

E-BOOK

On

Drafting of Good Show Cause Notice (Some Basics)

Drafting of Good Show Cause Notice: Some Basics

Note: In this E-book, attempts have been made to explain some basics about **how to draft a good Show Cause Notice (SCN)**. It is expected that it will help departmental officers in their day to day work.

2. Though all efforts have been made to make this document error free, but it is possible that some errors might have crept into the document. If you notice any errors, the same may be brought to the notice to the NACEN, RTI, Kanpur on the Email addresses: rtinacenkanpur@yahoo.co.in or goyalcp@hotmail.com (Email address of ADG, RTI, NACEN, Kanpur). This may not be a perfect E-book. If you have any suggestion to improve this book, you are requested to forward the same to us.

3. If any officer is interested in preparing E-book on any topic relating to Customs, Central Excise or Service Tax, he may forward the E-book prepared by him to the Email addresses mentioned above. After necessary vetting, we will include the same in our E-book library for benefit of all Departmental officers.

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1. Introduction

1.1 Show Cause Notice (SCN) is the culmination of our efforts from the beginning of investigation/proceedings for contravention of provisions of the tax statute(s) till conclusion of investigation /proceeding by way of formal issuance of a written notice to the noticee(s). Issuance of SCN is a statutory requirement and it is the basic document for settlement of any dispute relating to tax liability or any punitive action (civil proceeding) to be taken for contravention of provisions of Customs/Central Excise / Service tax laws and/ or Allied Laws, which are required to be enforced by our departmental officers.

1.2 It is the most important item of our work and any lapse in timely issuance of SCN or issuing SCN of poor quality may lead to serious trouble to the officer concerned. Since, it is the starting point of any legal proceeding, utmost care is required to be taken while drafting SCN.

2. Distinct Parts of the SCN

2.1 For convenience of understanding, the SCN can be broadly divided in several parts- each part dealing with a specific aspect of SCN. The several parts, into which an SCN can be broadly divided and the specific aspect dealt by each part, are as under:-

Part I: Receipt of Intelligence/Audit Objection/Reference

2.2 In this part, we discuss the background as to how the present proceeding started. It may differ from case to case. A case may be based on intelligence or audit objection or discrepancies in documents noticed during scrutiny of return, or reference received from other department /DRI/DGCEI/Vigilance/Audit etc. In this part, we basically mention gist of intelligence/audit objection/ observation/ communication received from other department /organization, name of the unit/ importer/ exporter/ dealer/assessee etc. and a brief modus operandi of duty evasion adopted by the alleged offender. The details given in this para should be sufficient enough to justify further investigation/Inquiry.

Part-II: Preliminary Action on Intelligence/Audit Objection/Reference

2.3 In this part, after receipt of intelligence/inputs/reference, what further action has been carried out by the department is discussed.

- The action could be by way of search (es) conducted, recording statement of concerned person(s), collecting relevant information from other sources including Bank, other departments etc.
- In case where searches have been carried out, details of the premises searched and outcome of such searches have to be mentioned in this part of SCN. If statement of any person, who is materially important for the investigation/inquiry, has been recorded, then relevant portions of such statement have to be captured/discussed in the SCN. Wherever letters have been addressed to Bank /other Government Department, other manufacturer /dealer etc., such action taken by the Department and consequent outcome thereof, have to be discussed in this part. If any computer has been recovered, the details of examination of such computer by expert and recovery of incriminating documents, if any, may also be mentioned in this part.
- Panchnama of premises searched, summons issued, statements recorded, any incriminating documents recovered etc. should be made as 'RUD'. As far as possible, incriminating documents recovered during searches, or obtained from other authorities and intended to be used as relied upon documents, should be shown to the concerned person (s) during recording of his statement (under Section 108 of the Customs Act, 1962/ Section 14 of the Central Excise Act) and his/her explanation to such incriminating documents should be obtained during recording of statement.

Part-III: Details of Further Investigations

2.4 In this part, further course of action taken to pursue further inquiry/ investigation is discussed. It may, inter alia, include following details:-

- (i) If any offending goods are seized and later released provisionally, then such details are discussed here.
- (ii) If any sample is sent for testing, then the outcome of such testing has to be mentioned.
- (iii) If any arrest is made, then details of arrest and subsequent development thereof, have to be mentioned in this part.
- (iv) If any court proceeding (such as for non-compliance of summons etc.) takes place, brief of such Court proceeding have to be discussed here.

