

Project Paper
on
“IS FEAR OF VIGILANCE
A REAL CAUSE OF POOR ADJUDICATION
BY
ADJUDICATING AND APPELLATE AUTHORITIES
UNDER
CBEC”

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*Every thing we hear
is an opinion, not a fact.
Every thing we see
is a perspective, not the truth.*

- *Marcus Aurelius*

INTRODUCTION

Statutes such as Customs Act, 1962, Central Excise Act, 1944 and Finance Act, 1994 confer power on authorities there under for their implementation and to enforce compliance thereto. Such power is administrative in the normal course and – wherever provided for in the statute – is quasi judicial in nature and scope.

2.0 WHAT IS QUASI JUDICIAL POWER?

Hon'ble Supreme Court had occasion in following decisions to examine the nature of quasi judicial power, and laid down criteria to determine whether a power is an administrative power or a quasi-judicial power. The following discussion also refers to the conduct and procedure relating to exercising quasi judicial power.

2.1 In the case of **Province of Bombay v. Khushaldas S. Advani — AIR 1950 SC 222**, Supreme Court held that

“(i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed

to each other, there is a *lis* and *prima facie*, and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and

(ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially.”

2.2 In ***Jaswant Sugar Mills Ltd., Meerut v. Lakshmi Chand & Ors.*** - **1963 Supp (1) SCR 242**, a Constitution Bench of the Supreme Court had observed that :

“Often the line of distinction between decisions judicial and administrative is thin : but the principles for ascertaining the true character of the decisions are well-settled. A judicial decision is not always the act of a judge or a tribunal invested with power to determine questions of law or fact : it must however be the act of a body or authority invested by law with authority to determine questions or disputes affecting the rights of citizens and under a duty to act judicially. A judicial decision always postulates the existence of a duty laid upon the authority to act judicially. Administrative authorities are often invested with authority or power to determine questions, which affect the rights of citizens. The authority may have to invite objections to the course of action proposed by him, he may be under a duty to hear the objectors, and his decision may seriously affect the rights of citizens but unless in arriving at his decision he is required to act judicially, his decision will be executive or administrative. Legal authority to determine questions affecting the rights of citizens, does not make the

determination judicial : *it is the duty to act judicially which invests it with that character*

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To make a decision or an act judicial, the following criteria must be satisfied :

- (1) it is in substance a determination upon investigation of a question by the application of objective standards to facts found in the light of pre-existing legal rule;
- (2) it declares rights or imposes upon parties obligations affecting their civil rights; and
- (3) that the investigation is subject to certain procedural attributes contemplating an opportunity of presenting its case to a party, ascertainment of facts by means of evidence if a dispute be on questions of fact, and if the dispute be on question of law on the presentation of legal argument, and a decision resulting in the disposal of the matter on findings based upon those questions of law and fact.”

2.3 Hon 'ble Apex Court in **Siemens Engineering and Manufacturing Co. of India Ltd. Vs. Union of India [AIR1976 SC 1785,]** held that where an authority makes an order in exercise of a quasi-judicial function it must record its reasons in support of the order it makes.

‘Every quasi-judicial order must be supported by reasons. It must be noted that if courts of law were to be replaced by administrative authorities and tribunals it is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. The rule requiring reasons to be given in support of an order is like the principle

of audi alteram partem, a basic principle of natural justice which must adhere to the quasi-judicial process. It is seen from the pleadings in which charges find place that the applicant has followed the quasi judicial process. His ultimate views may not be upheld by the higher judicial fora but he cannot be faulted to have circumvented the prescribed quasi judicial decision making process. In this regard he passed the test that his decision followed the quasi judicial process.’

3.0. STATEMENT OF THE PROBLEM

The tax dispute resolution system under indirect tax statutes primarily rest on the shoulders of huge army of adjudicating authorities under CBEC.

In the normal course of events, the talent that the CBEC attracts to join its ranks and long years of experience of these adjudicators in the field formations should be of great assistance to CBEC – as an agency to dispense judicious Tax Administration aiming for low levels of adversarial dispute resolution - wherein the adjudicators are expected to disallow the disputes, without merit, at the first instance so as to serve the larger mandate of society and the law.

But the signals of alarm – growing volume of litigation, poor success rate of the Revenue before appellate forums, frequent imposition of cost on adjudicating authorities in the recent past by Tribunal, growing perception among Taxpayers that the first instance of relief in a tax dispute can be expected only at the Tribunal level etc – speak volumes on the quality of adjudication being way behind the expectations associated with the powers vested with the Quasi Judicial Authorities.

The indication of the problem can be gauged from following figures-

Indirect Tax: level at which case is pending, as on 31.12.2013	Total number of appeals pending	Total amount involved (in million Rs.)
SC	3204	102,374
HC	14,515	157,319
CESTAT	67,575	1,088,693
Commissioner (Appeals)	35,432	89,627

Source: Annual report 2013-14 Min of Finance (Budget Division)

The emerging picture puts credibility and reputation of Revenue administration under shadow. Not only that it is a concern for Taxpayers but is also for the Revenue insofar as the taxes are locked up on account of sloppy confirmation spree devoid of examination of the issues on merits.

Reasons for poor quality of adjudication are more than one and are a complex mix. Reasons such as infrastructure, judicial training, man power deployment etc can be addressed by planning for improving the situation. The question of critical importance is whether fear of vigilance has any bearing on the quality of adjudication i.e passing a fair and judicious order following principles of natural justice. This issue - non-speaking orders/ without following judicial discipline/ non consideration of pleas put forth by the parties, etc. merely due to a fear of coming under vigilance scrutiny - was highlighted by first report of TRAC and also DGoV letter F.No.V.500/39/2015 Dated 01/04/2015. In an endeavour to answer this question, following methodology is adopted.

4.0. METHODOLOGY

To test the proposition as to 'whether fear of vigilance is a real cause of poor quality of adjudication', it is proposed to generate primary data by way of

conducting a Survey among present batch of MCTP participants – having reasonable experience of adjudication and exposure to review – and is proposed to interpolate this data with the secondary data derived from DGoV instructions and reported case law.

Accordingly, the study draws on

- (i) reported case law relating to nature of Quasi Judicial Power, what constitutes misconduct, question of amenability of Quasi Judicial Authorities to disciplinary action, criteria to initiate disciplinary proceedings against Quasi Judicial Authorities, etc
- (ii) reported judicial pronouncements/ cases that considered vigilance action initiated against Quasi Judicial Authorities deciding tax matters. These cases pertain to CBEC and also CBDT.
- (iii) data collected by way of circulating an open ended questionnaire among current batch of MCTP participants.
- (iv) Further, reference is also made to instructions on the subject issued by DGoV in CBEC and also by CVC.

