
Goods and Service Tax (GST)

*How to reply to SCN under
Section 74 under GST?*

18th October 2024

Section 74 of the CGST Act

- **Where it appears to the proper officer that**
 - any tax has not been paid or short paid or
 - erroneously refunded, or
 - where input tax credit has been wrongly availed or utilized

by the reason of

- fraud or
- any wilful-misstatement or
- suppression of facts

to evade tax

‘it appears’

- "it appears that" is indicative of a prima facie opinion and not final determination.”

RR Financial Consultants Limited (2013 (9) TMI 792 - DELHI)

- The words ‘where it appears to the proper officer’ implies free, unfettered and unbound usage

Devi Traders (2023) 8 Centax 22 (A.P.)

- No requirement of any prior proceedings to issue SCN

Section 74 of the CGST Act : Scope

- **Scope of this provision**
 - ❑ any tax has not been paid or short paid or
 - ❑ erroneously refunded, or
 - ❑ where input tax credit has been wrongly availed or utilized

- **No SCN for any other offence can be issued under this section e.g.**
 - ❑ cancellation of registration
 - ❑ penalty for e-way bill etc. under section 129
 - ❑ offences under section 122

Section 74 of the CGST Act

- Pre-SCN consultation to be conducted by issuing DRC 1A
 - Rule 142(1A) amended by changing word ‘shall’ to ‘may’
 - The requirement still appears to be mandatory to comply with section 74(5)

- Summary to be issued electronically in DRC 01
 - Mandatory to be issued
 - Not a substitute of SCN
 - The hon’ble Delhi High Court has allowed summary to be issued at a later stage as well

Sulender Shah (2023) 13 Centax 187 (Del.)

SCN is foundation of adjudication

- Audi alteram partem : No person should condemn unheard. Principle of Natural Justice
- SCN is the foundation on which the department has to build up its case
- Allegations in SCN must be specific and not vague
Brindavan Beverages (2007) taxmann.com 728 (SC)
- SCN a mandatory requirement for raising demand
Metal Forgings 2002 (146) E.L.T. 241 (SC)
- SCN should not be issued with a pre-determined mindset
Oryx Fisheries 2011 (266) E.L.T. 422 (SC)

Essentials of a SCN

- Background of the case
- Discussion on facts, legal framework and relied upon documents (RUDs)
- Allegations on merits
- Allegations of fraud, wilful misstatement or suppression
- Calculation of tax and other amounts due
- Allegations on penalty
- Statement of charges
- Time period to reply
- Authority to adjudicate
- Signatures

Essentials of a SCN

- Master Circular No. 1053/02/2017-CX dated 10.03.2017 also provides the above as essential elements of a SCN
- Rule 26(3) provides for digital signatures or E-signatures as provided by the Information Technology Act, 2000 or any mode notified by the board
- Uploading of order on portal is manner of service, not a substitute for digital signatures
SRK Enterprises (2023) 13 Centax 60 (A.P.)
- Signatures are mandatory – Digital Signature is essential to authentication
Railsys Engineers (P.) Ltd. [2022] 141 taxmann.com 527 (Delhi)

Essentials of a SCN

- **GSTN advisory dated 26.09.24** that documents issued through the common portal are considered valid, even without digital signatures violates **Rule 26(3) of the CGST Rules**

- **SCN without signature is a body without a soul**
B.K. Gooyee [1966] 62 ITR 109 (Cal)

- **DIN is mandatory in notices by the Central GST authorities**
 - **Circular No. 122/41/2019 & 128/47/2019-GST dated 23-12-2019**

- **In case of notices issued by the State, the hon'ble SC has issued an advisory which is not mandatory**

Essentials of a SCN

- Relied upon documents to be provided, might not be asked by the taxpayer

Lari Almira House [2023] 149 taxmann.com 476

- SCN can only be issued electronically on the common portal.

Shri Shyam Baba Edible Oils [2023] 151 taxmann.com 139 (MP)

- Notice should be available on the common portal in the “View Notices” tab, rather than the “Additional Notices” tab

Sabari Infra (P.) Ltd. [2023] 154 taxmann.com 147 (Mad.)

