

Adjudication Procedure, Recovery of Tax, Penalty and Arrest Provisions



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- What is adjudication?
 - Adjudicate means to hear or try and decide judicially
 - Adjudication means giving an order or a decision
 - Adjudicating Authority – any authority to pass any such an order or a decision under the act.
- Central Excise Officer has been empowered to adjudicate and thus they can be termed as “Adjudicating Authorities” [Rule 3 of the Service Tax Rules, 1994]

Adjudication Procedure





Authority	Demand of Duty/ Cenvat Credit
Superintendents	Upto Rs. 1,00,000/- [Excluding cases involving determination of rate of duty or valuation and cases involving extended period of limitation – Circular 922/12/2010 dated 18.05.2010]
Assistant/Deputy Commissioner	Rs. 5,00,000/- [Except the cases where Superintendents are empowered to adjudicate - Circular 922/12/2010 dated 18.05.2010]
Joint / Additional Commissioner	Rs. 5,00,000/- to Rs. 50,00,000/- [Circular 957/18/2011 - CX-3 dated 25.10.2011]
Commissioner	Without any limit



- **POWERS OF ADJUDICATING AUTHORITY:**
- Central Excise Officers have been empowered to adjudicate in following matters-
 - Demand of service tax and its recovery – Section 73
 - Rectification of mistake by amending own order – Section 74
 - Imposition of penalty – Section 83A
 - Refund of service tax and interest – Section 11B of Central Excise Act made applicable to Service Tax.



- **PROCEDURE OF ADJUDICATION:**

- After adequate investigations, the appropriate adjudicating authority issues a Show Cause Notice demanding tax along with relevant applicable interest and penalties.
- Reply to Show Cause Notice is required to be filed within the stipulated time prescribed in the said Show Cause Notice.
- If the assessee could not file the reply within the prescribed time limit then for safety purpose the assessee should file an extension letter.

Adjudication Procedure



- As per Section 33A of the Central Excise Act, 1944 (which has been made applicable to Service Tax), adjudicating authority is required to give an opportunity of personal hearing. Maximum 3 adjournments can be granted.
- Adjudicating Authority has to follow principles of natural justice
 - Full information about levies (tax + interest + penalties) must be provided.
 - Principles of Audi alteram partem should be followed. [i.e. Personal Hearing must be granted]
 - Order must be passed with adequate reasons

Issue of SCN



- Issue of Show Cause Notice [SCN] for recovery of taxes [Section 73(1) of the Finance Act, 1994]:
- Where service tax has not been levied or paid or short levied or short paid or erroneously refunded, the Central Excise Officer can serve a SCN on person chargeable to service tax. After considering the representation from the person concerned, if any, the Central Excise Officer can determine the amount of tax payable and then the person chargeable to service tax shall have to pay the amount.

Time Limit for Issue of SCN



- The SCN should be served within eighteen months from the relevant date.
- However, if non payment or erroneous refund of service tax is due to following reasons

- Fraud
- Collusion
- Wilful mis-statement
- Suppression of facts
- Contravention of any of the provisions of the chapter or the rules made thereunder with an intention to evade payment of service tax

then, SCN can be served within five years from the relevant date.

What is Relevant Date?



RELEVANT DATE

Service Tax not levied, paid or short levied or paid

Returns Filed - Date of filing the return

Returns not filed – Due date of filing the return

In any other case – Due date of payment of service tax

Provisional Assessment

Date of adjustment of service tax after final assessment

Erroneous Refund

Date of such refund

Extended Period of Limitation



- By Finance Act, 2012 the period of one year was amended to eighteen months.
- The said amendment was with effect from 28th May, 2012

- Therefore, time period for service of notice under this section:

Prior to May 28, 2012 – One Year from relevant date.

From May 28, 2012 – Eighteen months from relevant date.

Extended Period of Limitation



- Extended period [i.e. the period of 5 years] can be invoked only when the SCN proves that the assessee has either done
 - Fraud
 - Collusion
 - Wilfully Suppressed the facts
 - Misstated the facts
 - Contravene any of the provisions of the acts with an intention to evade payment of taxes.

Requirements of a Show Cause Notice



- SCN is the foundation on which the demand is based and it is a prerequisite for any demand under indirect taxes.
- SCN is the foundation of matter of levy and recovery of duty, penalty and interest.
- SCN should give all essential particulars and charges and grounds should be mentioned clearly. The SCN should not be vague, cryptic, confusing or self-contradictory.

