeal to GSTAT) where the order involves a penalty without involving any tax demand.

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 APL-01 or APL-05, and where it is deposited *via* DRC-03, *Circular 224/18/2024-GST dated 11 Jul 2024* specifies that DRC-03A must be filed to apply the payment made against demand in Electronic Liability Ledger. Another instance is where penalty imposed under section 129 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.

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.

<table>
<tr><td colspan="2">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.</td></tr>
<tr><td>Wrong ground: Impugned Order has misinterpreted the facts but failing to understand the clause……. of contract dated……. and proceeded with 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.</td><td>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 alternative facts alien to impugned transaction to foist an unjust demand. As such, the demand confirmed is liable to be set aside.</td></tr>
<tr><td colspan="2">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.</td></tr>
<tr><td>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……</td><td>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</td></tr>
</table>

	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…….

<table>
<tr><td colspan="2">Grievance: Order passed is not following the decision of higher authority</td></tr>
<tr><td>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.</td><td>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.</td></tr>
<tr><td colspan="2">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.</td></tr>
<tr><td>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…….</td><td>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 ……</td></tr>
<tr><td colspan="2">Explanation: Same as above</td></tr>
</table>

One may refer GSTAT (Procedure) 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 54. Impugned Order is bad in law in so far as it has confirmed the demand beyond the period of limitation. For this reason……

Illustration 55. 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 56. 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 57. 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 58. 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 59. 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.

Decisions in *Elanco India (P) Ltd. v. ETO* (2024) CWP No. 19286 of 2024, decided on 9-8-2024, *Sahulhammed v. CTO* (WP 26481/2024) Mad., *Poomika Infra Developers v. STO* (WP 33652/204) and *Axiom Gen Nxt India (P) Ltd. v. CTO* (WP 1114/2025), have exposed some of the jurisdictional questions that await authoritative resolution of the position of law that is just and equitable, which both sides are unable to disagree further.

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-01 / APL-05. 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 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 10 per cent of disputed tax (excluding interest and penalty) over and above that which would have been deposited under section 107(6) when the first appeal was filed, (subject to maximum of Rs. 40 crores (Rs 20 Crores each)) must be deposited for admission of the second 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.

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 would come out with the GSTAT portal with e-enabled filing procedure. As per Rule 115 of GSTAT procedure rules, every appeal and applications have to be uploaded in GSTAT portal and all the proceedings would happen through portal. However, hearing will be physically or in-person (and in exceptions 'virtually').

Goods and Service Tax Appellate Tribunal (Procedure) Rules, 2025 has provided with the workflow and document flow including sharing of copies

with respondent, Appellant and their Authorized Representatives, listing of matters, adjournment and other miscellaneous applications etc.

Amongst others, following key points for consideration in these Rules:

Rule	Brief description	Remarks
21	Appeal memo to be filed with documents from all prior proceedings	Omission of procedure of filing "paper-book" increases bulkiness of appeal memo and adds non-essential steps at the stage of filing appeal that can delay the process
27	Calling for records by Registrar from all previous stages	Most retrograde and outdated procedure that will cause undue delay (as noted from experience in VAT appeals). Appellant must be permitted to submit paper-book containing all relevant records and Respondent to file objections, if there are any discrepancies
29	Interlocutory applications	No provision in CGST Act for Interlocutory applications, reference appears to be Miscellaneous Application (see rule 64)
48	Open court proceedings	Ensures transparency and public scrutiny of conduct of proceedings
50	Reference to Larger Bench	Statutory provision in section 109(9) of CGST Act only provisions for reference to Third Member, in case of difference of opinion of Members on a Bench
53 to 58	Workflow management	Needs GSTN-GSTAT portal integration, and API integration must pull records efficiently
59 to 64	Internal record-keeping	Outdated steps. Automated data flow and record-keeping will add efficiency in working of Registry

115	Online filing and hybrid hearing	Unlimited *ad interim* submission (up to stage of hearing) be permitted with automated copy to Respondent for objections

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 (GSTAT) has not been preferred but the Revenue has preferred appeal before GSTAT, 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.

Reply to appeal is different from the Cross-objection. The Cross objection is a case where the respondent in an appeal is filing counter appeal/ claim against the point which was allowed in his favour or unaddressed since the relief was given. Whereas reply to appeal is filing response to the grounds taken in the departmental appeal. Former is considered as cross-appeal filed by the respondent, whereas later is only response to the appeal only. For example, the First Appellate Authority had decided the issue of classification against the taxpayer, whereas the demand was set aside on limitation under section 73, the department will file appeal only on the point of limitation. For contesting the point of classification, the taxpayer is required to file cross appeal or cross-objection.