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- (v) Differential duty recoverable and its calculation may also be worked out in this part. If it is not mentioned in this part, then it may also be mentioned in Part IV of the SCN.

Part IV: Summary of Investigations.

2.5 Now, after conducting searches, recording statements, conducting market inquiries/ testing of samples, seizure/ or provisional release of goods etc., the story-line, which emerges, has to be summarized in this part.

Part V: Relevant legal provisions:

2.6 In this part, we discuss the relevant legal provisions in the form of Sections/ Rules/ Notification/Circular/Department Instruction etc. which are relevant to this case.

Part VI: Act of Commission or Omission by Noticee vis a vis Legal Requirement

2.7 In this part, the act of noticee (s) *vis-a-vis* legal requirements is discussed, thereby, discussing contravention of various statutory provisions as well. Role played by each person and contravention of specific provision of the Act by the person should also be discussed. This would be required for imposition of personal penalty on the individual who, by his/her acts of omission or commission, resulted in evasion of duty/ contravention of provisions of law.

2.8 Wherever extended period of five years for demand of duty/tax is being invoked, then justification for such extended period of limitation should be clearly mentioned in the show cause notice. Whether there is fraud, or suppression of fact, or mis-statement or deliberate contravention of provisions of the Act, has to be clearly brought out in the SCN. Since invocation of extended period of limitation requires presence of *mens rea*, it has to be clearly explained/ discussed along with evidences supporting such intent in this paragraph dealing with invocation of extended period of limitation. Evidence, if any, which may help in establishing *mens rea* on part of alleged offender should also be mentioned here.

Part VII: Charging Paragraph-

2.9 In this part, the noticee is asked to show cause against the adverse actions which are proposed to be taken against him by the Department. This paragraph also mention as to whom (Designation of authorities and its office address) the impugned SCN is answerable. In this paragraph, depending upon the facts of the case, the following course of actions may be proposed by the Department:-

- Proposing confiscation of seized goods, demand of duty/tax along with interest, appropriation of amount deposited during investigation, if any, towards duty/interest demanded, imposition of penalty on the party as well as individuals including transporter/CHA, etc. Relevant sections of the Central Excise Act, 1944/ the Finance act, 1994/Customs Act, 1962 should also be mentioned. For example, for demanding Central Excise duty short paid/not paid, section 11A of Central Excise Act, 1944, must be mentioned. For demand of interest, relevant section providing for demand and recovery of interest should be mentioned. Similarly, section under which penalty is proposed to be imposed, should be clearly mentioned.
- For deciding the competent adjudicating authority, relevant instructions/ Circulars issued by CBEC from time to time specifying monetary limits for different levels of adjudicating authority may be referred to. Such instructions for Central Excise, Customs and Service tax are different; therefore, the relevant instructions /Circulars may be carefully seen. *[For this, e-book on monetary limits for adjudicating authorities may be referred].*
- If any amount has been pre-deposited by the noticee during investigation, then appropriation of this amount towards duty /interest demanded should also be mentioned. It should be remembered that any amount deposited during investigation remain deposit only.

2.10 While drafting this part, we should clearly decide as to who is the adjudicating authority (designation-wise, not name-wise) for the SCN and it should be mentioned in the SCN. Office address of adjudicating authority should be mentioned in this Para. Further, from the reading of this Para, it should appear as an allegation, rather than definite conclusion; in other words, it should start with “ From the foregoing, it appears that ...”}

2.11 Quantification of demand and basis (in the form of documents /balance sheets etc.) on which it has been worked out, should be explained in the SCN]. Any document such as Bill of Entry, Shipping Bills, Copy of Contract, Invoices, Private records, Balance Sheet/ or documents/email etc. recovered from computer/ during search proceeding, which may form basis of calculation of duty/tax demanded, should be made RUD to the SCN.

Part VIII: Three Standard Paragraphs which are Integral Part of Every SCN.

2.12 This part consists of three Standard Paragraphs, which are common to all SCNs. In these paragraphs, following aspects are discussed: –

- Asking noticee to furnish written submission within a period of 30 days of the receipt of SCN.
- Informing him that in case of failure to submit reply within prescribed period, the SCN will be decided Ex-parte.
- Asking him to submit documents/evidence in support of his contention/defence.
- Asking him to indicate in writing as to whether he/she want personal hearing.
- Mentioning that the present show cause notice is without prejudice to any other action, which may be taken under the same Act or any other Act for the time being in force.
- If there is any exception/limitation, the same can be mentioned in this paragraph. This is must where part SCN is being issued.

