

Background Material on Litigation Management



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

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Foreword

The laws governing taxation, especially indirect taxes, have undergone several changes on account of globalization, liberalization and privatization in India. Members have been practicing Service Tax and VAT for quite some time now. They would also embrace GST in emerging scenario. Frequent changes and complexities in indirect taxes law lead to scope for disputes and litigations which are required to be dealt intelligently.

Our members with their expertise can help trade and industry by preventing and resolving the disputes. Considering the expertise of the members and the opportunities available in the area of litigation, the Indirect Taxes Committee of the Institute of Chartered Accountants of India has come out with a Course on Litigation Management and has also developed Background Material for the same. The material covers principles of evidence, drafting and pleadings, ethics and etiquette, litigation strategy and mock tribunal etc. which seems very comprehensive.

I congratulate CA. Madhukar N. Hiregange, Chairman, CA. Sushil Kumar Goyal, Vice Chairman and other members of the Committee for their efforts in bringing out this highly useful publication. I am sure that the members, specifically those who are involved in area of litigation in indirect taxes would find this material immensely useful.

I wish the readers wonderful learning experience.

Date: 24th August, 2016

Place: New Delhi

CA. M. Devaraja Reddy

President, ICAI

Preface

The reforms in the indirect tax regime have been continuously throwing up newer challenges and opportunities for our members. It has now become imperative for the members to continuously sharpen their skills as they are looked upon to assume a leadership role in assessing and managing tax risks.

There is a need to skill and empower the members in the area of dispute prevention and resolution. It has further decided to organise focused Course on Litigation Management to help members in enhancing representational skill. This Background Material is divided into nine segments covering introduction, principles of evidence, drafting and pleadings, ethics and etiquette, litigation strategy and mock tribunal etc. The material, in appendices, also provides selection of statutory provisions and landmark decisions.

I am thankful to CA. M. Devaraja Reddy, President and CA. Nilesh Vikamsey, Vice-President, ICAI for their guidance and encouragement to the initiatives of the Indirect Taxes Committee. I must thank CA. A. Jatin Christopher, CA. Naveen Rajpurohit, Adv. Naveen Kumar K S, CA. Deepak Kumar Jain and CA. Bhanu Murthy J S for preparing of this material. I also complement and appreciate the Indirect Taxes Committee secretariat for their proactive support.

I look forward to feedback from members for further improvements in it at tdtc@icai.in

Welcome to an enjoyable learning.

Date: 24.08.2016

Place: New Delhi

CA. Madhukar N. Hiregange
Chairman
Indirect Taxes Committee

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Chapter 1

Introduction

1. Introduction

The word 'representation', in the context of indirect tax litigation, would mean the act of appearing in a client's cause to offer explanation, information or defense in relation to proceedings before the authorities or Tribunal.

Representation (discussed in detail later), is a legal right that upholds one's right to personal liberty which has been granted to us by various statutes including taxation related statutes, to provide the client (the person represented) the benefit of professional assistance in presenting his defense. But for the specific provisions in the taxing statutes permitting appearance through a representative, the party or assessee 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.

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 upto the Tribunal level. If the matter advances to High Court or Supreme Court, although a CA cannot legally represent the client, the CA can provide valuable assistance to lawyers in handling the matters before such fora.

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. Majority of the litigation under income tax upto 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 service tax regime, the scope for CAs under indirect tax as a whole has enlarged. The Institute of Chartered Accountants of India (i.e. ICAI) has been making efforts to empower the CAs with knowledge of Indirect taxes covering Customs, Central Excise, Service Tax and VAT, among others. In this regard, a certification course on

Indirect tax was introduced close to five years ago and has been conducted successfully across the country. More recently, the certificate courses are being conducted with a specialization in the field of indirect tax i.e. Certificate Course on Service Tax.

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 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 show cause notice, 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 in understanding facts for preparation of grounds for appeal, counter, rejoinder and legal research.

4. Historical background

If we go back in history then we have record of vakils appointed to represent others' causes before the Courts and other Officers. The concept slowly developed and as the laws were codified, specific provisions were introduced to provide for appearance / representation by authorized representative holding prescribed qualifications.

5. 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.

6. How to represent?

While representing before the Tribunal like CESTAT, there is a dress code prescribed which is specifically dealt with later. There is no 'right way' of representing a case. There are various skills and methods employed by an authorized representative while representing his client before authorities and Tribunal. By experience, observation and thinking, each person develops his own method of representation.

7. When to represent?

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 firsthand information and the expertise to provide evidentiary statements.

8. Skills and knowledge required

- (a) Knowledge of concerned tax laws is a *sine quo 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 exists 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) Knowing the case law developments relating to the concerned laws helps in keeping abreast of current interpretations by Courts and Tribunal.

9. Ethics and integrity

Practice *sans* integrity and ethics brings disgrace not only to the profession but also harms the society. Maintaining high standards of professional integrity and ethics is a must.

10. Different forms of representation

- (a) 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 show cause notice and additional submissions and entering appearance before the adjudicating authority.
- (b) Representation in appellate proceedings: A CA can render professional assistance by drafting the appeal with statement of facts, grounds and prayer, and appearing before the appellate authority or Tribunal and filing additional submissions, if any.

11. Conclusion

At this juncture, it would also be relevant to refer to the Constitution of India, which is the supreme law of the country. 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 leveled or made, should be given a reasonable opportunity of being heard 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 a notice detailing the allegations and the basis on which certain actions are proposed or compliance demanded.

2. Contents of notice

The notice should not be vague and should clearly spell out 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 his 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. 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 investigating authority

The main intention of the investigating authority (DRI or Preventive Wing or DGCEI) is to unearth certain facts and muster evidence to prove 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 documents. The information collected is thereafter used as a basis to issue show cause notice 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 exercising 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 both 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: Service tax authorities visited the New Delhi branch premises of an assessee and identified themselves as officers of the 'audit wing' of the tax department. They were seeking some information about the business activities, details of taxable value of services, service tax paid, etc., for the past five years. Assessee issued a copy of registration certificate showing 'centralized' registration at Bangalore HO and politely refused to provide any further information. Officers were understandably taken aback and left. Assessee issued a letter to the said officers with copy to Commissioner of ST, Bangalore referring to their visit and that no other information other than RC copy was submitted. The matter concluded there because having a centralized registration precludes every other office to exercise audit jurisdiction over all branch offices.

Illustration 2: DGCEI authorities had visited the registered office of an assessee and had sought information about the business activities, details of taxable value of services, service tax paid, etc., for the past five years. Assessee made note of the details required and asked for some time to supply information that needed to be compiled and submitted (*although new reports or information not maintained need not be provided*) but provided the audited financial statements, half-yearly returns with working calculations and ledger extract of income recognized, input credit and taxes paid. The officers worked out some tax liability and insisted that some tax payment has to be made. The assessee politely expressed inability to make payment at such short notice in a sudden inspection-led-demand. The officers left after making their displeasure known. Assessee visited the office after a few days to submit the information that was to be prepared. At that time, payment of tax (as computed by them) was discussed and the same reply was given. After more than six months, a show cause notice was issued which presently is pending adjudication and experts have advised that the issue raised is not sustainable and there are favourable decisions passed by Tribunal.

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 leveled in the notice and make out a new case against the noticee.

7. Duties/powers of first appellate authority

The first appellate authority (Deputy Commissioner, 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. The procedure set out in the relevant Appellate Procedure Rules, such as, Central Excise (Appeal) Rules, 2001, needs to be followed. Any delay in filing an appeal can be condoned only up to a limited extent if sufficient reason is shown.

8. Duties/powers of Tribunal

The Tribunal functions under the aegis of Ministry of Finance and has Benches at several places. Matters are heard by the Division Bench (two members) or Single Member Bench. The Tribunal has both Judicial Members and Technical Members. The Tribunal functions are described as quasi-judicial functions. The procedures and manner of conduct of proceedings are set out in the relevant Tribunal Procedure Rules, such as, CESTAT (Procedure) Rules, 2001. The Tribunal is the final 'fact finding' authority. Any delay in filing an appeal can be condoned if sufficient cause is shown. The orders passed by the Tribunal are appealable either before the High Court or Supreme Court.

9. Reference to IPC provisions

At this juncture, it would be relevant to refer to certain provisions of the 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 powers conferred on them.

Section	Description of Offence	Punishment
166	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. <i>Illustration 3: Quite often we find excesses committed by Tax Officers, who act according to their whims and fancy. Such excesses, if proved to be not done in good faith, can be punished.</i>
167	Public servant framing an incorrect document with intent to cause injury	Imprisonment of either description for a term up to three years, or with fine, or with both. <i>Illustration 4: During the course of investigation if the tax officer frames an incorrect document with a view to implicating a tax payer, then this provision may be invoked.</i>
169	Public servant unlawfully buying or bidding for property	Simple imprisonment upto two years, or with fine, or both and the property, if purchased, shall be confiscated. <i>Illustration 5: A property is auctioned and there is a condition that the officer should not buy it directly or indirectly. In case of breach, this provision can be invoked.</i>
170	Impersonating a public servant	Imprisonment of either description for a term upto two years, or with fine, or both. <i>Illustration 6: If a person poses himself as a tax officer or impersonates an officer, he would be punished under this section.</i>
171	Wearing garb or carrying token used by public servant with fraudulent intent	Imprisonment of either description, for a term upto three months, or with fine upto Rs.200 or with both. <i>Illustration 7: A person wears a garb of a CE or Customs Officer or carries some token which makes others believe that he is such an officer, would be punishable</i>

Section	Description of Offence	Punishment
172	Absconding to avoid service of summons or other proceeding	Simple imprisonment upto one month, or with fine upto Rs.500 or with both. If it relates to Court of Justice, with simple imprisonment upto six months, or with fine upto Rs.1000, or with both. <i>Illustration 8: An 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.</i>
173	Preventing service of summons or other proceeding, or preventing publication thereof	Simple imprisonment upto one month, or with fine upto Rs.500 or with both. If it relates to Court of Justice, with simple imprisonment upto six months, or with fine upto Rs.1000, or with both. <i>Illustration 9: A person prevents in any manner service of summons or prevents its publication would be punished.</i>
174	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. <i>Illustration 10: A tax officer issues an order or summons to someone to appear before him and if such person does not respond, he can be punished.</i>
175	Omission to produce document to public servant by person legally bound to produce it	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. <i>Illustration 11: An assessee cannot refuse or omit to provide documents to the tax officer. Doing otherwise would invite punishment under this section.</i>
177	Furnishing false information	Simple imprisonment up to six months, or with fine up to Rs.1000, or with both. If it relates to Court of Justice, with simple imprisonment up to two years, or with fine, or with both. <i>Illustration 12: During any proceedings or investigation if a person gives false information to a public servant then this section can be invoked.</i>

Section	Description of Offence	Punishment
178	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.1000, or with both. <i>Illustration 13: This can be invoked while recording statements of witnesses.</i>
179	Refusing to answer public servant authorized to question	Simple imprisonment up to six months, or with fine up to Rs.1000, or with both. <i>Illustration 14: Questions posed during recording of statements should be answered. Refusing to answer is an offence.</i>
180	Refusing to sign statement	Simple imprisonment up to three months, or with fine up to Rs.500, or with both. <i>Illustration 15: After recording statement if a person refuses to sign it, this provision could be invoked.</i>
181	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. <i>Illustration 16: Statement may be recorded during investigation. If a false statement is made then this provision can be invoked.</i>
182	False information, with intent to cause public servant to use his lawful power to the injury of another person	Simple imprisonment up to six months, or with fine up to Rs.1000, or with both. <i>Illustration 17: A competitor may give false information to a tax officer against another businessman, which may be used in tax proceedings. This is an offence.</i>
183	Resistance to the taking of property by lawful authority of a public servant	Imprisonment of either description up to six months, or with fine up to Rs.1000, or with both. <i>Illustration 18: While seizing a property or when recovery proceedings are initiated by a tax officer any resistance by the tax payer/assessee not within the framework of law would attract this provision.</i>

Section	Description of Offence	Punishment
186	Obstructing public servant in discharge of public functions	Imprisonment of either description up to three months, or with fine up to Rs.500, or both. <i>Illustration 19: Tax officers are public servants and while discharging their functions, no person could obstruct them. Otherwise it is would invite punishment under this section.</i>
189	Threat of injury to public servant	Imprisonment of either description up to two years, or with fine, or with both. <i>Illustration 20: Any threat of injury to a tax officer, while discharging his duties would be a punishable offence.</i>
191-193	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 <i>Illustration 21: Giving or fabricating false evidence at any stage of the tax proceedings is an offence.</i>
195A	Threatening any person to give false evidence	Imprisonment of either description for a term up to seven years or fine or both. <i>Illustration 22: Similarly, if any other person (e.g. Employee) is threatened to give false evidence, that also is an offence.</i>
196	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 <i>Illustration 23: Using any evidence in tax proceedings, which the noticee knows to be false is an offence.</i>

Section	Description of Offence	Punishment
197	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 <i>Illustration 24: 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 taken by the Institute.</i>
198	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 <i>Illustration 25: Even the client who uses such false certificate knowingly would be guilty.</i>
204	Destruction of document to prevent its production as evidence	Imprisonment of either description up to two years, or with fine, or with both. <i>Illustration 26: Destroying any incriminating documents like books of accounts, vouchers etc., to prevent its production as evidence in any tax proceedings, is an offence.</i>
228	Intentional insult or interruption to public servant sitting in judicial proceeding	Simple imprisonment up to six months, or with fine up to Rs.1000, or with both. <i>Illustration 27: An authority conducting hearing is intentionally insulted or interrupted by a CA, can be punished under this section.</i>

Illustration 28: Central Excise authorities issued summons to Director of a Company and raised questions about levy of duty on certain transactions and after explaining the provisions put the question to the Director 'Do you accept that duty is payable on the transaction?' – To this, the Director replied 'I do not know the law so well as I am an Engineer. As such, I am in no position to express an opinion about the levy of duty'. It is the right answer because 'I do not know' is factually accurate because a Director of Company is not competent to reach a conclusion about the levy and is only required to ensure that competent people are appointed to attend to such matters in the Company.

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 Alterem 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 Prioribus 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 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 Potest 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 any proceedings. The above is only an illustrative list of a few important maxims. The participants are encouraged 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, relevant 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. Evidence

Evidence in the popular sense means “that by which facts are established to the satisfaction of person enquiring”.

2. Importance under tax litigation

Litigation under indirect tax may be on account of dispute of exigibility to tax of a particular transaction or dispute relating to claim of exemption or claim of credit of duty or tax paid.

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.

Illustration 29: Where a service provider claims that his services qualify as exports, he may 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 and invoice would prove such fact
Place of provision of service is outside India:	Place of provision 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.

Meaning of Fact, Relevant Fact and Facts-in-Issue:

- (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 30:

- (a) *That there are certain objects arranged in a certain order in a certain place, is a fact.*

- (b) *That a man heard or saw something, is a fact.*
- (c) *That a man said certain words, is a fact.*
- (d) *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.*
- (e) *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 31:

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 32:

There is an allegation that the XYZ Pvt. Ltd. engaged in construction activity has not paid service tax on certain constructions undertaken by them. XYZ claims the said transaction relates to construction of a building meant for religious use for a trust and is exempt from service tax:

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	The entity to whom service is provided is a trust registered under 12AA of Income Tax Act
XYZ is paying service tax on its activities	Plan sanctioned by the local authority to construct the particular building	The building is meant for religious purposes
XYZ has not paid service tax certain specified transaction		

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:

Indian Evidence Act, 1872 categorizes evidences into two types, oral evidence and documentary evidences. 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. The documentary evidences 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.

Illustrations 33: (of documents as given in 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 provisions of the Indian Evidence Act, 1897

There are three parts in Evidence Act. All evidence shall pass through above three stages, namely:

- (a) **Part I:** To consider any matter or thing relevant, it must be *en suite* in the frame of PART-I i.e. section 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. Section 101 to 167 deals with burden of proof, estoppels and provisions relating to witness.

4. Relevance of Electronic Records

With advancement of technology, the Evidence Act has been amended to recognize electronic records also as evidences. Electronic records have been defined in Section 2(t) of 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 shall be noted that Section 65A and 65B of the Indian Evidence Act provides 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.

Further, the Evidence Act also provides for manner of verification of digital signature, presumptions as to electronic agreements, electronic gazette, etc.

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 101 of the Evidence Act, 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.

Burden to prove a particular fact is always on the person who alleges. However, once such burden is discharged, the onus then shifts 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 the issues of 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 exemption. However, once the same is proved by the assessee, the onus then shifts to the department to disprove the same.

It shall be noted that, merely because the burden of proof is on the department, it does not mean the assessee need not provide the evidences to support his case. Supplying of sufficient evidence would support the case and the deciding authority, whether at the stage of adjudication or appellate or Tribunal, 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 shall be noted that under 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 evidences supporting his contentions right from the stage of investigation. However, providing of evidences at the stage of adjudication proceeding in relation to show cause notice is very important and in terms of the rules governing appeal procedures, new evidences may be rejected by appellate authority or Tribunal. (Refer Rule 5 of Central Excise (Appeal) Rules, 2001).

Illustration 34: Type and nature of evidence to be produced depends on 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.

Dispute on clandestine removal goods from factory	<ul style="list-style-type: none"> - Quantitative analysis of purchase and sale - Electricity consumption - Bank statements to show receipts from customers and payments to vendors.
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 cenvat credit	Copy of the invoice/bill on the basis of which 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 / provide copy of the extract of cenvat register if paid by utilizing cenvat

8. Expert Advice

Section 45 of 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 hand writing 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 positions based on the expert opinions.

9. Admission to 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 central excise authorities, then such facts need not be proved by the department. (Refer Sec. 58 of Indian Evidence Act)

However, where the admission was under coercion or fraud or through misrepresentation, then in such cases, the admission itself could be disputed and for the same, the assessee must provide evidence to the effect there was a coercion or misrepresentation.

10. Privileged Communication

It shall be noted that in terms of Section 126 of Evidence Act, no barrister, attorney, pleader or vakil, shall at any time be permitted, unless 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, 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 or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Further, Section 127 provides that provisions of Section 126 above shall equally be applicable to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils. Similarly Section 129 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, 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 shall 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 issued by the Institute of Chartered Accountant 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 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 Evidence Act. It is possible that CA could well fit in the ambit of '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 chartered accountant before any adjudicating or the appellate authority or the Tribunal would not be as appearance before any "court", immunity under Sections 126 or 127 would not be available to the communications between the said Chartered Accountant and his client.

Apart from the above, the communications between CA and his client in relation to rendering legal advice could fall under Section 129

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 whether affidavits, in themselves, are an evidence in the court of law. (Source: Order XIX CPC)

12. Application of CPC to Central excise / Service tax issues

Section 14 of Central Excise Act, 1944 which grants powers to the Central Excise officer to summon a person and record his statement, provides that exemption from personal appearance given to certain persons under Civil Procedure Code would equally apply to the appearance under this section.

The provisions relating to non-cognizable offence (Sec.9A of Central Excise Act, 1944), power to arrest, power to Search and seizure, 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 1908 shall also be examined.

Chapter 4

Statutory Provisions

1. Introduction

An appeal is judicial examination of an inferior court by a higher forum. An appeal is an application to reverse, vary or set aside the judgment or decision or award of an inferior court on the ground that it is wrongly decided or that as a matter of justice or law it requires to be corrected. – Halsbury's Laws of England – quoted in Maruti Udyog Ltd vs ITAT (2001) 117 Taxman 122 (Del. HC-DB).

Right to appeal is neither a natural right nor an inherent right. It does not exist unless expressly conferred by statute. –Vijay Prakash D Mehta v. CC (72 STC 324). Hence, it is important to be mindful of the express nature of the right to appeal conferred by the statute.

