Validity of recovery without SCN or assessment - No stupidity here! - Part-1

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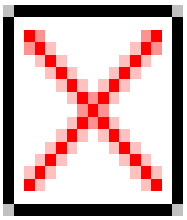

IT's a weird world. The strong take away from the weak, the clever take away from the strong, and the government take away from everybody - Anon

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 be tempted to 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 some 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 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. Affirming the judgement of the Hon'ble Tribunal, the Hon'ble Court held that issuance of a show cause notice in a particular format is a mandatory requirement of law and the law requires the said notice to be issued under a specific provision of law and not as a correspondence or part of an order. The Hon'ble Court further held that the Notice must also indicate the amount demanded and call upon the assessee to show cause if he has any objection for such demand and such 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.

The Hon'ble Apex Court took note of its earlier judgement rendered in the case of **Gokak Patel Volkart Ltd. vs. CCE, Belgaum - 2002-TIOL-508-SC-CX**
Â in which case, it was held that Notice is a condition precedent to a demand under sub-section (2) Section 11A of the CEA.

In Union of India & Others vs. **Madhumilan Syntex Pvt. Ltd. & Anr. -Â**2002-TIOL-512-SC-CX Â the Hon'ble Court, following the judgement in **Gokak Patel's case (supra)**
, observed and held 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 pay the amounts specified in the notice must be served on him. It was also held that aÂ post-facto show cause notice and grant of hearing cannot validate a demand raised without prior issue of the notice.

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 course of Audit of the records of the taxpayers. Insofar 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 this provision 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 are tempted to resort to various techniques so as to force the taxpayers in 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 or coercion 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 the Petitioner 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 of the 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 and the Madras High Court, after taking note of the 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.

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[The views expressed are strictly personal.]