5.0. THE VIGILANCE MECHANISM

Based on the recommendations of the Committee on Prevention of Corruption headed by late Shri K. Santhanam, the Conduct Rules for Government servants were revised with a view to maintaining integrity in public Services and the Central Civil Services (Conduct) Rules, 1964 were notified laying down the Code of Conduct for Central Government employees

Rule 3 (1) of the Central Civil Services (Conduct) Rules 1964 provides that a Government servant shall at all times maintain absolute integrity and devotion to duty and do nothing unbecoming of a Government servant. This

rule serves the specific purpose of covering acts of misconduct not covered by other specific provisions of the Rules.

The Central Vigilance Commission acts as the apex body for exercising general superintendence and control over vigilance matters in administration and probity in public life.

CBEC has a vigilance system in place with DGoV as a nodal agency at the national level

6.0. INSTRUCTIONS ON ADJUDICATION AND PREVENTIVE VIGILANCE

6.1. Vide Circular No 30/11/07 dated 01.11.2007, dealing with subject “Criteria to be followed while examining the lapses of authorities exercising quasi judicial powers”, CVC called for a uniform approach in proposing vigilance action against officers exercising quasi judicial powers. It refers to the decision in the case of Duli Chand 2007 (207) E.L.T. 166 (S.C.) to state that decision in Nagarkar case (1999) SCC 409 did not represent the law correctly and that CVOs were asked to examine the cases w r t criteria laid down in the case of K K Dhawan 1993 (2) SCC 56.

6.2. Subsequently, CVC made a suggestion in 2009 - after a vigilance audit of Customs & Central Excise Department - that as a measure of preventive vigilance, adjudication orders should be examined from the vigilance angle also, in terms of the criteria referred in CVC's Circular 39/11/07 dated 01.11.2007 and as laid down by Hon'ble Supreme Court in the case of Union of India and Others vs. KK Dhawan.

6.3. Vide letters F.No.V.500/100/2009-Pt.1 dated 24.02.2010 and 27.04.2010 the issue regarding scrutiny of adjudication/appellate orders from vigilance angle as a preventive vigilance action was addressed by DGoV, in terms of which the review committees were advised to undertake scrutiny of

adjudication/appellate orders from vigilance angle also as per the criteria laid down in the case of K K Dhawan as noted in CVC Circular No. 39/11/07 dated 01.11.2007.

6.4. Thereafter, vide letter F.No.V.500/39/2015 Dated /04/2015, DGoV refers to apprehensions that the above cited instructions have created a 'fear of vigilance' amongst the field officers, due to which some of the adjudicating/ appellate authorities are resorting to confirmation of demands through non-speaking orders/ without following judicial discipline/ non consideration of pleas put forth by the parties, etc. merely due to a fear of coming under vigilance scrutiny. It was conveyed that such unjust orders, besides attracting adverse judicial scrutiny, cause harassment to the trade and undermine the efforts of the Department in providing a non-adversarial tax regime to taxpayers.

While referring to system of comprehensive review of Adjudication and Appellate Orders – from the angle of legality, propriety and vigilance – by the Committees constituted under the respective statutes, DGoV clarified that the scrutiny from vigilance angle not required merely on the ground of it being an anti revenue order or having some legal infirmities for which review and appellate remedy is available, unless there are genuine reasons to doubt the bonafides of the decision or where the order shows a conspicuous violation of the procedures involved or recklessness, etc., as per the above criteria laid by Hon'ble Supreme Court in the KK Dhawan's judgment and as circulated by CVC in Circular No.39/11/07 dated 01.11.2007. In this regard, the said clarification refers to the fact that ever since 1997, only 18 adjudication orders i.e. 0.001% of the total quasi-judicial orders passed have been taken up for scrutiny by the Directorate General of Vigilance to state that the fear of vigilance action against adjudicating/ appellate authorities in respect of adjudication/ appeal orders, therefore, appears to be totally unfounded and misplaced.

7.0. SURVEY

7.1. An open ended questionnaire was circulated among the present batch of MCTP participants seeking views on the issues related to the subject so as to generate primary data. Thirty one responses are received. Sample copy of the Questionnaire is attached as enclosure. Though the questionnaire is open ended, quantitative summation of the responses is attempted and placed below.

Rating one self as an adjudicator	
Judicious and fairly judious	87%
Pro Revenue	13%

What is good adjudication	
Examining issue on merit and Passing reasoned orders	100%
Passing pro revenue orders	0%

Who is a good a adjudicator	
Being judicious	94%
Pro Revenue	6%

Can a faulty Notice be sustained by adjudicating authority and confirm the demand	
No	71
Yes	29

Departmental officers confirm the demands because of vigilance fear	
Yes	45
No	55

Vigilance fear is the cause for poor quality of adjudication	
Yes	41
No	59

7.2. What are the reasons - other than vigilance fear - for poor quality of adjudication ?

Following answers are given by the participants-

- (i) Indifference in following the principles of natural justice
- (ii) Bureaucratic highhandedness
- (iii) Lack of professionalism and incompetence;
- (iv) lack of interest in the work relating to adjudication;
- (v) Tendency to dispose the case in favour of Revenue as it saves time and effort ;
- (vi) Frequent changes in the law and procedure and lack of knowledge. This is aggravated by frequent transfers;
- (vii) Insufficient support staff
- (viii) Mask of vigilance fear is used to cover the above stated lacuna and shortcomings
- (ix) Pressure to liquidate pendency of notices and other work load.
- (x) Too much emphasis on quantity in disposal of SCNs rather than on qualitative effort resulting in a futile exercise in relation to desired objective.
- (xi) Culture in the Department not to invite trouble

- (xii) Premium attached to the pro Revenue image in the Department in assessing competence and suitability of officer for various assignments
- (xiii) Adjudication is not considered as the core function of one's duty
- (xiv) General perception that vigilance proceedings are time consuming, and better not be caught in the same.
- (xv) Wrath of reviewing officers who are also administrative bosses, who otherwise are supposed to encourage fair and judicious adjudication.
- (xvi) Many a time, acceptance of orders are dragged and explanations are called from the adjudicators.
- (xvii) the vigilance fear works on the adjudicator on account of the investigating agencies like DRI or DGCEI and invariably the demands are confirmed as keen interest shown and tracking of the cases by investigating officers/authorities after issue of Notices
- (xviii) One officer referred to an instance of audit of an order of refund claim, wherein the ADC incharge threatened the concerned officer-dealing with the subject - of vigilance action, if the refund is positively cleared.
- (xix) Weak or faulty SCN is the reason for poor adjudication.
- (xx) Adjudicators do not care to do the original work but simply sign the drafts prepared by the supporting staff.

