

Chapter V

Issue of Show Cause Notice and Adjudication process

5.1 Introduction

Adjudication is a quasi-judicial function of the officers of the Central Excise and Service Tax Department. Through imposition of an appropriate penalty after adjudication it seeks to ensure that no revenue loss is caused by the contravention of applicable laws/rules/regulations etc. However, if an innocent person is punished or the punishment is more than warranted by the nature of offence, it may undermine the trust between the Government and the tax payer. If, on the other hand, a real offender escapes the punishment provided by law, it may encourage commission of offences to the detriment of both, the Government and the honest taxpayers.

There may be situations relating to the demand of duty not paid, short paid or erroneously refunded, misclassification, Cenvat credit wrongly availed, imposition of penalty etc. It is mandatory that a show cause notice (SCN) is issued if the department contemplates any action prejudicial to the assessee. The SCN would detail the provisions of law allegedly violated and ask the noticee to show cause why action should not be initiated against him under the relevant provisions of the Act/Rules. Thus, an SCN gives the noticee the opportunity to present his case.

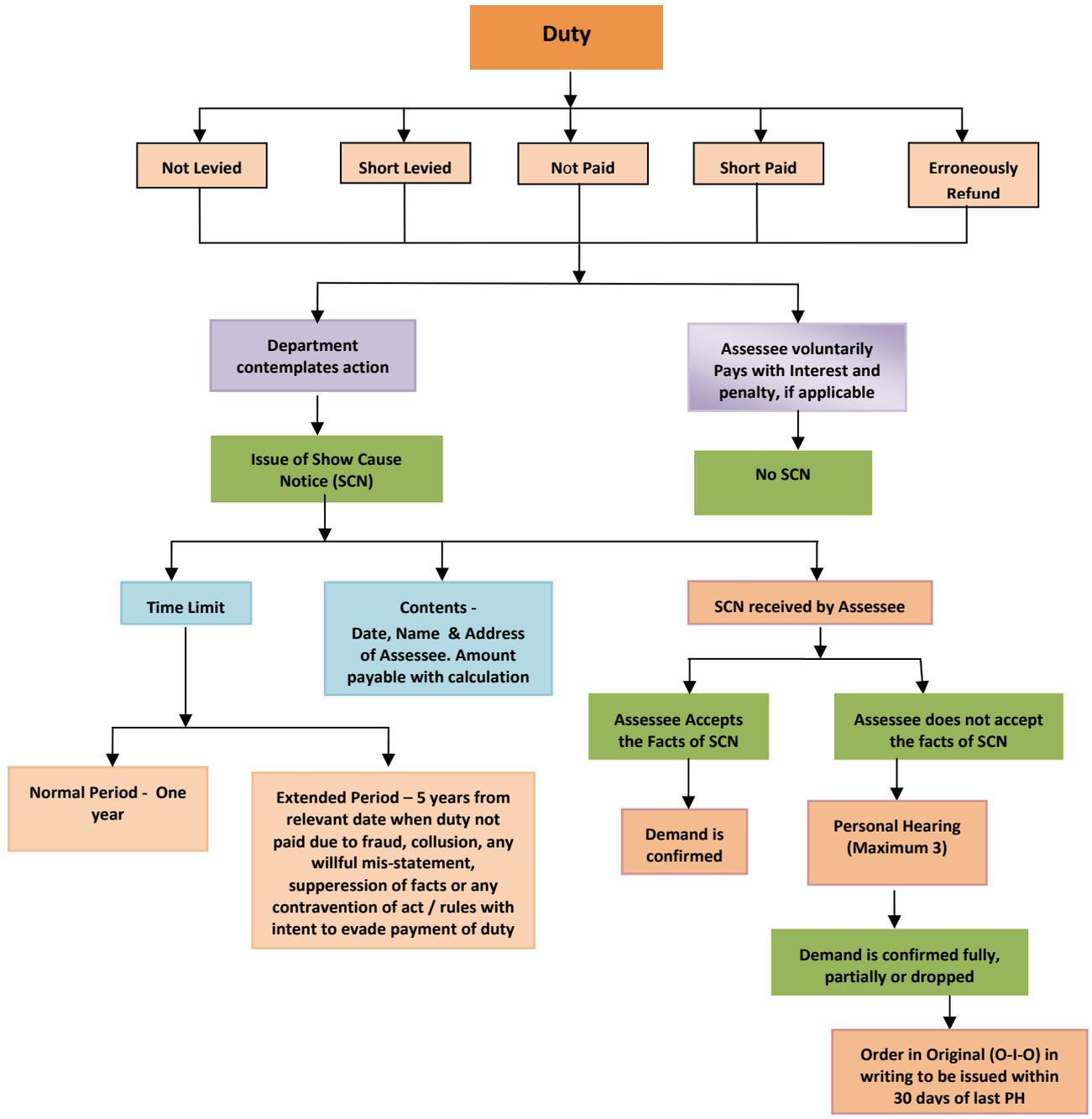
In the cases where duty has not been paid or short paid or erroneously refunded, SCN is to be served within one year from the relevant date in normal case and within five years from the relevant date in case of fraud, collusion, wilful suppression of facts, etc., with the intent to evade payment of duty or to get erroneous refund.

Further, it is provided in the Central Excise Act, 1944 that where it is possible to do so, the SCNs should be adjudicated within six month in normal cases and within one year in extended period cases, from the date of service of the notice to the person.

