

SUB-SECTION 7A TO SECTION 11A - LOOPHOLES INBUILT

Introduction:-

Section 11A of the Central Excise Act, 1944 prescribes the issuance of show cause notice and other related provisions. In this section, sub-section 7A is inserted by Budget, 2013 to cover the cases of recurring nature where the show cause notices are issued on the exactly same grounds and allegations from time to time to the same assessees. This piece of article is about if and but involved in this new section.

The history:-

If proceedings are invoked against the assessees on a particular issue, these are being invoked for the subsequent periods also on recurring basis. This is very particular on the cases related to the interpretation of legal provisions. For eg.: about a year back, there was dispute regarding payment of service tax under reverse charge from Cenvat. The assessees were paying from Cenvat while the department was issuing the show cause notices requiring them to pay the same in cash. This was a recurring natured issue and the show cause notices were being issued for each year on the exactly same grounds and allegations. This is only an example and there are a no. of other issues too where the show cause notices are being issued on recurring basis.

Sub-section 7A inserted in section 11A:-

In order to save the time, money and energy of the departmental officers to prepare and issue the show cause notice on the even matter again and again, sub-section 7A has been inserted in section 11A. This provision says that where a show cause notice has already been issued on a subject to an assessee, there is no need to issue a show cause notice again, only a statement showing duty calculation will suffice. The section contains the following language:-

“Notwithstanding anything contained in sub-section (1) or sub-section (3) or sub-section (4) or sub-section (5), the Central Excise Officer may, serve, subsequent to any notice or notices served under any of those sub-sections, as the case may be, a statement, containing the details of duty of central excise not levied or paid or short-levied or short-paid or erroneously refunded for the subsequent period, on the person chargeable to duty of central excise, then,

service of such statement shall be deemed to be service of notice on such person under the aforesaid sub-section (1) or sub-section (3) or sub-section (4) or sub-section (5), 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.”

Thus, this section applies if the following conditions are satisfied:-

- A show cause notice should already have been issued to that assessee on the even issue.
- The allegations raised in the earlier notice/notices are the same as are there for the subsequent period.

If both the above conditions are satisfied, then the statement containing the details of excise duty will be deemed as the serving of show cause notice.

Loopholes inbuilt!

- ✚ This section prescribes that where the show cause notice has been issued on the even subject on the same grounds and allegations, a statement showing duty calculation will be sufficient and will be deemed to be notice under this section. However, it is worth mentioning here that normally in the first show cause notice, the allegations are harsh and extended period is invoked, however, in the subsequent show cause notice allegations cannot be the same so far as suppression of facts is concerned. This is by virtue of a no. of Supreme Court decisions which says that second/subsequent show cause notice cannot allege the suppression of facts so as to invoke the extended period. Some of such landmark judgments are *NIZAM SUGAR FACTORY Versus COLLECTOR OF CENTRAL EXCISE, A.P.* [2006 (197) E.L.T. 465 (S.C.)], *HYDERABAD POLYMERS (P) LTD. Versus COMMISSIONER OF C. EX., HYDERABAD* [2004 (166) E.L.T. 151 (S.C.)] and *ECE INDUSTRIES LIMITED Versus COMMISSIONER OF CENTRAL EXCISE, NEW DELHI* [2004 (164) ELT 236 (SC)]. Thus, this is the law settled by hon'ble Supreme Court that second/subsequent show cause notice cannot be issued by alleging the suppression or wilful misstatement of facts. In view of this, the allegations and the grounds cannot be the same for the second/subsequent period. This fact itself will make this section ineffective in majority of the cases.

- ✚ Further, this section says that the “Central Excise Officer” will serve a statement which will be deemed as service of notice under this section. However, it is not clarified whether the “Central excise officer” means the authority who has earlier issued the show cause notice (which is normally Assistant/Deputy Commissioner or Commissioner of Central Excise); or any other officer. It is a normal practice adopted in most of the Central excise range offices where the superintendents are entrusted with the work to remind the assesseees of their dues on recurring basis. Whether these letters will be deemed as service of notice by virtue of this section?
- ✚ If the statement showing the calculation of duty will be deemed as service of notice, whether the interest and penalty thereupon will also be quantified in that statement or not? If not, whether the allegations of previous show cause notice proposing the penalties will follow as it is?
- ✚ Whether the section will still be applicable where the show cause notice previously issued is decided in favour of assessee?
- ✚ If the statement is to be deemed as service of notice, whether it is required to be answered, as if the show cause notice is the same, the submissions of the assesseees will also be almost the same. If it is not required to be answered, whether paying the duty is the only option available with the assesseees?
- ✚ What if there are cases where the first show cause notice is still not served to assessee, or the copy is lost?
- ✚ What about assesseees who do not have regular consultant for service tax issues, obviously they will be ignorant of this amendment? They will know about it only at the time when the above statement will be followed by a confirmed demand.

These are only a few loopholes that question the validity of this section.

Before parting:-

The loopholes apparent from the language of the sub-section 7A are indicators of the fact that this is going to be a big issue in coming time. A timely amendment in the section by incorporating the answers to these questions is required, else the department, as always, is ready with its new weapon to harass the poor assesseees...