CHAPTER 13

DEMAND NOTICE/SHOW CAUSE NOTICE, ADJUDICATION, INTEREST, PENALTY, CONFISCATION, SEIZURE, DUTY PAYMENT UNDER PROTEST

PART I

DEMAND NOTICE/SHOW CAUSE NOTICE

1. Introduction

1.1 In accordance with the principles of natural justice the central excise law provides that before any action is taken against an assessee he must be given reasonable opportunity of presenting his case. One such situation would be that relating to the demand of duty not paid, short paid or erroneously refunded.

1.2 As see, a show cause notice is invariable to be issued if the department contemplates any action prejudicial to the assessee. Thus, if on account of an infraction of the provisions of the central excise law it is considered appropriate to penalise the defaulter, it is necessary to first issue a show cause notice. The show cause notice would detail the provisions of law allegedly violated and ask the noticee to show cause why action should not be initiated against him. Thus, a show cause notice gives the noticee the opportunity to present his case.

2. Issue of duty demand notice

2. 1 Section 11A of the Central Excise Act, 1944 provides that if excise duty has not been levied or short levied or not paid or short paid, a notice has to be issued demanding the differential duty. This notice will be issued by Commissioner of Central Excise if the amount demanded does not exceeding one crore rupees. Where amount exceeds one crore rupees, prior approval of the Chief Commissioner of Central Excise is required.

2.2 The Board has also empowered the Officers of Director General of Central Excise Intelligence to issue Show-cause notices in accordance with the powers of Central Excise Officers conferred on them under rule 3 and the instruction above.

2.3 In order to provide mechanism for early dispute resolution, it has also been provided in the Act that an assessee may request for waiver of notice, if he deposits the amount of differential duty on his own along with interest in respect of only such cases where such non-levy or short levy or non-payment or short payment is by reason other than suppression of facts, fraud, collusion etc.

2.4 By opting for waiver of issue of notice, the assessee may avoid long drawn process of adjudication and appellate process including interest on the differential duty demanded. It is therefore, advisable that in cases where the assessee is convinced that the Department is correct in demanding duty, he may opt for this facility.

PART II

ADJUDICATION

1. Introduction

1.1 Central Excise law is a self-contained provision. Besides containing the provisions for levy of duty, the law also provides for the adjudication of matters relating to the legal provisions. The adjudication is done by the departmental officers, and in this capacity they act as quasi-judicial officers.

2. Adjudication and determination of duty

2.1 Adjudication of confiscation and penalty has to be done by Officers specified in section 33 of the Central Excise Act, 1944. Central Excise Officers have the power to determine duty short paid or not paid erroneously refunded under section 11A of the said Act. For this purposes, the Board has decided the powers of adjudication and determination of duty shall be exercised, based on monetary limit (duty involved in a case): -

(A) All cases involving fraud, collusion, any wilful misstatement, suppression of facts, or contravention of Central Excise Act/ Rules made there under-with intent to evade payment of duty and / or where extended period has been invoked in show-cause-notices, (including CENVAT cases, will be adjudicated by:-

Central Excise Officers	**Powers of Adjudication (Amount of duty involved)**
Commissioners	Without limit
Additional Commissioners	Upto Rs. 20 lakhs
Joint Commissioners	Upto Rs. 10 lakhs

(B) Cases which do not fall under the category (A) above, will be adjudicated as follows:-

Central Excise Officers	**Powers of Adjudication (Amount of duty involved)**
Commissioners	Without limit
Additional /Joint Commissioners	Above Rs. 2 lakhs and

	upto Rs. 20 lakhs
Deputy/Assistant Commissioners	Upto Rs. 2 lakhs.

(C) Cases related to issues mentioned under first proviso to Section 35B(1) of Central Excise Act, 1944 would be adjudicated by the Addl. Commissioners/ Joint Commissioners without any monetary limit.

(D) All cases relating to determination of classification and valuation will be adjudicated by the Deputy/Assistant Commissioner of Central Excise without any monetary limit.

2.2 The Board, under section 2(b) of the Central Excise Act, 1944 read with rule 3 also invests certain officers with powers of Commissioners or other officers through out the territory of India, for the purpose of investigation and adjudication.

PART III

INTEREST, PENALTY, CONFISCATION, DUTY PAYMENT UNDER PROTEST

1. Introduction

1.1 Interest of duty not paid on time is provided for in the Central Excise statute. It is expected that the interest provision would normally not have to be invoked as the assessee would make the duty payment on time.

1.2 Penalty and confiscation of offending goods i.e. which have violated the provision of the Central Excise law are an outcome of the adjudication proceedings. These are deterrents aimed at cautioning the dishonest taxpayer.