Part IX: List of Relied upon Documents (RUDs) and to enclose legible copies of RUDs.

2.13 The RUDs should be numbered serially (starting from 1 till last number). Each RUD should be given a specific number (as RUD-1, or RUD-2 etc.) and it's position in the complete set of RUDs (by way of page number(s)) should also be mentioned.

2.14 The copy of documents enclosed should be legible. While listing any document as RUD, the complete document should be enclosed rather than enclosing some specific pages (which are relevant for the investigation) of the documents in question. Sometime, officer encloses only relevant pages of agreement/ contract/ balance sheet etc., which is a wrong practice.

2.15 When a statement recorded has been made RUD to the SCN, then, if any evidence, recovered/obtained during investigation has been shown to the person at the time of recording of his statement and got signed from him in token of having seen and perused the documents, then such documents /evidence should also be treated as an integral part of the statement.

2.16 Since only xerox copy of RUDs is given to the noticee along with SCN, an option should be given to the noticee to inspect original RUDs during official working hours of any working day. In case, the noticee choose to inspect the original documents, a record of this exercise should be kept in the file and signature of the noticee having seen the original and convinced himself should be taken.

Part X: Determination of Noticees

2.17 Care should be taken to mention all noticees to whom the notice is to be served. The name and address of each noticee should be clearly and correctly mentioned. Sometime, despite the role of person been discussed in the SCN, he is not made noticee to the Show Cause notice. Such lapses should be avoided. Similarly, it should be noted that the company and individual are different and both should be made separate noticees (except in the case of proprietary concern).

Part XI: Return of non-RUDs or seized computer if not required for further investigation or criminal proceedings.

2.18 The non-RUDs or seized computer should be returned to the person from whom such documents /computer were recovered. If possible, in the SCN itself, the concerned noticee may be given opportunity to take back non-RUDs/ computer etc. Further, evidence indicating returns of non-RUDs/Computer should be kept in file and if possible, also be supplied to adjudicating authority while forwarding SCN along with RUDs for adjudication.

Service of Show Cause Notice

2.19 It is important to be aware and comply with statutory provisions contained in section 153 of the Customs Act, 1962 or Section 37 C of the Central Excise Act, 1944 (made applicable to Service tax also vide Section 83 of the Finance Act, 1994), which provide for service of decision, orders, summons or notice etc.

2.20 Make sure that SCN is delivered to the noticee before the last date for issuance of SCN, which include delivery of SCN to the party. Further, the evidence proving service or delivery of SCN to the noticee may be kept in file from which SCN has been issued and a copy of such evidence may also be given to the Adjudicating authority while forwarding the SCN along with RUDs for adjudication.

3. Other important thing to be kept in mind while issuing SCN

- 3.1** SCN to be issued with approval of the authority, who is competent to adjudicate the same.
- 3.2** To decide the level of adjudicating authority i.e. superintendent/AC/DC/JC / ADC /Commissioner, departmental instructions/Circular laying down monetary limits for adjudicating authorities may be seen carefully.
- 3.3** Whether extended period of limitation is being invoked or not ? If extended period of limitation has been invoked, grounds for invoking extended period of limitation should be clearly mentioned /explained in the SCN.
- 3.4** What is the last date of issuance of SCN? It should be clearly indicated in the file being sent for approval of draft SCN.
- 3.5** Where investigation in a case also involves violation of other allied laws which are administered by other departments, a copy of SCN along with RUDs should be endorsed /sent to the concerned department (s) also for further necessary and appropriate action by that department.
- 3.6** Also examine as to whether the case is fit for being referred to REIC (Regional Economic Intelligence Council). If the case also involves serious violation of other tax laws such as income tax or sale tax or it involves criminal act such as preparing forged documents (punishable under Indian Penal Code) aimed at causing serious loss of government revenue/money, which may be of interest to CBI/police, then it may be shared with the concerned department at the platform of REIC.
- 3.7** Whether the case is fit enough for launching criminal proceeding without waiting for adjudication of SCN. If so, then proceed further to launch prosecution against the offenders.
- 3.8** Whether the case is fit for taking deterrent action in case of Central Excise duty evasion, then proposal may be sent to jurisdictional Chief Commissioner for initiation of deterrent action against the alleged offender. It should be done within a period of one month from the date of initiation of investigation. *[For details, E-book on concept of deterrent action under Central Excise law may be referred].*