Adjudication proceedings shall be conducted by observing principles of natural justice. The noticee shall be given a personal hearing (PH) before deciding the case. There shall be a written Order in original (OIO) after the completion of adjudication process detailing facts of the case and justification of the adjudication order.

Thus the idea is to ensure prompt initiation and speedy disposal of the adjudication cases. The process of adjudication is shown in the chart overleaf:

Chart 5.1: SCN & Adjudication Process under Section 11A of Central Excise Act, 1944



5.2 Audit objectives

The objectives of this audit were to examine:

- a) the adequacy of rules, regulations, notifications, circulars/instructions etc. issued from time to time in relation to adjudication process;
- b) whether the extant provisions of law are being complied with adequately;
- c) whether there was an effective monitoring and internal control mechanism.

5.3 Scope of Audit and coverage

In this audit we covered 40 Commissionerates along with 84 Divisions and 70 Ranges falling under these Commissionerates. Further, we checked 1,737 adjudication cases yet to be finalized, 4,816 adjudicated cases, 320 draft SCNs pending for issue, 2,255 call book cases and 1,995 cases decided against revenue in adjudication stage. The period covered was 2011-12 to 2013-14.

5.4 Audit findings

We noticed irregularities in 809 cases involving revenue of ₹ 345.75 crore. The major findings are as under:

- (i) In 20 cases involving revenue of ₹ 4.40 crore, demands were concluded as time barred in adjudication due to late issue of SCN.
- (ii) In eight cases involving revenue of ₹ 2.28 crore, demands may get time barred due to late issuance of SCN.
- (iii) 196 cases involving revenue of ₹ 289.67 crore were pending for adjudication for more than one year as on 31 March 2014.
- (iv) 121 cases involving revenue of ₹ 29.76 crore were irregularly kept in call book.

The findings are discussed in subsequent paragraphs.

5.5 Issue of SCN

5.5.1 Invocation of extended period of time for issue of SCN

As per section 11A of the Central Excise Act, 1944 where any duty of excise has not been levied or has been short-levied or short-paid or erroneously refunded, central excise officer may, within one year from the relevant date, serve notice on the person chargeable with duty which has not been levied or paid or which has been short-levied or short-paid or erroneously refunded, requiring him to show cause why he should not pay the amount specified in the notice. Period of one year stands extended to five years where duty has been short-paid due to fraud, collusion, wilful mis-statement or suppression of facts with the intention to evade duty.

Test check of seven Commissionerates⁷⁵ revealed that issue of SCN invoking extended period on incorrect grounds in contravention of statute resulted in SCNs being time barred in the adjudication. We noticed 20 cases involving revenue of ₹ 4.40 crore. The Ministry accepted (November 2015) the facts in 17 cases and did not furnish reply in three cases. Two cases are illustrated below:

5.5.1.1 We noticed in Rajkot Commissionerate that a SCN dated 21 September 2004 was issued to M/s Reliance Industries Ltd. for short payment of duty of ₹ 1.18 crore. Assessee had transferred various excisable goods to their inter divisional units by adopting the value of comparable goods instead of adopting the value at the rate of 115 per cent of the cost of production. Assessee had submitted a duly acknowledged copy of letter dated 21 September 2000 addressed to the department based on which it was claimed that department was duly informed about the practice adopted by them.

The Commissioner adjudicated the above SCN vide OIO 04 February 2013 and dropped the demand and noted that, "it is seen that the present SCN demanding duty for the period from July 2000 to August 2003 was issued on 21 September 2004. Therefore, SCN is time barred and cannot be sustained on the point of limitation". Therefore, not issuing SCN within time resulted in loss of revenue of ₹ 1.18 crore.

When we pointed this out (September 2014), the Ministry accepted the facts (November 2015) and stated that appeal filed by the department in CESTAT had also been rejected.

5.5.1.2 In Thane-I Commissionerate, it was noticed that two units of M/s Omkar Speciality Chemicals Ltd. (OSCPL) were found evading payment of Central Excise duty on their finished product by misclassifying Potassium Iodide and Sodium Selenite as feed grade and classified under chapter heading 2309 attracting nil rate of duty, though these products were correctly classifiable under chapter 28 attracting duty at rate of 16 per cent. As per SCN issued (March 2011) by DGCEI, Zonal unit Mumbai, the assessee cleared excisable goods valued at ₹ 7.71 crore evading duty of ₹ 98.17 lakh from Unit-I and goods valued at ₹ 1.03 crore evading duty of ₹ 8.45 lakh from Unit-II during the period from 1 April 2007 to 22 February 2010 and 20 June 2009 to 13 February 2010 respectively. Accordingly the assessee paid (January/ February 2010) ₹ 24.21 lakh and ₹ 7.35 lakh in respect of Unit-I and Unit-II respectively at the time of investigation towards Central Excise Duty liability against the clearance of above said products.

⁷⁵ Kolkata III, Kolkata V, Bolpur, Shillong, Delhi I, Rajkot & Thane I

Based on the judgment of CESTAT, Mumbai in the case of M/s SMZS Chemicals Ltd, {2006 (1193) ELT 46 (Tri-Mumbai)} and finding the case to be at par with their products, the assessee again started classifying the products under chapter 23.09 after issuing advance intimation (November 2006) to the jurisdictional Assistant Commissioner of Central Excise. The assessee had also sent three reminders to the department for verification and obtaining response from the department. However the department failed to give any response on this issue.