2. Interest on duty

2.1 Under the provisions of Section 11AA, interest is charged on the delayed payment of duty. Thus, it is in the interest of an assessee to discharge the duty liability the earliest and not to prolong the dispute only for the sake of delaying payments. The interest will be charged under said Section 11AA, as follows:

(a) In the normal case interest will be charged for the period of delay after 3 months of the determination of the duty liability till the date of payment of duty.

(b) In the case the duty is not paid on account of fraud, suppression etc. the interest will be charged from the first date of the month following the month in which the duty was not paid.

2.2 There may not be need for any explicit mention of the interest liability in the show-cause notice since the legal provisions are explicit. However, the same may be done as a matter of abundant precaution. Likewise, the adjudicating officer may incorporate the fact about the interest liability in the order confirming the demand.

3. **Penalty and Confiscation**

3.1 Penalty is imposed under any of the following provisions of the Central Excise Act, 1944 or the rules made thereunder: -

(i) Section 11AC prescribes a mandatory penalty equal to the duty not levied or paid or short paid or erroneously refunded by reason of fraud, suppression etc. However, in the vent the duty and interest thereon is paid within 30 days of the communication of the order, the penalty shall be 25% of the duty subject to it being paid within the said period of 3o days.

(ii) Rule 25 of the said Rules provides for penalty on any producer, manufacturer, registered person of a warehouse or a registered dealer not exceeding the duty on the excisable goods in respect of which any of the specified contravention have been committed, or rupees ten thousand, whichever is greater. The penalty is subject to the provisions of Section 11 AC of the Central Excise Act, 1944. The offending goods are also liable to confiscation. The specified contravention are:

   (a) Removal of any excisable goods in contravention of any of the provisions of the said rules or the notifications issued under the said rules; or
   (b) Non-accountal of any excisable goods produced or manufactured or stored; or
   (c) Manufacture, production or storage of any excisable goods without having applied for the registration certificate required under Section 6 of the Central Excise Act; or
   (d) Contravention of any of the provisions of the said rules or the notifications issued under the said rules with intent to evade payment of duty.

(iii) Under rule 26 of the said Rules It is provided that any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or the said Rules, shall be liable to a penalty not exceeding the duty on such goods or rupees ten thousand, whichever is greater.

(iv) Rule 27 of the said Rules provides for imposition of a general penalty penalty which may extend to five thousand rupees and with confiscation of the goods in respect of which the offence is committed. This is attracted when no other specific penalty is provided for.

3.2 If penalty is imposed under Section 11AC, penalty under rule 25 will not be imposed. This, however, does not preclude the Department from confiscating the goods, imposing any fine in lieu of confiscation and prosecuting a person.

3.3 Rule 26 of the said Rules also provides that before any order of penalty or confiscation is passed the adjudicating authority shall follow the principles of natural justice. In other words a notice explaining the reasons why penalty should not be imposed or goods confiscated has to be given to the person. Thereafter, reasonable opportunity shall be given to such person to explain or defend his case. The adjudicating Officer shall pass a reasoned order, incorporating the defence arguments given by such person or his authorised representative.

3.4 As per Rule 28 of the said Rules, when any goods are confiscated under these rules, such thing shall thereupon vest in the Central Government. Accordingly, the Central Excise Officer adjudging confiscation shall take and hold possession of the things confiscated, and every Officer of Police, on the requisition of such Central Excise Officer, shall assist him in taking and holding such possession.

3.5 Rule 30 provides that if the owner of the goods, the confiscation of which has been adjudged, exercises his option to pay fine in lieu of confiscation, he may be required to pay such storage charges as may be determined by the adjudicating officer.

3.6 Provisions for disposal of goods confiscated are contained in rule 29 of the said Rules. Goods of which confiscation has been adjudged and in respect of which the option of paying a fine in lieu of confiscation has not been exercised, shall be sold, destroyed or otherwise disposed of in such manner as the Commissioner may direct.

4. Duty under protest

4.1 As per Section 11B of the Central Excise Act, 1944 the time limitation of application for refund of duty fixed at one year from the relevant date shall not apply when the duty has been paid under protest.

4.2 Any assessee who desires to pay duty under protest, may do so by following the procedure mentioned below:

a. The assessee shall inform the Superintendent or Inspector of Central Excise in writing giving reasons for paying duty under protest and a dated acknowledgement will be given to him.
b. He will mark invoices or monthly/quarterly return indicating the goods on which duty is paid 'under protest'. If it is a lump-sum duty payment in respect of past demand, he may record the fact of duty payment under protest in the Personal Ledger Account [against debits] CENVAT Account [against debits] and the Daily Stock Account.
c. If a case is appealed against by the assessee or where the appeal period for further appeal is available, he may continue to pay duty under protest. However, if decision is not in his favour and he exhausts the appellate remedy or does not appeal within stipulated period, the assessee shall not have ay right to pay duty under protest.

4.3 A letter of protest or a representation for paying duty under protest shall not constitute a claim of refund.