Excise, Customs and Finance Act have made elaborate provisions for appeals against adjudication orders passed by excise / customs / service tax authorities. There is only one appeal in case of orders of Commissioner, which in case of other orders (i.e., orders of Superintendent, Assistant Commissioner, Deputy Commissionerr etc.), first appeal is with Commissioner (Appeals) and other with Tribunal. In some matters, revision matters application lies with Government against order of Commissioner and Commissioner (Appeals).

In this chapter the relevant provisions relating to appeal and CESTAT procedures that one needs follow havebeen dealt.

2. Provisions of Appeal

Recovery of sums due to Government

Particulars	Service tax	Excise	Customs
Section	87	11	142
Amount	Any amount payable by a person to the credit of the Central Government under any of the provisions of the Act or of the rules made thereunder.		
By whom	Concerned Central Excise Officer or Customs Officer upon required authorisation from Principal Commissioner or Commissioner.		
Mode of recovery	1. May deduct or may require any other Central Excise Officer or any officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the said Central Excise Officer or any officer of customs. 2. May, by notice in writing, require any other person from whom money is due or may become due to such person, or who holds or		

	<p>may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;</p> <p>a. Every person to whom a notice is issued under this section shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary. In a case where the person to whom a notice under this section is sent, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be an assessee in default in respect of the amount specified in the notice</p> <p>3. May distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus amount, if any, to such person.</p> <p>4. May prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business and the said Collector, on receipt of such certificate, shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue.</p>
In case of transfer (or otherwise) of business	Where the person (hereinafter referred to as predecessor) from whom the tax /duty or any other sums of any kind, is recoverable or due, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all goods (like materials, preparations, plants, machineries, vessels, utensils, implements and articles), in the custody or possession of the person so succeeding may also be

	attached and sold by such officer empowered by the Central Board of Excise and Customs, after obtaining the written approval of the Principal Commissioner of Central Excise or Commissioner of Central Excise, for the purposes of recovering such tax /duty or other sums recoverable or due from such predecessor at the time of such transfer or otherwise disposal or change.
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2.1 Recovery of dues not-levied or not-paid or short-levied or short-paid or erroneously refunded

Particulars		Service tax	Excise	Customs
Section		73	11A	28
By whom		Concerned Central Excise Officer or Customs Officer.		
Notice		Serve notice on the person chargeable with the tax / duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount (including penalty, if any) specified in the notice		
Cases not involving fraud, collusion, wilful misstatements or suppression of facts to evade the payment of tax / duty	Period	Thirty months from the relevant date	Two year from the relevant date	Two year from the relevant date
	Procedure	<p>1. The person chargeable with tax / duty may, before service of notice, pay on the basis of-</p> <p>(i) his own ascertainment of such tax / duty; or</p> <p>(ii) the tax / duty ascertained by the Concerned Officer, the amount of tax / duty along with interest payable thereon</p> <p>2. The person who has paid the tax / duty as above, shall inform the Concerned Officer of such payment in writing, who, on receipt of such information, shall not serve any notice in respect of the tax / duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.</p> <p>3. Where the Concerned Officer is of the opinion that the amount paid falls short of the amount actually payable, then, he shall proceed to issue the notice in respect of such amount which falls short of the amount actually payable in the manner specified and the period of one year shall be computed from the date of receipt of information.</p> <p>4. The Concerned Officer shall, after allowing the concerned person an opportunity of being heard, and after considering the representation, if any, made by such person,</p>		

		<p>determine the amount of tax / duty of excise due from such person not being in excess of the amount specified in the notice.</p> <p>5. Where an order determining the tax / duty of excise is passed by the Concerned Officer under this section, the person liable to pay the said tax / duty of excise shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.</p>		
	Time For completion	Within six months from the date of notice, where it is possible to do so.		
Cases involving fraud, collusion, wilful misstatements or suppression of facts to evade the payment of tax / duty	Period	Five years from the relevant date	Five years from the relevant date	Five years from the relevant date
	Procedure	<p>1. Any person chargeable with tax / duty may, before service of show cause notice on him, pay the tax / duty in full or in part, as may be accepted by him along with the interest payable thereon and penalty as applicable, and inform the Concerned Officer of such payment in writing.</p> <p>(i) The Concerned Officer, on receipt of information shall not serve any notice in respect of the amount so paid and all proceedings in respect of the said tax / duty shall be deemed to be concluded where it is found by the Concerned Officer that the amount of tax / duty, interest and penalty has been fully paid</p> <p>(ii) proceed for recovery of such amount, if found to be short-paid, in the manner specified and the period of one year shall be computed from the date of receipt of such information.</p> <p>2. The Concerned Officer shall, after allowing the concerned person an opportunity of being heard, and after considering the representation, if any, made by such person, determine the amount of tax / duty of excise due from such person not being in excess of the amount specified in the notice.</p> <p>3. Where an order determining the tax / duty of excise is passed by the Concerned Officer under this section, the person liable to pay the said tax / duty of excise shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.</p>		

		4. Where during the course of any audit, investigation or verification, it is found that any tax / duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded for the reason of fraud etc., but the details relating to the transactions are available in the specified records, then in such cases, the Concerned Officer shall within a period of five years from the relevant date, serve a notice on the person chargeable with the tax / duty requiring him to show cause why he should not pay the amount specified in the notice along with interest and penalty.
	Time For completion	Within one year from the date of notice, where it is possible to do so.
Further notice(s)		The Concerned Officer may, serve, subsequent to any notice or notices served, as the case may be, a statement, containing the details of tax / duty not levied or paid or short-levied or short-paid or erroneously refunded for the subsequent period, on the person chargeable, 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 the same as are mentioned in the earlier notice or notices.
Relevant date		<ol style="list-style-type: none"> 1. Where no periodical return has been filed - the last date on which such return is required to be filed. 2. Where the return has been filed on due date - the date on which such return has been filed. 3. In any other case - the date on which tax / duty is required to be paid under the Act or the rules made thereunder. 4. In a case where Customs duty is not levied, or interest is not charged - the date on which the proper officer makes an order for the clearance of goods. 5. In a case where tax / duty of excise is provisionally assessed - the date of adjustment of tax / duty after the final assessment thereof. 6. In the case of erroneous refund of tax / duty - the date of such refund.

2.2 Power of Adjudication and Adjudication procedure.

Particulars	Service tax	Excise	Customs
Section	83A / 33A of CEA, 1944.	33 / 33A	122 / 122A
Power	Where under the Act or the rules made thereunder any person is liable to a penalty, such penalty may be adjudged by the Central Excise Officer conferred with such power as the Central Board of Excise and Customs may, by notification in the Official Gazette, specify.	Where anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged- 1. without limit, by Commissioner of Central Excise; 2. up to confiscation of goods not exceeding five hundred rupees in value and imposition of penalty not exceeding two hundred and fifty rupees, by an Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise.	In every case in which anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged, - 1. without limit, by a Principal Commissioner of Customs or Commissioner of Customs or a Joint Commissioner of Customs; 2. where the value of the goods liable to confiscation does not exceed five lakh rupees, by an Assistant Commissioner of Customs or Deputy Commissioner of Customs; 3. where the value of the goods liable to confiscation does not exceed fifty thousand rupees, by a Gazetted Officer of Customs lower in rank than an Assistant Commissioner of Customs.
Procedure	The Adjudicating authority shall, in any proceeding under the provisions of this Act, give an opportunity of being heard to a party in a proceeding, if the party so desires.		

	The Adjudicating authority may, if sufficient cause is shown, at any stage of proceeding, grant time, from time to time, to the parties or any of them and adjourn the hearing for reasons to be recorded in writing. (No such adjournment shall be granted more than three times to a party during the proceeding)
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2.3 Power to issue summons.

Particulars	Service tax	Excise	Customs
Section	14 of CEA, 1944.	14	108
By whom	Central Excise Officer		Gazetted Officer of Customs
Power	Shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making for any of the purposes of this Act. A summons to produce documents or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the persons summoned.		
Duty of the person	All persons so summoned shall be bound to attend, either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required.		

2.4 Provisional attachment to protect the revenue.

Particulars	Service tax	Excise	Customs
Section	73C	11DDA	28BA
By whom	Central Excise Officer		Gazetted Officer of Customs
Prior approval	Commissioner of Central Excise	Principal Commissioner of Central Excise or Commissioner of Central Excise	Principal Commissioner of Customs or Commissioner of Customs
Power	For the purpose of protecting the interest of revenue, if it is necessary so to do, the concerned officer may, with the previous approval as required, by order in writing, attach provisionally any property belonging to the person on whom notice is served in accordance with the rules made in this behalf.		
Time limit	Provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order.		
Extension of time limit	Chief Commissioner of Central Excise may, for	Principal Commissioner or Chief	Principal Commissioner or Chief

	reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years.	Commissioner of Central Excise of Central Excise may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years.	Commissioner of Customs may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years.
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2.5 Power to search the premises, conveyances, vehicles etc.

Particulars	Service tax	Excise	Customs
Section	82	12F	100/101/103/105/106
By whom	Joint Commissioner of Central Excise or Additional Commissioner of Central Excise or such other Central Excise Officer as may be notified by the Board		Authorised officer of Customs
Power	If the concerned officer has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under the CEA, 1944, are secreted in any place, he may authorize in writing any Central Excise Officer to search and seize or may himself search and seize such documents or books or things.		<p>1. If the proper officer has reason to believe that any person has secreted about his person, any goods liable to confiscation or any documents relating thereto, he may search that person. This applies to the following persons, namely: (a) any person who has landed from or is about to board, or is on board any vessel within the Indian customs waters;(b) any person who has landed from or is about to board, or is on board a foreign-going aircraft;(c) any person who has got out of, or is about to get into, or is in, a vehicle, which has arrived from, or is to proceed to any place outside India;(d) any person not included in clauses (a), (b) or (c) who has entered or is about to leave India;(e) any person in a customs area.</p> <p>2. If an officer of customs empowered in this behalf by general or special order of the Principal Commissioner of Customs or Commissioner of</p>

		<p>Customs, has reason to believe that any person has secreted about his person any goods (like gold, diamonds, manufactures of gold or diamonds, watches) which are liable to confiscation, or documents relating thereto, he may search that person.</p> <p>3. Where the proper officer has reason to believe that any person has any goods liable to confiscation secreted inside his body, he may detain such person and produce him without unnecessary delay before the nearest magistrate. Where any such magistrate has reasonable ground for believing that such person has any such goods secreted inside his body and the magistrate is satisfied that for the purpose of discovering such goods it is necessary to have the body of such person screened or X-rayed, he may make an order to that effect. Where on receipt of a report from a radiologist, the magistrate is satisfied that any person has any goods liable to confiscation secreted inside his body, he may direct that suitable action for bringing out such goods be taken on the advice and under the supervision of a registered medical practitioner and such person shall be bound to comply with such direction (that in the case of a female no such action shall be taken except on the advice and under the supervision of a female registered medical practitioner).</p> <p>4. If the Assistant Commissioner of Customs or Deputy Commissioner of Customs, or in any area adjoining the land frontier or the coast of India an officer of customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation, or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act, are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things.</p>
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2.6 Power to arrest

Particulars	Service tax	Excise	Customs
Section	91	13	104
By whom	Principal Commissioner of Central Excise or Commissioner of Central Excise	Central Excise Officer	Officer of Customs empowered in this behalf by general or special order of

			the Principal Commissioner of Customs or Commissioner of Customs
Power	<p>If the officer has reason to believe that any person has committed an offence, he may, by general or special order, authorise any officer of Central Excise, not below the rank of Superintendent of Central Excise, to arrest such person.</p> <p>Where a person is arrested for any cognizable offence, every officer authorised to arrest a person shall, inform such person of the grounds of arrest and produce him before a magistrate within twenty-four hours.</p> <p>In the case of a non-cognizable and bailable offence, the Assistant Commissioner, or the Deputy Commissioner, as the case may be, shall, for the purpose of releasing an arrested person on bail or otherwise, have the same powers and be subject to the same provisions as an officer in charge of a police station has, and is</p>	<p>The concerned officer may arrest any person whom he has reason to believe to be liable to punishment under the Act or the rules made thereunder. Any person accused or reasonably suspected of committing an offence under the Act or any rules made thereunder, who on demand of any officer duly empowered by the Central Government in this behalf, refuses to give his name and residence, or who gives a name or residence which such officer has reason to believe to be false, may be arrested by such officer in order that his name and residence may be ascertained.</p>	<p>If the officer has reason to believe that any person in India or within the Indian customs waters has committed an offence, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.</p> <p>Every person arrested shall, without unnecessary delay, be taken to a magistrate.</p> <p>Where an officer of customs has arrested any person, he shall, for the purpose of releasing such person on bail or otherwise, have the same powers and be subject to the same provisions as the officer-in-charge of a police-station has and is subject to under the Code of Criminal Procedure, 1898.</p> <p>(The following offences shall be cognizable (a) prohibited goods; or (b) evasion or attempted evasion of duty exceeding fifty lakh rupees - all other</p>

	subject to, under section 436 of the Code of Criminal Procedure, 1973.		offences under the Act shall be Non-cognizable) (The following offences shall be non-bailable (a) evasion or attempted evasion of duty exceeding fifty lakh rupees; (b) prohibited goods notified under section 11;(c) import or export of any goods which have not been declared in accordance with the provisions of the Act and the market price of which exceeds one crore rupees; (d) fraudulently availing of or attempt to avail of drawback; or any exemption from duty provided under this Act, if the amount of drawback or exemption from duty exceeds fifty lakh rupees)
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2.7 Appeals to the Commissioner of Central Excise (Appeals)

Particulars	Service tax	Excise	Customs
Section	85	35 / 35A	128
Appeal against	any decision or order passed by an adjudicating authority subordinate to the Principal Commissioner of Central Excise or Commissioner of Central Excise may appeal to the Commissioner of Central Excise (Appeals).		
Form	ST-4	E.A - 1	CA-1
Period	within two months from the date of receipt of the decision or order	within 60 days from the date of receipt of the decision or order	
Delay	One month	30 days	

Who can prefer an appeal	Any person aggrieved by any decision or order- Neither the Central Government or industry operating in the same field as the importer can as a matter of right prefer an appeal as 'person aggrieved' (NORTHERN PLASTICS LTD- 1997 (91) E.L.T. 502 (S.C.))
Procedure	<ol style="list-style-type: none"> 1. The Commissioner (Appeals) may, if sufficient cause is shown at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing; 2. No such adjournment shall be granted more than three times to a party during hearing of the appeal 3. The Commissioner (Appeals) shall, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against; 4. The order of the Commissioner] (Appeals) disposing of the appeal shall be in writing and shall state the points for determination, the decision thereon and the reasons for the decision. 5. The provision provides that wherever it is possible, the proceedings must be concluded within a period of six months from the date on which it is filed. It implies that there is no time limit to pass an order. 6. The order shall be communicated to: <ol style="list-style-type: none"> (a) The appellant, (b) the adjudicating authority, (c) the Principal Chief Commissioner of Central Excise or Chief Commissioner of Central Excise and (d) The Principal Commissioner of Central Excise or Commissioner of Central Excise. 7. The grounds of appeal and the form of verification as contained in respective Form shall be signed, in case of- <ol style="list-style-type: none"> (a) An individual <ul style="list-style-type: none"> — By himself or — where the individual is absent from India, by the individual concerned or by any person duly authorised by him in this behalf; and — where the individual is a minor or is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf; (b) Hindu undivided family – <ul style="list-style-type: none"> — by the Karta and, — where the Karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family;

	<p>(c) Company or local authority - by the principal officer;</p> <p>(d) Firm - by any partner thereof, not being a minor;</p> <p>(e) Any other association, by any member of the association or the principal officer thereof; and</p> <p>(f) Any other person, by that person or any person competent to act on his behalf.</p> <p>8. The form of appeal shall be filed in duplicate and shall be accompanied by a copy of the decision or order appealed against.</p>
Production of Additional Grounds	<ul style="list-style-type: none"> • The appellant shall not be entitled to produce any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority; • Except in the following circumstances, :- <ul style="list-style-type: none"> (a) where the adjudicating authority has refused to admit evidence which ought to have been admitted; or (b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by adjudicating authority; or (c) where the appellant was prevented by sufficient cause from producing, before the adjudicating authority any evidence which is relevant to any ground of appeal; or (d) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal. • No evidence shall be admitted unless the Commissioner (Appeals) records in writing the reasons for its admission. • The Commissioner (Appeals) shall not take any evidence produced unless the adjudicating authority or an officer authorised in this behalf by the said authority has been allowed a reasonable opportunity, - <ul style="list-style-type: none"> (a) to examine the evidence or document or to cross-examine any witness produced by the appellant; or (b) to produce any evidence or any witness in rebuttal of the evidence produced by the appellant under sub-Rule (1). • The Commissioner (Appeals) can direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal. • Further, the Commissioner (Appeals) can suo-moto direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal.

3. Appeals to Appellate Tribunal

Particulars	Service tax	Excise	Customs
Section	86	35B	129A
Order against	<p>1. An assessee aggrieved by an order passed by:</p> <ul style="list-style-type: none"> (a) Principal Commissioner of Central Excise; or (b) Commissioner of Central Excise as an adjudicating authority; or (c) an order passed by a Commissioner of Central Excise (Appeals) <p>may appeal to the Appellate Tribunal</p> <p>2. Under Excise law - No appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,-</p> <ul style="list-style-type: none"> (a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse, or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse; (b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India; (c) goods exported outside India (except to Nepal or Bhutan) without payment of duty; (d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No. 2) Act, 1998; <p>3. However, the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) where-</p> <ul style="list-style-type: none"> (a) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or (b) the amount of fine or penalty determined by such order, does 		

	<p>not exceed two lakh rupees.</p> <p>4. Under Customs law - No appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to, -</p> <p>(a) any goods imported or exported as baggage;</p> <p>(b) any goods loaded in a conveyance for importation into India, but which are not unloaded at their place of destination in India, or so much of the quantity of such goods as has not been unloaded at any such destination if goods unloaded at such destination are short of the quantity required to be unloaded at that destination;</p> <p>(c) payment of drawback as provided in Chapter X, and the rules made thereunder :</p> <p>5. However, the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) where -</p> <p>(a) the value of the goods confiscated without option having been given to the owner of the goods to pay a fine in lieu of confiscation under section 125; or</p> <p>(b) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or</p> <p>(c) the amount of fine or penalty determined by such order, does not exceed two lakh rupees.</p>
Period	<p>Within three months of the date of receipt of the order. The Appellate Tribunal may admit an appeal after the expiry of the relevant period, if it is satisfied that there was sufficient cause for not presenting it within that period.</p>
Departmental Appeal	<p>1. The Board may, by order, constitute such Committees as may be necessary for the purposes of this Chapter.</p> <p>2. The Committee of Principal Chief Commissioners of Central Excise or] Chief Commissioners of Central Excise may, if it objects to any order passed by:</p> <p>(a) the Principal Commissioner of Central Excise; or</p> <p>(b) Commissioner of Central Excise; or</p> <p>(c) Commissioner of Central Excise (Appeals)</p>

	<p>direct the Principal Commissioner of Central Excise or Commissioner of Central Excise to appeal to the Appellate Tribunal against the order.</p> <p>3. Every appeal shall be filed within four months from the date on which the order sought to be appealed against is received by the Committee.</p> <p>4. The other party may, notwithstanding that he may not have appealed against such order or any part thereof, within forty-five days of the receipt of the notice, file a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the Principal Commissioner of Central Excise or Commissioner of Central Excise or the Commissioner of Central Excise (Appeals), and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).</p> <p>5. An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of service tax and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of,-</p> <p>(a) where the amount of tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;</p> <p>(b) where the amount of tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;</p> <p>(c) where the amount of tax and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees :</p> <p>6. No fee shall be payable in the case of an appeal preferred by the department or a memorandum of cross-objections filed by the other party.</p> <p>7. Every application made before the Appellate Tribunal,-</p> <p>(a) in an appeal for rectification of mistake or for any other purpose; or</p> <p>(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees:</p>
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4. CESTAT (Procedure) Rules, 1982.