4. Checklist for the SCNs

- 4.1 Whether noticee's name, Central Excise Registration No./ Service Tax Registration No. / IEC No in case of import/export has been mentioned along with complete address.
- 4.2 Whether noticee is a manufacturer/dealer/service provider/service receiver /importer/ exporter/ warehouse owner/EOU/SEZ units, has been mentioned in the SCN.
- 4.3 Whether noticee is proprietary concern/private limited/ public limited/body corporate etc. has been mentioned or not.
- 4.4 Whether primary activity of the noticee mentioned. For example, in case of manufacturer, kind of goods manufactured or not etc.
- 4.5 Whether gist of intelligence/information resulting in further inquiry/ investigation has been mentioned in the SCN or not.
- 4.6 Whether grounds for invoking extended period of limitation has been clearly explained in the SCN.
- 4.7 Whether quantification of duty being demanded has been explained in an unambiguous manner. The documents on which such duty calculation is based, is also clearly mentioned in the SCN and whether or not, the same has been made RUD to the SCN.
- 4.8 Whether list of RUDs along with description of each RUD and page nos. at which it is placed, is enclosed with SCN.
- 4.9 Whether RUDs are legible and properly photocopied or not.
- 4.10 Whether SCN has been approved by the Adjudicating authority who is competent to decide the same.
- 4.11 Whether Non-RUDs have been returned or not. If not, then the same should be returned at the earliest after issuance of SCN.

The list of checks given above is only illustrative, not exhaustive.

5. Other Essential Checks to be done while putting up the SCN for Approval or /while approving the SCN.

- 5.1 Often it is said that issuance of poor quality SCN by the field formations is the reasons for department losing the large number of cases before Commissioner (appeals)/

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Tribunal. Before any draft SCN is put up to senior officer for approval or while senior officer is approving the Draft SCN, it may be re-checked in the light of the following points. This will not only improve the quality of SCN but also eliminate any possibility of SCN being set aside on flimsy grounds. This document has been prepared with an objective of helping field officers to issue better quality SCNs.

A. Examination on following of Principles of natural justice

5.2 All adjudicating authorities including quasi-judicial authorities are required to follow the principles of natural justice. The following are the principles of natural justice:-

- (i) No one can be judge in his own cause.
- (ii) Nobody should be condemned unheard.

5.3 In the light of above basic principles, the following checks may be done on the SCN to see whether there are any violations of principle of natural justice:

- Whether adjudicating authority was associated with the case in capacity other than supervisory role. In other words, if adjudicating authority has recorded Panchnama, or statement etc. then he cannot be the adjudicating authority simultaneously on ground of personal bias. This is necessary to remove any element of bias.
- Also see that the person, who has been alleged to have committed any offence under Customs Act/Central Excise Act/Finance Act,1994, was given any opportunity to give his side of explanation to the allegations.
- Whether all the documents /evidence submitted by the noticee in his defence have been taken on record or not. If not, then also bias can be alleged.
- There should not be anything in the SCN, which can give opportunity to the noticee to allege “personal bias” against him. Otherwise, such lapses may result in SCN getting set aside on ground of investigating authority being “bias and subjective”, rather than being objective.

B. Non-availability / Loss of documents/loss of computer seized by the investigating authority

5.4 During investigations, lot of documents, computers etc. are seized by the investigating officers. Out of document recovered and seized, some documents are relied upon for supporting allegations made out in the SCN. The documents which have not relied upon, should be returned to the party from whom these documents have been recovered. The SCN may get vitiated in the following circumstances:-

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- (i) any of the documents seized and not relied upon, has not been returned to the person from whom it had been seized.
- (ii) Any documents, which has been seized, has gone missing on account of misplacement of file etc. If this happens, then the noticee can ask for returns of the same on the ground that it contains the information which is necessary for preparing his defence to the SCN.
- (iii) if any documents has been recovered from seized computer and being used as evidence against the noticee, then make sure that necessary procedure to maintain evidentiary value of documents recovered from the computer is followed. Any failure to follow the prescribed procedure may vitiate the evidentiary value of such crucial evidences and in turn, also weaken the SCN.