7.3. Further, the following instances of disciplinary action, in relation to adjudication, are reported by the officers –

- (i) a case relating to import in 1997 by M/s Gujarat Small Industries Corporation at Kandla Customs, adjudication by Commissioner some time around 2000

(ii) a case relating to import of Gold at Goa Customs, adjudication some time around 2013, wherein both adjudicator (ADC) and Commissioner were chargesheeted

(iii) a case relating to M/s Greenply at Dibrugarh Commissionerate, in which matter vigilance apparently is under consideration.

It is also stated that in two of the three above cases, proceedings are initiated as per the complaint filed by an officer working in the said Commissionerate. In one case, it is said that the disciplinary proceedings were initiated at the instance of DRI eventhough the demand was set aside by CESTAT on a later day.

8.0. THE LAW AND THE CASE LAW

As stated above, Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. The question that arose before Supreme Court was whether quasi judicial authority was amenable to disciplinary action and in what circumstances such action is invited. The following discussion refers to law decided by Supreme Court – Govinda Menon, V.D.Trivedi, K.K.Dhawan, Z B Nagarkar, Ramesh Chander Singh, etc – and application of such law by High Courts – in the case of P.Parameshwaran, Arindam Lahiri, Ajit Kumar Singh and Ram Pratap.

8.1. Hon'ble Supreme Court in the case of **S. Govinda Menon vs The Union Of India & Anr 1967 AIR 1274** heard the argument that as a quasi judicial authority, the appellants were not in a master servant relation to have attracted the action. Hon'ble Supreme Court held as below to reject the proposition and to hold that a quasi judicial authority is subject to departmental proceedings.

“In our opinion, it is not necessary that a member of the Service should have committed the alleged act or omission in the course of discharge of his duties as a servant of the Government in order that it may form the subject-matter of disciplinary proceedings. In other words, if the act or omission is such as to reflect on the reputation of the officer for his integrity or good faith or devotion to duty, there is no reason why disciplinary proceedings should not be taken against him for that act or omission even though the act or omission relates to an activity in regard to which there is no actual master and servant relationship. To put it differently, the test is not whether the act or omission was committed by the appellant in the course of the discharge of his duties as servant of the Government; The -test is whether the act or omission has some reasonable connection with the nature and condition of his service or whether the act or omission has cast any reflection upon the reputation of the member of the Service for .integrity or devotion to duty as a public servant. “

8.2. In the case of **V.D. Trivedi vs. Union of India [(1993) 2 SCC 55]**, a 3 judge Bench of Hon Supreme Court held in a very brief order that "the action taken by the appellant was quasi-judicial and should not have formed the basis of disciplinary action"

8.3. Three years thereafter, in the case of In **Union of India & Ors v. K.K. Dhawan, 1993 (2) SCC 56**, Supreme Court clarified the above order while examining the following charges against the respondent ITO that nine assessments against various assesses were completed: (i) in an irregular manner, (ii) in undue haste, and (iii) apparently with a view to confer undue favour upon the assesses concerned

Hon Supreme Court held that what was of relevance was not the correctness or legality of the decision of the respondent but the conduct of the respondent in discharge of his duties as an officer. The legality of the orders

with reference to the nine assessment may be questioned in appeal or reversion under the Act. But the Government is not precluded from taking the disciplinary action for violation of the Conduct Rules.

In this case Supreme Court while explaining the above principle, held that **when an officer in exercise of judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person, he is not acting as a Judge. There is a great reason and justice for holding in such cases that the disciplinary action could be taken. It is one of the cardinal principles of administration of justice that it must be free from bias of any kind.**

The Supreme Court in this case stated the instances when a disciplinary proceedings can be initiated against an officer who is discharging quasi judicial function. These instances listed by the Court are as under:

- (i) Where the officer had acted in a manner as would reflect on his reputation for integrity or good faith or devotion of duty.
- (ii) If there is prima facie material to show recklessness or misconduct in the discharge of his duty.
- (iii) If he has acted in a manner which is unbecoming of a government servant.
- (iv) If he had acted negligently or that he omitted the prescribed conditions which are essential for the exercise of the statutory powers.
- (v) If he had acted in order to unduly favour a party.
- (vi) If he had been actuated by corrupt motive, however, the bribe may be.

Further , Hon'ble Court added a note of caution as below;

"29.The instances above catalogued are not exhaustive. However we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above enumerated instances disciplinary action is not warranted. Here we may utter a word of

caution. Each case will depend upon the facts and no absolute rule can be postulated."

The observation of the above cited decision in V.D. Trivedi was explained to say that the said decision was made to buttress the ultimate conclusion that the charge framed against the delinquent officer had not been established and, therefore, it could not be construed as laying down the law that in no case disciplinary action could be taken if it pertains to exercise of quasi-judicial powers.

8.4. There after a 2 judge bench of Supreme Court examined charges against Commissioner of Central Excise in the case of **Zunjarrao Bhikaji Nagarkar v. Union of India, (1999) SCC 409**. The charge against him was that he ordered imposition of excise duty and confiscation of the goods – on the goods clandestinely removed - but his Order-in-Original was silent about imposition of penalty. The Supreme Court on reviewing the legal position regarding imposition of penalty concluded that the appellant had no discretion not to impose penalty though he had discretion to decide quantum of penalty. His approach in not imposing penalty was found to be not in conformity with the law.

The Court considered the question whether mistaken view of law itself was sufficient to proceed against the appellant. The Supreme Court while deciding this question also took into consideration the explanation given by the appellant that he had acted in the overall interest of revenue in not imposing penalty on assessee party. In this process, it is held as under :-

(a) A wrong interpretation of law cannot be a ground for misconduct. It is a different matter altogether if it is deliberate and actuated by mala fides. Negligence in quasi-judicial adjudication is not carelessness, inadvertence or omission but a culpable negligence.

(b) When penalty is not levied, the assessee certainly benefits but it cannot be said that by not levying penalty, the officer has favoured assessee or shown undue favour to him. There has to be some basis for the disciplinary authority to reach such a conclusion even prima facie. He may have exercised his jurisdiction wrongly but that wrong can be corrected in appeal. That cannot always form a basis for initiating disciplinary proceedings against an officer while he is acting as a quasi-judicial authority. It must be kept in mind that being a quasi-judicial authority, he is always subject to judicial supervision in appeal.

(c) Initiation of disciplinary proceedings against an officer cannot take place on information which is vague or indefinite. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer.

(d) If every error of law were to constitute a charge of misconduct, it would impinge upon independent functioning of quasi-judicial officers like the appellant. Misconduct, in sum and substance, is sought to be inferred in the present case from the fact that the appellant committed an error of law. To maintain a charge-sheet against a quasi-judicial authority, something more has to be alleged than a mere mistake of law, e.g. in the nature of some extraneous consideration influencing quasi-judicial order. Since nothing of the sort is alleged herein, the impugned charge-sheet is rendered illegal.