Commissioner of Central Excise, Thane-1 issued (June 2011) OIO concluding that the extended period under proviso to Section 11A (1) of the Central Excise Act, 1944 was not invocable in the instant case as there was no suppression of facts involved. It was further stated in OIO that in fact, the department was well aware of the facts since many years through intimations, communications, documents and technical literature as well as flow chart of manufacturing process, list of raw materials, list of actual users, audit reports, ER-1 returns, etc. and dropped the SCN as time barred. This resulted in loss of revenue to the extent of ₹ 75.06 lakh (excluding excise duty of ₹ 31.56 lakh paid by the assessee during investigation).

In reply, the Ministry stated (November 2015) that the department had filed an appeal in CESTAT which is pending for decision. Hence, at this stage it can not be concluded that there is a potential loss in Government revenue.

Therefore, had the Department been vigilant enough to issue Show Cause cum Demand Notices within the prescribed time frame as per extant statute, potential losses to the Government Exchequer as highlighted above could have been avoided.

5.5.2 Issue of Show Cause Notice

One of the reasons for issue of SCN is the Audit Para raised during Internal Audit /CAG audit. The scrutiny of audit paras is done in the Monitoring Committee Meeting at Commissionerate level and these audit paras are deleted only after the issue of SCN. In this regard, Board has issued instruction dated 22 April 2013⁷⁶ that the audit objections should be settled within one year by issuing SCN.

Test check of six Commissionerates⁷⁷ revealed that non-issuance of SCN in contravention of statute which might result in these Show Cause cum Demand Notices being time barred. We noticed eight cases involving revenue

⁷⁶ F. No. 208/04/2013/CX-6 dated 22 April 2013

⁷⁷ Kolkata V, Ranchi, Jaipur I, Bengaluru LTU, Thane I & Ahmedabad II

of ₹ 2.28 crore. The Ministry's reply (November 2015) had been received in two cases only and the cases are illustrated below:

5.5.2.1 Kengeri Division of Bengaluru LTU Commissionerate confirmed a demand of ₹ 65.21 lakh along with interest for the period from 01 July 2000 to 31 March 2003 against M/s Toyota Kirloskar Motors Pvt. Ltd, for non-inclusion of promotional expenses incurred by their dealers in the transaction value of the products (multi utility vehicles, Passenger cars and parts thereof). The assessee preferred an appeal with Higher Authorities. The CESTAT in its final order dated 25 June 2007 allowed the appeal filed by the assessee. Against this final order, the department then preferred a Civil Appeal No.1389-1392/2008 before the Honorable Supreme Court of India, which was pending (August 2014). It was observed in audit that the department had not issued any SCN for the period from January 2004 to March 2006.

Scrutiny further revealed that the department issued periodical SCN on 6 April 2011 for the period from April 2006 to September 2010 for an amount of ₹ 21.19 crore. Since the extended Period cannot be invoked while issuing subsequent notices on the same or similar facts the demand raised for the period from April 2006 to March 2010 involving an amount of ₹ 18.47 crore would become time barred.

When we pointed this out (August 2014), the Ministry replied (November 2015) that the assessee furnished the details required for the period from August 2007 onwards, reluctantly and belatedly on 9 August 2010 after an inordinate delay of nearly three years from the date of first letter (31 August 2007), consequent to relentless persuasions and innumerable reminders. Hence, there was suppression of facts with the intent to evade duty and there was nothing wrong in invocation of extended period for issuing subsequent SCN. As regards, non-issue of SCN for the period mentioned in audit objection, the matter is under enquiry.

The reply of the Ministry is not acceptable because the extended period to issue the SCN is to be used in exceptional cases only and not in a matter of routine.

5.5.2.2 M/s Hindustan Coca Cola Beverages Pvt. Ltd in Range III of Kalyan I Division under Thane I Commissionerate engaged in manufacture of goods under Chapter 22 availed Service tax credit on Goods Transport Agency Service (GTA) for outward transportation of finished goods, Catering Services and other ineligible credits during the period April 2006 to March 2011. The SCN issued in this regard in May 2011 for ₹ 1.75 crore was confirmed by the Commissioner (August 2011) and a penalty of ₹ 1.75 crore was imposed. The

issue is since pending in CESTAT. We noticed that during the period April 2011 to March 2014, the assessee availed service tax credit of ₹ 1.45 crore on GTA Services for outward transportation and Catering Services. To safeguard loss of revenue, Department should have issued periodical SCN for the aforesaid period also but no such SCN had been issued (December 2014).

When we pointed this out (May 2014), the Ministry accepted (November 2015) the facts and stated that combined SCN including the said availment of Cenvat credit for period April 2011 to March 2014 has been issued by CCE- Thane-I on 20 June 2014 for the amount of ₹ 1.74 crore. Further, the department has issued periodical SCN dated 30 April 2015 for the period April 2014 to November 2014 for ₹ 5.29 lakh.

5.6 Completeness of Show Cause Notices

SCN is the foundation on which the demand is based and it is a pre-requisite for any demand under indirect taxes. Principles of natural justice fully apply to SCN e.g. all evidence on which department wants reply should be disclosed. SCN should give all essential particulars. Amount demanded must be indicated in the SCN. The notice should state nature of contravention and provisions contravened. Charges should be informed. Grounds should be mentioned. If penalty is proposed to be imposed, this should be mentioned in the notice. Above all, the SCN should not be vague, confusing or self-contradictory. If SCN is based on one ground, demand cannot be confirmed on other ground.

