

Dear Shailendra,

This is JK from Swamy Associates. Herewith I am sending my second article for the Budget Countdown series. Though this article is already published in April 2002 issue of RLT, the matters dealt with therein are still relevant.

Regards,

JK.

HIS MASTERS VOICE
(S. Jaikumar, Advocate, Swamy Associates, Chennai)

At the outset, I submit that, this article is not intended to hurt anyone personally. With due respects to the officers who exercise their quasi judicial function undoubtedly and manifestly, this article reflects the mass opinion and ground reality.

Show cause notices, replies, personal hearings and order-in-originals are integral part of the Excise and Customs departments, which constitute a very greater share in department's function. Show cause notices are being issued by the department, requiring the assesseees / respondents to show cause to the adjudicating authority for the alleged violations / offences committed.

It has been an age old cry of the respondent fraternity, that the show cause notice issuing officer should not be the adjudicating officer, as it would defeat the basic cardinal principle of natural justice (Bias to the subject matter). By having the show cause notice issuing authority as the adjudicating authority, the respondent fraternity are at a graver disadvantage, as they have to initially combat the adjudicating authority's personal bias, as he has issued the show cause notice, then his bias towards the subject matter and finally defend the case on merits.

With the advent of the amendment to Section 11 A of the Central Excise Act, 1944, which required the show cause notices issued under Section 11 A should have the prior approval of the Commissioner of Central Excise / Chief Commissioner of Central Excise, as the case may be, the scenario has become more pathetic. A good amount of show cause notices under Section 11 A are issued by the lower authorities like Assistant Commissioners and Deputy Commissioners. With this "prior approval" menace, every notice

issued by the lower authorities are sent to the competent authority for prior approval and subsequently issued after such approval. Most notices even bear an endorsement that such notices are issued with the prior approval of the said authority.

While the quasi-judiciousness of the lower authorities is already under debate, such "prior approval" from their superior authorities, influences their judiciousness precariously. Despite the intention of the legislature in introducing such "prior approval", that is to avoid unnecessary and frivolous show cause notices, the bullet has missed the target to a very greater extent. It could be seen from the facts and figures that, after the introduction of the "prior approval" proviso under Section 11 A, the show cause notices issued by the lower authorities have been confirmed consistently.

Already the trade is receiving a spate of show cause notices owing to the safe and conservative approach of the lower formations to "safeguard revenue". Even frivolous issues raised either by the Internal Audit wing or the Central Excise Revenue Audit (CERA) or Customs Revenue Audit (CRA), invariably gives rise to a show cause notice. Once the competent authority gives the prior approval for issue of the show cause notices, the lower authorities who adjudicate the show cause notices, are generally of the opinion that the permission granted for issue of show cause notice by the superior authorities is a dictation of the Order-in-Original and they seldom venture to exercise their judiciousness. This leads to a situation wherein show cause notices are nothing but a near-to-certain Order-in-Originals confirming the allegations. Thus, the attempt to reduce the number of show cause notices by introducing the "prior approval" clause has lead to a situation of assured confirmation of allegations contained in the show cause notice leaving the trade in greater misery.

The basic cardinal principles of natural justice are that justice should be free from bias and should be done undoubtedly and manifestly. This "prior approval" clause casts a serious doubt in the minds of respondent fraternity as to whether justice is done observing these basic cardinal principles of natural justice.

Will the Budget making authorities take note of this and introduce corrective measures by delinking the adjudication function from the enforcing authorities and by bidding farewell to the "prior approval" clause?

(Considering the relevance of the issue and the timing i.e. budget making, this article which has already been published in the 8th April 2002 issue of Revenue Law Times, is being republished)