

**SHOW CAUSE NOTICE – ITS INGREDIENT  
& RAMIFICATIONS.**

By  
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The Show Cause Notice (SCN) is a point of initiation of any proceedings be it for (i) recovery of statutory dues (ii) imposition of penalty (iii) recovery of interest (iv) confiscation of assets or (v) or any proceedings for deprivation of any properties (both moveable and immoveable) or for taking any coercive action against a person under any law. The Supreme Court in Golak Patel Volkart Limited Vs. CCE MANU/SC/0400/1987, inter alia, observing that the statutory scheme requires issue of show cause notice by the Central Excise Officer, response by the person served with the show cause notice and final determination by the order in original. Issue of SCN is a condition precedent to raising an enforceable demand. This ratio has been followed in other judgments of the Supreme Court viz. CCE Vs. Mehta & Co. MANU/SC/0107/2011 and UOI. Vs. Madhumilan Syntex Pvt. Ltd. & Anr. MANU/SC/0550/1988. Any order passed or contemplated action without service of SCN and without affording an opportunity of personal hearing shall be in violation of principal of natural and, therefore, shall be void and not voidable.

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2. Strangely, Section 75(4) GST Act says that opportunity of hearing shall be granted where request is received. A question arises, where no request has been received, Can Adjudicating Authority will not serve any notice of personal hearing and went on to decide ex-parte. In all humility, the provision is completely incomprehensible. The Hon'ble

Supreme Court has repeatedly held that any order entailing civil consequences cannot be passed without giving opportunity of personal hearing.

3: The Hon'ble Supreme Court in the case of State of Orissa v. Binapani Dei and Ors. MANU/SC/0332/1967 has observed that distinction between quasi-judicial and administrative decisions has been almost wiped off and it was held that even an administrative order or decision in matters involving civil consequences, the opportunity of personal hearing has to be granted.

4: The Supreme Court in the case of Canara Bank v. V.K. Awasthy MANU/SC/0249/2005 has dealt with extensively significance of principles of natural justice and further observed that the principles of natural justice are those rules which have been laid down by the Courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights. The court further observed.

Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. Expression 'civil consequences' encompasses infraction of not merely property or personal rights but of civil 'liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life.

5: The Supreme Court in the case of S.L. Kapoor v. Jagmohan and Ors. MANU/SC/0036/1980 : 1980 (4) SCC 379 has held as under:-

In our view, the principle of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It will come from a person who has denied

justice that the person who has been denied justice is not prejudiced.

6: Therefore, the authorities taking action cannot be heard to say that even if the principal of natural justice would have been followed, it would not have made any difference in the ultimate result.

7: The Section 73 (1) of the Central Goods & Service Act, (hereinafter called GST Act) provides for, inter-alia, issuance of SCN. The Section 73(2) says that notice shall have to be issued three month prior to time limit as provided under Section 73(10) for issuance of order. The Section 73 of GST Act, deals with issue of SCN for the normal period i.e. three years and Section 74 deals with the issue of SCN for extended period of five years. Section 75 deals with general principle to be followed during the process of adjudication of SCN.

### **SERVICE OF SCN IS SINE-QUA-NON**

8: Before any action, which entail any civil/onerous action or consequences, could be taken against a person, it should be ensured that the SCN has been served upon party along with all relied upon documents. Though in Section 73(2), the words used are “issue” and in Section 73(1), the words used are “serve”. However, in my view, both have to be read as “served” upon the party. Unless and unless the Department establishes that the SCN had been served upon the party, any action taken pursuant to said SCN, is liable to be quashed as being in violation of principal of natural justice. The Hon’ble Supreme Court in the case of Kundal Lal Behari Lal MANU/SC/0246/1974:AIR 1976 SC 1150 wherein the specific expression "issue/ issued" was considered and was found to mean, in the least, "despatch of a copy of the order" and also to mean, in some cases, "served".

9: The Supreme Court in the case of Delhi Development Authority v. H. C. Khurana MANU/SC/0235/1993 : (1993) 3 SCC 196 wherein the

word "issue" was considered. The question before the Supreme Court was whether the word "issued" would mean "served"? The Court felt that the meaning of the word "issued" has to be gathered from the context in which it is used and accordingly held that the word "issued" did not mean served but it also held that the word issued meant "dispatched".