Elements of SCN

- Same officer who conducts search, and seizure, cannot adjudicate the SCN

Swastik Plastics [2023] 156 taxmann.com 316 (Delhi)

- Service of SCN on the Accountant is not a valid form of service

Maa Mahamaya Alloys [2023] 150 taxmann.com 158 (All)

Mode of receipt of the SCN

- Hand delivery to the taxpayer/ representative/ registered post/ speed post
 - Retain the envelop and the original SCN
 - Retain evidence of date of receipt and person receiving the SCN
 - Post office tracking sheet in case of registered post/ speed post

- Received electronically
 - Retain a copy of the email/ screen shot of the portal
 - Service in 'additional notices' not a valid delivery

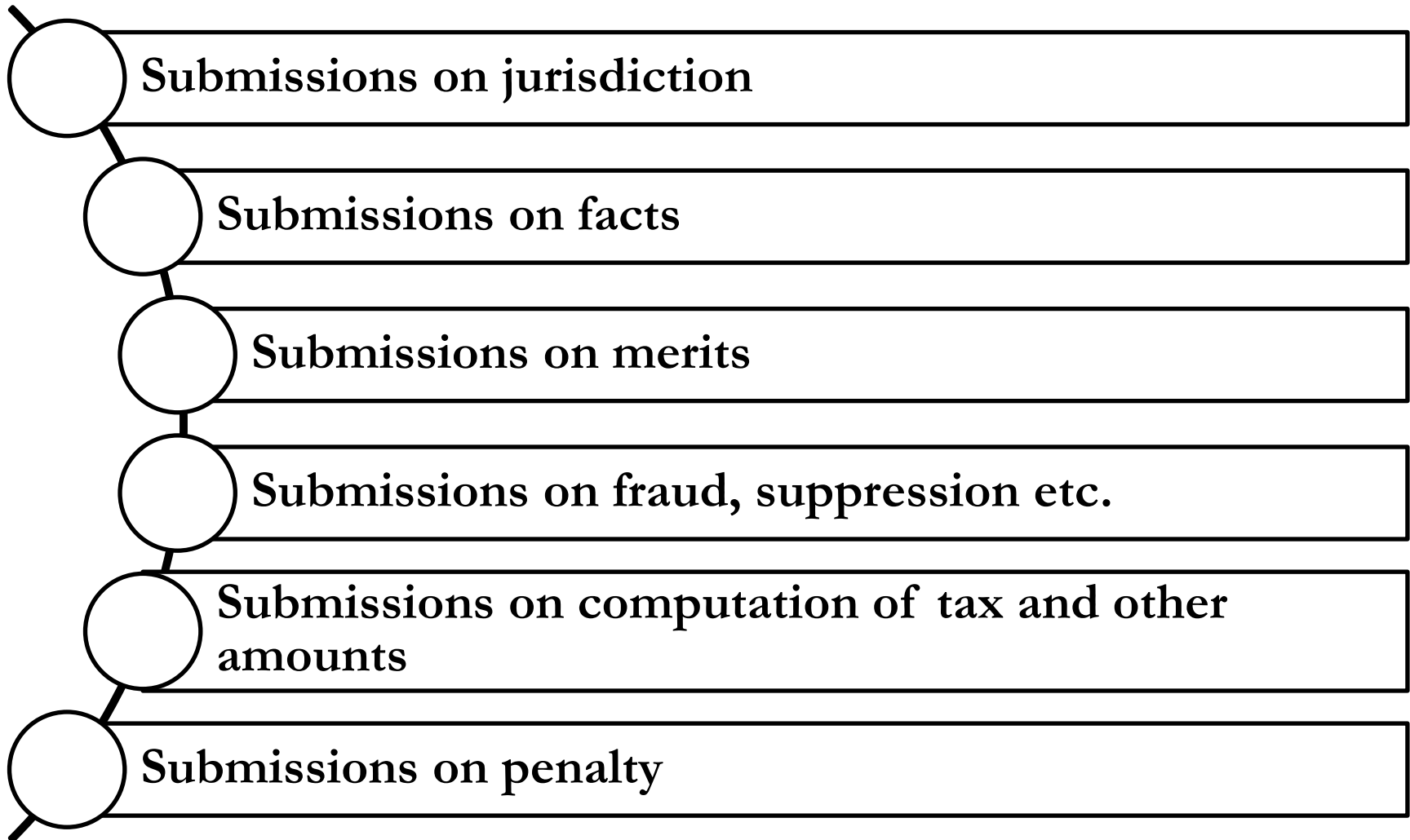
Supply of RUDs

- Verify whether all RUDs are attached to the SCN
 - If not, immediately write a letter to the SCN issuing authority as well as to the adjudicating authority requesting for supply of RUDs
 - Supply of RUDs is mandatory as per the Principle of Natural Justice

Universal Dyechem Private Limited C/SCA/1654/2021

- If other documents were seized, request for non relied upon documents as well

Drafting the Reply to the SCN



Submission on jurisdiction

- SCN is to be issued by **'the'** proper officer and not **'a'** proper officer

Canon India Pvt. Ltd. [2021] 125 taxmann.com 188 (SC)

- In absence of a notification for cross-empowerment, the action taken by the respondents are without jurisdiction

TVL. Vardhan Infrastructure 2024 (84) G. S. T. L. 443 (Mad.)