CESTAT (Procedure) Rules, 1982 came into effective 25th October 1982 by virtue of CEGAT Notification No. 1/CEGAT/82, dated 25-10-1982. It may be noted that CEGAT is not a tribunal constituted under Article 323B of the Constitution. Therefore, writ jurisdiction of the High Courts is not ousted.

Particulars	Provision / Commentary
Sittings of Bench (Rule 3)	Rule 3 confers the power on the president of the Tribunal to order sitting of the Bench either at the Headquarters or any other place coming within the jurisdiction of the Tribunal.
<i>Powers of Bench (Rule 4)</i>	<ul style="list-style-type: none"> • A Bench shall hear and determine such appeals and applications made under the Acts as the President may by general or special order direct. • Where two or more Benches are functioning at any place, the President, or in his absence the senior amongst the Vice-Presidents present, or in their absence the senior-most Member present, may transfer an appeal or application from one Bench to another.
<i>Procedure for filing appeals. (Rule 6)</i>	<p>(1) A memorandum of appeal shall be presented by:</p> <ol style="list-style-type: none"> (a) the appellant in person or (b) by an agent to the concerned officer, or (c) sent by registered post addressed to the concerned officer. <p>(2) In case of urgency or for other sufficient reason, present or send the appeal to the concerned officer of the Bench nearest to him, even though the matter relates to a different Bench; and in such a case the officer receiving the appeal shall, as soon as may be, forward it to the concerned officer of the appropriate Bench.</p> <p>(3) A memorandum of appeal sent by post shall be deemed to have been presented to the concerned officer on the date on which it is received in the office of the concerned officer.</p>
The number of appeals to be filed: (Rule 6A)	<p>(1) Irrespective of the number of show cause notices, price lists, classification lists, bills of entry, shipping bills, refund claims / demands, letters or declarations dealt with in the decision or order appealed against, it shall suffice for purposes of these rules that the appellant files one Memorandum of Appeal against the order or decision of the authority below, along with such number of copies thereof as provided in rule 9.</p> <p>(2) In a case where the impugned order-in appeal has been passed with reference to more than one order-in-original, the Memoranda of Appeal filed as per Rule 6 shall be as many as the number of the orders-in-original to which the case related in so far as the appellant is concerned.</p>

	<p>(3) In case an impugned order is in respect of more than one person, each aggrieved person will be required to file a separate appeal (and common appeals or joint appeals shall not be entertained).</p> <p>Number of orders and Number of appeals</p> <table border="1" data-bbox="548 499 1323 768"> <thead> <tr> <th>No of SCN(s)</th> <th>NO. of OIO</th> <th>Number of OIA</th> <th>Number of CESTAT appeals</th> </tr> </thead> <tbody> <tr> <td>One</td> <td>One</td> <td>One</td> <td>One</td> </tr> <tr> <td>Two</td> <td>One</td> <td>One</td> <td>One</td> </tr> <tr> <td>Two</td> <td>Two</td> <td>One</td> <td>Two</td> </tr> <tr> <td>Two</td> <td>Two</td> <td>Two</td> <td>Two</td> </tr> </tbody> </table> <p>Where in the same impugned order, the authority passes order on more than one person (Company, Director / customer/ job worker), each person has to prefer separate appeal</p>	No of SCN(s)	NO. of OIO	Number of OIA	Number of CESTAT appeals	One	One	One	One	Two	One	One	One	Two	Two	One	Two	Two	Two	Two	Two
No of SCN(s)	NO. of OIO	Number of OIA	Number of CESTAT appeals																		
One	One	One	One																		
Two	One	One	One																		
Two	Two	One	Two																		
Two	Two	Two	Two																		
<p>Date of presentation of appeals – Rule 7</p>	<p>The Registrar or, as the case maybe, the officer authorised by him, shall endorse on every memorandum of appeal the date on which it is presented or deemed to have been presented under that rule and shall sign the endorsement.</p> <p>Delay in filing of appeal.- There shall be no delay in filing of appeal if the due date was Saturday and appeal was filed on the next working day i.e. Monday.</p>																				
<p>Contents of a memorandum of appeal - RULE 8</p>	<p>(1) Every Memorandum of Appeal shall set forth concisely and under distinct heads, the grounds of appeals and such grounds shall be numbered consecutively and shall be typed in double space of the paper.</p> <p>(2) Every memorandum of appeal, cross-objection, reference applications, stay application or any other miscellaneous application shall be typed neatly in double spacing on the foolscap paper and the same shall be duly paged, indexed and tagged firmly with each paper book put in a separate folder.</p> <p>(3) Every memorandum of appeal / application / Cross-objection shall be signed and verified.</p> <p>(4) The appellant /applicant /respondent or the Consultant or Advocate shall certify as true, the documents produced before the Tribunal.</p>																				
<p>What to accompany memorandum of appeal? – Rule 9</p>	<p>(1) Every Memorandum of appeal shall be filed in quadruplicate and shall be accompanied by four copies, one of which shall be a certified copy of the order appealed against in the case of an appeal against the original order passed by the additional Commissioner or Commissioner of Excise or Customs and where such an order has been passed its appeal or revision, four copies (one of which shall be a certified copy) of the order</p>																				

	<p>passed in appeal or in revision and four copies of the order of the original authority.</p> <p>Explanation: "Copy for the purpose of this Rule shall mean a true copy certified by the appellant or appellant's representative to be a true copy.</p> <p>(2) In the case of an appeal which can be heard by a single Member, Memorandum of appeal shall be filed in triplicate and number of copies of the order shall be three instead of four.</p> <p>(3) Where an appeal which can be heard by a single Member is referred to or placed before a two-Member Bench or an appeal which can be heard by a two-Member Bench is referred to a Larger Bench, the appellant shall immediately furnish an additional copy of the memorandum of appeal and of the order or orders of the lower authorities.</p>
Rejection or amendment of memorandum of appeal: - Rule 11	<p>1. The Tribunal may, in its discretion, on sufficient cause being shown, accept a memorandum of appeal which is not accompanied by the documents referred to in Rule 9 or is in any other way defective, and in such cases may require the appellant to file such documents or, as the case may be, make the necessary amendments within such time as it may allow.</p> <p>2. The Tribunal may reject the memorandum of appeal, if the documents sought by the Tribunal are not produced, or the amendments are not made, within the time-limit allowed.</p>
Document authorising representative to be attached to the memorandum of appeal – Rule 13	<p>1. Where the parties to an appeal or application are being represented in such appeal or application by authorised representatives, the documents authorising such representatives to appear on their behalf shall be appended to the memorandum of appeal, application or memorandum of cross-objection if they are signed by the authorised representatives.</p> <p>2. The said documents shall indicate clearly the status of the authorised representatives as to whether they are relatives or regular employees of the parties and the details of the relationship of employment;</p> <p>3. In cases where they are not relatives or regular employees, their qualifications to act as authorised representatives under the Acts or, in the case of a person referred to in rule 2(c)(ii), particulars of the notification by which they have been appointed:</p> <p>4. Where the authorised representative is a legal practitioner, such document of authorisation shall be a duly executed vakalatnama.</p>
Filling of authorisation at a later stage: -	<p>1. Subject to satisfaction of the Bench, in cases, where an authorised representative known to the Court has been engaged but is unable to file immediately the document authorising him to appear and plead along with</p>

Rule 14	<p>the appeal or application for any reason, he may file memo of appearance along with an undertaking to file duly executed vakalatnama or document of authorisation during such time as the Bench may in its discretion allow.</p> <p>2. In case the direction of the Bench (including extended time, if any) is not followed, the Bench may in its discretion withhold the issue of the order or stay its operation till the compliance is duly made and/or refrain from extending the facility in future.</p> <p>3. Any misrepresentation for the purpose of this Rule will be considered as a misconduct and may invite the same action in the same way as indicated in Section 35Q(5) of the Central Excise Act, 1944.</p>
Reply to appeal – Rule 15A	<p>After a copy of the appeal has been served, the respondents may file a reply within one month and on receipt thereof, the appellant may file a rejoinder within one month or within such time as may be specified / extended.</p>
Preparation of paper book: - Rule 16	<p>1. The appellant shall, along with the appeal or within one month of filing of the appeal, submit in such number of copies as of the memorandum of appeal, a paper book containing copies of the documents, statements of witnesses and other papers on the file of, or referred to in the orders of, the departmental authorities, which he proposes to rely upon at the hearing of the appeal.</p> <p>2. The respondent may also file a paper book containing such documents as are referred to in sub-rule (1), which he proposes to rely upon at the time of hearing of the appeal, in such number of copies as of the memorandum of appeal, within one month of the service of the notice of the filing of the appeal on him, or within two weeks of the service of the paper book, whichever is later.</p> <p>3. The Tribunal may, in its discretion, allow the filing of any paper book referred to in sub-rule (1) or sub-rule (2) after the expiry of the period referred to therein.</p> <p>4. The Tribunal may on its own motion direct the preparation of as many copies as may be required of a paper book by and at the cost of the appellant or the respondent, containing copies of such statements, papers or documents as it may consider necessary for the proper disposal of the appeal.</p> <p>5. All paper books shall contain clearly legible documents duly paged, indexed and be tagged firmly.</p>
Date and place of hearing to be notified: - Rule 18	<p>The Tribunal shall notify to the parties the date and place of hearing of the appeal or application.</p> <p>The issue of the notice referred to in sub-rule (1) shall not by itself be deemed to mean that the appeal or application has been admitted.</p>

<p>Action on appeal for appellant's default: - Rule 20</p>	<p>The appellant does not appear when the appeal is called on for hearing, the Tribunal may, in its discretion, either dismiss the appeal for default or hear and decide it on merits:</p> <p>In case an appeal has been dismissed for default and the appellant appears afterwards and satisfies the Tribunal that there was sufficient cause for his non-appearance when the appeal was called on for hearing, the Tribunal shall make an order setting aside the dismissal and restore the appeal.</p> <p>Though the rule provides for dismissal for non- appearance, the appeal shall have to be decided on merits – refer Balaji Steel Rolling Mills v Commissioner of C.Ex. & Customs, 2014 (310) E.L.T. 209 (S.C.)</p>
<p>Hearing of appeals ex parte: - RULE 21</p>	<p>In case the appellant appears and the respondent does not appear when the appeal is called on for hearing, the Tribunal may hear and decide the appeal ex parte.</p>
<p>Continuance of proceedings after death or adjudication as an insolvent of a party to the appeal or application – Rule 22</p>	<p>Where in any proceedings the appellant or applicant or a respondent dies or is adjudicated as an insolvent or in the case of a company, is being wound up, the appeal or application shall abate, unless an application is made for continuance of such proceedings by or against the successor-in-interest, the executor, administrator, receiver, liquidator or other legal representative of the appellant or applicant or respondent, as the case may be:</p> <p>Every such application shall be made within a period of sixty days of the occurrence of the event. The Tribunal may condone the delay if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period so specified, allow it to be presented within such further period as it may deem fit.</p>
<p>Order to be signed and to dated – Rule 26</p>	<p>Every order of the Tribunal shall be in writing and shall be signed and dated by the Members constituting the Bench concerned.</p> <p>Last date of hearing of the matter shall be typed on the first page of the order.</p> <p>If the order is dictated on the Bench, the date of dictation will be the date of the final order. If the order is reserved, the date of final order will be the date on which the order is pronounced.</p> <p>In cases, where gist of the decision is pronounced without the detailed order, the last para of the detailed order shall specify the date on which the gist of the decision was pronounced. In such cases, the date of the final order shall be the date on which all the Members of the Bench sign the order. If they sign on different dates, the last of the dates will be the date of the order.</p>

<p>Procedure for filing and disposal of stay petitions: - Rule 28A</p>	<ol style="list-style-type: none"> 1. Every application preferred under the provisions of the Acts for stay of the requirement of making deposit of any duty demanded or penalty levied shall be presented in triplicate <ol style="list-style-type: none"> (a) by the appellant in person; or (b) by his duly authorised agent; or (c) sent by registered post to the Registrar or any other office authorised to receive memoranda of appeals, as the case may be, at the Headquarters of the Bench having jurisdiction to hear the appeal in respect of which the application for stay arises. 2. One copy each of such application shall be served on the authorised representative of the Commissioner or, as the case may be, the Administrator simultaneously by the applicant. 3. Every application for stay shall be neatly typed on one side of the paper and shall be in English and the provisions of rule 5 shall apply to such applications. 4. An application for stay shall set forth concisely the following: <ul style="list-style-type: none"> — the facts regarding the demand of duty or penalty, the deposit whereof is sought to be stayed; — the exact amount of duty or penalty and the amount undisputed therefrom and the amount outstanding; — the date of filing of the appeal before the Tribunal and its number, if known; — whether the application for stay was made before any authority under the relevant Act or any civil court and, if so, the result thereof (copies of the correspondence, if any, with such authorities to be attached); — reasons in brief for seeking stay; — whether the applicant is prepared to offer security and, if so, in what form; and — prayers to be mentioned clearly and concisely (state the exact amount sought to be stayed). 5. The contents of the appeal / application / cross-objection shall be supported by a verification regarding their correctness by the appellant or respondent or the principal officer authorised to sign appeal / cross-objection. 6. The Bench may, however, in a particular case direct filing of an affidavit by the appellant / respondent or any other person, if so considered necessary or desirable in the circumstances of a given case.
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	<p>7. Every application for stay shall be accompanied by three copies of the relevant orders of the authorities of the department concerned, including the appellate orders, if any, against which the appeal is filed to the Tribunal by the appellant and other documents, if any:</p> <p>8. Any application which does not conform to the above requirements is liable to be summarily rejected.</p> <p>9. Subject to any general or special orders of the President in this behalf, an application for stay shall be decided by the Bench having jurisdiction to hear the appeal to which the application relates.</p>
Change of authorised representative – Rule 28B	<p>In case an appellant / respondent changes the person authorised to represent him after the filing of the appeal or application then:</p> <ul style="list-style-type: none"> — the fact of such a change may be indicated by way of a memorandum addressed to the tribunal or an endorsement or Vakalatanama or document of authorization; — Upon such communication or endorsement the bench may not insist on filing of a no-objection certificate from the previous authorised representative except where in the opinion of the bench it was called for in a given case.
Procedure for filing of and disposal of Miscellaneous Application – Rule 28C	<p>The provisions of the rules regarding the filing of stay applications shall, in so far as may be, apply to the filing of applications under this rule (mutatis mutandis).</p>
Same Bench to hear applications for rectification of mistakes: - Rule 31A	<p>An application for rectification of a mistake apparent from the record, shall be heard by a Bench consisting of the Members who heard the appeal giving rise to the application, unless the President directs otherwise.</p>
Orders and directions in certain cases - Rule 41	<p>The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice</p>
Working hours of offices of the Tribunal: - Rule 42	<p>Except on Saturdays, Sundays and other public holidays, the offices of the Tribunal shall, subject to any order made by the President, be open daily from 9.30 A.M. to 6.00 P.M.; but no work, unless of urgent nature, shall be admitted after 5.30 P.M.</p>

Sittings of the Tribunal: - Rule 43	(1) The Tribunal shall not ordinarily hold sittings on Saturdays, nor on any Sundays and other public holidays. (2) The sitting hours of the Tribunal shall ordinarily be as under: In New Delhi, Mumbai, Bangalore, Chennai and other location From 10.30A.M. to 1.30 P.M. and from 2.15 P.M. to 4.45 P.M. In Kolkata From 10.30A.M. to 1.15 P.M. and from 2.00 P.M. to 4.30 P.M.
Dress for the parties - Rule 48	Every authorised representative other than a relative or regular employee of a party shall appear before the Tribunal in his professional dress, if any, and, if there is no such dress,- — Male - in a close-collared black coat, or in an open-collared black coat, with white shirt and black tie; or — Female - in a black coat over a white sari or any other white dress: Note: During the summer season from 15th April to 31st August, the authorised representatives may, when appearing before a Bench of the Tribunal, dispense with the wearing of a black coat.

5. Authority for Advance Rulings

The relevant statutory provisions Authority for Advance Ruling (Central Excise, Customs and Service Tax) Procedure Regulations, 2005 are as below:

Particulars	Provision / Commentary
Advance Ruling - Regulation 2	"advance ruling" means an advance ruling as defined in: <ul style="list-style-type: none"> • Section 28E(b) of the Customs Act, 1962 (52 of 1962); - <i>"advance ruling" means the determination, by the authority of a question of law or fact specified in the application regarding the liability to pay duty in relation to an activity proposed to be undertaken, by the applicant;</i> • Section 23A(b) of the Central Excise Act, 1944 (1 of 1944); - same as defined under customs law. • Section 96A(a) in Chapter VA of the Finance Act, 1994 (32 of 1994) (Chapters V and VA of the said Act referred to herein as the Service Tax Provisions). - <i>"advance ruling" means the determination, by the Authority, of a question of law or fact specified in the application regarding the liability to pay service tax in relation to a service proposed to be provided, by the applicant</i>
Definition of Applicant	"applicant" means,— <ul style="list-style-type: none"> (i) (a) a non-resident setting up a joint venture in India in collaboration with a non-resident or a resident; or (b) a resident setting up a joint venture in India in collaboration with a non-resident; or

	<p>(c) a wholly owned subsidiary Indian company, of which the holding company is a foreign company, who or which, as the case may be, proposes to undertake any business activity in India;</p> <p>(ii) a joint venture in India; or</p> <p>(iii) a resident falling within any such class or category of persons, as the Central Government may, by notification in the Official Gazette, specify in this behalf, and which, or who, as the case may be, makes application for advance ruling.</p>
Powers of Authority - Regulation 4	<p>Regulation 4 gives the Authority powers deemed necessary for determination of issues and passing of rulings. The Authority has the powers vested upon civil courts for the following:</p> <ul style="list-style-type: none"> • Discovery and inspection of records • Enforcing attendance of any person and examining that person on oath • Issuing commissions • It is also within the powers of the Authority to direct the following: • Examination of any records and submission of report • Conduct of any technical, scientific or market enquiry of any goods or services and submission of report and may also call for reports from experts and order such further investigations as may be necessary for effectual disposal of the application. <p>Cause 2 of this regulation provides power to issue orders necessary for removal of difficulties. It may be noted that such orders may be issued by the authority suomotu or on the basis of a petition made by an applicant or the Principal Commissioner or Commissioner. A period of three months has been prescribed for issuing the order.</p>
Mode of service of notices, etc.- Regulation 7.	<p>The service of notice or document shall be made by hand delivery or by registered post with acknowledgement due or by speed post or by courier service or by any other means of transmission of documents including e-mail/fax.</p> <p>Notices or documents required to be served on the parties to the application/petition shall be deemed to have been served, if delivered at the address indicated in the application/petition and in the case of a Commissioner at the Office of the Commissioner.</p>
Procedure for filing applications.-	<p>Procedure for filing application.- The procedural requirements pertaining to filing of applications are summarised below:</p> <ul style="list-style-type: none"> • The application must be in the prescribed form that is to say, Form

<p>Regulation 8.</p>	<p>- AAR (CUS) of the Customs (Advance Rulings) Rules, 2002 or Form - AAR (CE) of the Central Excise (Advance Rulings) Rules, 2002 or Form - AAR (ST) of the Service Tax (Advance Rulings) Rules, 2003, as the case may be.</p> <ul style="list-style-type: none"> • The Form and all accompanying documents must be legibly printed on A-4 paper leaving a margin of 5 cm. with double-line spacing. • The application form must be filed in quadruplicate. • The application must be filed in person (by the applicants themselves or their authorized signatory) before the Secretary. The application may also be filed by sending it to the Secretary by registered/speed post or courier. The application would be deemed to have been made on the date on which it is received in the office of the authority. • A fee of INR 2,500 is to be paid along with the application by demand draft. The demand draft must be in favour of 'Authority for Advance Rulings (Central Excise, Customs and Service Tax)' payable at New Delhi. • Applications are to be filed between 10 am to 1 pm or 2 pm to 5 pm on any working day • Every page of the application along with all annexures and supporting documents must be signed by the authorized signatory. The application is required to be filed along with evidence that the person signing the application is competent to do so. For instance, in the case of a company, a board resolution authorizing a person to sign on behalf of the company must be submitted along with the application • In case the applicant is located outside India, the application should be accompanied with the postal address abroad and the email address along with the postal address of the authorized representative of the applicant in India (who is authorized to act on behalf of the applicant and receive notices and other documents).
<p>Regulation 9. Procedure on receipt of an application</p>	<p>Regulation 9 provides for the procedure to be followed after receipt of the application. The procedure is summarized below,</p> <ul style="list-style-type: none"> • The officer receiving the application puts his initials and stamp on the application along with the date and time of receipt. The receipt is to be entered in the register maintained for this purpose. • The application is scrutinized by an officer authorized by the Secretary for this purpose. Any deficiency/defect found (such as evidence of authorized signatory not submitted or form of application not as prescribed) is communicated to the applicant (preferably within 10 working days of receipt of the application).