8.5. A 3 Judge bench of Supreme Court in **UOI Vs Duli chand 2007 (207) E.L.T. 166 (S.C.)**, while examining irregular sanction of refund of Income Tax, held that Nagarkar case was contrary to the view expressed in K.K.Dhawan case. The decision in K.K.Dhawan being that of a larger Bench would prevail. Hon'ble Court held that the decision in Nagarkar case did not correctly represent the law. Thus, a division between the view that culpable negligence is misconduct and the view that even gross negligence is an instance of misconduct came to the fore.

8.6. Subsequently, in **Ramesh Chander Singh v. High Court of Allahabad & Anr. (2007) 4 SCC 247**, Supreme Court was examining a case arising out of an inquiry initiated by the High Court against its judicial officer/appellant on receiving complaint against him. The appellant had granted bail to an accused who was charged with the offence of murder. It was held by the High Court that in the given circumstances, the bail applications having been considered and rejected twice on merits by the respective courts, the third bail application granted by the charged officer in utter disregard of the judicial norms and on insufficient grounds appeared to be based on extraneous considerations.

After considering the case, Hon Supreme Court referred to various pronouncements including that of Nagarkar and held that

“11. If the High Court were to initiate disciplinary proceedings based on a judicial order, there should have been strong grounds to suspect officers bona fides and the order itself should have been actuated by malice, bias or illegality.A Sessions Judge was competent to grant bail and if any disciplinary proceedings are initiated against the officer for passing such an order, it would adversely affect the morale of subordinate judiciary and no officer would be able to exercise this power freely and independently.”

Thus, relief was granted in absence of evidence relating to culpable behavior.

8.7. Hon SC in the case of **Inspector Prem Chand Vs. Government of NCT of Delhi and others**, (Civil Appeal number 1815/2007, decided on 05.04.2007) considered the allegation that the appellant – as raiding officer - did not seize the tainted money, although not accepted by the accused, despite being an important piece of evidence. The accused was acquitted by the Hon'ble Court of Spl. Judge, Tis Hazari, Delhi. Matter reached the Apex Court.

Hon'ble Supreme Court did not accept the finding of the Tribunal that the action of the applicant was not a case of error of judgement

Supreme Court, Citing the following ratio of Nagarkar case had set aside the proceedings-

"Initiation of disciplinary proceedings against an officer cannot take place on information which is vague or indefinite. Suspicion has no role to play in such matter. There must exist reasonable basis for the disciplinary authority to proceed against the delinquent officer."

8.8. Hon High Court of Madras in **UNION OF INDIA Versus P. PARAMESWARAN 2008 (226) E.L.T. 696 (Mad.)**, considered the allegation that the Respondant/Superintendent of Central Excise failed to issue show cause notice for the short levy of duty required to be paid by the assessee - on revision of prices for the sale from the depot and for the goods removed for own use for which the factory gate prices were not available - and that the demands made in the RT 12 assessment suffered from the vice and violation of principle of natural justice as the demand cannot be made by a mere endorsement in the RT 12.

High Court of Madras held that on a combined reading of K.K. Dhawan case, Nagarkar case, Duli Chand case, Ramesh Chander Singh case and Inspector Prem Chand case, it is necessary that before initiating disciplinary action, the Department must have a prima facie material to show recklessness and that the officer had acted negligently or by his order unduly favoured a party and his action was actuated by corrupt motive.

8.9. Subsequent to P Parameshawaran case, Hon'ble **Madras High Court** in the case of **Dr.G. Sreekumar Menon vs Union Of India on 28 January, 2009** examined vigilance proceedings initiated against an adjudicating authority. Referring to decision in Nagarkar case, Hon'ble Court held that

17. It is to be noted that in the above decision of the Supreme Court, there is no specific reference to the earlier decision of the Supreme Court in K.K. Dhawan's case or Duli Chand's case. However, the observations made in para 17, which have been emphasised by us, clearly indicate that the Division Bench of the Supreme Court was clearly conscious of the specific instances as recognised in K.K. Dhawan's case and reiterated in Duli Chand's case justifying initiation of a disciplinary proceedings against the officer in respect of judicial or quasi-judicial order.

In other words, in our humble opinion, even though there is no specific reference to those decisions, it is obvious that the Bench was conscious of the principles already elucidated in the aforesaid two decisions.

Having stated the above, Hon'ble Court further stated that-

18. In our considered opinion, on an in-depth perusal of the decisions of the Supreme Court in K.K. Dhawan's case, which was followed in Duli Chand's case and Nagarkar's case, which was followed in Ramesh Chander Singh's case is no real conflict in the principles elucidated in these decisions. As a matter of fact, in K.K. Dhawan's case, it has been clearly indicated that each case will depend upon the facts and no absolute rule can be postulated.

19. In Nagarkar's case, there is specific reference to K.K. Dhawan's case. It is obvious that two Judge Bench decision in Nagarkar's case was conscious of the law laid in K.K. Dhawan's case and that is why even while quashing the proceedings it was observed that "The record in the present case does not show if the disciplinary authority had any information within its possession from where it could form an opinion that the appellant showed "favour" to the assessee by not imposing the penalty."

It was further observed "In other words, to maintain any charge-sheet against a quasi-judicial authority something more has to be alleged

than a mere mistake of law, e.g., in the nature of some extraneous consideration influencing the quasi-judicial order. Since nothing of the sort is alleged herein the impugned charge-sheet is rendered illegal."

20. Similarly in Ramesh Chander Singh's case, it is apparent that the Bench was conscious of the exposition of law made in K.K. Dhawan's case as apparent from the observation made in para 17, which we have extracted earlier.

21. As a matter of fact, in a very recent Division Bench decision of this Court reported in 2008(226)E.L.T. 696 (Mad) ([UNION OF INDIA v. P. PARAMESWARAN](#)), to which one of us (P.K. Misra,J) was a party, after referring to all the above decisions of the Supreme Court, it was observed:-

"15. Therefore, if the decisions in K.K.Dhawan case, Nagarkar case, Duli Chand case, Ramesh Chander Singh case and Inspector Prem Chand case are read together, it is necessary that before initiating disciplinary action, the Department must have a prima facie material to show recklessness and that the officer had acted negligently or by his order unduly favoured a party and his action was actuated by corrupt motive. In fact, K.G. Balakrishnan, CJ in Rameh Chander Singh's case even took an exception to the practice of initiating disciplinary action against Officers merely because the orders passed by them were wrong."

22. We may venture to add that, even though the Supreme Court in Duli chand's case said that Nagarkar's case cannot be followed, in our humble opinion, the factual scenario in Nagarkar's case was completely different from the facts in K.K. Dhawan's case and Nagarkar's case can be said to have been resurrected in Ramesh Chander Singh's case.