**SCN IF VAGUE, AMBIGUOUS OR PRESUMPTIVE,  
THE CASE NEED NOT BE DECIDED ON MERITS.**

10: The Hon'ble Supreme Court in the case of CCE, Bangalore vs. Brindavan Beverages (P) Ltd: MANU/SC/2645/2007 has observed as under. In this case, CESTAT, without going into the merits of the case, has rejected the case of the Department on the plea that the case of the Department, as set out in the SCN, is totally presumptive.

The show cause notice is the foundation on which the department has to build up its case. If the allegations in the show cause notice are not specific and are on the contrary vague, lack details and/or unintelligible that is sufficient to hold that the noticee was not given proper opportunity to meet the allegations indicated in the show cause notice.

11: The Hon'ble Customs Excise & Service Tax Appellate Tribunal (hereinafter called Tribunal) in the case of Super Fashion Fasteners Pvt. Ltd. vs. CCE : MANU/CN/0199/2018

Having considered the rival contentions and on perusal of records, we find that the individual liability of duty alleged in the show cause notice and proposed to be recovered individually from M/s. Super and M/s. Omega has been arrived at on the basis of presumption that the clandestine activity was in the ratio of the consumption of electricity. Such a proposition is absurd and the quantification of individual liability is totally presumptive in nature. Therefore, we do not go into other arguments on merit and

hold that the show cause notice is totally presumptive and relying on the ruling of Hon'ble Supreme Court in the case of Commissioner of Central Excise, Bangalore v. Brindavan Beverages Pvt. Ltd. (supra), we set aside the impugned order-in-original and allow all the appeals.

12: In *Kaur & Singh vs. C.C.E., New Delhi- 1997 (4) ELT 289 (SC)*, it was held by Supreme Court that SCN must communicate to the addressee the specific allegation/charge and the basis for the demand of tax. The party to whom SCN is issued must be made aware of the allegations against it and that this is a requirement of natural justice.

### **ONE WHO ALLEGE MUST PROVE/ESTABLISH**

13: Often, question arises about the onus to prove the allegations leveled in the SCN. On many occasions, Department levels all frivolous, perverse and baseless allegations in the SCN and leave the assessee to prove its innocence. The Delhi High Court in the case of *Lord Chloro Alkali vs. Special Director Enforcement Directorate MANU/DE/2692/2017* has observed as under:-

16. Further, it is a settled principal of law that "Affirmati Non Neganti Incumbit Probatio", that is, "the burden of proof is upon him who affirms - not on him who denies".

14: The Supreme Court in the case of *Bhagwan Jagannath Markad and Ors v. State of Maharashtra* reported in *MANU/SC/1171/2016* has observed as under:-

"18. It is accepted principle of criminal jurisprudence that the burden of proof is always on the prosecution and the accused is presumed to be innocent unless proved guilty. The prosecution has to prove its case beyond reasonable doubt and the accused is entitled to the benefit of the reasonable doubt."

15: The Supreme Court in the case of Shanti Prasad Jain Vs. Director of Enforcement, MANU/SC/0250/1962 has observed that the proceedings under FERA are quasi-criminal in nature and that it is the duty of the respondents as prosecutor to make out beyond all reasonable doubt, that a violation of law has occurred.

**SUPPLY OF DOCUMENTS – RELIED UPON & NON-RELIED UPON.**

16: It is seen that the Department is reluctant to supply even the documents relied upon in the SCN and also non-relied upon documents on the plea that they have not relied upon these documents and hence, there is no necessity of supplying those documents to the party. The Division Bench of Hon'ble Allahabad High Court in Novamet Industries & Ors. v. UOI MANU/UP/0912/2007 after referring to circular issued by the Department of Revenue concerning seizure of books and records held that non-relied seized goods and documents should be released to the assessee, in cases where show cause notice is not issued, within six months from the date of the seizure. Once the show cause notice is issued to the party, the documents/records which have not been relied upon may be returned to the party under proper receipt.

17: The Hon'ble Delhi High Court in Vikas Gumber Vs. Commissioner of Customs MANU/DE/4998/2009 observed that the departmental authorities are under obligation to release such documents as are not relied upon by them within a reasonable time. Likewise, Hon'ble Tribunal in the case of Selvi Paper Mills Ltd Vs. CCE MANU/CC/0085/2012 has observed as under:-

Considering the fact that the appellants were not supplied with the un-relied upon documents, in that situation, the adjudicating authority is directed to supply the remaining documents which were seized and not relied upon to them appellants, so that the appellants shall be able to reconcile their records and thereafter the adjudicating authority will do the fresh adjudication. In view of

this observation, the matter is remanded to the adjudicating authority with the direction to supply the non-relied upon documents to the appellants and thereafter fix a date for final hearing of the matter.