During scrutiny it was revealed that five SCNs in three Commissionerates⁷⁸ were found to be erroneous. Ministry accepted (November 2015) the facts in one case. The Ministry did not furnish reply in rest of the cases (December 2015).

5.7 Procedure of Adjudication

Sub-section (2A) of section 11A of Central Excise Act, 1944 provides that in case any duty of Excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, where it is possible to do so, the adjudicating authority shall determine the amount of such duty, within a period of one year; and, in any other case, where it is possible to do so, he shall determine the amount of duty of Excise which has not been levied or paid or has been short-levied or

⁷⁸ Kolkata III, Kolkata V & Shillong

short-paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub-section 11A(1).

5.7.1 Pending Adjudication cases

Scrutiny of records in 16 Commissionerates⁷⁹, Division and Ranges revealed that in 196 cases, the department failed to adjudicate the cases upto 31 March 2014 resulting in blockage of revenue of ₹ 289.67 crore. The pendency ranges between six months to ten years beyond one year of issue of SCN.

The issue was pointed out to the Department (July to November 2014). In most of the cases the Ministry accepted the facts and stated (November 2015) that the main reason for non-adjudication of cases was due to absence/frequent transfer of regular adjudicating officers.

A few interesting cases are illustrated below:

5.7.1.1 In Ranchi Commissionerate a SCN was issued to M/s SAIL, Bokaro in May 2011 for contravention of provision of Section 4(1)(b) of Central Excise Act and Valuation Rule 2000 for evading payment of ₹ 5.32 lakh for the period 2006-07. In response to the SCN, M/s SAIL Bokaro had submitted its reply on 14 May 2012 with request to give personal hearing before the final decision. But no date was granted to the assessee by the department nor any other action has been taken in this case. The case has not been adjudicated even after a lapse of more than two years.

When we pointed this out (September 2014), the Ministry stated (November 2015) that the case will be adjudicated soon.

5.7.1.2 M/s Ramsarup Industrial Corporation in Kolkata-III Commissionerate was issued a SCN dated 30 April 2010 for ₹ 1.68 crore based on our observation. The issue was transferred to Call Book on 06 May 2010 on being contested by the Department. The case had been brought out from Call Book on 27 July 2011 for adjudication. We further observed that during process of adjudication, the Department had adjourned Personal Hearing six times on assessee's request (6th PH being on 12 April 2012) in place of statutory three times. The assessee appeared before the adjudicating authority (i.e., Commissioner of Central Excise, Kolkata-III Commissionerate) on 21 June 2012 and requested for verification of invoice by the concerned Range Officer. But the said verification was not done and consequently, the issue remained pending for adjudication till 31 October 2014.

When we pointed this out (November 2014), the Ministry stated (November 2015) all efforts are being made to issue the adjudication orders in the

⁷⁹ Kolkata III, Kolkata V, Delhi I, Delhi II, Delhi LTU, Shillong, Bolpur, Guwahati, Raigad, Kanpur, Bhopal, Jaipur I, Jaipur II, Puducherry, Chandigarh I & Ranchi

suggested time limit after personal hearing. But due to the unavoidable circumstances, such as time bound work pending with adjudicating authority, further documents/verification of documents submission by the party, the adjudicating authority has not been able to issue the orders in time. However, the audit objection has been taken note for compliance.

Thus, the department failed to comply with the provisions of the extant statutes to adjudicate the said cases within the prescribed time frame in these cases.

5.7.2 Fixing of personal hearing

As per Section 11A of the Central Excise Act, 1944 the SCN should be adjudicated within six months/one year from the date of SCN as far as possible.

On scrutiny of the SCNs and Adjudication files in five Commissionerates⁸⁰, it was noticed that the first Personal Hearing was fixed after inordinate delay in 20 cases. We observed that there was delay ranging between 371 days and 4,641 days which resulted in adjudication process getting delayed.

When we pointed this out (June 2014), the Ministry accepted (November 2015) the facts in most of the cases and stated that reason for delay is due to change of adjudication authorities and time taken in verification of facts mentioned in the SCN for following the principal of natural justice.

5.7.3 Grant of personal hearing

Section 33A (1) of Central Excise Act, 1944 provides that the Adjudicating Authority may, if sufficient cause is shown, at any stage of proceedings grant time, from time to time, to the parties or any of them and adjourn the hearing for reasons to be recorded in writing, provided that no such adjournment shall be granted more than three times to a party during the proceeding.

Scrutiny of records revealed that in 49 cases in nine Commissionerates⁸¹ the department, while adjudicating the demand cases, granted more than three adjournment to the assesseees in contravention of the above statutory provision.

The number of adjournment ranges from 4 to 9.

When we pointed this out (May to November 2014), the Ministry accepted the facts in most of the cases and stated (November 2015) that the reasons for giving more PH was change of adjudication authorities, due to the fact

⁸⁰ Ahmedabad II, Rajkot, Alwar, Jaipur I & Jaipur II

⁸¹ Kolkata III, Guwahati, Ahmedabad II, Jaipur I, Jaipur II, Chandigarh I, Delhi I, Belapur & Kanpur

that to deliver natural justice effective hearing was necessary and hence more PH was given and in most of the cases assessee asked for the same.

The reply of the Ministry is not acceptable as the Section 33(A) *ibid* categorically provides for maximum three adjournments of hearing.

5.7.4 Issuance of adjudication orders within stipulated period after completion of personal hearings

As per Board's Circular dated 5 August 2003⁸² in all cases where personal hearing have been concluded it is necessary to communicate the decision immediately or within a reasonable time of 5 days. Where for certain reasons, the above time limit cannot be adhered to in a particular case, the order should be issued within 15 days or at most one month from the date of conclusion of personal hearing.

