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ARTICLE IN GST
Validity of Recovery without Issue of SCN

Can the department recover the tax on any pretext without issue of the show cause notice? Is a taxpayer compulsorily liable to make the payment on receipt of the Statement in Form GST DRC-01A? Is a taxpayer obliged in law to honour the demand raised by the Audit Officers during the course of audit of the records of the taxpayer? Can the department force a taxpayer to make the payment of tax, etc. during enquiry or investigation?

The above questions continue to hound the taxpayers and have always been a bone of contention between the taxpayers and the Department. Undisputedly, contrary to the tall claims made every now and then, the Revenue Officers constantly operate under the pressure of achieving the targets of „case' (booking cases) and „cash' (Revenue Collections)! It is therefore not surprising that the Officers will ignore the well-established principles of law in order to achieve their targets!

It is a settled law that no recovery of tax or ITC, etc. can be made from a taxpayer without issue of the show cause notice in terms of Section 73 or Section 74, as the case may be, of the CGST Act, 2017. The provisions of Section 73 and Section 74 are patterned on Section 11A of the Central Excise Act, 1944, Section 73 of the Finance Act, 1994 and Section 28 of the Customs Act, 1962. It will therefore be advantageous to take a look at certain judicial pronouncements rendered by the Supreme Court and the High Courts/Tribunals in the context of these provisions and the principles of law settled vide these judgements.

In the case of Metal Forging vs. Union of India – 2002 (146) ELT 241 (SC), the Hon"ble Supreme Court observed and held as under:

"10. It is an admitted fact that a show cause notice as required in law has not been issued by the Revenue. The first contention of the Revenue in this regard is that since the necessary information required to be given in the show cause notice was made available to the appellants in the form of various letters and orders, issuance of such demand notice in a specified manner is not required in law. We do think that we cannot accede to this argument of the learned Counsel for the Revenue. Herein we may also notice that the learned Technical Member of the Tribunal has rightly come to the conclusion that the various documentsand orders which were sought to be treated as show cause notices by the Appellate authority are inadequate to be treated as show cause notices contemplated under Rule 10 of the Rules or Section 11A of the Act. Even the Judicial Member in his order has taken almost a similar view by holding that letters either in the form of suggestion or advice or deemed notice issued prior to the finalisation of the classification cannot be taken note of as show cause notices for the recovery of demand, and we are in agreement with the said findings of the two Members of the Tribunal. This is because of the fact that issuance of a show cause notice in a particular format is a mandatory requirement of law. The law requires the said notice to be issued under a specificprovision of law and not as a correspondence or part of an order. The said notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand. The said notice also will have to be served on the assessee within the said period which is either 6 months or 5 years as the facts demand. Therefore, it will be futile to contend that each and every communication or order could be construed as a show cause notice. For this reason the above argument of the Revenue must fail."

The Hon"ble Apex Court took note of its earlier judgement rendered in the case of **Gokak Patel Volkart Ltd. vs. CCE, Belgaum -1987 (28) ELT 53 (SC**), in which case, it was held as under:

"9. No notice seems to have been issued in this case in regard to the period in question. Instead thereof an outright demand had been served. The provisionsof Section 11A(1) and (2) make it clear that the statutory scheme is that in the situations covered by the sub-section (1), a notice of show cause has to beissued and sub-section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The Scheme is in consonance with the rulesof natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order thereof. Notice is thus a condition precedent to a demand under sub- section (2). In the instant case, compliance with this statutory requirement has not been made, and, therefore, the demand is in contravention of the statutory provision. Certain other authorities have been cited at the hearing by Counsel forboth sides. Reference to them, we consider, is not necessary."

In **Union of India & Others vs. Madhumilan Syntex Pvt. Ltd. & Anr. –1988 (35) ELT 349 (SC),** the Hon"ble Court, following the judgement in **Gokak Patel's case (supra),** observed and held as under:

"4. A perusal of the aforesaid provisions shows that before any demand is made on any person chargeable in respect of non-levy or short-levy or under payment of duty, a notice requiring him to show cause why he should not paythe amounts specified in the notice must be served on him. It is the admitted position in the present case that no such notice was served. It would thus appear that the aforesaid demand notice, dated 7th February, 1984 was in violation of the provisions of Section 11A and is bad in law.