23. It has to be seen whether in the present case initiation of the disciplinary proceeding was justified.

We have already extracted the articles of charges. It is apparent that charges were based upon the order passed by the petitioner which was perceived to be erroneous by the appellate authority. Entire articles of charges read as a whole would indicate that there is no specific allegation of recklessness or utter negligence of the quasi-judicial function and similarly there is no specific allegation of any overt misconduct.

24. In our considered opinion, the ratio of the latest decision of the Supreme Court in Ramesh Chander Singh's case would be applicable in the absence of specific imputation of dishonesty, lack of bona fide or utter negligence in discharge of duties and initiation of departmental proceedings is required to be quashed. Incidentally it may be pointed out that even though the appellate authority had set aside the order passed by the present petitioner, subsequently, in further appeal, CESTAT had set aside the order of the appellate authority and had restored the order which had been passed by the present petitioner. In view of this subsequent event, even the main basis for the initiation of the disciplinary proceedings, namely, the alleged illegal and erroneous order, is no longer available. In the changed circumstances it would not be appropriate to continue the disciplinary proceedings.

8.10. In **Arindam Lahiri vs Union Of India & Ors.** on 20 March, 2009, issue before Delhi HC was "That the said Shri Lahiri while functioning as Commissioner of Income-Tax (Appeals) (Central) IV Mumbai in 1994, has with malafide intention entertained and disposed of a petition filed by M/s. GTC Industries Limited, for stay of demand ignoring statutory requirements and also the decision of ITAT on the same issue for the same A.Y. "

By referring to K K Dhawan case, Hon Court noted that the department has tried to allege that the manner in which the orders were passed by the petitioner, it manifests that he acted in order to unduly favour those assesseees.

At the same time, it is also accepted by the department that there is no evidence or even allegation that the petitioner was actuated by corrupt motive.

8.11. High Court Delhi **Union Of India Through The ... vs Kamal Kishore Dhawan & Anr. on 18 April, 2012** captured the legal position, as contended by parties before their Lordships, post Ramesh Chander Singh decision by Hon'ble Supreme Court w r t discussion on decisions of Supreme Court discussed in above paras –

“On perusing the impugned order it is clear that the Tribunal did not rely on the judgment of Ramesh Chander Singh (supra) in order to adjudicate upon the present matter. It had indeed referred to the same and had observed that there is a controversy regarding which ratio of either Duli Chand (supra) or Ramesh Chand (supra) would be a precedent. The judgments of K K Dhawan (supra), Duli Chand (supra) and Nagarkar (supra) which has been followed in the Ramesh Chander (supra) were duly examined and it was observed that while in the judgments of K K Dhawan (supra) and Duli Chand (supra) it was held that gross negligence can be a misconduct for which departmental enquiry can be held even if the charged officer was discharging functions in quasi judicial capacity, whereas, in the judgment of Nagarkar, which has been upheld in the case of Ramesh Chand (supra) it was held that it would have to be culpable negligence of an officer which can be tested in a departmental enquiry. The bench strength of the judgments in K K Dhawan (supra), Duli Chand (supra) and Ramesh Chand (supra) is also equal, consisting of a quorum of three judges. Thus which judgment would be a precedent for the controversy, whether negligence would constitute misconduct to entitle disciplinary proceedings against the charged officer was questioned? The Tribunal noted that while the learned counsel representing the Respondent No.1 would insist that it is

the law laid down by the Hon“ble Supreme Court in Nagarkar“s case (supra) shall hold the field, which has been followed in Ramesh Chander Singh (supra), particularly, when the said judgment (Ramesh Chander Singh) is by a coordinate Bench and later in point of time than that of Duli Chand (supra), and that the Tribunal should hold that it is culpable negligence which can be subject matter of departmental enquiry when it may relate to allegations that may pertain to functions of an officer, which functions are discharged by him in his judicial or quasi judicial capacity. On the other hand, the counsel representing the petitioners would, however, insisted that the judgment of the Supreme Court in Duli Chand (supra) would hold the field, particularly when in the decision of Ramesh Chander Singh (supra) the decision in Duli Chand (supra) has not been considered. Ultimately the Tribunal concluded that even though it would not be difficult to determine this controversy, on the basis of judicial precedents covering the issue, however, it would refrain from doing so since it did not feel the necessity to do so in the present case.

8.12. Further to the above cases at Supreme Court and High Court level, some cases on the said subject were also decided by the Central Administrative Tribunal. These cases applied the ratios derived from above discussed decisions of Supreme Court and set aside proceedings as there is no allegation or evidence of culpability or corrupt motive, etc.

8.13. At the end of this section it relevant to refer to a case where in vigilance action was proposed against review committee for accepting an order.

In the case of of **RUCHI SOYA INDUSTRIES LTD. Versus UNION OF INDIA 2012 (281) E.L.T. 79 (Guj.)**, a dispute regarding area based exemption was agitated before High Court and the Taxpayer relied upon the order of Commissioner for the preceding period, which was not appealed against by the Department. In this context, Hon Court took note of the fact that the Second show cause notice after the first one on issues of actual investment and

commencement of commercial production before the prescribed date, was dropped by Committee constituted under Notification No. 39/2001-C.E. Department placing on record detailed report of Addl. Director General [Vigilance] and pleading that from documents on record, admitted facts and circumstances and materials which were available before previous committee, it was impossible to come to conclusion in favour of assessee, and that question of taking disciplinary action departmentally against members of committee was under active consideration of appropriate authority.

This case merits examination as to why vigilance action was contemplated. If there is no malafide alleged against the members of the review committee, this case appears to be an indication of vigilantism vis a vis system of fair adjudication.

9. Analysis

On the basis of primary and secondary data discussed above, following analysis is attempted.

10.0. What the Survey suggests ?

10.1. Significant division in responses to following questions **indicate the the seriousness of and the need to address the issue of vigilance fear and poor quality of adjudication.** –

- (i) whether a faulty Notice can be sustained by an adjudicator,
- (ii) whether notices are confirmed due to ‘vigilance fear’ and
- (iii) whether ‘vigilance fear’ is a major reason for poor quality adjudication

10.2. **Positive behavioural indicators** noticed on the basis of data collected are –

- (i) perception that everyone them is a judicious adjudicator
- (ii) perception that 'being pro Revenue' is not good adjudication

10.3. Forty five percent of the respondents endorsed the view that notices are being confirmed on account of vigilance fear. Said view among this 45% is mainly a **perceptual proposition**. The said fear can be stated as perception for the following reasons –

- (i) that the responses indicated fear based on what they heard, what they perceived of working of vigilance mechanism in CBEC, without reference to real time evidence.
- (ii) The expressions used are 'I think' 'I heard' 'I percieve' etc.
- (iii) Interestingly, those who reported instances of vigilance action - relating to adjudication - did not state that vigilance fear as a valid factor.