	<ul style="list-style-type: none"> • The application can be rectified within the time granted by the Secretary for this purpose. The application shall be deemed to have been received on the date on which it is resubmitted after removal of the deficiency or defect. If the application is not rectified by the applicant within the time granted, it is put forth before authority by the Secretary for appropriate orders. • The application free from any defect or deficiency is marked as 'examined and registered' and a serial number is allotted to the application. • The application is forwarded to the concerned revenue authorities for furnishing of relevant records and comments, if required. A time of two weeks is granted to the revenue authorities. This time limit may be extended by the Authority. • On receipt of the records and/or comments from the revenue authorities or on expiry of the time granted to the revenue authorities, the application is put up before the Authority for a ruling. • If there is a prima facie case for rejection of the application, the Authority sends a notice to the applicant recording the reasons for rejection along with comments of the revenue authorities. This notice gives the applicant an opportunity of being heard. A copy of this notice is sent to the revenue authorities as well. • An order is passed by the Authority on the date of the hearing (or any other date to which the matter is adjourned). A copy of the order is sent to both the applicant and the revenue authorities. The applicant's attention should be drawn to the statutory provisions that he/she has the right to be heard before pronouncement of the ruling. The response of the applicant must reach the Authority within 2 weeks of the receipt of copy of the order. • The hearing of the application shall normally take place between 11 am and 5 pm on any working day. • If the applicant does not request for a personal hearing, the ruling is pronounced after hearing the revenue authorities and on the basis of evidence available on record with the Authority. • If the Authority reserves an application for consideration, the ruling is pronounced in open court with intimation to the applicant and the revenue authorities. A copy of the ruling is served to both parties.
Additional facts by way of a petition - Regulation 11	<p>The Authority may, at its discretion, either suo motu or on a petition, permit or require the applicant to submit such additional facts as may be necessary to enable it to pronounce its advance ruling.</p> <p>The additional facts sought to be brought on record, by the petitioner shall be supported by necessary documents, if any, duly verified.</p>

<p>Questions not specified in the application - Regulation 12</p>	<p>The applicant shall not, except with the leave of the Authority, urge or be heard in respect of any question other than the question specified in the application but in pronouncing an advance ruling on the question set forth in the application, the Authority may at its discretion consider such other aspects as may be necessary to pronounce the advance ruling on the question specified in the application.</p> <p>On a petition made by an applicant, the Authority may permit amendment of a question, in appropriate cases.</p>
<p>Authorization to be filed - Regulation 13</p>	<p>An authorized representative appearing for the applicant shall before the commencement of the hearing, file before the Secretary, a document authorizing him to appear for the applicant.</p> <p>Every authorized representative shall notify to the Secretary the address of his office, before the commencement of the hearing.</p> <p>Any change of an authorized representative shall be intimated by the concerned party to the Secretary as well as to the other party to the application.</p>
<p>Continuation of proceedings after the death, etc., of the applicant. - Regulation 14.</p>	<p>Even on the death or dissolution of the applicant, the application shall be continued by the legal representatives, executors, administrators, liquidators, assignees, etc. of the applicant. However, this continuation is only on approval by the Authority of a petition made in this regard.</p>
<p>Hearing of application - Regulation 15</p>	<ul style="list-style-type: none"> • On the day fixed for hearing or any other day to which the case is adjourned, the Authority shall hear the applicant or his authorized representative in cases where it is proposed to reject the application or where the applicant seeks an opportunity of being heard; • the Authority may also hear the Commissioner or his authorized representative, if it considers it necessary, before pronouncing its advance ruling. • The Authority may, on such conditions as the circumstances of the case require, adjourn the hearing of the application.
<p>Hearing of application ex parte - Regulation 16</p>	<p>In case an order is passed ex parte on merits because of non – appearance of either party or their authorized representatives, an application aside the ex parte order may be made within 7 days of receipt of that order.</p> <p>If the authority is satisfied that there was sufficient cause for non-appearance at the time of the original hearing, and after giving the other party to the application a reasonable opportunity of being heard the ex parte order may be set aside and the application restored</p>

Withdrawal of application - Regulation 17	The applicant may withdraw his application within thirty days from the date of such application and thereafter only with the leave of the Authority.
Modification of the order/advance ruling. - Regulation 18.	The Authority may suomotu or on a petition by the applicant or the Commissioner, Before pronouncement of an advance ruling or before an advance ruling pronounced has been given effect to, On being satisfied that an order/advance ruling was pronounced under mistake of law or fact, Modify such order/advance ruling in such respects as it considers appropriate, after allowing the applicant and the Commissioner a reasonable opportunity of being heard.
Rectification of mistakes - Regulation 19	The Authority may, with a view to rectifying any mistake apparent from the record, amend any advance ruling pronounced by it before such ruling has been given effect to.
Declaration of advance ruling to be void in certain circumstances - Regulation 23	The regulation states that a ruling obtained on the basis of fraud or misrepresentation is void ab initio. The procedural aspects in this regard are summarised below: <ul style="list-style-type: none"> • The revenue authorities may make a representation to the authority claiming fraud or misrepresentation. The representation is to be accompanied by an attested affidavit and attested copies of all documents relied upon for making the representation. • If the authority is of a prima facie view that the application is obtained by fraud or misrepresentation, a notice is sent to the application informing of the grounds on which the ruling is void along with copies of documents relied upon. A reasonable opportunity of being heard is given (in writing and in person). • A copy of the notice is also sent to the revenue authorities and they are given an opportunity of being heard as well.,
Proceedings of Authority - Regulation 27	(1) When one or both of the Members of the Authority other than the Chairperson is unable to discharge his functions owing to absence or vacancies etc., the Chairperson alone or the Chairperson and the remaining Member may function as the Authority. (2) In case there is difference of opinion among the Members hearing an application, the opinion of the majority of Members shall prevail; (3) Where the Chairperson and one other Member hear a case and are divided in their opinion, the opinion of the Chairperson shall prevail.
Dress Regulation - Regulation 29	(1) An authorized representative shall appear before the Authority in dress prescribed for the members of his profession by the competent professional body, if any.

	(2) All other persons appearing before the Authority shall be properly dressed.
Prohibition of arms, mobile phones etc.- Regulation 30.	No person shall be allowed to bring mobile phones, sticks, arms or other weapons in the room where the Authority conducts the proceedings.

6. Settlement Commission

Particulars	Service Tax	Excise	Customs
Application for Settlement Commission - Section 32E (Under Customs law - Section 127B)			<ol style="list-style-type: none"> 1. An assessee may, in respect of a case relating to him, make an application, before adjudication, to the Settlement Commission to have the case settled, 2. The application must contain a full and true disclosure of: <ol style="list-style-type: none"> (a) His duty liability which has not been disclosed before the Central Excise Officer having jurisdiction or proper officer, the manner in which such liability has been derived, (b) The additional amount of excise duty / customs duty accepted to be payable by him; and (c) Such other particulars as may be prescribed including the particulars of such excisable goods in respect of which he admits short levy on account of misclassification, under-valuation, inapplicability of exemption notification or CENVAT credit or otherwise; (d) Under customs law - the particulars of such dutiable goods in respect of which he admits short levy on account of misclassification, under-valuation or inapplicability of exemption notification or otherwise; 3. No application shall be made unless,— <ol style="list-style-type: none"> (a) the applicant has filed returns showing production, clearance and central excise duty paid in the prescribed manner; (b) a show-cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant; (c) the applicant has filed a bill of entry, or a shipping bill, or a bill of export, or made a baggage declaration, or a label or declaration accompanying the goods imported or exported through post or courier, as the case may be, and in relation

	<p>to such document or documents, a show cause notice has been issued to him by the proper officer;</p> <p>(d) the additional amount of duty accepted by the applicant in his application exceeds three lakh rupees; and</p> <p>(e) the applicant has paid the additional amount of excise duty accepted by him along with interest due under section 11AA of Central Excise and 28AA of the Customs law.</p> <p>4. No application shall be entertained by the Settlement Commission:</p> <p>(a) In cases which are pending with the Appellate Tribunal or any court:</p> <p>(b) For the interpretation of the classification of excisable goods under the Central Excise Tariff Act, 1985 (5 of 1986).</p>
<p>Power of Settlement Commission to grant immunity from prosecution and penalty. - Section 32K</p>	<p>1. The Settlement Commission may, if it is satisfied that any person who made the application for settlement:</p> <p>(a) has co-operated with the Settlement Commission in the proceedings before it, and</p> <p>(b) has made a full and true disclosure of his duty liability,</p> <p>grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act and also either wholly or in part from the imposition of any penalty and fine under this Act, with respect to the case covered by the settlement:</p> <p>2. No such immunity shall be granted in cases where the proceedings for the prosecution for any such offence have been instituted before the date of receipt of the application under section.</p> <p>3. An immunity granted to a person shall stand withdrawn if</p> <p>(a) such person fails to pay any sum specified in the order of the settlement passed within the time specified in such order; or</p> <p>(b) fails to comply with any other condition subject to which the immunity was granted.</p>
<p>Procedure covered under - Customs and Central Excise Settlement Commission Procedure, 2007 Rule 5</p>	<p>(1) A settlement application shall be presented by the applicant in person to the Secretary at the headquarters of the Commission at New Delhi or of the Bench within whose jurisdiction his case falls or to any officer authorized in this behalf by the Secretary, or shall be sent by registered post addressed to the Secretary.</p> <p>(2) A settlement application sent by post under sub-rule (1) shall be deemed to have been presented to the Secretary on the day on which it is received in the office of the Commission</p>

<p>Form and Manner of Application – Rule 4 of Central Excise (Settlement cases) Rules 2007.</p>	<p>(1) An application under shall be made in the Form SC(ST)-1; SC(E)-1.</p> <p>(2) The application referred to in sub-rule (1), the verification contained therein and all relevant documents accompanying such application shall be signed by the authorised person;</p> <p>(3) Every application shall be filed in quintuplicate and shall be accompanied by a fee of one thousand rupees.</p> <p>(4) The additional amount of excise duty accepted by the applicant, along with interest due thereon, shall be deposited by him in any of the authorized bank under TR-6 challan in quintuplicate.</p>
<p>Fee for Copies of reports – Rule 6 of Central Excise (Settlement cases) Rules 2007.</p>	<p>Section 32J of the Central Excise Act provides for inspection of reports made by Central Excise officers to the Settlement Commission on the basis of an application along with payment of fees. This rule provides that the fee for this purpose shall be INR5/page of the report.</p>
<p>Preparation of paper books etc. – Rule 6</p>	<p>(1) If the applicant or the Commissioner, as the case may be, proposes to refer or rely upon any documents or statements or other papers, he may submit six copies of a paper book containing such papers duly indexed and paged within seven days from the date of issuance of notice; Provided that if the Commission is satisfied that there is sufficient reason for delay, it may condone the delay and admit the paperbook.</p> <p>(2) If the applicant proposes to refer to or rely upon any documents or statements or other papers during the course of hearing, the applicant may submit six copies of a paper book containing such papers duly indexed and paged, within thirty days or within such extended period as may be allowed by the Commission.</p> <p>(3) The Commission may, <i>suomotu</i>, direct the preparation of six copies of a paperbook by and at the cost of the applicant or the Commissioner, containing copies of such statements, documents and papers, as it may consider necessary for the proper disposal of the settlement application on or matters arising therefrom.</p> <p>(4) The paperbook must be legibly written or type-written in double space or printed. If xerox copy of the document is filed, then the same should be legible. Each paper should be certified as a true copy by the party filing the same and indexed in such a manner as to give a brief description of the documents, with page numbers and the authority before whom it was filed.</p>

Filing of Affidavit – Rule 7	Where a fact which is not borne out by or is contrary to the record relating to the case, is alleged in the settlement application, it shall be stated clearly and concisely and supported by a duly sworn affidavit.
Filing of authorization	An authorised representative appearing for the applicant at the hearing of an application shall file before the commencement of the hearing a document authorising him to appear for the applicant and if he or she is a relative of the applicant, the document shall state the nature of his or her relationship with the applicant, or if he or she is a person regularly employed by the applicant, the capacity in which he or she is at the time employed.
Verification of additional fact	Where in the course of any proceedings before the Commission any facts not contained in the settlement application (including the annexure and the statements and other documents accompanying such annexure) are sought to be relied upon, they shall be submitted to the Commission in writing and shall be verified in the manner as provided for in the settlement application.
Proceedings not open to the public	The proceedings before the Commission shall not be open to the public and no person (other than the applicant, his employee, the concerned officers of the Commission or the Customs and Central Excise Department or the authorized representatives) shall, without the permission of the Commission remain present during such proceedings.

7. State Provisions - Karnataka Value Added Tax Act, 2003

7.1 Adjudication Process - Assessment:

The provision of the Karnataka VAT Act provides following assessments

Type of Assessment	Section	Provisions
Self – Assessment or Deemed Assessment and Best Judgement Assessment	38	1) Every dealer shall be deemed to have been assessed to tax based on the return filed by him However, in cases where the Commissioner may notify the dealer of any requirement of production of accounts before the prescribed authority in support of a return filed for any period and such authority shall proceed to assess such dealer. - (a) where the return filed is correct and complete, or (b) to the best of its judgment, where the return filed appears to be incorrect

		<p>2) In case, registered dealer fails to furnish his monthly or final return on or before the date provided in this Act or the rules made thereunder, or the return furnished is incorrect or incomplete, the prescribed authority shall issue an assessment to the registered dealer to the best of its judgment and the tax assessed shall be paid within ten days from the date of service of such assessment on the dealer.</p> <p>However, in case the dealer subsequently furnishes a return for the period to which the assessment relates, the prescribed authority may withdraw the assessment but the dealer shall be liable to penalties and interest as applicable. However, the return shall be furnished within one month of service of such assessment on the dealer.</p>
Protective Assessment	38(5)	<p>1) The prescribed authority on any evidence showing a liability to tax coming to its notice may with the previous permission of his Joint Commissioner or Additional Commissioner issue a protective assessment in the case of a dealer registered under this Act or a dealer liable to be registered under this Act, if the prescribed authority has reason to believe that such dealer will fail to pay any tax, penalty or interest so assessed or imposed or payable and such tax, penalty or interest shall become payable forthwith.</p> <p>2) On any application made within thirty days from the date of receipt of such protective assessment by the dealer or on his own motion within thirty days from the date of issue of such protective assessment, if the Joint Commissioner or Additional Commissioner considers that any protective assessment issued is erroneous, he may after giving the dealer concerned an opportunity of being heard and after making such enquiry as he deems necessary, pass such order thereon as the circumstances of the case may justify.</p>
Re – Assessment	39	<p>1) Where the Commissioner has grounds to believe that any return furnished which is deemed as assessed or any assessment issued under self-assessment/ deemed assessment/ protective assessment understates the correct tax liability of the dealer, it-</p>

		<p>(a) may, based on any information available, reassess, to the best of its judgment, the additional tax payable and also impose any penalty and demand payment of any interest; and,</p> <p>(b) shall issue a notice of re- assessment to the dealer demanding that the tax shall be paid within thirty days of the date of service of the notice after giving the dealer the opportunity of showing cause against such re-assessment in writing.</p> <p>2) Where after making a re-assessment-</p> <p>(a) any further evidence comes to the notice of the prescribed authority; or</p> <p>(b) if the prescribed authority has reason to believe that the whole or any part of the turnover of a dealer in respect of any tax period has escaped re-assessment to tax; or</p> <p>(c) tax has been under re-assessed; or</p> <p>(d) has been re-assessed at a rate lower than the rate at which it is assessable under this Act; or</p> <p>(e) any deductions or exemptions have been wrongly allowed in respect thereof,</p> <p>the prescribed authority may, proceed to make any further re-assessments in addition to such earlier re-assessment.</p>
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7.2 Clarification and Advance Rulings:

Particulars	Section	Provisions
Constitution	60 (1)	The Commissioner may constitute an 'Authority for Clarification and Advance Rulings', consisting of atleast three Additional Commissioners, to clarify the rate of tax in respect of any goods or the exigibility to tax of any transaction or eligibility of deduction of input tax or liability of deduction of tax at source under the Act, in respect of any case or class of cases as the Commissioner may specify.
Application by	60 (2)	Any registered dealer seeking clarification or advance ruling, shall make an application to the Authority in such form, accompanied by proof of payment of such fee, paid in such manner as may be prescribed.

Procedure	60 (2A) to 60 (6)	<ol style="list-style-type: none"> 1. On receipt of an application, the Authority shall cause a copy thereof to be forwarded to the assessing or registering authority concerned and call for its finding on the clarification sought or question raised and also any information or records. 2. The Authority may, after examining the application and any records called for, by order, either, admit or reject the application. 3. However, the Authority shall not allow the application where the question raised in the application- <ol style="list-style-type: none"> (i) is already pending before any officer or authority of the Department or Appellate Tribunal or any Court; (ii) relates to a transaction or issue which is designed apparently for the avoidance of tax. 4. (No application shall be rejected unless an opportunity has been given to the applicant of being heard and where the application is rejected, reasons for such rejections shall be recorded in the order.) 5. A copy of every order made shall be sent to the applicant and the officer concerned. 6. Where an application is admitted, the Authority shall after examining such further material as may be placed before it by the applicant or obtained by the Authority, pass such order as deemed fit on the questions specified in the application, after giving an opportunity to the applicant of being heard, if he so desires and also to the assessing authority or registering authority concerned. The authority shall pass an order within ninety days of the receipt of any application and a copy of such order shall be sent to the applicant and to the officer concerned. 7. No officer or any other authority of the Department or the Appellate Tribunal shall proceed to decide any issue in respect of which an application has been made by an applicant. 8. The order of the authority shall be binding, only on the applicant who seeks clarification and only in respect of the goods or transaction in relation to which a clarification is sought and also only in the
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		<p>proceedings before the officers of the department (other than the Commissioner) and the Appellate Tribunal, relating to such applicant.</p> <p>9. The order of Authority shall be binding as aforesaid unless there is a change in law or facts on the basis of which the order was passed.</p> <p>10. Where the authority finds, on a representation made to it by any officer or otherwise, that an order passed by it was obtained by the applicant by fraud or misrepresentation of facts, it may, by order, declare such order to be void ab initio and thereupon all the provisions of this Act shall apply to the applicant as if such order had never been made.</p>
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7.3 Appeals to the Joint Commissioner (Appeals).