Scrutiny of records in 23 Commissionerates⁸³ and Divisions revealed that the department failed to adjudicate in 342 cases within the prescribed time frame of one month from the date of conclusion of personal hearing. The delay ranges between 2 days to 333 days (in excess of 30 days from the date of completion of last personal hearing granted to the parties.

When we pointed this out (between June 2014 and November 2014), the Ministry while admitting the facts (November 2015) stated that in most of the cases the delay was due to seeking comments from division office in respect of reply filed by noticee, non- submission of additional documents timely by the assessees. Further, it was reiterated that the Adjudication authority always try to dispose of the cases within prescribed time limit in most of cases but in certain cases where some difficult question of law crops up and where the case law and defence require detailed examination vis-a-vis the allegations of SCN, strict adherence to time limit prescribed is not feasible.

The reply of the Ministry is not acceptable as the Board had fixed the maximum limit at one month after last PH hence either the departmental officers shall adhere to this timeline or the Board may revise the time limit suitably for exceptional cases.

⁸² Circular No. 732/48/2003-CX dated 5 August 2003

⁸³ Kolkata III, Kolkata V, Bolpur, Guwahati, Noida, Kanpur, Delhi I, Delhi II, Indore, Bhopal, Mumbai LTU, Belapur, Aurangabad, Raigad, Coimbatore, Chennai II, Cochin, Vadodara I, Jaipur I, Jaipur II, Hyderabad II, Chandigarh I & Panchkula

5.8 Adjudication of remanded cases

5.8.1 Sub-section (1) of section 11A of Central Excise Act, 1944 provides that Central Excise Officer shall determine amount of duty of excise within six months from the date of notice where it is possible to do so in normal case and within one year from the date of notice, where it is possible to do so in case of any duty of Excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty. In de-novo cases, when case is remanded to original authority, the case should be taken as afresh case and decided accordingly.

Scrutiny of records in five Commissionerates⁸⁴ revealed that the department in eight cases failed to adjudicate the de-novo cases in time. Delay ranges between 2 to 10 years. Ministry accepted (November 2015) the facts in all but one case. Two interesting cases are narrated below:

5.8.1.1 In Guwahati Commissionerate, we observed that in case of M/s Assam Asbestos Ltd. [SCN dated 13 July 2001] the department confirmed demand of ₹ 12.02 lakh vide Order dated 25 July 2002. Being aggrieved the assessee preferred an appeal to CESTAT against the impugned order. CESTAT in its Order dated 27 May 2005 remanded the case for de novo adjudication. Audit observed that the case was personally heard on 12 November 2010 after a lapse of more than five years but was not decided by the then Commissioner. Again the case was heard on 26 November 2012 and finally De novo adjudication order was issued on 11 March 2013. Thus, the department took more than seven years to complete the adjudication process afresh in the instant case.

In reply (November 2015) the Ministry accepted the facts and regretted the delay. It further, stated that due care will be taken to finalize the remand cases within prescribed time.

5.8.1.2 In Raigad Commissionerate, the SCN issued to M/s Nippon Denro Ispat Ltd. was initially adjudicated (February 1997) by Commissionerate Mumbai III. However, this case was remanded for de-novo adjudication (November 2003) by CESTAT. Though the file was submitted for deciding the adjudicating authority during 2004 and 2005, no further action was taken till 2013 and Personal hearing was conducted (August 2013) and the case adjudicated (November 2013) after 10 years of CESTAT order for de-novo

⁸⁴ Vadodara I, Noida, Kanpur, Guwahati & Raigad

adjudication. The adjudication of the case was delayed due to insufficient monitoring of the cases pending for adjudication.

In reply (November 2015) the Ministry accepted the facts and stated that delay was due to re-organisation of the Commissionerate and for following the principals of natural justice.

Audit noticed that there was inordinate delay in adjudicating the remand cases contravening the codal provisions cited supra.

5.8.2 Cases remanded by Commissioner (Appeals)

As per Section 35A(3) of Central Excise Act, 1944, the Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, confirming, modifying or annulling the decision or order appealed against.

Further, Board's Circular dated 18 February 2010⁸⁵ clarified that the power of remand by the Commissioner (Appeals) has been taken away by amending section 35A with effect from 11 May 2001 under the Finance Bill, 2001.

Scrutiny of records in four Commissionerates⁸⁶ revealed that in seven cases the Commissioner (Appeals) remanded the cases contravening the statutory provisions cited supra.

Remand of the cases by the Commissioner (Appeals) was, thus, in contravention of the statutory provisions read with Board's clarification cited supra.

When we pointed this out (November 2014), the Ministry stated (November 2015) that Commissioner (Appeal) still has power to remand matter as also held by Honorable CESTAT in the case law reported at {2014(302) ELT 244 (Tribunal Delhi)}. The said judgment of CESTAT was passed by placing reliance on the judgment passed by the Honorable Supreme Court in the case of UOI vs Umesh Dhaimode {1998 (98) ELT 584(S.C.)}. The Honorable High court of Gujarat's judgment reported {2004(173)ELT 117(Gujarat)} has also confirmed this views.

The reply of the Ministry is not acceptable as Honorable Supreme Court in its judgment dated 1 March 2007⁸⁷ has observed that power of remand by the Commissioner (Appeal) has been taken away by amending Section 35A with effect from 11 May 2001. Subsequent to which the Board issued above mentioned clarification asking its field formation to strictly follow the judgment.

