

Income Tax Search and Seizure: Right of the assessee to cross-examine



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Introduction:-

The principles of natural justice forms an integral part of procedural fairness and justness, thereby excluding the scope of arbitrariness. Even though the right of hearing, which forms a part of the principles of natural justice, before an order is passed under some of the provisions of the Income-tax Act 1961, is not specifically provided by the Act, though compliance with at least the minimal rules of natural justice as expressed by the maxim '**audi alteram partem**' is necessary. Recording of reasons, as well as their communication to the affected party is a must for a valid order. The various High Courts as well as the Supreme Court of India have consistently held in many cases that such a right forms an integral part of a proceeding under the provisions of the Income-tax Laws and the denial thereof would vitiate the entire proceeding. Therefore, it has been held consistently that the rules of natural justice must be complied with by the authority by giving a fair and adequate opportunity of hearing to the affected party before an order involving civil consequences is passed under the Income-tax Laws.

The Income-tax Act,1961 though contains various provisions embodying the principles of natural justice, yet there are

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certain areas where the non-compliance of the statutory provisions in its true spirit have been held to be violative of the natural justice. Again, there are certain provisions under the Income-tax Laws wherein, though no specific provisions have been made incorporating the principles of natural justice, yet these principles have been held to be a part of a proceeding initiated and concluded under the Income-tax Laws.

It is most pertinent to mention here is that under the Income-tax Act 1961, the principles of natural justice have been held to be applicable in Income Tax proceedings. The Income Tax Officials therefore, must place before the assessee all materials gathered by him on the basis of his enquiry, which they proposes to use against the assessee, must give the assessee an opportunity of being heard by him to deal with the material and other evidence, must take into account the explanations given by the assessee, cannot frame his conclusion based on guesswork and must not act arbitrarily or vindictively, and the conclusion must be framed on the basis of cogent material and facts.

Having said so, the revenue department however, is not debarred from relying on information from private sources, which he may not disclose, to the assessee at all. However, in case he proposes to use the result of any private enquiry made by it against the assessee, he should communicate to the assessee the substance of such information so as to put the assessee in possession of full particulars of the case he is expected to meet, and should further give him sufficient opportunity to meet it. This principle is established by the judgment of the Supreme Court in ***Dhakeswari Cotton Mills Ltd. vs. CIT (26 ITR 775)*** and applied by the courts in many cases including that of ***Kishinchand Chellaram vs. CIT (125 ITR 713)***.

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From the above discussion, it may be concluded that an assessment order which has been passed without giving opportunity of hearing to the assessee violates the principles of natural justice and the same is liable to be set aside. In other words, an order which infringes a fundamental freedom and passed in violation of the audi alteram partem rule is a nullity. When a competent court or authority holds such order invalid or sets it aside, it operates from nativity i.e. the impugned order was never valid. The non-observance of the principles itself is prejudice to any man and proof of prejudice independently of proof of denial of natural justice is, unnecessary. Thus, breach of natural justice nullifies the order made in its breach.

Issue under consideration:-

Now the question arises as to whether the right of the assessee to cross-examine the witnesses relied upon by the department under the Income Tax Act, 1961, to be treated a part of natural justice.

Let us understand the concept of cross examination. Evidence of a witness through examination or cross-examination is covered under Sections 137 to 154 of the Indian Evidence Act though not explicitly under the Income Tax Act'1961. For the purposes of application under Income-tax Act, the relevant provisions are sections 137 to 139 of the Indian Evidence Act. These sections are reproduced herein under-

(i) Section137

Examination-in-chief: The examination of a witness by the party who calls him shall be called his examination-in-chief.

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Cross-examination: The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination: The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

(ii) Section 138. Order of examinations.

Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined. The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination: The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

(iii) Section 139.

Cross-examination of person called to produce a document : A person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called for as a witness.

The issue of cross examination of witnesses in Income Tax proceedings has seen substantial litigation before various appellate forums. It is seen in practice that many a times

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though the income tax assessments particularly search assessments are otherwise sound on facts and merits, however suffer adverse consequences at appellate forums due to opportunity of cross examination not being provided to the assessee's. It is necessary, therefore, to understand the importance and scope of the principles of cross examination in income tax proceedings.

Analysis:-

In law, cross-examination is the interrogation of a witness called by one's opponent. Section 138 of the Indian Evidence Act 1872 provides that a witness will be first examined in chief, and then if the adverse party deems fit, cross-examined and if the party calling him so desires, be re-examined.

