

Cross examination in tax adjudication -past , present and future

If natural law and quasi-judicial proceedings always worked harmoniously in India , the burgeoning litigation due to violation of natural justice at the bureaucratic level would be nothing but a bad dream. It isn't. While the Government is the biggest litigant here, the taxpayer is fighting back and how!

To be sure, natural justice is nothing but commonly accepted principles of fairness; a metric that satisfies the broad perception of justice which is rooted in basic human right. Overtime, these ideas have formed the foundation of law, giving rise to more nuanced legal principles that aid the justice disposal mechanisms. They are now considered to be an inalienable part of any legal proceeding and quasi judicial proceeding are no exception.

The adjudication process in field of direct as well as indirect taxation is carried out by Officers exercising quasi judicial powers. The nature of the power is such that it has simultaneous limitations for those exercising it and disadvantages for the person against whom it is exercised. When the settled principle 'rules of evidence are not strictly applicable in quasi judicial proceedings¹' is a blessing for the officer for speedy and time bound disposal, it is a curse for the taxpayer. When adjudication is necessarily a process which commences on the basis of allegations with factual observations mixed with inappropriate amount of presumptions and less than adequate quantum of supporting evidence , the burden of proof for the tax payer is way large where the pendulum sways between clarifying facts, rebutting presumptions and advancing evidence in their favour .

¹ C. Vasantlal & Co vs CIT 1962 45 ITR 206 S.C

The production of evidence poses a mightier challenge especially in cases booked solely on statements of third parties or where one of the pivotal evidence relied on against the tax payer is statement of third parties recorded behind his back and not revealed to him till service of show cause notice. When destiny of tax payer alternate between Intelligence/ Anti Evasion/DGGI / Enforcement / Audit , the principle laid down under Article 20(3) of the Constitution that ,no person accused of any offence shall be compelled to be a witness against themselves is often buried. The final outcome of demand is therefore wrapped up against the assessee with self incriminating evidence corroborated with further evidences including statements of various third parties recorded behind the back of assessee.

When such matters proceeds for adjudication, though the opportunity of being heard are inbuilt expressly in adjudication provisions, the length and breadth of such opportunity is at the mercy of adjudicating authorities. Though Section 138 of Evidence Act provides that *Witnesses shall be first examined-in-chief then (if the adverse party so desires) cross-examined*, since such rules of evidence are not strictly applicable to quasi judicial proceedings and is left to discretion of proper officers, the inclination of the officers has often been to over look not just principles of Evidence Act but also rules of fair play.

Such situations are sometimes well guarded in favour of tax payer by the very Statute itself by providing situations or circumstances under which such statements can be relied and acted upon by the department. Section 9D of the erstwhile Central Excise Act, 1944 was one such provision. An identical provision is still available under Section 138 B of the Customs Act. Though an identical provision is available under Section 136 of GST Act, there exist a significant departure under GST. The relevant sections under both laws are extracted below:

<p>CENTRAL EXCISE ACT, 1944</p> <p>SECTION 9D. Relevancy of statements under certain circumstances. -</p> <p><i>(1) A statement made and signed by a person before any Central Excise Officer of a gazetted rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, -</i></p> <p><i>(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or</i></p> <p><i>(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.</i></p> <p><i>(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court.</i></p>	<p>CGST Act, 2017</p> <p>SECTION 136. Relevancy of statements under certain circumstances. -</p> <p><i>A statement made and signed by a person on appearance in response to any summons issued under section 70 during the course of any inquiry or proceedings under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, —</i></p> <p><i>(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or</i></p> <p><i>(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.</i></p>
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By virtue of Section 9D, the statements recorded during investigation could be relied on only after same is admitted in evidence as per procedure prescribed under Section 9D (1) of Central Excise Act, 1944. The courts have enforced Section 9D with so much of rigour in adjudication proceedings making cross examination mandatory when statements are relied on against assessee².

Though identical provision has been incorporated under Section 136 of the GST Act, same is noticeably restricted in scope as the requirement is to be followed when the statement is relied on in prosecution cases. The model GST law in November 2016 , had Section 95 which was identical to Section 9D. But the section was enacted making conditions regarding acceptability of statement applicable only for prosecution cases.

² *Andaman Timber Industries Vs. CCE* 2015 (324) E.L.T. 641 (S.C.), *Jindal Drug v. Union of India* [2016 (340) E.L.T. 67 (P & H)]; *G. Tech Industries v. Union of India* [2016 (339) E.L.T. 209 (P & H)]; *CCE, Meerut-I v. Parmarth Iron Pvt. Ltd.* [2010 (260) E.L.T. 514 (All.)];

This leaves open the question whether restrictive applicability of the section only for prosecution is giving an extra latitude to the proper officers in adjudication in so far as not to grant an opportunity to challenge the evidentiary value of such statements through cross examination. Though there is a parallel line of thought which has been formed around the omission, by over enthusiastic tax fraternity to the effect that the impact of the omission is that such statements of third parties shall not be relied on in any proceeding other than prosecution, in anticipation of the magnitude and legacy of settled principles that could come in aid of law enforcing agency in favour of admissibility of such statements in evidence, we are constrained to abandon this line of thinking and examine the impact of conspicuous omission in Section 136 of the GST Act making it inapplicable for adjudication proceedings.