Judicial Proceedings



- C.C.E., Bangalore vs. Brindavan Beverages (P) Ltd

2007 (213) E.L.T. 487 (S.C.)

“ show cause notice is the foundation on which the department has to build up its case.”

- C.C.E. vs. H.M.M. Ltd

1995 (76) E.L.T. 497 (S.C.)

“**Inference of intention to evade payment of duty not drawable automatically**”

Judicial Proceedings



- CosmicDyeChemicalVs.CollectorofCentralExcise,Bombay

1995 (75) ELT 721 (SC)

The court held that 'intent to evade duty' must be proved for invoking the extended period of limitation.

- CCEVs.ChempharDrugandLiniments

1989(40) ELT 276 (SC)

Held that something positive, rather than mere inaction or failure on the part of manufacturer, has to be proved before invoking the extended period of limitation.

Judicial Proceedings



- PushpamPharmaceuticalsassesseeVS.CCEBombay

1995 (78) ELT 401 (SC)

Held that, 'suppression of facts' does not mean any omission. The act must be deliberate.

In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.

The assessee cannot be held guilty on the mere 'suppression of facts' when the law itself is not clear or there are conflicting judgments or when the position is not settled in law, unless it can be proved that the intention of the assessee was to evade payment of duty.

Judicial Proceedings



- Continental Foundation Jt. Venture vs. C.C.E., Chandigarh-I

2007 (216) E.L.T. 177 (Supreme Court).

- Soorajmull Baijnath Industries (P) Ltd vs. C.C.E., DELHI-III

2008 (232) E.L.T. 143 (Tri. - Del.)

Extended period cannot be invoked in circumstances involving interpretation of any statutory provision.

Adjudication Procedure



- Sub – section (1A) of Section 73: (Inserted w.e.f. May 28, 2012)

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

Payment of Tax before issue of SCN



- If the assessee pays service tax with interest on his own before service of SCN then, assessee should inform to department in writing, and then, the central excise officer shall not service any notice under Section 73(1) of the Finance Act, 1994, 'in respect' of the duty and interest amount so paid and all the proceedings are concluded.
[Section 73(3)]
- To that extent even clarification has been issued by the department wherein it is said that if tax and interest is paid before the issue of SCN then all the proceedings are concluded. [Circular – 137/167/2006 – CX – 4 dated 03.10.2007]

Payment of Tax before issue of SCN



- During the course of any audit, investigation or verification it is found that service tax has not been levied or paid or short levied or short paid or erroneously refunded.
- The assessee thereafter pays service tax in full or in part along with interest at specified rates and penalty equal to 1% of such tax for each month during which the default continues subject to maximum of 25% of the tax amount and the assessee should inform the Central Excise Officers of such payment in writing before issue of SCN. [Section 73 (4A)].

Voluntary Payment after issue of SCN



- Even in cases where notice has been served on assessee for non – payment of service tax on account of fraud, wilful misstatement, suppression of facts etc, the person to whom notice is served can pay full tax or in part as acceptable to him within 30 days. In addition, he should pay interest and penalty equal to 25% of service tax specified in the notice.
- However, this proviso has been deleted with effect from 08.04.2011

Recovery of Tax



- Section 73A provides for payment by an assessee of any amount collected in excess of the service tax leviable or recovery of any amount as representing service tax, that has been collected by a person but not deposited with the Central Government.
- Section 73B enables the Central Government to collect interest on the amount section 73A at a rate notified [18%] by the Central Government.

Recovery of Tax



- Section 73C provides for provisional attachment by Central Excise Officer of any property belonging to a person on whom notice is served under sub-section(1) of section 73 or sub-section (3) of section 73A during the pendency of such proceedings.
- The attachment can be done only in manner prescribed by rule and only with written approval of Commissioner.
- Service Tax (Provisional Attachment of Property) Rules, 2008 prescribes procedure for provisional attachment.

Recovery of Tax



- Proposal for attachment of property shall be send by Assistant / Deputy Commissioner in prescribed form to Commissioner.
- In lieu of such proposal a notice as well as opportunity of personal hearing should be given by the Commissioner.
- The provision should be resorted too only when service tax or Cenvat Credit involved is more than Rs. 25,00,000/-.

Recovery of Tax



- Personal property of partner or proprietor cannot be attached.
- The attachment will cease to have effect after six months from the date of order of attachment.
- The said period of attachment can be extended. However, the total period cannot be extended to more than 2 years.