⁸⁵ F.No.275/34/2006-CX.8A dated 18 February 2010

⁸⁶ Jaipur I, Kolkata III, Noida & Belapur

⁸⁷ MIL India Ltd. [2007(210)ELT 188 (SC)]

5.9 Effectiveness of monitoring and Internal Control

Monitoring and Internal Control is an integral process which addresses risk and provides reasonable assurance about effectiveness and adequateness of system and procedures. We noticed the following inadequacies in this regard.

5.9.1 Adjudication of call book cases

As per Board's Circular dated 14 December 1995⁸⁸, the following categories of cases may be transferred to Call Book with the approval of the Competent Authority:

- (i) Cases in which the Department has gone in appeal to the appropriate authority.
- (ii) Cases where injunction has been issued by Supreme Court/ High Court/ CEGAT, etc.
- (iii) Cases where audit objections are contested.
- (iv) Cases where the Board has specifically ordered the same to be kept pending and to be entered into the call book.

Again, the Board had emphasized⁸⁹ that Call Book cases should be reviewed every month. The Director General of Inspection (Customs and Central Excise) had reiterated (December 2005) the need for monthly review stating that review of Call Book cases may result in substantial reduction in the number of unconfirmed demands in call book.

During test check we noticed 30 cases having monetary implication of ₹ 18.20 crore kept in Call Book as on 31 March 2014 in Kolkata V Commissionerate, where periodical review of the cases was not done.

Scrutiny of files revealed that four cases amounting to ₹ 5.34 crore and 10 cases amounting to ₹ 3.29 crore were pending for more than five years and three years respectively.

A case in point is narrated below:

The case of M/s Flakt India Ltd. involving revenue of ₹ 1.23 crore [SCN dated 25 April 1986] was pending for more than ten years from the date of entry in the call book and twenty five years from issue of SCN. The case was transferred to call book on the grounds of Writ Petition (W. P. No. 5086 of 1987) in Kolkata High Court filed by the assessee. The department approached Sr. Central Government Advocate to make necessary

⁸⁸ Circular No. 162/73/95-CX dated 14 December 1995

⁸⁹ DO F No. 101/2/2003-CX-3 dated. 03 January 2005

arrangement for early listing and hearing of the case in July 2004 since then no further progress was made till the date of audit. All this indicates lackadaisical approach on the part of the department to dispose of the case pending for a very long time in Call Book.

When we pointed this out (July 2014), the Ministry stated (November 2015) that cases have been kept in call book as department has gone in appealing similar cases. But the fact remains that these cases are pending for very long time and no proactive action has been taken by the department to clear the pendency.

5.9.2 Monitoring of Call Book cases

Scrutiny of records in 14 Commissionerates⁹⁰ for the period 2011-12, 2012-13 and 2013-14 revealed that the call book register was not maintained properly and not reviewed on regular basis. DGICCE also pointed out the irregularity in their report. Despite this, 121 cases having monetary implication of ₹ 29.76 crore were found to be kept in Call Book irregularly. Some of the reasons for this error were, non-approval of the competent authority to transfer the case to Call Book, paras kept pending in Call Book although decisions in similar cases was given by higher authorities and paras kept pending in Call Book on the ground of contesting CAG para although either no SOF/DP issued by CAG in these cases or paras closed by CAG etc. Ministry accepted the facts (November 2015) and stated that remedial action is being taken now.

Some interesting cases are narrated below:

5.9.2.1 The Board in its Circular dated 12 January 2005⁹¹ categorically clarified that where the cases remanded back for de-novo adjudication, it should be decided by an authority which pass the said remanded order i.e the original adjudicating authority.

Scrutiny of records of Kolkata-V Commissionerate revealed that in a case of M/s Jay Engineering Works Ltd. which was remanded back for De-novo adjudication by CESTAT Kolkata. The Department filed Miscellaneous Application vide appeal No. 198/2008 to ascertain the adjudication authority for such De-novo adjudication. Despite there being categorical instructions from Board, the department still made a miscellaneous application to CESTAT in 2008 to ascertain the adjudicating authority. As such, the case was transferred to the call book on account of the case lying in the appellate forum, though the case could have been adjudicated following the Board's clarification *ibid*.

⁹⁰ Jaipur I, Jaipur II, Delhi I, Delhi II, Noida, Calicut, Cochin, Bhopal, Chennai II, Vadodara I, Chandigarh I, Guwahati, Kolkata V & Bolpur

⁹¹ Board's circular no. 806/3/2005-CX dated 12 January 2005

In a similar case under Bolpur Commissionerate, an issue relating to the period 24 November 1980 to 08 October 1985 against M/s Eastern Biscuits Company Ltd., had been retained in Call Book since 21 October 2008 citing CESTAT, Kolkata Order dated 07 July 2006 in which CESTAT remanded the case for re-adjudication after finalization of provisional assessment by the proper officer. We also observed that during periodical review of Call Book cases in December 2011, the Commissioner of said Commissionerate opined in the Review Sheet that no reason persisted to keep the case in Call Book. However, the case remained in the Call Book till 21 August 2014. Though the case did not fall into any category as cited supra for keeping a case in Call Book, yet the Department kept the case irregularly in the Call Book.