18: It would also be pertinent to note the observations of the Tribunal in the cases of Hindustan Dyeing & Printing Works Vs CCEMANU/CE/0444/2013 and Lekh Raj Vs. CCE MANU/CE/0509/2014 where the Department has been directed to supply non-relied upon documents to the assessee.

19: On many occasions, in order to unearth the evasion of duty and taxes, the departmental officers carry out search and seizure of factory, office premises, suppliers of raw materials and buyers of the factory, weigh-bridge operator, transporter and other related parties. Besides the above, the statement of workers, supervisors, officers and the Directors of the respective companies are also recorded. Needless to say, on most of the occasions, their statements are procured and extracted by physical beating, threat of arrest and inflicting physical torture - though, invariably, it is claimed that their statement was voluntary and made on their own volition and without any force or pressure.

20: The statements, of the above categories of persons, were recorded (in pre-GST regime) under Section 14 Central Excise Act which is equivalent to Section 70 of CGST Act, 2017. The Statement were recorded before the Gazetted Officer of the Government and since the Gazetted Officer is not a police officer, the statements so recorded, can be read as a evidence against the party and in support of the case of the Department. The question arises as to whether the statements, so recorded, without any safeguards, can be straightaway read by way of evidence against the party and in the aid of the case of the Department. In previous regime, Section 9D of the Central Excise Act, 1944 (now Section 136 of CGST Act) was the protective umbrella against the arbitrary and whimsical extraction of statements of various persons

whose statements had been recorded under serious threats on many occasions and relied upon against the party.

### **PRESENCE OF ADVOCATE AT THE TIME OF RECORDING OF STATEMENT.**

21: The Supreme Court has permitted the presence of Counsel for the person who is sought to be interrogated U/s 108 of the Customs Act, 1962 but, however, the presence of the Counsel should be at such distance, which is beyond the hearing distance but within the visible distance - general law is that Advocate cannot accompany the person who is interrogated. M.K. Kundia Vs. Union of India 2015 (319) ELT 9 (SC).

### **EXAMINATION OF WITNESS:**

22: The Punjab & Haryana High Court in the case of G-Tech Industries vs. Union of India MANU/PH/1118/2016 has observed as under:-

17. In fact, Section 138 of the Indian Evidence Act, 1872, clearly sets out the sequence of evidence, in which evidence-in-chief has to precede cross-examination, and cross-examination has to precede re-examination.

18. It is only, therefore,

(i) after the person whose statement has already been recorded before a gazetted Central Excise officer is examined as a witness before the adjudicating authority, and

(ii) the adjudicating authority arrives at a conclusion, for reasons to be recorded in writing, that the statement deserves to be admitted in evidence,

that the question of offering the witness to the assessee, for cross-examination, can arise.

19. Clearly, if this procedure, which is statutorily prescribed by plenary Parliamentary legislation, is not followed, it has to be regarded, that the Revenue has given up the said witnesses, so that the reliance by the CCE, on the said statements, has to be regarded as misguided, and the said statements have to be eschewed from consideration, as they would not be relevant for proving the truth of the contents thereof.

23: The Allahabad High Court in the case of CCE, Meerut vs. Parmarth Iron Pvt. Ltd. [MANU/UP/2113/2010 : 2010 (260) ELT 514 (Alld.) have held-

"Evidence-Cross-examination - Revenue if chooses not to examine any witnesses in adjudication, their statements are not considerable as evidence - Statements if relied, then persons whose statements relied upon have to be made available for cross-examination for evidence to be considered.

24: In the aforesaid case, the Allahabad High Court has observed that if the Department wishes to rely upon the statement of those persons, those persons should be first examined by the commissioner on oath and later on, offered for the cross-examination by the Counsel or AR of the assessee so that veracity of their statement could be tested. If this procedure is not followed, such statements are of no evidentiary value.