Particulars	Provisions	
Section	62	
Appeal against	Any decision or order passed by an adjudicating authority subordinate to the Joint Commissioner may appeal to the Joint Commissioner (Appeals).	
Form	Form VAT 430	
Period	Order of assessment - within 30 days from the date of on which the notice of assessment was served	Order of any other proceedings - within 30 days from the date of on which the order was communicated
Delay	Up to 180 days, if it is satisfied that there was sufficient cause for not preferring an appeal	
Procedure	<p>1. No appeal against an order of assessment shall be entertained by the appellate authority unless it is accompanied by satisfactory proof of the payment of tax and other amount not disputed in the appeal.</p> <p>2. The tax or other amount shall be paid in accordance with the order or proceedings against which an appeal has been preferred.</p> <p>3. The appellate authority may, in its discretion, stay payment of Seventy percent of tax and other amount, if the appellant makes payment of the balance thirty percent of the tax and other amount along with prescribed form of appeal.</p> <p>4. Where any application made by an applicant for staying proceedings of recovery of any tax or other amount has not been disposed of by the Appellate Authority within a period of thirty days from the date of such application, it shall be deemed that the Appellate Authority has made an order staying proceeding of recovery of such tax or other amount subject to payment of thirty percent of the tax and other amount disputed and</p>	

	<p>furnishing of sufficient security to the satisfaction of the Assessing Authority in regard to the balance Seventy percent of such tax or amount within a further period of fifteen days.</p> <p>5. Where an order staying proceedings of recovery of any tax or other amount is passed in any proceedings relating to an appeal, the appellate authority shall dispose of the appeal within a period of Two hundred forty days from the date of such order.</p> <p>6. In disposing of an appeal, the appellate authority may, after giving the appellant a reasonable opportunity of being heard,</p> <p>(a) in the case of an order of assessment or penalty:</p> <p>(i) confirm, reduce or enhance the assessment including any part thereof whether or not such part is objected to in the appeal;</p> <p>(ii) pass such other orders as it may think fit; and</p> <p>(b) in the case of any other order or proceedings, confirm, cancel or vary such order.</p> <p>7. In disposing of an appeal before it, the appellate authority, shall not remand the case to make fresh assessment or fresh order, but shall proceed to dispose of the appeal on its merit, as it deems fit, if necessary by taking additional evidence.</p> <p>8. The Appellate Authority shall pass an order by disposing of an appeal, within a period of ninety days from the date on which the hearing of the case was concluded.</p>
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7.4 Appeals to the Appellate Tribunal.

Particulars	Provisions
Section	63
Appeal against	Any decision or order passed by the Joint Commissioner.
Form	Form VAT 440
Period	Within 60 days from the date of on which the order was communicated
Delay	Up to 180 days, if it is satisfied that there was sufficient cause for not preferring an appeal
Procedure	<p>1. On receipt of notice that an appeal against the order of the appellate authority has been preferred by the other party, may, notwithstanding that he has not appealed against such order or any part thereof, file, at any time before the appeal is finally heard, a memorandum of cross-objections, verified in the prescribed manner, against any part of the order of the appellate authority, and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented.</p>

	<p>2. The appeal, or the memorandum of cross-objections, shall be in the prescribed form, shall be verified in the prescribed manner, and, in the case of an appeal preferred by any person other than an officer empowered by the State Government or the Commissioner shall be accompanied by proof of payment of thirty percent of tax or other amount disputed and also a fee equal to two percent of the amount of assessment objected to, provided that the sum payable in no case be less than two hundred rupees or more than one thousand rupees.</p> <p>3. The Appellate Tribunal shall, after giving both parties to the appeal a reasonable opportunity of being heard, pass such orders thereon as it thinks fit.</p> <p>4. If the appeal involves a question of law on which the Appellate Tribunal has previously given its decision in another appeal and either a revision petition in the High Court against such decision or an appeal in the Supreme Court against the order of the High Court thereon is pending, the Appellate Tribunal may defer the hearing of the appeal before it till such revision petition in the High Court or the appeal in the Supreme Court is disposed of.</p> <p>5. If as a result of the appeal any change becomes necessary in the assessment, which is the subject matter of the appeal, the Appellate Tribunal may authorize the Prescribed authority to amend the assessment, and the prescribed authority shall amend the assessment accordingly and thereupon, any amount over paid by the dealer shall be refunded to him without interest, or any additional amount of tax due from him shall be collected in accordance with the provisions of the Act, as the case may be.</p> <p>6. The Appellate Tribunal may, in its discretion, stay payment of Seventy percent of the tax or other amount disputed, if the appellant makes payment of the thirty percent of the tax or other amount disputed along with the prescribed form of appeal.</p> <p>7. The Appellate Tribunal shall dispose of such appeal within a period of three hundred and sixty-five days from the date of the order staying proceedings of recovery of Seventy percent of tax or other amount and, if such appeal is not so disposed of within the period specified, the order of stay shall stand vacated after the said period and the Appellate Tribunal shall not make any further order staying proceedings of recovery of the said tax or other amount.</p> <p>8. The Appellate Tribunal may, on the application either of the appellant or of the respondent, review any order passed by it on the basis of facts which were not before it when it passed the order.</p>
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	<p>9. The application for review shall be preferred in the prescribed manner within six months from the date on which the order to which the application relates was communicated to the applicant; it shall be accompanied by a fee equal to that which has been paid in respect of the appeal.</p> <p>10. If the application for review is preferred within ninety days from the date on which the order to which the application relates is communicated to the applicant, the application shall be accompanied by half the fee which had been paid in respect of the appeal.</p> <p>11. With a view to rectifying any mistake apparent from the record, the appellate Tribunal may, at any time, within five years from the date of any order, amend such order after giving a reasonable opportunity of being heard to both the parties.</p> <p>12. Every order passed by the Appellate Tribunal shall be communicated to the appellant, the respondent, the appellate authority on whose order the appeal was preferred and the Commissioner.</p>
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7.5 Revision Powers

Particulars	Joint Commissioner	Additional Commissioner / Commissioner
Section	63A	64
Revision w.r.t.	The JC may on his own motion call for and examine the record of any order passed or proceeding recorded under this Act and if he considers that any order passed therein by any officer, who is not above the rank of a Deputy Commissioner, is erroneous in so far as it is prejudicial to the interest of the revenue	The Ad. C. may on, his own motion, call for and examine the record of any order passed or proceeding recorded under this Act and if he considers that any order passed therein by any officer, who is not above the rank of a Joint Commissioner, is erroneous in so far as it is prejudicial to the interest of the revenue, the Commissioner may on his own motion call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by any officer subordinate to him or the Authority for Clarification and Advance Rulings is erroneous in so far as it is prejudicial to the interest of the revenue

No revision if	(a) the time for appeal against the order has not expired; or the matter has been subject to an appeal to the Appellate Tribunal or a revision in the High Court. (b) more than four years have expired after the passing of the order sought to be revised.	
Period	The JC shall pass order within a period of one year from the date of initiation of proceeding or calling for the records	The Additional Commissioner or the Commissioner may pass an order, as the case may be, on any point which has not been raised and decided in an appeal or revision, before the expiry of a period of one year from the date of the order in such appeal or revision or before the expiry of a period of four years, whichever is later.
Procedure	The JC / Ad.C/ Commissioner may, if necessary, stay the operation of the order for such period as he deems fit and after giving the person concerned an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing the fresh assessment.	

8. Delhi Value Added Tax Act, 2004

8.1 Adjudication Process - Assessment:

The provision of the Delhi VAT Act provides as follows

Type of Assessment	Section	Provisions
Self – Assessment	31	1. Where a return is furnished by a person, which contains the prescribed information and complies with the requirements of the Act and the rules - (a) the Commissioner is taken to have made, on the day on which the return is furnished, an assessment of the tax payable of the amount specified in the return; (b) the return is deemed to be a notice of the assessment and to be under the hand of the Commissioner; and (c) the notice referred to in (b) is deemed to have been served on the person on the day on which the

		<p>Commissioner is deemed to have made the assessment.</p> <p>2. However, no assessment shall arise, if the Commissioner has already made an assessment of tax in respect of the same tax period under any another section of the Act.</p>
Default Assessment or Best Judgement Assessment	32	<p>1. If any person –</p> <p>(a) has not furnished returns required under this Act by the prescribed date; or</p> <p>(b) has furnished incomplete or incorrect returns; or</p> <p>(c) has furnished a return which does not comply with the requirements of this Act; or</p> <p>(d) for any other reason the Commissioner is not satisfied with the return furnished by a person;</p> <p>the Commissioner may for reasons to be recorded in writing assess or reassess to the best of his judgment the amount of net tax due for a tax period or more than one tax period by a single order so long as all such tax periods are comprised in one year.</p> <p>2. If, upon the information which has come into his possession, the Commissioner is satisfied that any person who has been liable to pay tax under this Act in respect of any period or periods, has failed to get himself registered, the Commissioner may for reasons to be recorded in writing, assess to the best of his judgment the amount of net tax due for such tax period or tax periods and all subsequent tax periods.</p> <p>3. Where the Commissioner has made an assessment, the Commissioner shall forthwith serve on that person a notice of assessment of the amount of any additional tax due for that tax period.</p> <p>4. Where the Commissioner has made an assessment and further tax is assessed as owed, the amount of further tax assessed is due and payable on the same date as the date on which the net tax for the tax period was due</p>
Assessment of Penalty	33	<p>1. Where the Commissioner has reason to believe that a liability to pay a penalty under the Act has arisen, the Commissioner, after recording the reason in writing, shall make and serve on the person</p>

		<p>a notice of assessment of the penalty that is due under the Act.</p> <p>2. The amount of any penalty assessed is due and payable on the date on which the notice of assessment is served by the Commissioner.</p> <p>3. Any assessment made shall be without prejudice to prosecution for any offence under this Act.</p>
Limitation on assessment or re-assessment	34	<p>1. No assessment or re-assessment shall be made by the Commissioner after the expiry of four years from</p> <p>(a) the end of the year comprising of one or more tax periods for which the person furnished a return; or</p> <p>(b) the date on which the Commissioner made an assessment of tax for the tax period, whichever is the earlier.</p> <p>2. However, where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.</p>

8.2 Objections to the Commissioner

Particulars	Provisions
Section	74
Objection against	(a) An assessment made under the Act (including an assessment of penalty); or (b) Any other order or decision made under the Act
Form	38 to 41
Period	Within 2 months of the date of service of assessment or order or decision. Where the Commissioner is satisfied that the person was prevented for sufficient cause from lodging the objection within the time specified, he may accept an objection within a further period of two months.
No objections if	No objection may be made against a non-appealable order as defined in section 79 of the Act. Also, no objection against an assessment shall be entertained unless the amount of tax, interest or penalty assessed that is not in dispute has been paid failing which the objection shall be deemed to have not been filed.
Procedure	1. An objection shall be in writing in the prescribed form and shall state fully and in detail the grounds upon which the objection is made. 2. The Commissioner shall conduct its proceedings by an examination

	<p>of the assessment, or order or decision, as the case may be, the objection and any other document or information as may be relevant. And where the person aggrieved, requests a hearing in person, the person shall be afforded an opportunity to be heard in person.</p> <p>3. Where a person has requested a hearing and the person fails to attend the hearing at the time and place stipulated, the Commissioner shall proceed and determine the objection in the absence of the person.</p> <p>4. Within three months after the receipt of the objection, the Commissioner shall either – (a) accept the objection in whole or in part and take appropriate action to give effect to the acceptance (including the remission of any penalty assessed either in whole or in part); or (b) refuse the objection or the remainder of the objection, as the case may be; and in either case, serve on the person objecting, a notice in writing of the decision and the reasons for it, including a statement of the evidence on which it is based.</p> <p>5. Where the Commissioner within three months of the making of the objection notifies the person in writing, he may continue to consider the objection for a further period of two months. Also the person may, in writing, request the Commissioner to delay considering the objection for a period of up to three months for the proper preparation of its position, in which case the period of the adjournment shall not be counted towards the period by which the Commissioner shall reach his decision.</p> <p>6. Where the Commissioner has not notified the person of his decision within the time, the person may serve a written notice requiring him to make a decision within fifteen days.</p> <p>7. If the decision has not been made by the end of the period of fifteen days after being given the notice, then, at the end of that period, the Commissioner shall be deemed to have allowed the objection.</p>
Section 79- Bar on appeal or objection against certain orders	<p>No objection or appeal shall lie against –</p> <p>(a) a decision of the Commissioner to make an assessment of tax or penalty;</p> <p>(b) a notice requiring a person to furnish a return;</p> <p>(c) a notice issued for audit, special audit and inspection of records;</p> <p>(d) a decision of the Commissioner to notify any matter;</p> <p>(e) a notice asking a dealer to show cause why he should not be prosecuted for an offence under this Act;</p> <p>(f) a decision relating to the seizure or retention of books of account, registers and other documents;</p> <p>(g) a decision sanctioning a prosecution under the Act;</p> <p>(h) an interim decision made in the course of any proceedings;</p>

	<p>(i) a decision of the Commissioner touching on the internal administration of the Value Added Tax authorities;</p> <p>(j) an assessment issued by the Commissioner to give effect to an order of the Appellate Tribunal or a court; or</p> <p>(k) a notice served on the person for determination of specific questions.</p>
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8.3 Appeals to the Appellate Tribunal

Particulars	Provisions
Section	76
Appeal against	Any decision or order passed by the Commissioner.
Form	38A
Period	Within 2 months from the date of on which the order was communicated
No appeals against	Against a non-appealable order as defined in section 79 of the Act. Further, that no appeal shall be entertained by the Appellate Tribunal unless it is satisfied that such amount as the appellant admits to be due from him has been paid.
Procedure	<p>1. Every appeal made shall be in the prescribed form, verified in the prescribed manner and shall be accompanied by such fee as may be prescribed.</p> <p>2. No appeal against an assessment shall be entertained by the Appellate Tribunal unless the appeal is accompanied by satisfactory proof of the payment of the amount in dispute and any other amount assessed as due from the person:</p> <p>3. However, the Appellate Tribunal may, if it thinks fit, for reasons to be recorded in writing, entertain an appeal against such order without payment of some or all of the amount in dispute, on the appellant furnishing in the prescribed manner security for such amount as it may direct:</p> <p>4. In proceedings before the Appellate Tribunal -</p> <p>(a) The person aggrieved shall be limited to disputing only those matters stated in the objection;</p> <p>(b) The person aggrieved shall be limited to arguing only those grounds stated in the objection; and</p> <p>(c) The person aggrieved may be permitted to adduce evidence not presented to the Commissioner for good and sufficient reasons.</p> <p>5. The Appellate Tribunal shall -</p> <p>(a) In the case of an assessment, confirm, reduce, or annul the assessment (including any penalty and interest imposed);</p> <p>(b) In the case of any other decision of the Commissioner, affirm or reject the decision; or</p>

	<p>(c) Pass such other order for the determination of the issue as it thinks fit:</p> <p>6. The Appellate Tribunal shall give reasons in writing for its decision which shall include its findings on material questions of fact and the evidence or other material on which those findings were based.</p> <p>7. The Appellate Tribunal shall use its best endeavours to make a final resolution of the matter before it and for this purpose may make a decision in substitution for the order in dispute, including the exercise or re-exercise of any discretion or power vested in the Commissioner.</p> <p>8. The Appellate Tribunal shall not set aside an assessment and remit the matter to the Commissioner for a further assessment, unless it has first-</p> <p>(a) Advised the aggrieved person of the proposed order;</p> <p>(b) Offered the person the opportunity to adduce such further evidence before it as might assist the Appellate Tribunal to reach a final determination.</p> <p>9. Where the Appellate Tribunal sets aside an assessment and remits the matter to the Commissioner for a further assessment, the Appellate Tribunal shall at the same time order the Commissioner to refund to the person some or all of the amount in dispute:</p> <p>10. Where no order is made, it shall be presumed that the Appellate Tribunal has ordered the refund of the amount in dispute.</p> <p>11. Where a person has failed to attend the hearing at the time and place stipulated, the Appellate Tribunal may adjourn the proceedings, strike out the appeal or proceed to make an order determining the objection in the absence of the person.</p> <p>12. The Appellate Tribunal may rectify any mistake or error apparent from the record of its proceedings.</p> <p>13. Any order passed by the Appellate Tribunal may be reviewed suo-motu or upon an application made in that behalf Provided that before any order which is likely to affect any person adversely is passed, such person shall be given a reasonable opportunity of being heard.</p>
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8.4 Revision Powers

Particulars	Provisions
Section	74A
Revision w.r.t	After any order (including an order under this section) or any decision in objection is passed under the Act, rules or notifications made thereunder, by any officer or person subordinate to him, the Commissioner may, of his own motion or upon information received by him, call for the record of such

	<p>order and examine whether –</p> <p>(a) any turnover of sales has not been brought to tax or has been brought to tax at lower rate, or has been incorrectly classified, or any claim is incorrectly granted or that the liability to tax is understated, or</p> <p>(b) in any case, the order is erroneous, in so far as it is prejudicial to the interest of revenue, and after examination, the Commissioner may pass an order to the best of his judgment, where necessary.</p>
Form	24B
No revision if	No proceedings shall be entertained on any application made by a dealer or a person.
Period	<p>(a) No order shall be passed after the expiry of four years from the end of the year in which the order passed by the subordinate officer has been served on the dealer.</p> <p>(b) Where in respect of any order or part of the said order passed by the subordinate officer, an order has been passed by any authority hearing the objection or any appellate authority including the Tribunal or such order is pending for decision in objection or in appeal, or an objection or an appeal is filed, then, whether or not the issues involved in the examination have been decided or raised in the objection or the appeal, the Commissioner may, within five years of the end of the year in which the said order passed by the subordinate officer has been served on the dealer, make a report to the said objection hearing authority or the appellate authority including the Tribunal regarding his examination or the report or the information received by him and the said appellate authority including the Tribunal shall thereupon, after giving the dealer a reasonable opportunity of being heard, pass an order to the best of its judgment, where necessary.</p>
Procedure	<p>1. For the purpose of the examination and passing of the order, the Commissioner may require, by service of notice, the dealer to produce or cause to be produced before him such books of accounts and other documents or evidence as he thinks necessary for the purposes aforesaid.</p> <p>2. If the Commissioner has initiated any proceeding before an appropriate forum against an issue which is decided against the revenue by an order of the Tribunal, then the Commissioner may, in respect of any order, other than the order which is the subject matter of the order of the Tribunal, call for the record, conduct an examination as aforesaid, record his findings, call for the said books of account and other evidence and pass an order as provided for as if the issue was not so decided against the revenue, but shall stay the recovery of the dues including the interest or penalty, insofar as they relate to such issue until the decision by the appropriate forum and after such decision, may modify the order of revision, if necessary.</p>

Chapter 5

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 fulfills 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 investor and the 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 large 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 35:

"To,

.....

This has 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 good self 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 36:

"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 schedule 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 from the date of completion of the said event to provide the information as requested above.

....."

Illustration 37:

"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 Cenvat credit availed segregated based on payment made 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 under Service Tax or other applicable law(s), we do not have the processes to capture 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.

....."

3. Audit

Audit is undertaken based on certain criteria such as revenue or risk in a unit and 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 departmental audit officers.

It is usual to receive 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, it is not acceptable that reconciliation is not available with the value of taxable services disclosed in ST3 returns.

The scope of an audit correspondence may be bifurcated into two parts:

(a) Categorization of transaction for purposes of levy of service tax – here contractual arrangements are inquired into and copies of agreements / contracts are called for to verify the tax positions followed. 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 38:

“General Business Overview

The Company is engaged in the business:

Not Advisable	Suggested Alternative
<i>.....of software development and customization, sale of software licenses of its own products namely, and annual maintenance contracts</i>	<i>.....of information technology software services and trading of goods (packaged software, namely,)</i>
<i>.....of real estate development</i>	<i>.....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</i>
<i>.....of operating restaurant</i>	<i>.....of operating air-conditioned restaurant serving food and non-alcoholic drinks and outdoor catering services</i>
<i>.....of operating dealership of XYZ (brand) cars including service station</i>	<i>.....of trading of goods (motor cars and parts) as authorized dealer and providing maintenance and repair services</i>

.....REPRODUCE WORDS FROM 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.

Illustration 39:

“Revenue Reconciliation – ST3 and Audited Financial Statements

<i>Revenue as per ST3</i>	<i>(column __ of ST3 Apr-Sept)</i>	<i>.....</i>
	<i>(column __ of ST3 Oct-Mar)</i>	<i>.....</i>
<i>Add:</i>		<i>.....</i>
<i>Less:</i>		<i>.....</i>
<i>Balance</i>		<i>.....</i>
<i>Revenue as per audited financial statement</i>		<i>.....</i>

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 show cause notice as the starting point. Not only that, the SCN provides the framework or boundaries for correspondence.