When we pointed this out (July to August 2014), the Ministry (November 2015) in case of M/s Jay Engineering Works Ltd stated that concerned adjudicating authority has been advised for De-novo adjudication of the case as per Board's Circular. In case of M/s Eastern Biscuits Co Ltd stated that De-novo adjudication could not be submitted due to non-finalization of provisional assessment by the Divisional Deputy Commissioner. Subsequently, the case was transferred to Durgapur Commissionerate.

5.9.2.2 In Noida Commissionerate, a SCN was issued on 05 November 2001 to M/s Hongo India (P) Ltd demanding Modvat credit of ₹ 8.43 crore wrongly availed during the period 10 March 1999 to 15 November 2000 on which the department filed Special Leave Petition, which was dismissed by Honourable Supreme Court on 27 March 2009. Despite the order of Honourable Supreme Court, these cases along with five other cases of similar nature were irregularly retained in call book even after the lapse of five years.

When we pointed this out (September 2014), the Ministry accepted the facts and stated (November 2015) that the case of M/s Hongo India Pvt Ltd has been taken out from the call book in March 2015 in view of the dismissal of the departmental appeal by the Apex court.

5.9.2.3 According to Board's circular dated 3 February 2010⁹², the cases of CAG audit objections where contested and not received any reply from the CAG even after one year and also where no SOF and DAP are pending have to be taken from Call Book and to be adjudicated on merit of the case.

In Bolpur and Vadodara-I Commissionerate, it was noticed that the following cases were transferred to Call Book in respect of contested CAG audit objection but irregularly retained in Call Book even after the closure of Para raised by CAG:

⁹² F. No. 206/02/2010-CX-6 dated 03 February 2010

Table 5.1

Assessee	Commissionerate	Entry in Call Book	CAG audit objection status	Closure by CAG
M/s Durgapur Steel Plant	Bolpur	July 2005	SF No. 102/99-2000 DAP No.63/99-2000	September 2005
M/s Durgapur Steel Plant	Bolpur	June 2006	SF No. 105/99-2000	September 2005
M/s Sri Vasavi Industries Ltd.	Vadodara I	March 2012	IR No. CERA/IR/Bol/10-11/921	October 2012
M/s Gujarat Alkalies and Chemicals Limited	Vadodara I	April 2003	DAP-64/2005-06.	May 2008

This implies lack of proper monitoring of Call Book.

When we pointed this out (June to August 2014), the Ministry stated (November 2015) that all these three cases have been taken out of Call Book during October 2014.

Despite the continuing concern of the Board regarding periodical review and disposal of call book cases by the department, lapses on the part of the department still persist.

5.9.3 Monitoring mechanism of reporting through MTR

The Board vide letter dated 23 May 2003⁹³ had instructed the Commissioners and Chief Commissioners to analyze the reasons of pendency of adjudication cases and strengthen the monitoring system. Annexure-IV and IVA of the Monthly Technical Reports (MTR) incorporate information relating to adjudications and their disposals.

There are certain annexure on MTR relating to adjudications and their disposals, reasons for pendency, unconfirmed demands, call book cases pending etc. Some of these are monitored by DGICCE. The Chief Commissionerates forward the same to the monitoring authorities. The relevant annexure include Annexure II, IV, IVA, VII and XI.

Scrutiny of records in seven Commissionerates⁹⁴ revealed that there was discrepancies in figures between MTR and other records (335J Register / adjudication Register) maintained in the department. The Ministry accepted the facts (November 2015) in most of the cases and stated that due care is taken now.

⁹³ Letter No. 296/2/2003-CX dated 23 May 2003

⁹⁴ Delhi I, Kolkata III, Bolpur, Bhopal, Indore, Raipur & Rajkot

A case in point is narrated below:

In Bolpur Commissionerate, Audit scrutiny revealed that the Call Book cases were not reviewed on monthly basis. Reconciliation of call book register with MTR revealed that although there were 114 cases as on 31 March 2014 of more than 2 years old but in the MTR no case was shown as above 2 years old. Moreover, there were 5 cases in the call book which were more than 8 years old.

When we pointed this out (August 2014), the Ministry stated (November 2015) that proper records are being maintained now.

5.9.4 Maintenance of registers

The Board in its Circular dated 24 December 2008⁹⁵ envisaged the functions, responsibilities and duties to be performed by Range Officers and Sector officers under the Central Excise Act, 1944 and the rules made there under for maintenance of proper records/ registers and timely review and prepare monthly abstract.

Scrutiny of records in 10 Commissionerates⁹⁶ revealed that there was lack of proper monitoring in respect of preparation and maintenance of 335J, Confirmed/Unconfirmed Demand; Adjudication, Call Book registers etc.

The issues were pointed out to the Department (July to November 2014). In reply, the Ministry accepted the facts (November 2015) in most of the cases and stated that registers are being maintained properly now.

5.9.5 Internal control in respect of preparation and issuance of SCN

The Board vide letter dated 23 May 2003⁹⁷, had instructed the Commissioners and Chief Commissioners to do the analysis of the reasons of pendency of adjudication cases and strengthen the monitoring system.

Scrutiny of records in nine Commissionerates⁹⁸ revealed that there was lack of proper monitoring in respect of preparation and issue of SCN, analysis of the reasons of pendency of SCNs for adjudication, review of call book etc.). Ministry accepted (November 2015) the facts in most of the cases.

