

SHOW CAUSE NOTICE – PART II
EXAMINATION AND CROSS EXAMINATION
OF WITNESSES WHOSE STATEMENT
RELIED UPON BY DEPTT AND BY PARTY.

BY

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In the process of adjudication of Show Cause Notice (hereinafter called SCN), examination and cross examination of respective witnesses, (whose testimony is relied upon both the department and assessee), is the most important tools both in the hands of Department and Assessee in order to strengthen their respective case before the Appellate Authorities. It is very common that the Department, during the stage of investigation, apply all methods (both fair and foul) in order extracts of the statements of their choice (generally secure admission/confirmation/acknowledgements from the witnesses in order to buttress their case) so that their job, during the investigation, is thoroughly simplified and there is no need to carry out all-round investigation which the Department is duty bound to prove clandestine removal of goods. Normal rule is that if the witness is not cross-examined, then the examination-in-chief/statement of that witness cannot be termed as evidence and, therefore, cannot be read in evidence and cannot be relied upon by the Department in support of their case.

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2: In accordance with the provisions of Section 9D of Central Excise Act, (equal to Section 136 of CGST Act) when any statement given by any person is relied upon by the Adjudicating Authority, they should first intimate the admission of said statements. Thereafter, if the noticee seek cross examination, cross should be provided and an opportunity should have been provided for the assessee to contest the contents of the statement which will necessary during cross examination. Before cross-examination of witness, it is absolutely necessary that there shall have to be examination of the witness(s) as has been held in the following cases.

1) Jindal Drug vs. Union of India [MANU/PH/1117/2016 : 2016 (340) ELT 67 (P & H)];

2) G Tech Industries vs. Union of India [MANU/PH/1118/2016 : 2016 (339) ELT 209 (P & H)];

3) CCE, Meerut I vs. Parmarth Iron Pvt. Ltd. [MANU/UP/2113/2010 : 2010 (260) ELT 514 (All)];

4) Goyal Tobacco Co. Pvt. Ltd. vs. CCE Jaipur I] [MANU/CE/0031/2017 : 2017 (348) ELT 720 (Tri-Del)];

5) R D Plast vs. CCE, Delhi I [MANU/CE/0490/2016 : 2017 (357) ELT 881 (Tri-Del)]

Bhartiya Loha Udyog Pvt. Ltd. and Ors. vs. Commissioner of CGST, Customs, Central Excise and Alwar (28.02.2018 - CESTAT - Delhi) : MANU/CE/0127/2018

3. In view of the catena of judgments as cited above, so long as there was no any examination of the witnesses (who may be employees of the assessee, raw materials suppliers, transporters,

buyers of finished goods, supplier of plant and machinery, experts or any person whose statement is heavily relied upon by the Department), by virtue of Section 136 of CGST Act, their statements cannot be relied upon by the Department in support of their case against the assessee/party/appellant.

4: Section [106](#) of the Indian Evidence Act in terms does not apply to a proceeding under the Excise, Customs Acts etc. However, the Supreme Court has pronounced that the principle underlying Section 106 is of universal application and therefore, shall apply to proceedings under Indirect Tax Laws now GST. Under that section, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him has been held by the Supreme Court in the case of *Amba Lal Vs. Union of India* MANU/SC/0090/1960 The Supreme Court once again in the case of *Shambu Nath Mehra v. [The State of Ajmer](#)* MANU/SC/0023/1956 : 1956CriLJ794 after considering the earlier Privy Council decisions on the interpretation of s. [106](#) of the Evidence Act, observed as under:-

"The section cannot be used to undermine the well established rule of law, that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

5: The Supreme Court in the case of *Collector of Customs Vs. D Bhoormal* MANU/SC/0237/1974 has held that provisions of Section 106 Indian Evidence Act shall apply to proceedings under Customs & Excise Act.

6: The necessity of allowing cross-examination of the witnesses during departmental adjudication proceedings is well-

settled and accepted, as is clear from the following decisions of the Hon'ble Supreme Court and High Courts:

(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.