Recovery of Tax



- Once the tax demand is confirmed against the assessee and he is not disputing the same, then, recovery proceedings can be initiated by following any of the below mentioned methods:
 - Deduction of any money payable by excise/customs.
 - Recovery from third party.
 - Distrain property of the person.
 - As arrears of land revenue.



- The due date for payment of service tax is 6th day of the month following the relevant month/quarter, if electronically paid and in other cases, 5th day of the month following the relevant month / quarter.
- It is provided under section 75 of the Finance Act, 1994 that in case of delayed payments (after due date) the assessee is required to pay simple interest at the rate prescribed.



- The table below shows the rate of interest applicable at relevant period of time.

Sr.No.	Period	Rate of Interest
1.	Till 11.05.2001	1.5% per month
2.	11.05.2001 to 11.05.2002	24% per annum
3.	11.05.2002 to 10.09.2004	15% per annum
4.	From 10.09.2004 to 31.03.2011	13% per annum
5.	From 01.04.2011	15/18% per annum

Section 76: Penalty for failure to pay service tax.



Any person, liable to pay service tax in accordance with the provisions of section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax in accordance with the provisions of section 75, penalty not less than Rs.100/- for every day during which failure continues, or @ 1% of such tax per month, whichever is higher but shall not exceed 50% of service tax due.

Section 76: Penalty for failure to pay service tax.



- Illustration:

- X, an assessee, fails to pay service tax of ten lakh rupees payable by the 5th March. X pays the amount on the 15th March. The default has continued for ten days. The penalty payable by X is computed as follows: –

1% of the amount of default for 10 days

$$\frac{1}{100} \times 10,00,000 \times \frac{10}{31} = \text{Rs. } 3,226/-$$

Penalty calculated @ Rs.100 per day for 10 days = Rs. 1,000/-

Therefore, penalty liable to be paid is Rs. 3,226/-

Section 77: Penalty for contravention of rules and provisions of Act for which no penalty is specified elsewhere.



Manner of contravention	Penalty
Any person who fails to pay service tax or to take registration under Section 69 of the Finance Act, 1994	Rs. 10,000/-; or Rs. 200/- per day of delay, whichever is higher.
Any person fails to keep, maintain or retain books of account and other documents as required	Maximum Rs. 10,000/-.
Any person fails to furnish information or produce documents called by an officer or appear before the Central Excise Officer, when issued with a summon for appearance to give evidence	Rs. 10,000/-; or Rs. 200/- per day of delay, whichever is higher.
Any person fails to pay tax electronically.	Maximum Rs. 10,000/-.
Any person fails to issues a proper invoice or fails to account an invoice in the books of accounts.	Maximum Rs. 10,000/-.
Any contravention under the Chapter or rules made there under for which no penalty is prescribed.	Maximum Rs. 10,000/-.

Section 78 : Penalty for suppressing, etc. of value of taxable services.



- Service tax not been levied or paid or been short-levied or short-paid or erroneously refunded by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of chapter V of Finance Act, 1994 or of the rules made there under with intent to evade payment of service tax.
- In addition to the Service Tax and interest thereon, the amount equal to the amount of Service tax not levied or paid or short-levied or short paid or erroneously refunded. [i.e. penalty = 100% of the service tax demanded]

Section 78 : Penalty for suppressing, etc. of value of taxable services.



- But where true accounts are available in specified records, the penalty is reduced to 50%.
- Where the service tax and interest is paid within 30 days, from the date of communication of the order the penalty is 25%.
- The reduced penalty is available only if the penalty is paid within 30 days of the date of communication of the order.