Some interesting cases are cited overleaf:

⁹⁵ Circular No. F. No. 224/37/2005-CX-6 dated 24 December 2008

⁹⁶ Delhi II, Bhopal, Mumbai LTU, Raigad, Jaipur I, Noida, Kanpur, Ranchi, Jamshdepur & Cochin

⁹⁷ Letter No. 296/2/2003-CX.9 dated 23 May 2003

⁹⁸ Delhi V, Kolkata V, Indore, Bhopal, Jamshedpur, Ranchi, Bolpur, Rajkot & Noida

5.9.5.1 As per Board's instructions dated 29 April 1965⁹⁹, Adjudicating officers should guard against passing two formal adjudication orders on the same case. The legal position in this respect is that, where a matter has already been adjudicated by the competent authority and another order of adjudication is passed relating to the same transaction subsequently, the second order is a nullity. The authority who undertakes the enquiry resulting in the second adjudication acts without jurisdiction. The second order being a nullity, it should be taken as not to exist at all. When the fact of such an order having been passed is brought to light, the records should be corrected, the order deleted from the record and the party affected informed accordingly.

(i) In Kolkata V Commissionerate, in the case of M/s Design Era Pvt. Ltd., it was noticed that a demand of ₹ 10.91 lakh was raised under violation of Rule 4, 5, 6, 8, 10, 11 and 12 of the Central Excise Rules, 2002 covering the period 2006-07 to 2009-10 vide SCN dated 02 May 2011. Further, on 24 May 2011, another show cause cum demand notice of ₹ 49.13 lakh was issued to the assessee under the same ground covering same period vide SCN dated 24 May 2011. Both SCNs were adjudicated vide OIO dated 20 February 2012 confirming the two demand cases for the same period and same issue. Audit scrutiny further revealed that no corrigendum was issued on this account. Thus, issuance of two show cause cum demand notices for two different amounts covering the same period and for same grounds of allegations seems irregular in light of the extant statutes.

In reply, the Ministry accepted (November 2015) the facts and stated that mistake is regretted and observation of the audit has been noted for future reference.

(ii) In a similar case of M/s Sreeleathers, in Kolkata V Commissionerate issued Two SCNs dated 05 March 2012 demanding duty of ₹ 19.20 lakh and ₹ 23.55 lakh respectively for same issue and for the same period from 01 February 2011 to 30 June 2011 for violation of Section 6 of the Central Excise Act, 1944 read with Rule 9 of Central Excise Rules, 2002.

In reply, the Ministry accepted (November 2015) the facts and stated that mistake is regretted and observation of the audit has been noted for future reference.

(iii) Similarly, Bolpur Commissionerate issued a demand of ₹ 9.60 crore (SCN dated 16 June 2011) to M/s Durgapur Steel Plant for irregularly availing of Cenvat credit during the period from June 2006 to March 2011. In the process of adjudication the department found that two other SCNs, dated 03 February 2010 and dated 20 December 2010 were issued to the assessee

⁹⁹ F. No. 18/18/65-CXIV dated 29 April 1965

already included a portion of the demand amount raised in the SCN dated 16 June 2011. Thus there was duplication of demands as observed by the department while passing the adjudication order [Order dated 13 December 2011] of the demand notice dated 16 June 2011. The department had no option but to drop an amount of ₹ 37.82 lakh which was demanded through SCN dated 03 February 2010 [amounting to ₹ 31.01 lakh confirmed on 10 August 2010] and SCN dated 20.12.2010 [amounting to ₹ 6.81 lakh confirmed on 20 July 2011]. This duplication of demands for the same period indicates poor control mechanism persisting in the department for issue of show cause cum demand notices.

In reply, the Ministry accepted (November 2015) the facts and stated that mistake is regretted and the officers have been sensitized to prevent recurrence of such lapses.

(iv) In Division-I under Rajkot Commissionerate we observed that a SCN dated 26 July 2011 for ₹ 0.52 lakh was issued to M/s Star Industries which was adjudicated and dropped by the Assistant Commissioners of Central Excise vide OIO dated 16 January 2012. Audit further noticed that the Assistant Commissioner of Service Tax Division had also issued another SCN to same assessee for same transaction and amount. (SCN dated 30 September 2009), which was subsequently confirmed by the same authority vide OIO dated 16 August 2010, against which assessee preferred an appeal before the Commissioner (A), Rajkot. The Commissioner (A) vide OIA dated 14 December 2010 stated that the instant case might be pertaining to wrong availing of Cenvat credit by the appellant in the capacity of manufacturer for which the demand, if any, should have been made by the jurisdictional Central Excise Assistant Commissioner.

This shows that two different adjudicating authorities had adjudicated the same issue in different way. While one had confirmed the demand, the other had dropped the same.

When we pointed this out (July to October 2014), the Ministry stated (November 2015) M/s Star Industries is a case of suppression of fact and hence it does not fall within the criteria of case to be adjudicated by the jurisdictional range superintendent and falls within exclusion category-B.

The reply of the Ministry is not correct as the audit objection was related to issuance and adjudication of two SCN in one case.

This implies that there was lack of proper monitoring in respect of preparation and issue of SCN.

5.10 Conclusion

It was noticed during audit that the journey of SCN right from the first step of issue of SCN till its adjudication was fraught with delays and shortcomings. Administrative efficiency requires that the work is done in minimum possible time. The maximum time limits define the outer boundaries for completion of tasks. The time limit prescribed for issue of SCN was one year with provision to invoke extended period of five year for specific circumstances. But instead, it was seen that the extended period was used as a routine provision rather than a rare exception. Thus there is a need to reduce delays in various stages of issue and processing of SCN by systematic monitoring so that interests of both the government revenue and the assessee are protected.