SHOW CAUSE NOTICE

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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, observe 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.

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 prejudicial to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary.

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, AMBIGIOUS 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 levelled 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".

Criminal Jurisprudence.

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 person 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 a 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

MANU/GJ/0467/2014 : 2014 (308) ELT. 655 (Guj) CCE Vs. Saakeen Alloys Pvt. Ltd.

MANU/CS/0138/2014 : 2014 (309) ELT. 698 (T) Jay Bhavani Metal Co. Pvt. Ltd. Vs. CCE

MANU/CE/0624/2014 : 2015 (316) ELT. 162 (T) Shivalyalspat & Power Ltd. Vs. CCE

MANU/CE/0281/2012 : 2012 (283) ELT. 563 (T) CCE Vs. Renny Steel Castings P. Ltd.

MANU/CE/0405/2003 : 2004 (163) ELT. 255 (T) Harichand Kidarnath Khanna Vs. CCE

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.

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

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

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

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

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

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

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.

WHO IS COMPETENT TO ISSUE SCN

30. It is very pertinent as to the person who has issued the Show Cause Notice as the SCN is liable to be quashed. The Superintendent of Central Tax has been designated as ‘Proper Officer’ for the purpose of issuing SCN which shall be in form GST DRS-01 – rule 142(1)(a) of CGST Rules, 2017and confirm demand under section 73 of CGST Act (where suppression of facts is not alleged - in other words, there is no invocation of extended period of limitation) and Section 74 of CGST Act (where suppression of facts or fraud is alleged – where there is invocation of extended period of limitation) as per CBI&C Circular No.3/3/2017-GST dated 05.07.2017 (State Government will prescribe ‘proper officer; for purpose of SGST in the respective State].

TIME PERIOD FOR ISSUE OF SCN

31. In the erstwhile Central Excise Act, 1944, proviso to Section 11A dealt with a situation where extended period of limitation could be invoked. In other words, the Department can go backward for a period of five year from the date of SCN. However, in the GST regime, the SCN is required to be issued as per Section 73 of GST Act by invoking normal period of limitation of three years and Section 74(2) read with Section 74(10) of CGST Act deals with situation for invoking extended period of limitation of five years. In other words, the Department has a time of five (5) years from the due date of filing of Annual Return for the financial year to which the tax not paid.

However, it is incumbent upon the Department to issue SCN at least six months prior to time limit as laid down under sub-section 10 of Section 74. In other words, within a period of six months, the following exercise is required to be done:-

Supply of documents both relied upon and non-relied upon (if not supplied earlier);

Supply of expert report relied upon by the department (if not supplied earlier); Arranging expert report by the assessee in defense of their Case.

Examination of witness relied upon by the Department and assessee; Cross-examination of the witnesses of both the sides; and Opportunity of personal hearing

32. It can be said from experience at the bar the manner in which and the extent to which, things move in the Department, it is a virtually impossible to complete the above exercise within a period of six months and result would be either any of the step would be left out or no adequate and proper opportunity of personal hearing or no opportunity to the assessee to defend the case, would be granted thus leading to serious and grave violation of principal natural justice. Now, providing for a period of three months and six months is extremely inadequate and highly deficient. It is a clear case of giving premium to lethargy and lackadaisical attitude being adopted by some of the officers of the Department who either fail to issue SCN within time prescribed and/or complete the process of adjudication of SCN. At one time, only, in normal case, only a period of six months was allowed and which, over a period of time, gone up to three years to accord premium to lethargy.

33. As per Section 73(2) of CGST Act, where there is no invocation of extended period of limitation, the above exercise is required to be completed within a period of three months. How the above exercise would be completed within a period of three months - is any body's guess. Perhaps, it is another time limit prescribed by law to complete the whole exercise which would never be completed in time. Under the Companies Act, 2013, it is incumbent to decide the petition under Section 241 (i.e. oppression & mis-management) within a period of six months, petitioner would be lucky if it is decided within a period of three years – solely due to highly inadequate number of members who are adoring the Benches and extra-ordinary pressure of work both under Companies Act, 2013 and IB Code,2016

SECTION 74 INVOKE EXTENDED PERIOD OF LIMITATION.

34. Now let us try to understand the grounds, reasons and circumstances, under which, the extended period of limitation of five years could be invoked by the Department while issuing SCN under Section 74 of CGST Act. A mere inaction or a mere non-disclosure is not suppression of facts. Suppression means not providing information, which the person is legally required to state, but is intentionally or deliberately not stated. The Supreme Court in the case of Collector v. Chemphar Drugs 1989 (40) ELT 276 has held that mere inaction or failure, on part of manufacturer, will not amount to suppression of facts. Conscious or deliberate withholding of information, when the manufacturer knew otherwise, is required to be established, before saddling the manufacturer with liability of tax for extended period of five years.

35. However, if SCN was issued but kept pending as department had filed appeal against an order adverse to revenue in some other proceedings on the same issue and appeal of department is pending before Appellate Tribunal, High Court or Supreme Court, that time will not be counted for calculating three years/five years limit – section 75(11) of CGST Act.

36. In Padmini Products v. CCE – 1989 (43) ELT 195 (SC), the assessee did not obtain excise license under belief that the goods are exempt from duty. There was scope for doubt regarding liability of duty. Hence, demand for period beyond period of one year was set aside.