- Jurisdiction issue cannot be challenged at a later stage

Kedar Shashikant Deshpandey (2011) 2 SCC 654

- SCN lacking jurisdiction can be challenged in a writ. Alternative remedy would not be a bar

Submission on facts

- Verify the facts carefully – errors are frequent and deliberate
- Department is known to record ‘inches’ as ‘feet’ and ‘feet’ as ‘meters’
- Even legal provisions are incorrectly quoted
- Non relied upon documents are sometimes most important
 - Expressly state that a reply to the SCN cannot be prepared without non-relied-upon documents

Parmarth Iron [2014] 51 taxmann.com 315 (All.)

- Examine corroborative evidence
- Ask for cross examination where statements of third parties are relied upon
 - Cross- examination of witnesses relied upon in SCN

Rajputana Stainless Ltd. [2021] 133 taxmann.com 109 (Guj.)

Submission on fraud/ suppression

- Onus is on the department

"The section cannot be used to undermine the well-established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

Amba Lal 1960 taxmann.com 1 (SC)

- SCN must clearly make out case for extended period

HCL Infotech Ltd (2024) 23 Centax 71 (All.)

- Mere non-payment of tax is not suppression

Northern Operating System 2022 (61) G.S.T.L. 129 (S.C.)

Submission on fraud/ suppression

- The words ‘fraud, wilful misstatement or suppression of facts to evade tax’ are strong words

Pushpam Pharmaceutical Company 1995 Supp (3) SCC 462

- Mere inaction on part of taxpayer is not enough to establish suppression etc.

Continental Foundation 2007 (216) E.L.T. 177 (SC)

- Some deliberate and positive action is must to establish suppression

Circular No. 268/102/96-CX dated 14.11.96

Submission on fraud/ suppression

- Suppression of facts not applicable where interpretation of law is involved

Delhi Airport Metro Express ST Appeal No. 50919 of 2015

- Suppression not applicable where question of law decided by the SC or clarified by the CBIC

- Suppression cannot be alleged when information required by law has been provided. Taxpayer cannot provide any additional information in electronic filing of returns

- Suppression of facts is not applicable in case of revenue neutral cases

Nirlon Ltd. [2015] 58 taxmann.com 28 (SC)

Recent allegations of the department

- The appellant was operating under self-assessment
- Because the appellant did not agree with the audit and claimed that CENVAT credit was admissible
- Because the appellant did not seek any clarification from the Revenue
- Because the officer did not conduct a detailed scrutiny of the Returns and the availment of CENVAT credit which is alleged to be inadmissible and was discovered only during audit

G.D. Goenka Private Limited ST APPEAL NO. 51787 OF 2022

- Evasion could not have been detected had the audit or investigation was not conducted

Cum-Tax Benefit

- Tax is on the value of taxable services, and it has to be collected on that value only; value of taxable services cannot be said to include tax also.

Maruti Udyog 2002 (141) ELT 3 (SC)

- If tax is to be paid, it has to be worked out on the basis of gross amount received by them as inclusive of tax

Bhagawati Security Services 2006 (3) STR 763 (Tri- Del.)

Submissions on penalty

Particulars	Normal Cases (sec.73)	Fraud Cases (sec. 74)
If tax is paid along with the interest before serving of SCN	Proceeding are deemed to be concluded	Proceeding deemed to be concluded upon payment of penalty of @15% of demand
If tax is paid along with interest within 30 days of issue of SCN	No penalty All proceedings deemed to be concluded.	Proceedings deemed to be concluded upon payment of penalty of @25% of demand.
If tax paid along with interest within 30 days of Order	No provision	Proceedings deemed to be concluded upon payment of penalty of @50% of demand.
If amount not paid within 30 days	Penalty @ 10% of the amount due or Rs. 10,000 whichever is higher	Penalty equal to the demand or Rs. 10,000 whichever is higher.

Thank you

Kamal Aggarwal, FCA

Kamal@singhania.com

+91 98103 86017