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In Gokak Patel Vokkart Ltd. v. Collector of Central Excise, Belgaum - 1987 (28) E.L.T. 53 (S.C.) = A.I.R. 1987 S.C. 1161 = 2002-TIOL-508-SC-CX, this Court has held that the provisions of Section 11A(1) and (2) of Central Excises andSalt Act, 1944 make it clear that the statutory scheme is that in the situations covered by sub-section (1), a notice of show cause has to be issued and sub- section (2) requires that the cause shown by way of representation has to be considered by the prescribed authority and then only the amount has to be determined. The scheme is in consonance with the rules of natural justice. An opportunity to be heard is intended to be afforded to the person who is likely to be prejudiced when the order is made before making the order. Notice is thus a condition precedent to a demand under subsection (2)."

The aforesaid principle of law has been followed, recognised and/or emphasised by the Hon"ble High Courts and the Appellate Tribunals in a catena of judicial pronouncements. [See, **J.K. Synthetics vs. UOI – 2009 (234) ELT 417 (Del.); Ennor Steel vs. UOI – 1990 (47) ELT 363 (Mad.); Acme Mfg. Co. vs. CCE – 2000 (124) ELT 1021 (Tribunal); Cipla Ltd. vs. CCE – 2002** (143) ELT 202 (Tribunal); Sidwal Refrigeration vs. CCE – 2002 (145) ELT 682 (Tribunal); United Telecoms Ltd. Vs CST Hyderabad 2011-TIOL- 56-CESTAT-BANG, to cite a few].

The above well settled principles of law apply on all fours under the GST law. Consequently, the department cannot recover the tax from a taxpayer without adhering to the mandatory requirements of Section 73 or Section 74 and without issuing a show cause notice thereunder to the taxpayer. This principle also applies in case of any demand raised by the Audit Officers during the courseof Audit of the records of the taxpayers. In so far as the issue of a Statement in Form GST DRC-01A in terms of Rule 142 (1A) of the CGST Rules, 2017 before issue of the show cause notice to the taxpayer is concerned, the objective of thisprovision is only to apprise the taxpayer of the proposed liability so that he can,if he so wishes, make the payment of the requisite amount and avoid lengthy and costly litigation. However, the proposed liability as reflected in the Statement in Form GST DRC-01A is not at all binding on the taxpayer and the taxpayer can make his representations thereagainst and insist upon the issue of the show cause notice.

Likewise, the recovery of the tax or ITC, etc. by any means during the course of an enquiry or investigation being conducted by the department against a taxpayer is quite common though the action is without authority of law. The Revenue Officers, in their enthusiasm and over-eagerness of meeting the revenue targets often resort to various techniques so as to force the taxpayersin making the payment of the amount as determined by the Officers and as per their wishes and directions. Needless to say, such recovery made under threat orcoercion is always labelled and projected as „**voluntary'** by the department absolving itself of all the legal obligations otherwise cast upon it for making any recovery from a taxpayer. Be that as it may, recovery of any tax or ITC, etc. in this manner is absolutely illegal. Recently, taking serious note of such illegal recoveries being made by the authorities, the Hon"ble Gujarat High Court, in the case of **Bhoomi Associates vs. Union of India – 2021-TIOL-397-HC-AHM- GST,** has deprecated such action of the authorities and laid down certain guidelines with the directions to the CBIC as well as the Chief Commissioner of Central/State Tax of the State of Gujarat to issue the said guidelines by way of suitable Circular/Instruction.

Here, the judgement of the Hon"ble Madras High Court delivered on April 07, 2021 in the case of **M/s. Shri Nandhi Dhall Mills India Pvt. Ltd. vs. SIO, CGGST, Trichy – 2021- TIOL-828-HC-MAD-GST** is also worthy of mention. In this case, despite the non-leviability of GST on the activities in which thePetitioner was engaged, the Revenue Officers had, during the course of their investigation, forced the Petitioner in making the payment of merely Rs.2.00 crores "voluntarily", during the investigation. However, the Petitioner-Company had later registered their protest against the recovery, pointing out that the GST was not leviable on their business activities and had sought the refund ofthe amount paid by them. However, the department neither refunded the amount nor issued any show cause notice in the matter. Ultimately, the Petitioner-company approached the Hon"ble High Court who, after taking note ofthe entire facts of the case, declared the recovery of tax as absolutely unjustified and illegal and ordered the department to refund the entire amount to the Petitioner.

The vast and unbridled powers available under the law on one hand and the complete lack of accountability on the other hand are reflected in such arbitrary and illegal action of the Revenue Officers. The pressure of „**meeting the targets'** only add "**fuel to the fire**"**!** After all, there is no gainsaying of the fact that a „**Target-oriented Tax System'** will eventually become and operate as a„**Terror-driven Tax System'!** Has anyone doubt about this?

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