C. Close Examination of Statement/ Panchnama

5.5 Under the law, the statement has to be recorded before the Gazetted officer.

- Make sure that the statements, recorded during investigation and being relied upon, have been duly signed by the officer, who has recorded statement and his name should also appear below his signature. If any statement is not signed by the Gazetted officer, the same is not a valid statement and has no value in the eye of law. Any admission of the alleged offender contained in such statement may be of little or no use for the adjudicating authority.
- Make sure that the witnesses present during search are independent witnesses. If the witnesses are not independent witnesses, then the Panchnama proceedings can be questioned during adjudication proceedings and get vitiated.
- At times, the main portion of statement relied upon in the SCN (included in the body of SCN) do not match with the actual statement given. At times, the officers draw their own conclusion while drafting the SCN.
- See whether the statement recorded could be interpreted differently than the interpretation of the Department and avoid any such chances of same being interpreted in multiple ways by being careful while recording the statement.

D. Evaluation of Evidences Relied Upon by the Department.

5.6 Case should be based on evidences which have been obtained in a legal manner or recovered from the noticee or his computer. Further, explanation of the noticee to these evidences should be obtained during investigation.

- Make sure that all evidences which the department has relied upon in the SCN have been obtained in a legal manner.

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- While issuing SCN in case of undervaluation of imported goods, the valuation rules should be followed sequentially after rejection of declared value under Rule 12 of the Valuation Rules.
- At times, if the evidence relied upon by the Department in the SCN has not been legally obtained, then the same could be questioned by the noticee and has no or considerably low evidentiary value in the eye of law. For example, the documents obtained from overseas customs without cover of any Mutual Assistance Agreement has no or low evidentiary value.
- If the case is based on incriminating statements of some persons, then these persons may get invariably be cross-examined during adjudication proceeding. But this cannot be done in appellate proceedings. Therefore, the case should not be based on mere statements only, but based on evidences. Number of statements, if possible, should be kept at minimum while maximizing evidences.

E. Jurisdiction of the SCN Issuing Authority

5.7 Make sure that the officer, who is issuing SCN, has jurisdiction to issue SCN. If not, then SCN can be questioned on the ground of jurisdiction also.

F. Time Barred SCN

5.8 In cases, where extended period is invoked, the following need to be carefully considered:-

- If it is case of invocation of extended period, then see whether it is case of allegation of fraud, suppression of facts or mis-statement or contravention with intention to evade the duty. The SCN should be specific with regard to nature of allegation and free from any vagueness in allegations. This is necessary to eliminate any possibility of challenge of invocation of extended period. Evaluation of evidences relied upon by the Department also needs to be carefully seen and it should be ensured that there is no ground for questioning the admissibility of such evidences.
- Sometimes, the department uses only some of the evidences. The documents which do not support department's case, particularly allegation of suppression of facts, but still on record, are not used as RUD. Eliminate such possibility if any by bringing such documents on record but countering any inference in the SCN itself, which can be drawn from such documents.
- Make sure that the SCN is not questioned on ground of non-delivery or non-service of SCN. Law provides certain mechanism for delivery of SCN, make sure to follow the same and keep evidence of delivery of SCN in the file.

G. Quantification of demand

5.9 With regard to duty/tax being demanded from the noticee, the following may be considered:-

- Make sure that the quantification of demands has been done correctly and is based on proper documents. Documents relied upon for such calculations should be made RUDs.
- Also make sure that source of such documents should be authentic and reliability of such documents could not be questioned by the noticee.

H. Charging para of the SCN.

5.10 The Charging paragraph of the SCN should be carefully drafted and correct provisions of the law are mentioned therein. Carefully see as to what has been mentioned in the Charging paragraph. Charging paragraph defines the limit of the SCN. Adjudicating authority cannot go beyond the charging paragraph.

I. Definitive conclusion drawn by the Department in the SCN

5.11 Make sure that the language of the SCN should not indicate that definite conclusion has been drawn by the Department in the SCN by using the word such as it is clear case of evasion of duty / it is evident that noticee has evaded the duty. Use of such words indicates that department has already drawn conclusion and there is nothing left for the adjudicating authority. Such SCN can be set aside on this ground alone.

J. Burden of Proof

13. Make sure that burden of proof has been discharged by the Department. While in most of the cases it is on the department, but depending on the evidence produced by the Department such as documents recovered from the noticee etc., then in such cases, burden of proof can be shifted onto the noticee. Burden to proof to explain any documents recovered from the noticee or produced by the noticee is on the noticee, not on the department.

Note: *This write up has been attempted to help the departmental officers. This may not be a perfect write up and there is scope to improve it further. Any suggestion in this regard is welcome.*

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