7: It has been repeatedly held that at the stage of adjudication, it is the right of an assessee to seek cross-examination of the witnesses, whose statements are sought to be relied upon by the Revenue and that the cross-examination is necessary so that it could be established as to whether the statements of witnesses so recorded had been given voluntarily or whether the same are based on personal knowledge or legal records or on hearsay or the statements were extracted.

8: The Hon'ble Delhi High Court in the case of *New Decent Footwear Industries v. Union of India* - MANU/DE/0821/2002 : 2002 (150) E.L.T. 71 (Del.) and of Hon'ble Punjab & Haryana High Court in the case of *C.C.E. v. Hindustan Polyester Lines* - 2009 (236) E.L.T. 44 (P & H), wherein Hon'ble High Courts have held that denial of cross-examination of the witnesses on whose evidence the allegation against the assessee is based, would amount to violation of principles of natural justice hence any order passed is null and void.

9: The Delhi High Court in the case of **Directorate of Revenue Intelligence Vs. Vinod Kumar** MANU/DE/1005/2004 has observed as under:-

The only right available to an accused is to rebut or demolish the said report by way of cross examination of expert or in the alternative, produce another expert to counter the opinion given in the report or rely upon the authoritative text books to challenge the opinion given by the expert.

10: Now, there are some of the following landmark judgments on the cross-examination of expert.

(I) **(Collector v. Kiran Overseas 1996 (88) E.L.T. A187 (SC)** Expert report/opinion if disputed - Cross examination essential otherwise report to be ignored.

(ii) **MANU/GJ/0063/1985 Arunodaya Mills Ltd. And Anr.** Cross examination of experts not allowed-assessment order quashed. Assistant Collector directed to decide the question afresh; according to law, after giving an opportunity to the petitioner to cross-examine the two experts as well as evidence on record.

(iii) **MANU/CE/0387/1983 Walker Anjaria and Sons Pvt. Ltd.** Evidence-Cross Examination- Natural Justice violated if cross examination of experts so to their status and to rebut their opinion has been denied - Matter remanded for re-adjudication without either party being restricted to evidence already on record-Section 35C(1) of the Central Excises and Salt Act, 1944.

(iv) **MANU/CM/2330/2001 Carrara Marble and Granite Industries** Expert's opinion-Cross-examination-Reputation and age of institution to which expert belong not enough to justify refusal of cross-examination of those who tested samples.

(v) **MANU/CC/0032/1993 Vijayalakshmi Industries:** Adjudication-Natural justice-Cross-examination-Expert opinion relied on by department but expert not made available for cross-examination though requested-Principles of natural justice violated.

11: The Supreme Court in the case of Shalimar Rubber Industries v. CCE - [MANU/SC/1023/2002](#) : 2002 (246) E.L.T.

248 (S.C.), held that no reliance can be placed on the oral statement of the raw material suppliers as he is not subjected to any examination and cross examination during adjudication.

12: As per provisions of Sec. [9D](#) of the Central Excise Act 1944 (equal to Section 136 CGST Act), such statements recorded loose its relevance and evidentiary value if cross examination is not allowed. He relied upon the following case laws in support of his arguments:

(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.

CROSS-EXAMINATION OF CHEMICAL EXAMINER

13: The Hon'ble Supreme Court in the case of **Commissioner of Customs v. Punjab Stainless Steel Industries** **MANU/SC/0402/2001 : 2001 (132) ELT10 (SC)** has held that the cross-examination of the Chemical Examiner, whose report has been relied upon the Department, is permissible . Needless to say, if the cross is not allowed, his Report cannot be relied upon by the Department.

CROSS-EXAMINATION OF CO-NOTICEE

14: The Tribunal in the cases of **Anil Pannalal Sarogi v. CC 2009 (241) E.L.T. 219**, **Sai Kripa Exim (P) Ltd. v. CC**, reported in **MANU/CB/0048/2003 : 2003 (156) E.L.T. 225 (Tri.)** has held that cross-examination of co-noticee, if requested, cannot be denied.

Contd.....Part III