Show cause notice 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 a show cause notice 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.

Illustration 40:

“OPENING WORDS (IN REPLY TO SCN) AGAINST EACH REBUTTAL PARA –

Without prejudice and in addition to the foregoing.....”

Illustration 41:

“CONCLUDING (IN REPLY TO SCN) AGAINST EACH REBUTTAL PARA –

.....for these reasons the demand in para no. of the impugned notice is liable to be set aside as being unlawful and contrary to facts which the Noticee vehemently objects and rejects in totality.”

Illustration 42:

“MAKING REFERENCE TO PARAS IN ORDER APPEALED AGAINST –

.....the learned Assistant Commissioner has extracted para no..... in internal page no..... of the Intelligence Report and reproduced it in para no..... at page no..... of the impugned order that.....”

Illustration 43:

“CONCLUDING PARA IN REPLY IN THE FORM OF PRAYER –

In view of the foregoing, the Noticee prays that:

- a) Su ppression alleged in the impugned notice may be dropped as unsubstantiated*
- b) Demand for service tax in para no..... of impugned notice may be dropped as barred by limitation / not sustainable in law*
- c) Demand for consequent interest may also be dropped*
- d) Demand for penalty is liable to be set aside*

Noticee further craves leave to furnish additional grounds or amend any or all of the grounds setout herein as may be necessary to support contentions raised herein and seeks opportunity to be heard in person through authorized signatory.”

5. Revisionary Authority

Power of revision is a supervisory power conferred by 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. Hence, it is important for such Noticee to ensure accuracy of facts being referred or relied upon. And correspondence may be directed towards:

- (a) Firstly, ensure correctness and completeness of information being considered in the proceedings and
- (b) Secondly, ensure all judicial precedents holding field on a given date are supplied to the authority carrying out these proceedings

6. Authority for Advance Ruling

The binding nature of the rulings of AAR requires very precise line of communication by the Applicant. The applicant must ask a specific question based on the intended facts or proposed action. It, therefore, goes without saying that the ruling will have its binding force only if the transaction is carried out exactly the same way in which it was stated in the application.

“If the facts are as follows” is a presumption in the application. For exactly this reason, “if the facts were altered as follows” is impermissible in the application. AAR is not a forum to seek legal opinion for various hypothetical scenario in which a certain transaction could possibly be implemented.

7. Settlement Commission

Commission is a forum where the tax department does not have any representation. It is the Applicant who is to make a truthful and voluntary disclosure of the admitted amount of dues with an unconditional undertaking to pay these admitted dues in exchange for immunity from prosecution. Hence, the nature of the underlying cause for non-payment of dues is one which imminently attracts prosecution.

Given the nature of remedy sought, the application must be simple and clear in stating the facts. Further, securing decision by misleading the Commission has very severe consequences. In such a case, the decision will be revoked, erstwhile proceedings that were halted will be resumed and the time lost in approaching the Commission until discovery of such deception will be excluded in calculating the applicable limitation.

8. 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 Appellate Procedure Rules that are prescribed by the statute. Diligence in the adherence to the form and presentation is essential.

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 the 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 Income-tax 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 44:

".....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 45:

".....the impugned order is not legal and proper in as much as it seeks to regard the services rendered by the Appellant tax contrary to the express language of rule by introducing extra-legislative tests and criteria not contained in the extant Rules and thereby performing great injustice against 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 46:

"...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 principles of natural justice and for this reason the demand for tax deserves to be set aside."

9. Additional Evidence

Evidence is that which advances the cause asserted by the Appellant. Appellant is free to mount a barrage of evidence that may prevail upon the Appellate Authority. Use of additional evidence must not appear 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 visualizing the 'reasons' for the 'actions' charged to have or ought not to have taken place. Availability of evidence only supports the imagination of the Authority to reach a substantial conclusion about the events that have occurred in the past.

10. 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 who 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 to leave the respondents unaware. Although this is the principle, Courts have not allowed this to deny the Appellant to urge a *bona fide* ground that was omitted at the time of filing the appeal.

10.2 Additional or new grounds must show 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.

11. 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 one copy each as well as one copy is filed / separately served to each respondent .

12. 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.

13. 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 or order(s) received from the tax department. If it is not available, it can be sourced under right to information law.
- (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) Provide written communication in case of change of address for serving 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.

14. 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, refer to 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) Do not allow typographical errors in statements or replies
- (h) Do not submit incomplete or erroneous enclosures to be including in the submissions
- (i) As a practitioner, do not discard books / publications of Act and Rules when the next year's publications 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

15. Errors (common or otherwise)

- (a) Excess or unsolicited information – Often in the eagerness to supply information or to lay emphasis on the diligence exercised, assessee may volunteer to provide unwarranted information without any purpose being served.

Illustration 47:

“UNSOLICITED INFORMATION –

.....as such the applicable taxes have been deposited regularly. In fact, there have been occasions where the Company has voluntarily deposited taxes identified 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 48:

“NON-SPECIFIC INFORMATION –

.....as the Company has 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 then 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."

(c) 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.

Illustration 49:

"PERSONAL AND UNCHARITABLE REMARKS –

.....in so doing the learned Commissioner has taken leave of his senses and made a mockery of the discretion vested in him under rule of Act"

Chapter 6

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 express 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 eitherway.

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) Departmental authority, that is, pursuant to a notice issued by the lower authority which considers that the assessee has either not paid or short paid any tax, interest or penalty due to the Government and who has either issued a show cause notice or desires to issue a show cause notice
- (b) Appellate Authority such as Commissioner (Appeals), where an adjudicating order has been passed and the assessee is aggrieved.
- (c) Tribunal, where the order is passed by any lower authority in adjudicatory or appellate proceedings, or in case of a departmental appeal, as respondent.
- (d) Appropriate High Court or the Supreme Court of India.

2. Authority of Persons to Represent

In terms of Section 35Q of the Central Excise Act, 1944, Section 83 of the Finance Act, 1994 read with Section 35Q of the Central Excise Act, 1944 and Section 146A of the Customs Act, 1962 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.

Legal recognition of professional qualification does not prohibit the authority from examining whether the person appearing is mindful of the force that his averments obtain to bind his client in the proceedings. It is not unimaginable that in his obedience to conduct a fair proceeding, the authority may express dissatisfaction with the attitude of the person appearing to be excused from representing the assessee / appellant. Hence, CAs must pay attention to preparation and appearance while providing representation services.

3. Dress code

The dress code for appearance by an authorized representative is prescribed only for appearances before Tribunal. The recommended dress code for representation is given in the table below:

Represented before	Prescribed dress code	Recommended dress code
Departmental Authority	Not specified	Recommended to be formal
Commissioner (Appeals)	Not specified	Recommended to be formal
Tribunal	In terms of Rule 48 of Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982: If prescribed by Professional body to which the representative is attached, the said prescribed dress code, else: (i) For a male: A close-collared black coat, or in an open-collared black coat, with white shirt and black tie; (ii) For a female: A black coat over a white sari or any other white dress	When representing in person: Formal dress. When representing by authorized representative: as prescribed.

4. Preparations before the hearing

Personal hearings are an opportunity afforded in ensuring that while 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 more favorable rulings. Certain precautions that may be taken before appearing in front of the authorities are listed below:

- (a) Block your calendars for the scheduled date of personal hearing;
- (b) In case the hearing is scheduled before Tribunal, it is customary for the court 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 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 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 adjudicating authority/ appellate authority. Rules, wherever prescribed, should be followed while appearing.

In case the matter is listed before departmental 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 departmental authority, it is important to be courteous. It is advisable to address the adjudicating authority/ appellate authority as 'Sir' and any respectful salutation / title that is customary.

In case the matter is listed before Tribunal:

- (a) Meeting the court master before the court 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. Common 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 is a contempt of court and can result in punishment.
- (e) Stand whenever the members on the bench enter or leave the courtroom 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 courtroom 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/ first appellate authority

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) Stay Matter:

In a stay matter, the question before the adjudicating authority/ appellate authority is to *prima facie* understand the merits of the case and thereon upon decide the quantum of stay. In such cases, the representation to be made should be brief and precise. Elaborate submissions on merits are not welcome.

In case of financial hardship, adequate financial evidence would need to be supported to support the plea. In case the assessee is financially strong but the plea is taken, the bench may not appreciate the same and consider the plea as frivolous. Further the details of tax and other levies demanded, period of dispute and amounts already paid and appropriated by the department should be highlighted.

Illustration 50: Appellant praying for financial hardship had filed an affidavit claiming financial hardship without submitting corroborative evidence to show financial hardship. Stay was rejected without expressly holding the affidavit to be false.

Illustration 51: Appellant submitted financial statements where loss was reported for two years in a row in support of his claim for financial hardship. Appellate authority verified the balance sheet and found that loans to related parties had been extended for a sufficient amount and recognizing the financial hardship allowed stay application partially by directing the appellant to deposit to the extent monies were advanced as loans to related parties.

Illustration 52: Appellant claimed financial hardship but the financial statements showed profitability of the business. The CA representing the appellant stated that by being asked to deposit the disputed amount, would cause financial distress to the operations. He supported this submission with an elegant cash flow statement projecting the working capital implication of making such a deposit. The Appellate Authority agreed with the submission and granted absolute stay after making a statement that in view of the extent of ongoing Government contracts, there was no apparent risk to recovery of dues, if eventually determined in favour of revenue.

Illustration 53: Appellant praying for stay of recovery of demand had claimed financial hardship along with corroborative evidence. During arguments, the CA showed that the case was covered by a superior Court's decision which had been followed by this forum in a number of recent decisions. Appellate Authority allowed the stay application and as there was no objection by the departmental Counsel, took up the appeal itself and disposed of it in the interest of time and justice.

(ii) 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 high financial implications are not the only reasons for early hearing.

Illustration 54: Appellant filed application for early hearing stating that the stay application has also not come up for hearing but the tax department has issued a letter to the bank asking for 'blocking' of funds in view of the adjudicating order that is currently in operation. Appellate authority took exception to this revenue recovery tactic and allowed the early hearing application and directed the Registry to bring the stay application. Appellate authority heard the stay application in the afternoon session and passed stay orders noting that such aggressive measures were unwarranted and showed disrespect to the Appellate Authority who is yet to hear the stay application. Factors like stakes involved, other similar matters, availability of precedents, and recurring nature of the issue are considered while granting early hearing.

Illustration 55: Appellant filed application for early hearing of application stating that appeal along with stay application has been filed; however the time limit stated in the adjudicating order for payment of disputed tax is about to expire and that the Appellant is apprehensive that the tax authorities may take aggressive recovery action. Appellate authority assured the Appellant that when the stay application is pending, the tax authorities will not take any recovery action. They will wait for disposal of the stay application and directed the departmental Counsel to taken note of this confidence that the Appellate Authority is reposing

in the tax authorities. After making these observations, the early hearing application was dismissed as unsubstantiated apprehension without any real evidence and as such unwarranted.

(iii) Clubbing:

Similar matters may be prayed to the adjudicating authority/appellate authority to be clubbed for hearing. In case the matters in different appeal have common cause, the adjudicating authority/appellate authority may list the same together for speedy disposal. This would also reduce the litigation costs.

Illustration 56: Appellant filed application for clubbing of multiple appeals involving substantially similar questions. 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 57: Appellant filed application for clubbing of multiple appeals involving substantially similar questions. Appellate authority heard the application and though other dissimilar issues were present, they were not substantial and as such allowed the application as the substantial questions involved in all appeals being identical merited consideration together.

Illustration 58: Appellant filed application for clubbing of multiple appeals where some were cross-appeals and some were appeals by Appellant. Appellate authority heard and allowed the application so that appeals by Appellant and Department could receive consideration together.

(iv) 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 provide for reasons that account for the delay and in the event the adjudicating authority/ appellate authority considers the same to be fit for condonation and is within the extendable period, the matter subject to the satisfaction of the adjudicating authority/appellate authority, is condonable. The applicant will have to bring a strong case for condonation. The application should also be supported by an affidavit and other documentary evidence.

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 59: Appellant filed application for condonation of delay of more than 1000 days and explained that being a PSU, they required clearance to file the appeal from their Committee of Disputes. When the Appellate Authority found that the case each day of delay was explained and if the time taken by the Committee were excluded, the Appellant had filed the appeal in time, and the application was allowed. The CA for the Appellant made successful submissions

on the strong *prima facie* merits of the case and the Appellate Authority noted that need to do justice on the merits of the case further supported condonation of delay.

Illustration 60: Appellant filed application for condonation of 200 days' delay before First Appellate Authority where the condonable delay was 180 days and due to *bona fide* reasons the Appellant was prevented from filing appeal within this extended time limit. The First Appellate Authority dismissed the application and also the appeal also stating the there is no statutory power to condone delay beyond the time limit of 180 days. Delay of 200 days being beyond the statutory time limit for condonation, even though the cause for delay is genuine and verifiable, the law does not vest the First Appellate Authority with the power to condone.

Illustration 61: An appeal was filed in respect of dismissal of the condonation application and the appeal itself (as in the above illustration) before the Second Appellate Authority. In law, the Second Appellate Authority has power to condone delay and there is no upper limit for the extent of delay that can be condoned. The Second Appellate Authority found that this appeal was filed in time and held that the scope of the second appeal is 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 this appeal was dismissed by the Second Appellate Authority stating that there was nothing improper in the order passed by the First Appellate Authority. Appellant was left to consider whether writ petition can be filed against the order of the Second Appellate Authority in view of the merits of the case having never come up for consideration and that justice eluded the Appellant on account of technicalities of procedure. Appellant was relying upon decisions in *Orient Syntex Ltd. v. AC-CE 1990 (47) ELT 321 (Bom.)* and *Zafarullah v. CC 1992 (60) ELT 263 (Trib.)*

(v) Regular hearing:

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.

(b) Start with your hearing by addressing the bench 'Your Honour' and state in brief the matter before the adjudicating authority/ appellate authority

Illustration 62: The CA for an Appellant opened his submissions by stating "Your Honour, the facts of the case are covered by 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 also show us how your facts are 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 that question and if it is in fact true and acceptable in our view, we will pass an equitable order". The CA quickly retraced his steps and made his submissions and the Bench eventually ruled in favour of the Appellant.

(c) Speak slowly, softly and clearly

A calm and deliberate voice will exude more confidence and command more attention in the room than a frenetic one.

Illustration 63: Representatives are advised not to put on an accent when 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-emptsnervous interruptions that appear to arise from the use of accent.

Illustration 64: Representatives 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 65: Representatives should not imitate any influence of native accent of the authority as it may be taken as mocking and disrespectful.

Illustration 66: The 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 got him to immediately stop the distraction. The Bench seemed to carry some residue 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) Question raised by the adjudicating authority/ appellate authority

Very often adjudicating authorities ask questions. It is important to satisfactorily address the question raised and not to launch a counter question or debate over it.

(e) In case written submissions are to be made or the summary needs to be presented, its copies may be provided to the adjudicating authority/appellate authority. Each member on the bench and the other party 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 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. This may annoy the adjudicating authority/ appellate authority and adversely impact his / her perception
- (k) In case where the respondent is presenting his version of the matter, allow him to complete his / her 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 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 providing of 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 like now to close submission and thank the bench for the attention"
- (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 quote 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

7.1 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.

7.2 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 initialed. It is advisable to file synopsis of facts and submissions during final hearing. This is moreso when the issues are complex and no direct precedents are available.

Chapter 7

Ethics and Etiquette

1. Introduction

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.

This chapter in sum is a recollection of visible signs that a learned member of this Institute has come to personify. A few areas where this recollection may be required are briefly discussed.

2. Code of Conduct

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 (www.esb.icai.org). 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.

Conduct as it is said is contagious and articulated 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.

3. Knowledge

Knowledge is gained continuously - 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 create 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 'teachable' or 'coachable' and 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 spend greater number of hours on this aspect than a fresher. Embracing technology to access most recent information advances the cause of Clients by allowing you to placehands 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 someof 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.

4. 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 aims 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. Dress and presentation are discussed in detail in another chapter, but style and approach can be brought into these areas, too.

It is easy to see if a representative is imitating another person in the style and approach during arguments. This is a put-off 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 or more reading. While reading decisions, attention is paid to the ratio laid down by the Court, but attend to the manner in which a complex set of facts are unraveled 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.

5. Integrity

This is an overused expression but is visible and apparent in 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 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 the office of a member and particularly one who is providing representational services. Corruption is the cloak that hides incompetence and it deserves 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.

Exercise knowledge and experience to develop pleadings suited for different kinds of matters. Pleadings cannot be copied and recycled because it may have been developed for a certain approach in the notice issued and not suitable in another case. Refer pleadings prepared as a guide to draft fresh pleadings. As explained in another chapter, develop check-lists to ensure completeness of all submissions going out of the office. Follow relevant Appellate Procedure Rules regarding form, format and content of each submission before appellate authority. Diligence in this area goes a long way in conveying the attention expected of the authority in hearing the matter.

6. 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 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.

7. 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 pursuing litigation. The possibility of approaching the Settlement Commissioner could also be explored
- (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 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 CESTAT or VAT 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

8. 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 entertain personal communication with adjudication / appellate authorities
 - (h) Do not 'cut and paste' pleadings, 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 one of your own
 - (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

Chapter 8

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, risk involved, litigation costs, precedent value, time span etc.

Litigation strategy enables analysis of various factors, which enable arriving 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 tax credits. Hence, ongoing compliances must be aligned to defend all possible questions that may be posed in any audit inquiry.

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.

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 show cause notice 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 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 show cause notice has been issued shall also be analyzed and understood as the department may invoke the wrong provisions.

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) How strong is the case and whether the provisions of the statute support the client's case.
- (b) Existence of supporting evidence.
- (c) Whether the interpretation adopted is backed by precedent decisions.
- (d) What would be the monetary impact of losing the case (in terms of outflow of duty/tax+ interest+ penalty).
- (e) Possibility of issues on cenvat availment/availability, where the client accepts the liability and pays it along with interest and penalty (Rule 9 of Cenvat credit Rules,2004).
- (f) Impact on other existing litigations.
- (g) Impact on stand taken under other taxing statutes/statutory compliance. For example, where the client wishes to contest in VAT proceedings wherein that particular activity is service and not sale under State laws, Tax implication and impact of such a stand on service tax liability and probable demand by the service tax authorities should also be borne in mind.
- (h) 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.

Assurance about possible outcome – While a CA is expected to give 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 67: Where a client enquires about the probability of winning the case, rather than assuring him of certainty of winning you could say that based on present law and the case laws, the client has a good chance.

CA may also make the client aware that the issue is pending at a higher stage (SC or HC) and any view is possible

5. Alternative Remedy, Settlement Commission, Writ

In adjudication proceedings, while replying to the notice on merits it is also advisable to explore alternative options as below:

- (a) **Payment of duty along with interest and availment of credit by the buyer of the goods or recipient of service:** Where the buyer is willing to accept the supplementary bill for the services/goods and if the demand is not on account of invoking of extended period of limitation (refer Rule 9(1)(bb) of Cenvat Credit Rules, 2004), the possibility of using the credit by the buyer/service recipient could be explored..
- (b) **Settlement Commission:** Where the issue cannot be contested on merits or the case is weak on merits and limitation, then the option of going for settlement should be considered instead of opting for the adjudication route.
- (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 show cause notice 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.

Illustration 68: Where the transaction is in the nature of sale of goods (fact is accepted by department) and the department issues a notice proposing demand of service tax on such transaction, challenge could be made before writ court

6. Revenue Neutrality

Revenue neutral situation arises when the tax (if paid) would be eligible for availment as credit either by the person paying the tax or person who purchases/receives the goods or services. The Revenue neutrality is also considered in the matter of invoking extended period of limitation and imposing penalties.