The simplest way to address the question is, if there is conspicuous omission and statements are being relied on in adjudication proceeding, is there a remedy of cross examination available on basis of fair play. The answer would be in affirmative and this is further endorsed by the judicial precedents³ under age old and time tested Income Tax Act wherein cross examination has been held as mandate when reliance is placed on third party statements. Similarly, there are settled precedents⁴ under erstwhile Sales tax/VAT legislations, where, even in absence of a provision like Section 9D of Central Excise Act, opportunity of cross examination has been mandated when there is reliance on third party statements and cross examination has specifically been requested by the affected party.

Even under GST, whenever there have been cases of denial of opportunity for cross examination, the affected party has invoked the writ jurisdiction and such a right has been held

³ Kishinchand Chellaram Vs. CIT 1980 125 ITR 713 SC

⁴ State of Kerala Vs. KT Shaduli Yusuff AIR 1977 SC 1627; Jose Vs. Addl. STO; V.S. Narayan Nair V. Sales Tax officer MANU/KE/0132/1971; State of Kerala Vs. PT Johnson & Others MANU/KE/3428/2021; MANU/KE/3853/2021

as part of natural justice and sanctioned ⁵. The recent Judgment of Kerala Highcourt⁶ categorically observed that the writ jurisdiction has been justified on the ground that even when there is violation of principles of natural justice there is no power of remand vested in first appellate authority under Section 107 of the GST Act. The court also touched upon the basis settled principles and held that unless request for cross examination is frivolous or it is impossible to procure presence of person, cross examination ought to be permitted. The rule of fairness mandates that reliability and credibility of the statement of third party be tested for cross examination. The fore gone conclusion of the adjudicating authority that cross examination will not affect credibility of statement is legally impermissible as it reflects a predilection. The court holds that the adjudicating authority cannot presuppose or presume the subject matter of cross examination or what benefit would be derived out of such cross examination. When statements of third parties are relied on, it flows from opportunity of hearing under Section 75 (4) that such person against whom statements are relied on shall be given an opportunity. The adoption of unilateral statements behind the back of person cannot be justified under rule of law, even in quasi judicial proceedings.

Though the above discussion can be concluded on premise that even in absence of a specific provision in GST law providing for cross examination as a right, same is always available to the aggrieved as a part of rule of fair play and natural justice, there always exists the acid tests as laid down under legacy laws and which permeates to GST litigation landscape as well. While challenging proceedings of non granting of cross examination, the following factors would equally be important and relevant ;

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⁵ *Akshit Petrochem Pvt Ltd Vs. Dept of NCT, Delhi* (2024) 18 Centax 126 (Del.), *B. Sivakumar vs. State Officer, Adjudication* (2024) 15 Centax 478 (Mad.), *Elora Tobacco Company Ltd Vs Union of India* (2024) 18 Centax 503 (M.P.)

⁶ *Nishad K.U Vs. The Joint Commissioner*, 2024 VIL 1414 KER

- *Natural Justice is not violated if the person giving information is not allowed cross-examination⁷*
- *Right of cross examination not essential part of reasonable opportunity of being heard . whether right of hearing extend to right for cross examination depends on the nature of materials relied on , the manner in which assessee can rebut and facts and circumstance of each case, terms of statute, nature of proceeding⁸;*
- *To extend an opportunity of cross examination the nature of inquiry, the framework of law under which it is held, the extent of power of the adjudicating authority and the nature and character of rights affected and consequence flowing from a denial cross examination would remain relevant factors.*
- *There is necessity for explicit request for cross examination. 'Reasonable opportunity' does not inherently encompass the right to cross-examine witnesses unless explicitly sought by the assessee; If assessee fails to avail the opportunity, he is precluded from raising this issue at later stage of proceedings.*

The conscious restriction of scope of section 136 under the GST Act can therefore only be viewed as a precautionary measure wherein the proper officer is not compelled to automatically subject every statement to cross examination if same is to be taken on record as an evidence. This does not mean that such statements cannot be relied on as a piece of evidence or right of cross examination is completely ousted. The right of cross examination always available as a right to aggrieved when there is violation of his natural justice and the conditions seeking such cross examination satisfies the parameters as mentioned above.

⁷ *Kanungo & Co Vs. Collector of Customs 1983 (13) E.L.T. 1486 (S.C.)*

⁸ *MK Thomas Vs. State of Kerala (1977)*