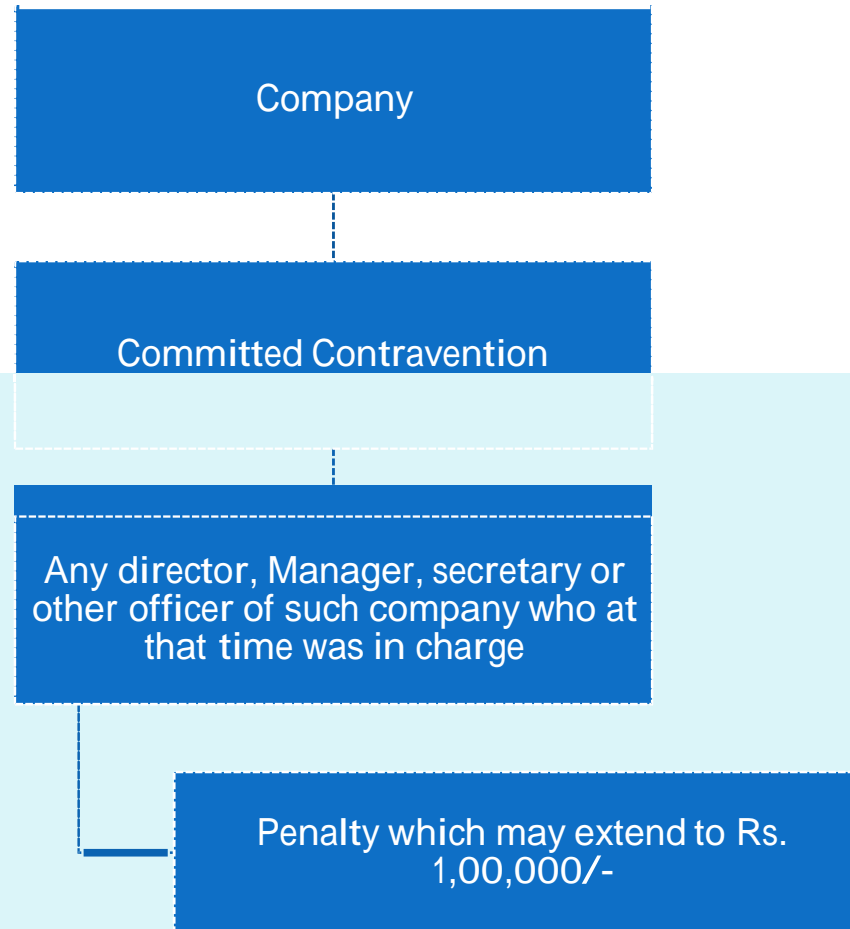
Section 78A : Personal Penalty



- The provision for personal penalty was introduced vide Finance Act, 2013
- The same is applicable from 10.05.2013
- It is applicable to only companies as defined under Section 2(20) Companies Act, 2013. The same is stated as under:

(20) “company” means a company incorporated under this Act or under any previous company law

Section 78A : Personal Penalty



Section 78A : Personal Penalty



Contravention

Evasion of Service Tax

Issuance of invoice, bill or as the case may be, a challan without provision of taxable service in violation of the provisions or rules made thereunder.

Availment and utilization of credit of taxes or duty without actual receipt of the taxable service or excisable goods either fully or partially in violation of the provisions or rules made thereunder

Collects but fails to pay beyond a period of six months

Section 80: Penalty not to be imposed in certain cases.



Sub-section (1) of Section 80: Notwithstanding anything contained in the provisions of section 76, section 77 or first proviso to sub-section (1) of section 78, no penalty shall be imposed on the assessee for any failure referred to in the said provisions if the assessee proves that there was reasonable cause for the said failure.

Reasonable Cause: Azadi Bachao Andolan v. Union of India

2001 (116) Taxman 249 / 252 ITR 471

Reasonable cause can be reasonably said to be a cause which prevents a man of average intelligence and ordinary prudence, acting under normal circumstances, without negligence or inaction or want of bonafide.

Penalties CANNOT be imposed both under Sections 76 as well as under Section 78



- The Finance Act, 2008 has added a proviso to Section 78 with effect from 10.05.2008.
- The said proviso states that if penalty is payable under Section 78, the provisions of Section 76 is not applicable.

Judicial Proceedings



- Nopenaltyasissueisofinterpretation.
 - Sonar Wires (P) Ltd. vs. C.C.E., Raipur [1996 (87) E.L.T. 439 (Tribunal)]
 - Synthetics & Chemicals Ltd vs. C.C.E., Kanpur [1997 (89) E.L.T. 793 (Tribunal)]
 - Man Industries Corporation Ltd vs. C.C.E., Jaipur [1996 (88) E.L.T. 178 (Tribunal)]
 - Sports & Leisure Apparel Ltd. C.C.E., Noida [2005 (180) E.L.T. 429 (Tri. - Delhi)]
 - Aquamall Water Solutions Ltd vs. C.C.E., Bangalore [2003 (153) E.L.T. 428 (Tri. - Bangalore)]



Commissioner of
Central Excise

Reasons to Believe

Committed an offence

As specified under
Section 89(1)(i)

As specified under
Section 89(1)(ii)

Amount > 50L



- If the Commissioner of Central Excise has reason to believe that any person has committed any of the following offence, then, the following person can be arrested:
 - where a person knowingly evades the payment of service tax, or
 - avails and utilizes credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules, or
 - maintains false books of accounts or fails to supply any information which he is required to supply or supplies false information.
- and the amount of service tax involved is more than fifty lakh rupees.