11.0. Is there a need for CVC to revisit their instruction issued in 2007?

11.1 As discussed above, Courts have consistently been saying that Quasi Judicial Authorities are amenable to disciplinary proceedings. Philosophy underlining the amenability of quasi judicial authority to disciplinary actions is lucidly explained in K.K.Dhawan –

“1.03. The officer who exercises judicial or quasi-judicial powers acts negligently or recklessly or in order to confer undue favour on a person is not acting as a judge.”

At the same time, Courts have recognized the need for their fearlessness and independence in discharging their duties. **UOI Vs A N Saxena, [1992] 3 SCC 124**, it was held as under

" The initiation of such proceedings, it is true, is likely to shake the confidence of the public in the officer concerned and also if lightly taken likely to undermine his independence. Hence, the need for extreme care and caution before initiation of disciplinary proceedings against an officer performing judicial or quasi-judicial functions in respect of his actions in the discharge or purported to discharge his functions."

This view has been the bottom-line of the reasoning of Supreme Court in various decisions dealing with subject under consideration.

11.2. Then, the question for consideration would be in what circumstances actions of a quasi judicial authority attract disciplinary proceedings.

The CVC circular issued in 2007 is based on the law declared in Dulichand case. The following discussion is made in view of various decisions of Supreme Court post Dulichand decision. Various decisions discussed in pre pages refer to degree of blameworthiness or culpability as the most important parameter to construe misconduct. Culpability as an important yardstick is underlined by the oft quoted case of Union Of India & Ors vs J. Ahmed on 7 March, 1979 1979 AIR 1022 - to discuss the subject of misconduct – in the following words –

“An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence. “

11.3. Supreme Court in K K Dhawan case, while examining allegation against the charged officer of intent to unduely favour the assessee, after a detailed consideration of the case law, distilled six instances, where a quasi judicial authority could be proceeded against. Hon'ble Court observed that said instances are not exhaustive and that each case depends on its facts.

11.4. In Duli chand case, Supreme Court was examining a case of sanctioning the refund to an applicant negligently on three different occasions. Court was also considering an argument based on Nagarkar decision that no disciplinary action is warranted against quasi judicial authority where allegation of moral turpitude is not made.

Court held that Nagarkar case did not lay down correct law and that it was contrary to decision in K K Dhawan. It was also held that Hon'ble Court in Nagarkar appeared to have reverted to the earlier view of disciplinary action only if an element of culpability is involved.

Dulichand case found decision of 3 judges in K K Dhawan prevails over law laid down in Nagarkar.

To enlist the said six instances, Supreme Court in the case of K K Dhawan approvingly quotes from **Govinda Menon Vs UoI, AIR 1967 SC 1274** as below

In other words, the charge and the allegations are to the effect that in exercising his powers as Commissioner the appellant acted in abuse of his power and it was in regard to such misconduct that he is being proceeded against. It is manifest, therefore, that though the propriety and legality of the sanction to the leases may be questioned in appeal or revision under the Act, the Government is not precluded from taking disciplinary action if there is proof that **the Commissioner had acted in gross recklessness in the discharge of his duties** or **that he failed to act honestly** or **in good faith** or **that he omitted to observe the prescribed conditions which are essential for the exercise of the statutory power**. We see no reason why the Government cannot do so for the purpose of showing that the Commissioner acted in utter disregard of the conditions prescribed for the exercise of his power or that **he was guilty of misconduct or gross negligence**. (emphasis supplied)

11.5. In this context, it is relevant here to understand what is meant by misconduct from an oft quoted judgment in service matters Union Of India & Ors vs J. Ahmed supra..

It would be appropriate at this stage to ascertain what generally constitutes misconduct, especially in the context of disciplinary proceedings entailing penalty.

Code of conduct as set out in the Conduct Rules clearly indicates the conduct expected of a member of the service. It would follow that that conduct which is blameworthy for the Government servant in the context of Conduct Rules would be misconduct. If a servant conducts himself in a way inconsistent with due and faithful discharge of his duty in service, it is misconduct [see *Pierce v. Foster*(1)]. A disregard of an essential condition of the contract of service may constitute misconduct [see *Laws v. London Chronicle .(Indicator Newspapers) (2)*]. This view was adopted in *Shardaprasad Onkarprasad Tiwari v. Divisional Superintendent, Central Railway, Nagpur Division, Nagpur*(1), and *Satubha K. Vaghela v. Moosa Raza*(2). The High Court has noted the definition of misconduct in *Stroud's Judicial Dictionary* which runs as under:

"Misconduct means, misconduct arising from ill motive; acts of negligence, errors of judgment, or innocent mistake, do not constitute such misconduct".

In industrial jurisprudence amongst others, habitual or gross negligence constitute misconduct but in *Management, Utkal Machinery Ltd. v. Workmen, Miss Shanti Patnaik*(3), in the absence of standing orders governing the employee's undertaking, unsatisfactory work was treated as misconduct in the context of discharge being assailed as punitive. In *S. Govinda Menon v. Union of India*(4), the manner in which a member of the service discharged his quasi judicial function disclosing abuse of

power was treated as constituting misconduct for initiating disciplinary proceedings. A single act of omission or error of judgment would ordinarily not constitute misconduct though if such error or omission results in serious or atrocious consequences the same may amount to misconduct as was held by this Court in P. H. Kalyani v. Air France, Calcutta(5), wherein it was found that the two mistakes committed by the employee while checking the load-sheets and balance charts would involve possible accident to the aircraft and possible loss of human life and, therefore, the negligence in work in the context of serious consequences was treated as misconduct. It is, however, difficult to believe that lack of efficiency or attainment of highest standards in discharge of duty attached to public office would ipso facto constitute misconduct. There may be negligence in performance of duty and a lapse in performance of duty or error of judgment in evaluating the developing situation may be negligence in discharge of duty but would not constitute misconduct unless the consequences directly attributable to negligence would be such as to be irreparable or the resultant damage would be so heavy that **the degree of culpability** would be very high. **An error can be indicative of negligence and the degree of culpability may indicate the grossness of the negligence. Carelessness can often be productive of more harm than deliberate wickedness or malevolence.** Leaving aside the classic example of the sentry who sleeps at his post and allows the enemy to slip through, there are other more familiar instances of which a railway cabinman signals in a train on the same track where there is a stationary train causing headlong collision; a nurse giving intravenous injection which ought to be given intramuscular causing instantaneous death; a pilot overlooking an instrument showing snag in engine and the aircraft crashes causing heavy loss of life. Misplaced sympathy can be a great evil [see Navinchandra Shakerchand shah v. Manager, Ahmedabad Co- op. Department Stores Ltd.(1)]. **But in any case, failure to attain the highest standard of efficiency in performance of duty permitting an**

inference of negligence would not constitute misconduct nor for the purpose of Rule 3 of the Conduct Rules as would indicate lack of devotion to duty. (emphasis supplied)

The above incisive passage indicates the importance of the context and facts of each case in construing charge of misconduct, which apparently echoes the observation of Supreme court in para 29 of judgement in K K Dhawan case, extracted above. It is important to note the emphasis placed on degree of culpability as a yardstick. Apparently, decision in Nagarkar focused on the degree of culpability whereas K K dhawan focused on creating a caricature of certain situations attracting disciplinary proceedings.