25: That as per provisions of Sec. [9D](#) of the Central Excise Act 1944 (equivalent to Section 136 of CGST Act), such statements recorded lose its relevance and evidentiary value if cross examination is not allowed in respect of those persons whose statements are sought to be relied upon by the Department in support of their case. The following judgments also supports the above proposition of law.

(a) 2010 (261) ELT. 803 Shree Industries Ltd. Vs. CCE

(b) [MANU/UP/1995/2014](#) : 2014 (309) ELT. 411 (All)  
Continental Cement Co. Vs. UOI

- (c) [MANU/GJ/0467/2014](#) : 2014 (308) ELT. 655 (Guj) CCE Vs. Saakeen Alloys Pvt. Ltd.
- (d) [MANU/CS/0138/2014](#) : 2014 (309) ELT. 698 (T) Jay Bhavani Metal Co. Pvt. Ltd. Vs. CCE
- (e) [MANU/CE/0624/2014](#) : 2015 (316) ELT. 162 (T) Shivalyalspat & Power Ltd. Vs. CCE
- (f) [MANU/CE/0281/2012](#) : 2012 (283) ELT. 563 (T) CCE Vs. Renny Steel Castings P. Ltd.
- (g) [MANU/CE/0405/2003](#) : 2004 (163) ELT. 255 (T) Harichand Kidarnath Khanna Vs. CCE
- (h) [MANU/CS/0102/2014](#) : 2014. TIOL. 1032. CESTAT. AHM Mahesh Silk Mills Vs. CCE

**RETRACTED STATEMENT HAS NO EVIDENTIALY VALUE.**

26: It is settled law as held by the Apex Court in [2015 (321) ELT A210] and Delhi High Court in the case of Shakti Zarda Factory (I) Ltd. [MANU/DE/1665/2004 : 2015 (321) ELT 438] and Saakeen Alloys Pvt. Ltd. [MANU/GJ/0467/2014], wherein it was held that the retracted statement is not admissible in evidence in absence of independent reliable evidence to corroborate the same.

**CROSS EXAMINATION OF WITNESSES**

27: It is well settled principle of law that if any party to the litigation wishes to rely upon the statements of any person, then the persons whose statements are sought to be relied upon, must be offered for cross examination compulsorily without any excuse, cause or reason (good or bad) as per Section 138 of Indian Evidence Act, 1872. Needless to say, the provisions of Indian Evidence Act, also applies to the proceedings initiated under the Indirect Tax Laws as has been repeatedly held by the Hon'ble Supreme Court and more particularly in the case of Collector Customs Vs. D Bhoormall MANU/SC/0237/1974. If the cross examination is not offered to the other party, then such statements

cannot be relied upon at all by the Department and cannot be used against the party.

28: The Supreme Court in the case of Andaman Timber Industries vs. Commissioner of C. Ex., Kolkata-II: MANU/SC/1250/2015

According to us, not allowing the Assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. When the Assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the Assessee. It was not for the Tribunal to have guess work as to for what purposes the Appellant wanted to cross-examine those dealers and what extraction the Appellant wanted from them.

29: There are some other judgments wherein the Supreme Court and High Courts have consistently held that cross-examination is indispensable part of principal of natural justice.

(i) Laxman Exports Ltd. v. Collector of Central Excise [MANU/SC/0548/2002](#) : (2005) 10 SCC 634

(ii) Swadeshi Politex Ltd. v. Commnr. Of Central Excise 2000 (122) ELT 641 (SC)

(iii) Arya Abhushan Bhandar v. Union of India [MANU/SC/0552/2002](#) : 2002 (143) ELT 25 (SC)

(iv) Gyanchand Sant Lal Jain v. Union of India 2001 (136) ELT 9 (Bombay High Court)

(v) Kellogg India Pvt. Ltd. & Madhukar Patil v. UOI [MANU/MH/0802/2005](#) : 2006 (193) ELT 385 (Bombay High Court)

(vi) Ripen Kumar v. Deptt. of Customs 2003 (160) ELT 60 (Delhi High Court)

(vii) New Decent Footwear Industries v. UOI [MANU/DE/0821/2002](#) : 2002 (150) ELT 71 (Delhi High Court)

(viii): M/s India Sales Corporation and Shri Tayeb Haroon v. Commissioner of Customs MANU/TN/0625/2013

(ix): The Division Bench of Hon'ble Delhi High Court in Basudev Garg v. Commissioner of Customs MANU/DE/1876/2013.

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