37. Mere omission to give correct information did not constitute suppression unless that omission was made willfully in order to evade duty. Suppression would mean failure to disclose full and true information with the intent to evade payment of duty as has been held by Supreme Court in the cases of - Continental Foundation Jt. Venture v. CCE (216) ELT 177 (SC) and Anand Nishikawa Co. Ltd. v. CCE 2005 (188) ELT 149 SC.

38. If a party bonafide believes in a legal position (e.g. that no duty is payable or no license is required in his case) and if there is scope for such belief and doubt, penal provisions of Section 11A of Central Excise Act (now Section 74) will not apply.

NO SUPPRESSION IF DEPARTMENT AWARE OF FACTS:

39. Extended period of five years is not applicable for any omission on part of assessee, unless it is a deliberate attempt to escape from payment of duty. When facts were known to the department, extended period of five years is not invocable. – Pushpam Parmaceuticals Co. V. CCE 1995(78) ELT 401 (SC) – quoted with approval in Sarabhai M Chemicals v. CCE (179) ELT 3 Anand Nishikawa Co. Ltd. V. CCE 2005 (188) ELT 149.

MEANING OF WILLFUL MIS-STATEMENT.

40. A false statement becomes ‘willful’ if it is deliberate or intentional. It is not willful if the statement is accidental or inadvertent. A statement will not be misstatement only because full facts were not disclosed. UOI v. Rajasthan Spinning & Weaving Mills (2009) 238 ELT 3 (SC).

DEBIT OF DUTY OR DEPOSIT OF AMOUNT DOES NOTAMOUNT CONFESSION OF GUILT

41. During investigation, the officers from Department visits factory, office and residences of Directors and force, undue pressure and torture is inflicted and the parties are compelled to deposit the amount showing as if the amount has been deposited voluntarily by the party. The Tribunal in the case of Gujarat Agrochem Ltd. v/s. C.C.E., Surat [MANU/CS/0385/2010 : 2012 (280) ELT 435 (Tri. Ahmd)] and Dodsal Pvt. Ltd. v/s. CCE - MANU/CM/0807/2005 : 2006 (193) ELT 518, has observed that debit of duty and statements at time of visit of Revenue officers is not sufficient for holding against the party.

ADMISSIBILITY OF COMPUTER PRINT OUT

42. During the search of the premises of the assessee, various documents viz invoices, kuchhaparchis, slips, note books, pads etc. are seized by the officers of the Department and the Department rely upon those seized documents in support of their case – more particularly about clandestine removal of goods which has been cleared without payment of duty and taxes. The Section 145 of GST Act (previously Section 36B of Central Excise Act, 1944) dealt with admissibility of micro films, facsimile copies of documents and computer print-out as a document and as an evidence. As to the reliability or admissibility of these, Tribunal in the case of Premium Packaging Pvt. Ltd. Vs CCE reported in MANU/CE/1076/2004 : 2005 (184) ELT 165 (Tri.-Del.) has observed as under:-

5. The Department has no doubt placed much reliance on the provisions of Section 36-B, to sustain the admissibility of the computer printout for proving the charge of clandestine receipt of raw material and manufacture of the final products by the appellants, but admissibility of the printed material under the said Section, has been made subject to the fulfillment of certain conditions, detailed therein. The condition in respect of the computer printout laid down in that Section, as is evident from the reading of its clause (ii), is that, the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or possess the information.

‘’ In the instant case, the printouts were not produced by the computer. Peripherals were picked up by the Officers from the Head Office-cum-Sale Depot of the appellants and they were inserted into the computer, and that too, not all but certain information from the part of two zip discs were taken in the absence of the appellants. Certain zip discs were copied out by the Officers in the computer of the Department and that too without associating any authorized person of the appellants' company. As observed above, when the appellants wanted to have access to the peripherals and requested for obtaining the information or data from those peripherals, some floppies were found blank while some even could not run on the computer. The hard disc even could not be opened for the reason best known to the Department as all these peripherals remained in their custody after the date of seizure i.e. 30-7-1999.

43. The Tribunal in the case of Kamal Sponge Steel and Power Ltd. and Ors. vs. CCE : MANU/CE/0035/2019 has observed as under:-

21. In view of the above orders, there can be no doubt that computer printout can be taken in evidence only if the parameters stipulated in section 35 B (2) of the Central Excise Act 1944 are fulfilled. In the present case, we are unable to find any evidence on record to show that the parameters have been fulfilled. In addition, there is no corroborative evidence to prove correctness of the data/figure in the computer printout. Under the circumstances, we are of the view that it is not proper to take computer printout in evidence in the present case for holding the appellant company guilty of suppression of production and clandestine removal of goods.

EVIDENTIARY VALUE OF DOCUMENTS PRODUCED:

44. The Section 36A of Central Excise Act, 1944 (now Section 144 of CGST Act) deals, inter-alia, with presumption as to certain documents, which had been seized from the custody and control of any person. The Hon'ble Supreme Court in the case of Bareilly Electricity Supply v. Workmen, MANU/SC/0501/1971 : 1971 (2) SCC 617 has observed as under

"when a document is produced in a Court or Tribunal, "mere production of the documents does not amount to proof of it or the truth of the entries therein. The writer must be produced or his affidavit in respect thereof be filed and an opportunity accorded to the opposite party who challenges this fact to assess the probative value of the contents of the documents.

THANK YOU