11.6. Interestingly, subsequent to Dulichand case, a 3 judge bench of Supreme Court in the case of Ramesh Chandar Singh positively approved decision in case of Nagarkar but did not refer to the decision of K K Dhawan. In para 11 of its judgement – extracted into preceding paras – Supreme Court underscores the need for the order itself to have been actuated by malice, bias or illegality for construing misconduct. It further said-

“Para 12: "This Court on several occasions has disapproved the practice of initiation of disciplinary proceedings against officers of the subordinate judiciary merely because the judgments/orders passed by them are wrong. The appellate and revisional courts have been established and given powers to set aside such orders. The higher courts after hearing the appeal may modify or set aside erroneous judgments of the lower courts. While taking disciplinary action based on judicial orders, the High Court must take extra care and caution.”

“In Zunjarrao Bhikaji Nagarkar v. Union of India, AIR 1999 SC 2881, this Court held that wrong exercise of jurisdiction by a quasi judicial authority or mistake of law or wrong interpretation of law cannot be the basis for initiating disciplinary proceeding. Of course, if the Judicial

Officer conducted in a manner as would reflect on his reputation or integrity or good faith or there is a prima facie material to show recklessness or misconduct in discharge of his duties or he had acted in a manner to unduly favour a party or had passed an order actuated by corrupt motive, the High Court by virtue of its power under Art. 235 of the Constitution may exercise its supervisory jurisdiction. Nevertheless, under such circumstances it should be kept in mind that the Judges at all levels have to administer justice without fear or favour. Fearlessness and maintenance of judicial independence are very essential for an efficacious judicial system. Making adverse comments against subordinate judicial officers and subjecting them to severe disciplinary proceedings would ultimately harm the judicial system at the grassroot level.”

11.7. Another two Judges Bench in **Inspector Prem Chand v. Government of NCT of Delhi and others [2007 (4) SCC 566]** considered the decision in Nagarkar's case in giving relief on the ground that "A finding of fact was arrived at that the accused did not make demand of any amount from the complainant and thus no case has been made out against him." The actions of the applicant were treated as a case of error of judgement.

11.8. It is submitted with great humility and respect to the above judicial pronouncements that the decision in Dulichand appears to have overlooked the consistent practice of the Supreme Court, before and after Dulichand, to look at misconduct as a quotient of culpable conduct. However, the decision in Dulichand draws a line between culpable negligence and negligence without an element of culpability. It is humbly submitted that reliance on views expressed in Govinda Menon – that highlights the elements of gross negligence - and extracted into decision in K K Dhawan appears to have been read by Dulichand as Gross negligence as a stand alone parameter without reference to degree of

culpability. These observations, if considered valid, can only be addressed by a legal forum.

11.9. In the recent past, Hon'ble High Court of Madras in P. Parmeswaran case tried understand the law that prevails in the back drop of various decisions referred to above and found – reproduced at the cost of repetition – that

“15. Therefore, if the decisions in K.K.Dhawan case, Nagarkar case, Duli Chand case, Ramesh Chander Singh case and Inspector Prem Chand case are read together, it is necessary that before initiating disciplinary action, the Department must have a prima facie material to show recklessness and that the officer had acted negligently or by his order unduly favoured a party and his action was actuated by corrupt motive.”

11.10. A subsequent judgement of Madras High Cort in the case of G.Sreekumar Menon held as under

18. In our considered opinion, on an in-depth perusal of the decisions of the Supreme Court in K.K. Dhawan's case, which was followed in Duli Chand's case and Nagarkar's case, which was followed in Ramesh Chander Singh's case is no real conflict in the principles elucidated in these decisions. As a matter of fact, in K.K. Dhawan's case, it has been clearly indicated that each case will depend upon the facts and no absolute rule can be postulated.

This is a very emphatic view to clear the confusion that emerged following Dulichand judgement and subsequent CVC circular.

11.11. The moot point is the mechanical application of said six instances listed in K K Dhawan in disciplinary proceedings without reference to element of blameworthiness as is borne out in cases discussed above and in the cases enlisted in the list of references enclosed. The circular issued in 2007 while

reproducing para relating to six instances has omitted all important para that follows in KK Dhawan case. Many subsequent decisions of Spreme Court intently deliberated on the implication of Supreme Court observations in the said para reproduced below -.

The instances above catalogued are not exhaustive. However, we may add that for a mere technical violation or merely because the order is wrong and the action not falling under the above enumerated instances, disciplinary action is not warranted. Here, we may utter a word of caution. Each case will depend upon the facts and no absolute rule can be postulated.

It is important to note that if instance (iv) listed in K K Dhawan i.e. ‘if he had acted negligently’ is to be read on a stand alone basis without reference to the above referred observations in K K Dhawan or other legal principles enunciated by Supreme Court (as discussed above), the consequence would not be what K K Dhawan or Rameshchander Singh decisions would warrant. Apparently, 2007 CVC instruction – to scrutinize as to whether any one of the criteria is attracted – is not designed to allow complete and true application of decisions in K K Dhawan and decisions of Supreme Court thereafter.

Considering the above discussion, there is a need to revisit the instructions issued by CVC and provide clarity to CVOs in so far as the standards of negligence in tune with the law affirmed by the Supreme Court in decisions subsequent to Dulichand.

12.0. TRIGGER FOR VIGILANCE FEAR

12.1. CVC circular dated 01.11.2007 conveyed that the criteria laid down in the case of K K Dhawan has to be followed in examining the lapses in quasi judicial orders. Subsequent audit by CVC of CBEC in 2009 suggested scrutiny of orders from vigilance angle. In this back drop, DGoV issued instructions requiring the Review Committees constituted under the statue to look into legality and propriety of the orders also to look into vigilance angle.

The said letter issued in 2010 also makes further important points i.e

- (i) vigilance scrutiny only in cases of an amount of Rs. 50 lacks and above,
- (ii) Head of the department to assume a pro active role in vigilance scrutiny,
- (iii) criteria laid down in K. K. Dhawan can get attracted even in respect of adjudication proceeding which unjustifiably confirm the charges in SCN etc.

12.2. It is evident from the above that while implementing the instructions of CVC to scrutinise the adjudication orders from vigilance angle, DGoV entrusted this task to statutory Review Committees, which were required to examine the legality and propriety of the orders. Thus, review mechanism came to be perceived as a mechanism of scrutiny from vigilance angle. Interestingly, the other member of the committee examining the issue is not the administrative head/ Head of the Department of the adjudicating authority to examine the issue from vigilance angle.

