

F. No. 137/46/2015-Service Tax
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise & Customs
Service Tax Wing

New Delhi, dated 18th August, 2015

To

All Principal Chief Commissioners of Central Excise
All Chief Commissioners of Central Excise/ Service Tax
Principal Directors General of Goods & Services Tax/ Systems/
Central Excise Intelligence
Director General of Audit
All Principal Commissioners of Central Excise/Service Tax
All Commissioners of Central Excise/Service Tax
All Principal Commissioners/Commissioners LTU
Joint Secretary TRU-I/TRU-II/Review
Commissioner Central Excise/ Service Tax/Legal/PAC

Madam/Sir

Subject: Clarification regarding the provisions of Section 73, 76 and 78 of the Finance Act, 1994 and Section 11AC of the Central Excise Act, 1944 after amendments made vide Finance Act, 2015

Consequent to the amendments made to section 73, 76 and 78 of the Finance Act, 1994 and section 11AC of the Central Excise Act, 1944, vide Finance Act, 2015 with effect from 14.05.2015, field formations have sought certain clarifications with regard to detections made during audit, investigation or scrutiny. Keeping in mind the need to reduce litigation as well as paperwork and compliance formalities, I am directed to convey the following clarifications.

2.0 Issuance of a Show Cause Notice (SCN)

Doubt: Does a SCN have to be issued in a case involving the extended period of limitation, where the assessee pays the tax/duty, interest and 15% penalty as prescribed?

2.1 In a case involving the extended period of limitation, if an assessee pays the service tax/central excise duty, interest and penalty equal to 15% of the tax/duty and makes a request in writing that a written SCN may not be issued to them, then in such cases the SCN can be oral and the representation (if he desires) against it also oral. In other words, an assessee can request for an informed waiver of a written SCN. The Supreme Court in the case of **Commissioner of Customs, Mumbai versus Virgo Steels** reported in **2002(141) E.L.T 598 (S. C.)** has held that:

“14. From the ratio laid down by the Privy Council and followed by this Court in the above cited judgments, it is clear that even though a provision of law is

mandatory in its operation if such provision is one which deals with the individual rights of person concerned and is for his benefit, the said person can always waive such a right.

15. *Bearing in mind the above decided principle in law, if we consider the mandatory requirement of issuance of notice under Section 28 of the Act, it will be seen that that requirement is provided by the Statute solely for the benefit of the individual concerned, therefore, he can waive that right. In other words, this Section casts a duty on the Officer to issue notice to the person concerned of the proposed action to be taken. This is not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice. Thus, the right of notice being personal to the person concerned the same can be waived by that person.*

16. *If the above position in law is correct, which we think it is, M/s Virgo Steels, having specifically waived its right for a notice, cannot now be permitted to turn around and contend that the proceedings initiated against them are void for want of notice under Section 28 of the Act, so as to frustrate the statutory duty of the Revenue to demand and collect customs duty which M/s Virgo Steels had intentionally evaded."*

Although this decision is in relation to section 28 of the Customs Act, 1962, the principles laid down are equally applicable to SCNs issued under other statutes. Hence, an assessee can waive the requirement of a written SCN.

2.2 Further, section 124 of the Customs Act, 1962 provides, inter alia, that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing, an opportunity of making a representation in writing and a reasonable opportunity of being heard. The section also provides that the notice and the representation may, at the request of the person concerned, be oral. This provision has been made applicable to the Central Excise Act, 1944 vide notification number 68/63-Central Excise dated 04.05.1963 issued under section 12 of the Central Excise Act, 1944. The said section of the Central Excise Act is also applicable to service tax vide section 83 of the Finance Act, 1994.

2.3 If the grounds on which the department feels that there has been short/non-payment of tax/duty are intimated to the assessee orally with its quantification and the assessee indicates in writing that he has been informed about such grounds and he accepts the grounds and the quantification and is waiving the requirement of a written SCN, then a written SCN need not be issued.

2.4 Further, clause (i) of the second proviso to section 78 of the Finance Act, 1994 and clause (d) of sub-section (1) of section 11AC of the Central Excise Act, 1944 refer to a thirty day period, from the date of service of the notice, within which the assessee may make the payment of tax/duty, interest and reduced penalty of 15%. In case the assessee makes a written request for waiver of a written SCN, the thirty day period can be computed from the date of receipt of such a letter by the department.

2.5 There is no bar on an assessee making the payment of tax/duty, interest and reduced penalty of 15% even before the date of receipt of such a letter by the department. Such an assessee cannot be placed on a worse footing than one who pays tax/duty, interest and reduced penalty of 15% within 30 days of the receipt of the SCN/receipt of letter by the department.

3.0 Conclusion of proceedings

Doubt: Who is competent to order conclusion of proceedings if the conditions meriting conclusion of proceedings are fulfilled?

3.1 Conclusion of proceedings may be approved by an officer equal in rank to the officer who is competent to adjudicate such cases. The cases can be closed by officers of DGCEI/Executive Commissionerate/Audit Commissionerate, as the case may be. If multiple issues involving different monetary values arise from the same proceedings, then the sum total involved in all the issues arising from the same proceedings should be considered for conclusion of proceedings. The conclusion of proceedings should invariably be intimated to the assessee in writing. There is no need to issue an adjudication order. Further, there is no need to undertake review of such conclusion of proceedings.

3.2 It is further clarified that as per section 73(3) of the Finance Act, 1994, in cases not involving fraud, suppression of facts, etc, if the assessee pays the tax and interest thereon, on the basis of his own ascertainment or that ascertained by the department, no penalty is payable and no show cause notice shall be served under sub-section (1) of section 73 in respect of the amount so paid. Further, as per provisions of clause (i) of proviso to section 76, in such cases not involving fraud, suppression of facts, etc, if the tax and interest thereon is paid within 30 days of the issuance of SCN, no penalty shall be payable and the proceedings shall be deemed to be concluded. These two provisions have to be read harmoniously to conclude that in cases not involving fraud, suppression of facts, etc, if the assessee pays the tax along with interest, either within 30 days of issuance of SCN or before the issuance of SCN, then in such cases proceedings shall be deemed to be concluded. Legal provisions for similar closure in central excise are present in clause (a) of sub-section (1) of section 11AC of the Central Excise Act, 1944.

Yours faithfully

Himani
18/8/2015

(Himani Bhayana)

Under Secretary (Service Tax)

P.P.S to Chairman CBEC

P.P.S to Member Customs / Member Service Tax / Member Central Excise / Member Personnel and Vigilance / Member Legal and Judicial