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 9

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 sections 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 SCN – 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" approach because exercise of jurisdiction is more fruitful than for GSTAT to re-enter 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 21 of BSA, 2023 (section 23 of Indian Evidence Act).

Appeals to High Court under section 117 or Supreme Court under section 118 arises 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 10

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 60.

"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 61.

"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 62.

"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.

……."

An investigation becomes illegal if;

[1] it is not conducted with proper authorisations;

[2] Officers use coercion, harassment or mental abuse;

[3] it is not witnessed by witnesses of near by area;

[4] female officers are not present, in case a female is to be searched;

[5] it is happening after business hours;

[6] statements are recorded during investigation;

[7] instantly after investigation, taxpayer receives intimation in Form DRC-01A;

[8] access to SAP is sought by rejecting extracts taken thereof;

[9] Panchnama signed under pressure;

[10] Panchnama which is not speaking and issued without depicting true events of the investigation;

[11] The authorisation issued for conducting investigation at one place is used to conduct investigation of other place or person.

Further, evidence collected in an illegal investigation also becomes illegal and cannot be used for alleging a demand.

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 63.

"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.

An audit becomes illegal if;

(a) State department has not issued proper notifications empowering audit teams to access premises;

(b) Same points concerning conduct of department, as discussed above.

(c) Audit conducted by CAG under GST.

Further, evidence collected in an illegal audit also becomes illegal and cannot be used for alleging a demand.

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 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. 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 GST Appellate Tribunal (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 64.

"…….. 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 65.

"……..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 66.

"…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."

7. 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.

8. 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. Refer rules 31 and 45 of GST Appellate (Procedure) Rules.

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.

9. 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.

10. 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.

11. 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.

12. 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.

13. 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 67.

"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 68.

"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."

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.

Chapter 11

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**, who is the proper officer, who has either issued a SCN or desires to issue a SCN considering that the taxpayer/ any other person has either not paid or short paid any tax, interest or penalty dues to the Government or availed/ utilized excess input tax credit or has violated any of the provisions of the law.

(b) **Appellate Authority** such as Joint/Additional Commissioner (Appeals), Commissioner (Appeals), where an adjudicating Order has been passed and the assessee is aggrieved or in an appeal filed by the department.

(c) **Appellate Tribunal**, where the Order is passed by Appellate Authority under section 107 or Revisionary Authority under section 108 of the CGST/SGST 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

As already discussed in the beginning of this book, 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 Goods and Service Tax Appellate Tribunal (Procedure) Rules, 2025. The prescribed dress code for appearance is given in the table.

Every authorised representative other than a relative or regular employee of a party shall appear before the Appellate Tribunal in his professional dress, if any, and, if there is no such dress — (a) if a male, in a close-collared black coat, or in an open-collared black coat, with white shirt and black tie; or (b) if a female, in a black coat over a white sari or any other white dress: Provided that during the summer season from the 15th April to 31st August, the authorised representatives may, when appearing before a Bench of the Appellate Tribunal, dispense with the wearing of a black coat.

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 77 and 122 of Goods and Service Tax Appellate Tribunal (Procedure) Rules, 2025: If prescribed by professional body to which the representative is attached,	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).

	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.	

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 favourable 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 / Tribunal. 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/ Appellate Authority/ Tribunal

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 69. 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 70. 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 71. 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 72. 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 73. The Appellant filed application for condonation of delay of more than 1,000 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 (it was Service tax appeal). 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 74. 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 (1) month (it was GST appeal). 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.

In case appeal were to be 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. While the appeal to Appellate Tribunal was filed within time but the scope of the *lis* in this appeal was 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 appeal is liable to be dismissed by the Appellate Tribunal on the ground that there is no impropriety in the Order passed by the First Appellate Authority. The Appellant will be left to consider whether writ petition may 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 75. 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 76. 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 77. 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 78. CAs should not imitate influence of native accent of the Members on the Bench as it may be taken as 'mocking' and 'disrespectful'.

Illustration 79. 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/ members:* Very often the Adjudicating / Appellate Authorities/ members of tribunal 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 / Member. This may annoy the Adjudicating Authority / Appellate Authority / Member 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.

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