Power to Arrest



- Further, where a person has collected any amount exceeding fifty lakh rupees as service tax but fails to pay the amount as collected to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due.
- In such cases, after following the due procedure of arrest, the arrested person must be produced before the magistrate without unnecessary delay, and definitely within 24 hours. This is in terms of section 91(2) of the Finance Act, 1994, as amended. The magistrate will decide on whether or not to grant bail. [Circular: 171/6/2013-Service Tax 17th September, 2013]

Power to Arrest



Offences	Cognizable	Bailable
Where a person knowingly evades the payment of service tax	No	Yes
Avails and utilizes credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules	Yes	Yes
Maintains false books of accounts or fails to supply any information which he is required to supply or supplies false information	No	Yes
Collects but fails to pay beyond a period of six months	No	Yes

Power to Arrest



	Offence	Cognizable / Bailable	Power of arrest
C U S T O M S	Specific offences (in excess of Rs. 50 lakhs)	Cognizable and non-bailable	<ul style="list-style-type: none"> Arrest only upon authority of Commissioner of Central Excise Must be taken before a Magistrate without unnecessary delay
	Others	Non-cognizable and bailable	<ul style="list-style-type: none"> Arrest only upon authority of Commissioner of Central Excise AC/DC to have same powers as an officer in charge of a police station under Section 436 of the CrPC for the purpose of releasing an arrested person on bail
S E R V I C E	Specified offences of more than Rs.50 lakhs	Cognizable and non-bailable	<ul style="list-style-type: none"> Arrest only upon authority of Commissioner of Central Excise Inform such person of the grounds of arrest and produce him before a magistrate 24 hours
	Specified offences of more than Rs.50 lakhs	Non-cognizable and bailable	<ul style="list-style-type: none"> Arrest only upon authority of Commissioner of Central Excise AC/DC to have same powers as an officer in charge of a police station under Section 436 of the CrPC for the purpose of releasing an arrested person on bail
T A X	Specified offences of more than Rs.50 lakhs	Cognizable and non-bailable	<ul style="list-style-type: none"> Power to arrest any person if there is reason to believe that such person is liable to punishment under the Act/Rules, with prior approval of the Commissioner of Central Excise
	Specified offences of more than Rs.50 lakhs	Non-cognizable and bailable	
E X C I S E	Specified offences of more than Rs.50 lakhs	Non-cognizable and bailable	

Judicial Proceedings



- KandrameshbabuNaiduVs.SuptServiceTax,Mum-II

2014 TIOL 307 – HC – MUM – ST

In the instant case, the Appellant had collected Rs. 2.59 crores of Service Tax whereas deposited only Rs. 15 Lakhs. Further, the Appellant did not filed the service tax returns and siphoned the funds collected in the name of service tax for personal use. Based on the payment pattern of the Appellant the High Court rejected the bail application stating that the same as a continuing offence.

Judicial Proceedings



- SudipDasVs.UnionofIndia

2014 TIOL 314 – HC – KOL – ST

Retrospective application of offence punishable under Section 89 (1) (d) of the Finance Act, 1994. It is correct that the offence is alive till now but it is not less than correct that when it is originated, the offence was bailable in view of the observation made by the Hon'ble Apex Court. It is also reckoned that the new Act does not have any retrospective effect. Therefore, on the above mentioned grounds bail was granted to the Appellant.

Case Study



- M/s. ABC Limited is a media firm. The company has procured certain housekeeping services from M/s. XYZ. The company has not paid service tax under reverse charge mechanism on the said contract. However, the contract suggest that the same cannot be classified under Manpower Recruitment Agency Service. Therefore, the question of payment of service tax under reverse charge does not arise. However, a SCN was issued to the M/s. ABC Limited invoking extended period of limitation and applicable interest under Section 75 and penalties under Section 76, 77 and 78 of the Finance Act, 1994. What should M/s. ABC Limited do and as a consultant what grounds should form part of SCN reply.

Case Study



- Definition of Manpower Recruitment Agency Service
- Thereby stating that the present contract itself is not taxable.
- Related cases
- Since no tax then no interest.
- Penalties
- Reasonable Cause
- Request for Personal Hearing

THANK YOU



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Have a nice weekend