7. Payment under protest

Payment under protest could possibly reduce the burden of interest in case of unfavorable 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.

Illustration 69: where claim of exemption is doubtful /department has contested the issue of such claim of exemption to goods in case of other parties in the same industry, in order to save the burden on payment of interest, assessee could opt to pay duty under protest.

8. Refund Matters

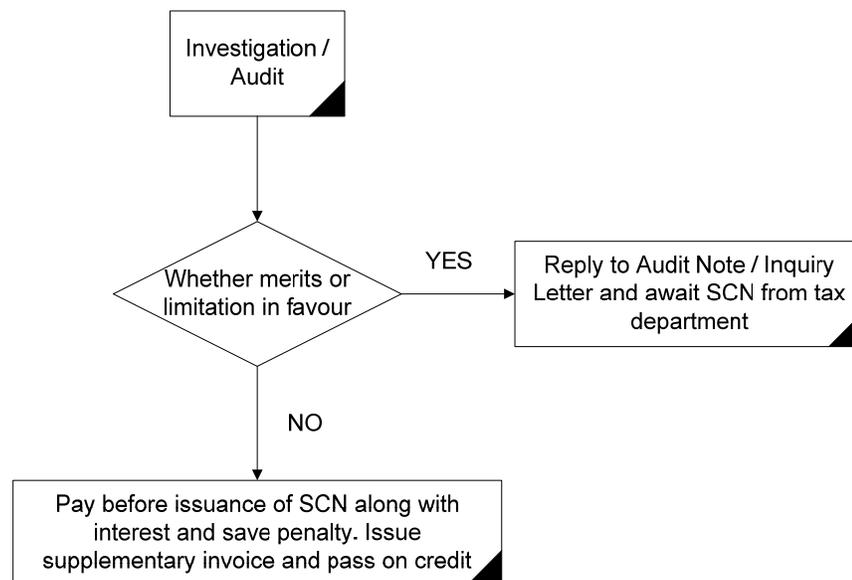
In cases involving refund, whether refund of duties or taxes excess paid or refund/rebate arising out of export of goods or services (like cenvat refund/rebate of duty paid on inputs) etc., the following aspects are to be considered:

- (a) Compilation of the relevant documents and submission of such documents.

- (b) Principle of unjust enrichment.
- (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.

9. Checklist – SCN Stage

It is advisable to prepare and follow a check list for the activity of drafting and filing reply to show cause notice / filing appeal before Commissioner (Appeals)/ CESTAT. 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 in a time- bound manner.

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 show cause notice.

- (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) The SCN shall not pre-judge or conclude the issue but it should contain only the allegations.

Check whether officer issuing show cause notice has power to issue such SCN.

Check whether the reply to show cause notice is to be addressed to an officer other than the officer who has issued it. [To illustrate, DGCEI may issue SCN but the reply has to be submitted to the jurisdictional Commissioner.]

In case you cannot submit the reply within the time granted in show cause notice, write a letter to the concerned officer seeking time.

Drafting reply to the show cause notice:

A. Background

- (a) Give a brief background of the assessee.
- (b) State the background (audit or investigation etc.) leading to the issue of present show cause notice.
- (c) Briefly mention the issue in dispute.
- (d) Amounts proposed to be demanded in the SCN along with period and relevant provisions.

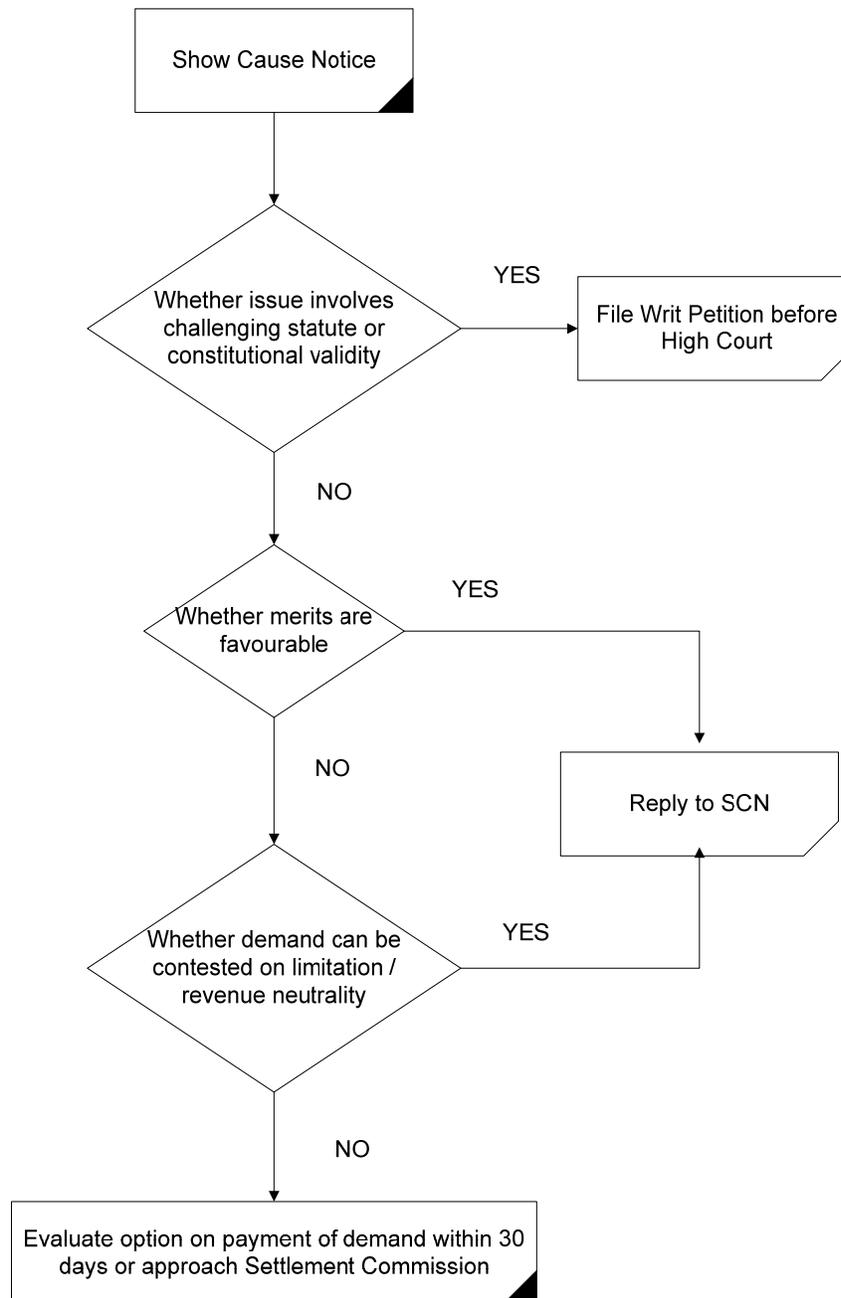
B. Reply

- (a) Address each of the allegations and provide evidence to support the contention.
- (b) In case 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 case 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 be concluded 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 CESTAT or Commissioner (Appeals) while filing the appeal.



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 provisions relating to appeal and the rules issued there under.
- (b) Appeal shall be filed in specific forms and format as notified. Select the proper form.
- (c) If the appeal is being filed before the CESTAT, ensure that the appeal filing fee is computed properly and demand draft for the same is submitted.
- (d) Provide correct information as required under the form of appeal.
- (e) Don't leave any of the questions in the form unanswered.
- (f) Prayer for grant of relief shall be specific.
- (g) 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) Chronological events prior to issue of SCN (if relevant) may be stated and the relevant documents be enclosed.
- (c) Summarize the allegations in the SCN, your reply and the findings in the impugned order. Enclose copy of each of the document.
- (d) Grounds of appeal:
 - (i) State the grounds of appeal in a precise and concise manner. Link such grounds to the reply to show cause notice and the evidence relied upon, which apparently was 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 Appeal rules and CESTAT procedure Rules for 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 CESTAT.
- (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 attend to enhancement of their representational skills by considering the need to read matters stated in this material relating to 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 9

Mock Tribunal and Logistics of the Course

1. Introduction

This module on Mock Tribunal and Mock Appellate/Adjudication Proceedings is included in the course to give the participants a feel of what happens, while representing a case before the authority or Tribunal. Hence, it should be ensured that the logistics and format are as close to that we come across in the Tribunal or before the authority.

2. Structure and suggested format of Mock Tribunal

All the participants should prepare for the case and get one chance to appear in the Mock Tribunal or hearing.

SCNs (for mock hearing) or Orders (for Mock Tribunal) shall be provided to the participants in advance so that they shall spend sufficient time in understanding preparation

Paper books should be prepared with statement of facts, grounds and annexures and made available to the presiding members and opposite side.

In a case, four participants can be there – two for Appellant and two for Respondent.

Case laws/circulars relied upon should be made available at the time of arguments to the presiding members and opposite side.

Two or three experienced faculties should be chosen as presiding members of the Tribunal or as departmental authority hearing the case.

Dress code as prescribed by the CESTAT Rules, should be followed by the participants including faculties acting as Tribunal members or departmental authorities.

One day should be dedicated for Mock Tribunal/Mock Departmental hearing.

Court room atmosphere should be created and even the seating arrangement should be in the same manner to the extent possible.

Microphone facilities should be available to all participants and faculties, preferably collar mics.

The names of faculties and their contact numbers should be given to the participants for clarifying any doubts about the mock tribunal. A local coordinator should ensure preparation for mock tribunal/hearing.

ICAI should have atleast 25 SCNs and orders kept ready for use in mock tribunal.

3. Adjudication or appellate authority

A faculty should be the presiding authority.

The participants should have a SCN, reply to SCN and case laws ready for the hearing.

ICAI should have atleast 25 SCNs and the participants shall prepare reply to SCNs ready for use in such mock hearing.

Two participants can be allowed to represent in a particular case.

Adequate number of microphones should be made available.

4. Logistics for drafting/pleadings

Participants should be encouraged to bring their laptops, which can be used for drafting.

Two faculties should be present while conducting this session.

One day should be spent on drafting/pleading skills including drafting of letters, appeals, reply to notices, miscellaneous applications.

One day can be dedicated for drafting/pleadings.

5. Schedule of the course

Day 1	<ul style="list-style-type: none"> • About the course and importance of representation - Duration 1 hour • Relevant statutory provisions under Central Excise, Customs, Service Tax and VAT laws – Duration 3 hours • Principles of Administrative law – Duration 2 hours • Principles of Evidence law – Duration 2 hours
Day 2	<ul style="list-style-type: none"> • Advisory role during litigation including search, seizure, audit, investigation etc. – 2 hours • Handling litigation before the adjudicating authority with practical tips and illustrations – Duration 2 hours • Handling litigation before the appellate authority with practical tips and illustrations – Duration 2 hours • Dress code, logistics and litigation strategies – 2 hours
Day 3	<ul style="list-style-type: none"> • Drafting and pleadings and its importance – Duration one hour • Drafting audit reply and other correspondence during audit and investigation – Duration 30 minutes • Drafting of reply to SCN (analysis of SCN, evidence and grounds) – Duration 3 hours • Drafting of appeal to Tribunal including form, statement of facts, grounds, prayer and verification– Duration 3 hours

Day 4	<ul style="list-style-type: none">• Mock Hearing (adjudication/first appellate authority) – 3 hours• Mock Tribunal – 4 hours.• Ethical practices and integrity – one hour
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Annexure A

Selection of Statutory Provisions

1. Basis for Legal Remedies

1.1 Parliament has further powers to make any law for any part of India not comprised in a state, notwithstanding that such matter is included in the state list. Part XII of the Constitution of India, contains matters related to "Finance, Property, Contracts and Suits" in the Articles 264 to Article 300A. Article 265 states that "no tax shall be levied or collected except by authority of law".

1.2 It has been held by the Supreme Court in *Kunnathat v. State of Kerala* AIR 1961 SC 552, that the term "authority of law" means that tax proposed to be levied must be within the legislative competence of the Legislature imposing the tax.

1.3 The law must not be a colorable use of or a fraud upon the legislative power to tax. It must not also violate the fundamental rights such as Article 14, 19 etc.

1.4 The Supreme Court in the case of *Vijaylakshmi Rice Mills 2006* (201) ELT 329 has distinguished the works 'tax' and 'fee' and has held that tax is compulsory exaction of money for public purposes by state whereas the fee is charge for service rendered by governmental agency.

1.5 A few Articles of the Constitution relevant to the taxation have been referred to below:

- (a) Article 13: Laws Inconsistent with or in Derogation of Fundamental Right
- (b) Article 14: Equality before Law
- (c) Article 15: Prohibition of Discrimination on the Grounds of Religion, Race, Caste, Sex or Place of Birth
- (d) Article 20 : Protection in respect of conviction for offences

2. Writ Jurisdiction

2.1 Writ has been defined as a written command or formal order issued by Court directing person(s) to do or refrain from doing some act specified therein. The Constitution of India provides writ jurisdiction under Article 32 and Article 226 for the enforcement of Fundamental Rights and other legal remedies. A petitioner can approach Supreme Court under Article 32 and High Court under Article 226 of the Constitution.

2.2 The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of the following:

- (a) Habeas Corpus: Habeas Corpus is a Latin term which means "you may have the body".

The writ is issued to produce a person who has been detained, whether in prison or in private custody, before a court and to release him if such detention is illegal. The writ provides a prompt and effective remedy against illegal detention. The principal aim of the writ is to ensure swift judicial review of alleged unlawful detention on liberty or freedom of the prisoner or detenu.

- (b) **Mandamus:** Mandamus is a Latin word, which means “We Command”. Mandamus is an order from the Supreme Court or High Court to a Lower Court or Tribunal or public authority to perform a public or statutory duty. The writ of mandamus would be to issue an order to cancel an order of an administrative or statutory public authority or the Government itself where it violates a fundamental right.
- (c) **Prohibition:** The writ of prohibition means to forbid or to stop and it is popularly known as ‘Stay order’. The writ of prohibition would be issue of order to prevent or prohibit a quasi-judicial authority from proceeding to act in contravention of a fundamental right such as ex-jurisdiction, violation of natural justice, unconstitutional etc. After the issue of this writ, proceedings in the lower court etc. come to a stop.
- (d) **Certiorari:** Certiorari means “to be certified”. The writ of certiorari can be issued by the Supreme Court or any High court for quashing the order already passed by an inferior court, tribunal or quasi- judicial authority.
- (e) **Quo Warranto:** The word Quo Warranto means “what is your authority”. It is a writ issued with a view to restrain a person from holding a public office to which he is not entitled. The writ requires the concerned person to explain to the court by what authority he holds the office.

2.3 In addition to the specific writs for the enforcement of fundamental rights and other constitutional rights, a petition can also be filed in cases where the vires of the law has been challenged or where the principal of natural justice has not been followed or against the validity/enforceability of circular/rule/notification or against any order/notice issued without jurisdiction or where the alternate remedy is inadequate. The writs are subjected to rejection when any efficacious alternate remedy is available or if it involves a disputed question of fact.

2.4 There is no prescribed time limit for filing writ petition in the Supreme Court or High Court. However, writ can be dismissed on grounds of unreasonable delay.

2.5 Only the person aggrieved can file a writ in the Supreme Court or Jurisdictional High Court. However public interest litigation or enforcement of habeas corpus or quo warrantoare some exceptions where writ can be filed other than the aggrieved person.

3. General Clauses

3.1 Any exercise on interpretation of law is incomplete without due consideration being given to the provisions of General Clauses Act, 1897. States too have their own laws on General Clauses. This Act provides the ‘rules’ for interpretation and the provisions of this Act burns into every legislation to which it applies. The Constitution of India also does not fall

outside the scope of the rules laid down in this Act. Some key provisions of the Central law on General Clauses are discussed here.

3.2 Section 5 Coming into force – when a Central Act is to ‘come into force’ from the date it receives assent of the President of India, it shall come into force from ‘end of day preceding’ its commencement.

3.3 Section 6 Effect of repeal – when any Act is ‘repealed’, it shall not:

- (a) Revive anything not in force;
- (b) Affect anything already done;
- (c) Affect any – right, privilege obligation or liability – arrived previously;
- (d) Affect any – penalty, forfeiture, punishment – incurred previously;
- (e) Affect any – investigation, legal proceeding or remedy – in respect of above.

3.4 Section 8 References to repealed enactments – when any law refers to provisions from other laws which undergo amendment, then reference to those provisions will have to be applied along with those amendments while enforcing the law.

3.5 Section 9 Commencement and termination of time – when referring to a series of days with ‘from’ it excludes the first of those days and ‘to’ includes the last of those days.

3.6 Section 17 Functionaries – for indicating a person executing certain functions, it is sufficient to mention the official title of the person and every successive incumbent in that office will continue those functions.

3.7 Section 20 Construction of notification – words and expressions used in a notification issued under an enactment must be interpreted according to the meaning available of those words and expressions in the enactment itself.

3.8 Section 21 Scope of power – when power is given to issue notifications or orders, then it includes the power to add, amend, vary or rescind those notifications or orders but the procedure prescribed must be followed without any deviation.

3.9 Section 23 Laying down – when power is delegated with a condition that exercise of such delegated power must be ‘laid’ before Parliament or ‘published’ in gazette or after any other similar procedure of supervision (with or without affirmative action) then, unless the said procedure is followed, the exercise of delegation is void.

3.10 Section 24 Continuation after repeal – when any notification or order is issued under a law which is repealed and re-enacted, then those notifications or orders (unless inconsistent with the re-enacted law) will continue to apply as if issued under the re-enacted law until superseded.

3.11 Section 27 Meaning of service by post – when service is required in respect of any due process, it is sufficient if the said process, properly addressed and stamped with all necessary contents included, is put into dispatch which would reach the addressee in the normal course of delivery by post.

4. Limitation

4.1 Assistance from the State is available to everyone whose rights are violated. If not, those rights will be illusory. However, such assistance only avails to those who are vigilant about enforcing their rights. *Vigilantibus Et Non Dormientibus Jura Subveniunt* - the law assists those that are vigilant with their rights, and not those that sleep thereupon.

4.2 Limitation is provided in every enactment and where it is missing, recourse may be had to the Indian Limitation Act, 1963. Certain matters, in the wisdom of law maker, do not have any limitation or have a very large period of limitation.

4.3 Limitation is not that the underlying right abates but it merely states that the assistance of the State is not available if the step to avail such assistance is not taken within the said period of limitation. For example, section 25 of Indian Contract Act recognizes the payment of a time barred debt

4.4 Prescription, on the other hand, is the state of affairs where after the expiration of the period specified, the underlying right itself evaporates.

4.5 Identifying whether it is a case of limitation or prescription would greatly advance the litigation strategy to be adopted. Reference may be had to illustration 61 above where it is claimed by the revenue that the right to appeal abates after lapse of the time permitted for its filing, whereas assessee holds that it is unjust and the time limit must not be treated as a prescription but as a limitation which can be cured by intervention of higher judiciary.

4.6 Timelines of limitation can be interrupted by supervening events that can suspend the clock. Such events could be way, lunacy, etc. Examination of expiration of limitation must also take into account whether any supervening events may have occurred.

Annexure B

Landmark Decisions

1. General Principles

1.1 Natural Justice

(a) Oryx Fisheries Private Limited v UOI 2011 (266) ELT 422 (SC)

Issue before the Hon'ble Supreme Court was whether the authority who issued show cause notice proposing cancellation of the registration certificate of the appellant acted fairly and in compliance with principles of natural justice and also whether such authority acted with an open mind.

Quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.

(b) Kothari Filaments Vs. CC (Port), Kolkata, 2009 (233) E.L.T. 289 (S.C.)

The customs department, based on the enquires conducted and information collected, passed the order of confiscation of goods and imposed penalties. The said information was not supplied to the assessee.

Supreme Court held that when a document is relied upon by the department in passing an order or coming to certain conclusions, the same cannot be done without supplying the relied upon documents or information to the assessee

1.2 Contents of Notice

(a) CCE v Brindavan Beverages (P) Ltd. 2007 (213) ELT 487 (SC)

The allegations in the show cause notice was that the assessee wrongly availed the benefit of SSI exemption.