12.3. It is interesting to note that the vigilance appraisal of the adjudication orders contemplated in DGoV communications dated 24.02.2010 and 27.04.2010 also envisage coverage of cases in respect of adjudication proceedings which unjustifiably confirm the charges in an SCN and also that it intends to examine the issue of SCNs with out legs to stand on but to harass assesseees or issue of SCNs with loop holes.

It appears to be a case that the said instructions of DGoV were not within the reach of adjudicating authorities/ authorities to understand that said vigilance fear also can surface in case of issue of a notice with loopholes or in case of an order that unjustifiably confirm a demand. It is also not known as to the extent of usage of such instructions. The reason as to why only a portion of the instruction got into the public lore appears to be on account of our stated belief as protectors of Revenue/being pro Revenue and the image

associated with the same; of the perception about vigilance mechanism in terms of time it consumes or the prolonged downturn of one's career; and on account of perception that taking a stand against the assessee does not attract disciplinary action.

12.4. Against backdrop of the above subparas, it is interesting to note that the details furnished in DGoV Circular dated 01.05.2015 amply demonstrate the facts that Review committees used the said instructions on a de minimus level, assuming that all the 18 cases mentioned in the said communication were referred to vigilance by the said review committees only, which appears to be not the case.

13.0. It is relevant here to refer to the opinion expressed by officers participating in the survey that vigilance action can be taken in cases of reckless and mala fide use of adjudication power.

14.1. In this context it is pertinent to refer to the incidents of imposition of cost on adjudicators by the Tribunal. High Court of Allahabad in the case of OKAY Glass 2015-TIOL-2145 HA-ALL approved such imposition of cost. From a Taxpayer perspective, this is a long overdue action.

14.2. In this regard it is pertinent to refer to situation as prevailed in USA and discussed in the article by SETH KAUFMAN on "IRS RESTRUCTURING AND REFORM ACT OF 1998: MONOPOLY OF FORCE, ADMINISTRATIVE ACCOUNTABILITY, AND DUE PROCESS" 50 Admin.L.Rev.819(1998). It refers to provision in prior to 1998 act in IRC enabling the taxpayers to sue the US government for damages resulting from IRS employees' reckless or intentional violation of IRC in conjunction with collection actions. However, this was undone by S 7433 of IRC ADDED in 1988 Taxpayer Bill of Rights provides that before a Taxpayer takes government to federal court, he should exhaust

administrative remedies scheme. This was apparently with the assumption that agencies act in good faith and will eventually solve problems within their jurisdiction in a fair manner.

The author finds that courts may struggle in applying an objective negligence test.

One may be tempted to find similarities between the actions of CESTAT to impose cost on adjudicators with the law earlier prevailing in USA enabling a Taxpayer to sue IRS employees for their reckless actions.

15.0 FEAR CREATION

It is understood and gathered in discussions with the participants that there are instances when Head of the Department would orally emphasize the need of scrutiny of all the orders from vigilance angle.

Similarly there was an instance relating to refund section of a Custom House, wherein consequent to the investigation in particular case, CBI took over some three hundred review files relating to refund on the ground that in all such cases refund action was not accepted by the Department.

Such instances of unprofessional conduct definitely creates a fear and creates delay in disposing the cases and also gives rise to confirmation without merits of the notices or deny refunds . Thus there is a need to impress upon the senior officers not to create a fear of vigilance among the junior officers acting as Quasi Judicial Authorities.

16.0 TRAINING and INITIAL DAYS

It is understood that during the initial face of induction into the Department the young recruits are often reminded by the colleagues of vigilance mechanism and it appears to become part of their psyche.

17.0 CONCLUSION

17.1. The question as to whether vigilance fear affects quality of adjudication, vigilance fear appears not to have a one to one bearing on quality of adjudication. But the influence of vigilance fear is present in more than one way. Going by the results of the survey, vigilance fear acts on the adjudicator and it is also an excuse for many adjudicators who donot follow basic principles of exercising quasi judicial authority to save on effort or to cover up lack of competence etc.

As already said, it need to be stated that the fear of vigilance is more in the nature of perception and on a hearsay basis. Those who said they think vigilance fear has a bearing could not provide an instance to back the same. The fear perception is mainly on account of general information and perception on working of vigilance mechanism in the Department.

17.2 Inview of the discussion above,

- (i) there is a need to reexamine the existing instructions for better clarity
- (ii) As survey suggests the fear of vigilance even among 45% of (fear believing) participants is mainly a perceptual proposition. At the same time, there is a strong positive behavioral indication among the officers. There is a need for a nudge to overcome fear, if any. Delinking vigilance review from the perview of review committee and assign

- Chief Commissioners to monitor quality of adjudication and address grievances of trade in this regard may work as a nudge.
- (iii) There is a need to encourage and incentivize quality adjudication on the lines of practicing fair, judicious decision making
 - (iv) There is a need to impress upon the senior officers to mentor junior adjudicators to act judiciously and fairly.
 - (v) Over emphasis on quantity of adjudication requires critical reexamination

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ANNEXURE

QUESTIONNAIRE

TOPIC: *“Is the so called Vigilance fear indeed a significant cause of the poor quality of adjudication and appellate decisions”*

The participants answering the questionnaire are requested to be descriptive in answering the questions; state the description / details of the instances that may be cited in their replies;

Part A

1. Name (optional) :

2. Please state whether you worked anytime in Adjudication/Review/ Vigilance sections in your career so far –

- 3 .Please describe your experience with adjudication work so far -

4. How do you rate yourself as an adjudicator? Do you rate yourself judicious or pro revenue or in any other terms :

5. Can you state instances where you found SCN devoid of merits and Asessee’s reply to be valid, and still confirmed the demand. Why was it so?

Part B

6. In your view what is a good adjudication?

7. In your view, what an assessee should expect of an Adjudicator. Similarly, what Revenue should expect of an Adjudicator?

8. Do you believe in the view that it is better to confirm SCN, irrespective of its merits or demerits – Please state your view:

9. Can an adjudicator save a faulty SCN to sustain the proposed action under the Notice- please state your view:

Part C

10. Is there any truth in the view that Departmental officers invariably confirm the demands so as to avoid vigilance scare. Please explain your view:

11. In confirming demands as stated above, whether adjudicator is discharging the role expected of him? Please state your view:

12. Have you come across any case where vigilance case was initiated on account of adjudication? Please give details

13. According to you, in what circumstances Vigilance can initiate action against an adjudicating authority?

14. Do you think Vigilance fear indeed a significant cause of the poor quality of adjudication and appellate decisions? Pl state your views:

15. Please state reasons – other than said vigilance fear – affecting quality of adjudication.