Though the department's case was that the assessee had arranged their transactions to erroneously avail the benefit of exemption, the allegations in show cause notice were not clear and specific.

The Supreme Court observed that the show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice.

(b) Oudh Sugar Mills Ltd. v UOI 1978 (2) ELT J172 (SC)

The show cause notice alleged clandestine removal of dutiable goods based on sample testing of raw materials and machinery usage.

The Supreme Court held that the show cause notice issued on the basis of assumption and presumption and the findings based on such show cause notice are without any material evidence and are based only on inferences involving unwarranted assumptions and are vitiated by an error of law. In the absence of tangible evidence of clandestine activity the notice was held as invalid.

1.3 Jurisdiction of the officer

(a) CC Vs Sayed Ali, 2011 (265) E.L.T. 17 (S.C.)

Whether Commissioner /Collector of Customs (Preventive), Mumbai has jurisdiction to issue show cause notice when imports have taken place at Bombay Custom House

Supreme Court held that Customs officer assigned with specific functions of assessment and re-assessment in jurisdictional area where goods imported, are competent to issue show cause notice under Section 28 of Customs Act, 1962 as 'proper officer'. Such officer alone can adjudicate the matters. Since Collector of Customs (Preventive) is not shown as officer assigned with such functions under Section 28 as 'proper officer', such officer is not competent to adjudicate the matters

1.4 Extended period of limitation

(a) Cosmic Dye Chemicals Vs. CCE, 1995 (75) E.L.T. 721 (S.C.)

The assessee did not include value of certain clearances, in the information supplied to the department, on the basis of bona fide belief that these were exempted and need not include.

The issue before the Court was whether non-supply of information without intent to evade would also be reasons to invoke extended period.

Each of the words (fraud, willful misstatement, collusion, Contravention of any provisions) used in the statute allowing invocation of extended period of limitation, requires to prove existence of intent to evade payment of duties. Without providing existence of intention to evade, no extended period could be invoked.

(b) Tamil Nadu Housing Board Vs. CCE, Madras 1994 (74) E.L.T. 9 (SC)

Assessee, a statutory body engaged in manufacture of concrete and wood in two different units, did not pay duty on wood on the basis of the belief that the wood products are not sold but are used in construction activity.

When the law requires an intention to evade payment of duty then it is not mere failure to pay duty. It must be something more. That is, the assessee must be aware that the duty was leviable and it must deliberately avoid paying it. The word 'evade' in the context means defeating the provision of law of paying duty. It is made more stringent by use of the word

'intent'. In other words, the assessee must deliberately avoid payment of duty which is payable in accordance with law.

(c) Maruti Suzuki India Ltd., Vs. CCE., Delhi, 2009(240) ELT 641(S.C)

Issue relates to interpretation of the definition of phrase 'inputs' and eligibility to avail credit on inputs used in power generation.

Huge litigation in the country stands generated on account of repeated amendments in Cenvat Credit Rules hence penalty is not leviable, particularly on account of conflict of views expressed by various Tribunals/High Courts, in large number of other cases where assessee also succeeded.

1.5 Presence of counsel during deposition

(a) Poolpandi v Superintendent 1992 (60) ELT 24 (SC),

The Supreme Court held that a person being interrogated did not have the right to insist on the presence of his lawyer.

The Court observed that there is no force in the arguments of appellant's advocates that if a person is called away from his own house and questioned in the atmosphere of the customs office without the assistance of his lawyer or his friends, his constitutional right under Article 21 is violated

(b) Senior Intelligence Officer v Jugal Kishore Samra 2011 (270) ELT 147 (SC)

In this case, the applicability of above decision (Poolpandi case) to Narcotic Drugs and Psychotropic Substances Act, 1985 was examined and it was held that the decision referred to above would be applicable and the advocate could not be part of the investigation. However, considering poor medical conditions of the party, interrogation was allowed to be done in the presence of a lawyer.

1.6 Act v. Rule

(a) Bimal Chandra Banerjee v. State of M.P. and Ors., (1971) 81 ITR 105,

No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule making authority. A rule making authority has no plenary power. It has to act within the limits of the power granted to it.

(b) L. CHANDRA KUMAR Vs. UoI, 1997 (92) E.L.T. 318 (S.C)

Tribunal competent to test the vires of subordinate legislations and rules but not the vires of their parent statutes because being a creature of an Act it cannot declare the very Act as unconstitutional

1.7 Alternative remedy

- (a) Union of India Vs. Vicco Laboratories, 2007 (218) E.L.T. 647 (S.C.)

Where a show cause notice is issued either without jurisdiction or in an abuse of process of law, the writ Court would not hesitate to interfere even at stage of issuance of show cause notice

- (b) Baburam Prakash Chandra Maheswari vs Antarim Zilla Parishad, AIR 1969 SC 556

Rule of alternate remedy as a bar to exercise writ jurisdiction is not a rule of law but is a self imposed restraint by the Courts. The Apex Court further observed that in proper cases, it is open to the High Courts to exercise writ jurisdiction even in cases where alternative remedy may be available

1.8 Retrospective operation of laws

- (a) Ujagar Prints v UOI 1988 (38) ELT 535 (SC)

A competent legislature can always validate a law which has been declared to be invalid by courts, provided the infirmities and vitiating factors noticed in the declaratory-judgment are removed or cured. Such a validating law can also be made retrospective. No individual can acquire a vested right from a defect in a statute and seek a windfall from the legislature's mistakes. Validity of legislations retroactively curing defects in taxing statutes is well recognised and courts, except under extraordinary circumstances, would be reluctant to override the legislative judgment as to the need for and wisdom of the retrospective legislation. In testing whether a retrospective imposition of a tax operates so harshly as to violate fundamental rights under Article 19(1)(g), the factors considered relevant include the context in which retroactivity was contemplated such as whether the law is one of validation of taxing statute struck-down by courts for certain defects; the period of such retroactivity, and the degree and extent of any unforeseen or unforeseeable financial burden imposed for the past period, etc.

- (b) Chhotabhai Jethabhai Patel & Co. v UOI 1999 (110) ELT 118 (SC),

The Supreme Court held that it is within the legislative competence of the Parliament to impose excise duty retrospectively, and it cannot be challenged on the ground that the same is incapable of being passed on to the buyer or under Article 19 or 31.

2. Evidence

2.1 Burden of Proof

- (a) State of Maharashtra v. Wasudeo Ram Chandra Kaidalwar AIR 1981 SC 1186

Burden of proof has two aspects (i) legal burden – to bring forth an assertion about something and (ii) evidential burden – to lead evidence to establish that assertion. The former is burden and later is onus. Burden does not shift but onus shifts. An issue poorly defended does not

prove the allegation unless the allegation itself is proved satisfactorily. No benefit of an assertion accrues unless burden of proof is discharged. Burden to prove lies on the person who asserts (*onus probandi*).

A substantive point not contested during adjudication but contested only in appeal causes misleading of adjudication process. Party entitled to contest estopped from questioning admitted or uncontested assertion.

Onus permits adducing counter-evidence to displace the proof adduced to establish the assertion. Once proof of assertion is displaced, the assertion, while still true, is rendered without force during remainder of proceedings.

Burden of proof and onus of proof are not synonymous. Refer *res ipsa loquitur*.

2.2 Degree of proof

(a) Mah. State Board of Secondary & Higher Education v. KS Gandhi (1991) 2 SCC 716

Strict rules of Evidence Act do not apply to domestic Tribunals. It is open to receive all necessary, relevant, cogent and acceptable material facts though not strictly proved. Inference from evidence and circumstances must be carefully distinguished from conjectures or speculation. The mind is prone to take pleasure to adapt circumstances to one another and even in straining them a little to force them to form parts of one connected whole. The standard of proof is not proof beyond reasonable doubt but the preponderance of probabilities tending to draw an inference that the facts must be probable. Probative value of evidence must be gauged from facts and circumstances of the case. Incriminating facts incompatible with innocence – is the degree to which an assertion is to reach to be disproved.

Seriousness of offence and evidence in support must be proportionate. As a matter of ordinary human experience, a person is less easily satisfied that a serious allegation is made out than that a trivial one is made out.

Severity of consequences inherently discourages deviation. Fraud is less likely than negligence. Courts are to try the case, not the moral rectitude of assessee. Doubt about innocence not adequate to establish guilt.

2.3 Presumption

(a) Sodhi Transport Co. v. UO AIR 1985 SC 1099

A presumption is not in itself evidence but only makes a prima facie case for party in whose favour it exists. It indicates the person on whom the burden of proof lies. When presumption is conclusive it obviates the production of any other evidence. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has provided evidence fairly and reasonably tending to show that the real fact is not as presumed, the purpose of presumption is over.

Proved means the evidence adduced establishes the assertion. Disproved means that based on evidence.

2.4 Expert Opinion

- (a) Ramesh Chandra Agarwal v. Regency Hospital Ltd. AIR 2010 SC 806

An 'expert' is one who has devoted time and study to a special branch of learning and thus specially skilled on those points on which he is asked to state his opinion.

Occurrence of an accident is information that a witness can provide. Negligence of driver being cause of accident is opinion which only an expert can provide.

2.5 Mens rea

- (a) RS Joshi v. Ajit Mills AIR 1977 SC 2279

Prohibition from collecting tax in excess of that leviable was made punishable without having to establish mens rea. The principle of 'no mens rea no crime' had no application in economic offences – actus non facit reum nisi mens sit rea – the act itself creates no guilt in the absence of a guilty mind.

Question in tax statutes is whether proof of mens rea is dispensed with or presence of mens rea is irrelevant. This can be known from the words of the statute.

Being aware of the existence of a risk of tax demand, if party proceeds to follow a course involving lower tax payment, it is a case of 'willfulness' in the non-payment.

2.6 Bona fide

- (a) Miniyatan Zacharias AIR 2008 SC 1456 (following Gibson v. Jeyes 1801)

In relationships of trust, where some benefit or advantage flows to the one holding the trust, the risk of mala fides must be disproved if questioned – *"He who bargains in a matter of advantage with a person placing confidence in him is bound to show that a reasonable use has been made of that confidence; a rule applying to trustees, attorneys or anyone else"*

The law reverses the usual rule of evidence of burden of proof in dealings involving trust or other fiduciary relationships.

Bona fide interpretation of non-liability to tax as long as it is tenable even if such interpretation set aside by Courts does not impute mala fide to that interpretation.

3. Interpretation

3.1 Per incuriam

- (a) Central Board of Dawoodi Bohra Community Vs State of Maharashtra, 2010 (254) ELT 196 (SC)

Review of earlier judgment. Doctrine of precedents.

"Per incuriam" means a decision rendered in ignorance of a previous binding decision such as decision of its own or of a Court of coordinate or higher jurisdiction. It may also mean decision rendered in ignorance of terms of a statute or of a rule having force of law.

(b) State of UP Vs Synthetics and Chemicals Limited, 1991 (4) SCC 139

'*Incuria*' literally means 'carelessness'. In practice *per incuriam* appears to mean *per ignoratum*. The 'quotable in law' is avoided and ignored if it is rendered, 'in *ignoratum* of a state, or other binding authority'.

3.2 *Sub Silentio*

(a) Municipal Corporation of Delhi v. Gurnam Kaur [(1989) 1 SCC 101],

Under Delhi Municipal Corporation Act, 1957, there was a bar on illegal encroachment on public land. A question arose whether the Commissioner can exercise authority to remove encroachment.

A decision is *sub silentio* when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass *sub silentio*.

(b) Security Printing & Minting Corpn of India Ltd Vs Gandhi Industrial Corporation, 2007 (217) ELT 489 (SC)

Job work was done for gumming and super-calendering of stamp paper for appellant-security press. Impugned papers brought by appellant after paying excise duty and gate passes issued evidencing thereof. Issue was whether Appellant was entitled to Modvat benefit.

Principle of *sub silentio* not applicable when terms and conditions well known and clearly understood between parties.

3.3 *Res Judicata*

(a) M.J. Exporters P. Limited Vs UOI, 2015 (325) ELT 216 (SC)

The appellant had challenged the demand of interest claimed by the Department on the amount of duty paid belatedly. The High Court rejected the prayer of the appellant and gave partial relief for recalculating interest.

Settled law that principles of constructive *res judicata* are applicable in writ proceedings also. Accordingly, while undoubtedly question of law can be raised at any time of *lis*, appellant not permitted to raise fresh argument on law point on a foreclosed issue.

(b) CC Vs Texcomash Export, 2015 (322) ELT 601 (SC)

The respondent had exported children's garments to Russia under the claim of drawback. Value for drawback purpose was fixed by the ACC, which was challenged in earlier proceedings and concluded by higher authority. Fresh show cause notice was issued by alleging fraud against the respondent and on that basis, the entire issue was sought to be reopened.

Show cause notice for drawback recovery was not issuable by Commissioner, when issue had already been settled by higher authority viz., Joint Secretary (Review). Even if certain additional material had come to notice, proper course was to challenge order of Joint Secretary (Review) at appropriate forum. No infirmity in Tribunal's order setting aside demand arising out of impugned show cause notice.

3.4 *Promissory Estoppel*

(a) Shrijee Sales Corpn Vs UOI, 1997 (89) ELT 452 (SC)

Appellant had imported PVC Resin, which was sought to be taxed. Whether time bound customs exemption can be removed prior to its expiry.

The principle of promissory Estoppel is applicable against the Government but in case there is a supervening public equity, the Government would be allowed to change its stand. It would then be able to withdraw from representation made by it which induced persons to take certain steps which may have gone adverse to the interest of such persons on account of such withdrawal. However, the Court must satisfy itself that such a public interest exists.

(b) Kasinka Trading Vs UOI, 1994 (74) ELT 782 (SC)

Courts would not interfere with fiscal policy unless there is fraud or lack of bona fides on the part of Government.

(c) UOI Vs Dharampal Satyapal Ltd, 2015 (319) ELT 6 (SC)

Industries set up in North-Eastern Region were exempted from Excise Duty. The exemption on tobacco product was sought to be withdrawn. Whether it was hit by promissory estoppel.

Withdrawal of exemption did not violate the principle of promissory estoppel.

3.5 *Lex Non Cogit Impossibilia*

(a) Indian Seamless Steel & Alloys Ltd Vs UOI, 2003 (156) ELT 945 (Bom.)

Prescribed period for making payment of tax expired on a holiday. Whether there was a default in tax payment.

Law cannot compel a person to do the impossible. Unforeseen circumstance beyond control of assessee resulting in non-payment of duty would not mean that there was failure to pay the duty by due date.

(b) Hico Enterprises Vs CC, 2005 (189) ELT 135 (T-LB). Affirmed by SC in 2008 (228) ELT 161 (SC)

Export obligation under Notification No. 203/92-Cus. was fulfilled by original licence holder. Department alleged that endorsement of transferability made on licence obtained by fraud or misrepresentation. Satisfaction arrived at by DGFT that exporter had discharged export obligation without availing input credit is binding on the Customs Department at all times.

Maxim *Lex Non Cogit Ad Impossibilia* to be read from the point of view of performance of an act by transferee of licence to fulfil condition, which is allegedly not discharged by transferor but not from the point of view of applicability of Notification No. 203/92-Cus.

3.6 *Ratio decidendi*

(a) Bharti Airtel Ltd Vs State of Karnataka, 2012 (25) STR 514 (Kar.)

Competence of the State to levy Sales Tax/VAT on telecommunication service. Interpretation of constitutional and statutory provisions and upholding the rule of law.

Ratio decidendi is the reason assigned in support of conclusion. It must be ascertained and determined by analyzing all material facts and issues involved in the case.

(b) Ahmedabad Mfg. & Calico Ptng. Ltd & Ors Vs UOI, 1982 (10) ELT 821 (Guj.)

Includability of post-manufacturing expenses in assessable value of goods in case of factory gate sale.

It is not everything said by the Supreme Court in its judgment which is binding as law declared by the Supreme Court. What is considered binding on all the courts is the actual ratio decidendi of the decision culled out in the context of the facts of the case in question.

3.7 *Obiter Dicta*

(a) Municipal Corporation of Delhi v. Gurnam Kaur [(1989) 1 SCC 101]

Under Delhi Municipal Corporation Act, 1957 there was a bar on illegal encroachment on public land. A question arose whether the Commissioner can exercise authority to remove encroachment.

Quotability as to law applies to the case, its ratio the only thing binding on an authority is the principle upon which the case was decided. Statements which are not part of the *ratio decidendi* are distinguished as *obiter dicta* and are not authoritative.

(b) Mohandas Sardas Vs CC, 2000 (125) ELT 206 (Bom.)

Powers of the authority to impose penalty when there is a prohibition or restrictions on importation.

An *obiter dictum* is an expression of opinion on a point which is not necessary for the decision of a case. Two questions may arise before a Court for its determination. The Court may determine both although only one of them may be necessary for the ultimate decision of the case. The question which was necessary for the determination of the case would be *ratio decidendi*. The opinion of the Tribunal on the question which was not necessary to decide the case would be only an *obiter dictum*.

3.8 Binding Precedent

(a) A One Granites Vs State of UP & Ors, AIR 2001 SC 1203

Issue arose in the context of re-grant of mining leases for following the procedure for giving notice.

A decision which was not express and was not founded on reasons nor it proceeded on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141.

- (b) ACCE Vs Dunlop India Ltd &Ors, 1985 (19) ELT 22 (SC)

Impact of ex parte interim orders

It is inevitable in a Hierarchical system of courts that there are decisions of the Supreme Court which do not attract the unanimous approval of all members of the judiciary, but the judicial system only works if someone is allowed to have the last word and that last word once spoken is loyally accepted. The better wisdom of the Courts below must yield to the Higher wisdom of the Court above that is the strength of the hierarchical judicial system. In India, needless to say, under Article 141 of the Constitution, the law declared by the Supreme Court shall be binding on all courts within the territory of India, and under Article 144 all authorities civil and judicial in the territory of India shall act in aid of the Supreme Court.

3.9 Judicial discipline

- (a) Pradip Chandra Parija Vs Pramod Chandra Patnaik, 2002 (144) ELT 7 (SC)

Judicial discipline to be followed by Judges as regards Court decisions.

Judicial discipline requires that two Judge Bench should follow the decision of a Bench of three learned Judges. If the two Judge Bench concludes that the earlier judgment of three learned Judges is very incorrect and under no circumstances to be followed, proper course is to set out the reasons why it could not agree with the earlier judgment and refer the matter to a Bench of three Judges and if then the Bench of three Judges also comes to the conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, it should refer the matter to a Bench of five learned Judges.

- (b) UOI Vs Kamalakshi Finance Corpn. Ltd, 1991 (55) ELT 433 (SC)

It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department, in itself an objectionable phrase and the subject-matter of an appeal, can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assesseees and chaos in administration of tax laws.

3.10 Doctrine of merger

- (a) Kunhyammed Vs State of Kerala, 2001 (129) ELT 11 (SC)

Doctrine of merger is neither a doctrine of constitutional law nor one statutorily recognized. It is a common law doctrine founded on principles of propriety in the hierarchy of justice delivery system. Its underlying logic is that there cannot be more than one operative order governing

the same subject matter at a given point of time. The doctrine is not of universal or unlimited application. To attract it, the superior jurisdiction should be capable of reversing, modifying or affirming the order put in issue before it and it should do so by passing a speaking and reasoned order.

(b) *Fuljit Kaur vs. State of Punjab*, 2010 (262) ELT 40 (SC)

Unique case of an influential person having allotment of residential plot in discretionary quota within 48 hours of submission of application and to assert right to have land at throwaway price and not deposit sale price for quarter of a century.

Dismissal of Special Leave Petition in limine does not mean reasoning of judgment of High Court stood affirmed or such judgment merges with Supreme Court order. Such dismissal of SLP means case not considered as worthy of examination. Such order does not operate as *res judicata* and is not a binding precedent.