In the Process of arriving at the liability of an assessee to tax under the Income- tax Laws, reliance on the statements of the witnesses is generally placed by the Department. Revenue refers to or relies upon the oral statements by the witnesses which in turn, assumes vital importance so far as the tax liability of an assessee under the law is concerned. Again, as it is obvious that the principles of natural justice presupposes that there should be a fair determination of a question of taxable liability by the income-tax authorities, who in fact act as quasi-judicial authorities. Arbitrariness certainly does not ensure fairness. Therefore, the corollary to the rule of fairness and justness is that statement of those witnesses referred to relied upon by the Revenue should be subjected to be cross-examined by the assessee to ascertain the truth or veracity of the statement. Thus, we can say that one of the corollaries of the rule of hearing is the rule regarding the cross-examination of witnesses. Likewise, oral argument, the legitimacy of inferences to be drawn from facts and circumstances on records etc. are

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subsidiary to the rule of hearing. The opportunity to afford cross-examination is the sine qua non of due process of taking evidences and no adverse inference can be drawn against a party unless the party put on a notice of the case made out against it.

During the course of search and seizure action and during post search investigations, it is seen that investigating officers to reinforce and further strengthen the findings of the search, records statements of third parties at the back of the assessee so searched. The question that often arises is about the right of the assessee searched to have cross examination of such persons who have given a statement against the assessee. As judicially settled , the invariable rule is that the affected party has a right to cross-examine the makers of such hostile statements and that such a right must be granted to him as part of the enquiry proceedings, except in exceptional case where the denial of such a right has to be specifically justified for stated reasons. It must be noted that cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood.

To the contrary one may also say that the rules of evidence do not govern the income-tax proceedings strictly, as the proceedings under the Income Tax Act are not judicial proceedings in the sense in which the phrase "judicial proceedings" is ordinarily used. Therefore Assessing Officer is not fettered or bound by technical rules of evidence contained in the Indian Evidence Act, and he is entitled to act on material which may or may not be accepted as evidence in a court of law. However as judicially settled, the principles of natural justice need to be applied by the income-tax authorities during assessment and appellate proceedings. It is therefore pertinent that due process of law has to be adopted and applied wherever revenue collects evidences against the assessee before using it against the assessee which includes the opportunity to cross-examine

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the witness. Not allowing the opportunity to cross examine or denial of such cross examination to the assessee may vitiate the very assessment order at a later stage due to such technical irregularity. Similarly a statement recorded other than that of the assessee during the course of search and post search investigation proceedings which adversely affects the assessee, shall carry evidentiary value only if such a statement has been tested in cross-examination.

Judicial decisions in support:-

- In ***State of Kerala v. K T. Shaduli Yusuf (1977) 39 STC 478***, the Supreme Court held that not only it is the duty of the Department to provide copies of statements or reports, but the assessee is entitled to seek right of cross-examination.

- The Supreme Court in ***Kishan Chand Chellaram v. CIT (1980) 125 ITR 713 (SC)*** held that evidence which is used against the assessee must be provided to the assessee and also an opportunity to confront the same should be given permitting cross-examination.

- In the case of ***Kalra Glue factory vs. Sales Tax Tribunal (1987) 65 CTR (SC) 233*** the tribunal relied upon the statement of a third party which was obtained behind the back of the assessee, to arrive at the conclusion that a certain transaction was an inter-State sale, and the assessee was not allowed an opportunity to test this statement by cross-examination. The Supreme Court set aside the order of the tribunal for failure to afford the facility of cross-examination to the assessee. The observations made by the Apex Court is relevant for the purpose of present discussion and is being reproduced as under:

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"We allow this appeal solely on the ground that the statement of Banke Lai, which was not tested by cross-examination, was used in order to reach the conclusion that the transaction was an inter-State sale. Under the circumstances, we set aside the order of the High Court as also of the Sales-tax Tribunal and remit the matter to the Sales-tax Tribunal at Meerut.".

The above judgment though was rendered under the sales tax law, yet the observations reproduced above clearly highlights importance of cross-examination.

- In the case of ***Gargi Din Jwala Prasad vs. Commissioner of Income Tax(1974) 96ITR 97 (All)***, the Allahabad High Court had held that the principles of natural justice are applicable to assessment proceedings. The elementary principle of natural justice is that the assessee should have knowledge of the material that is going to be used against him so that he may be able to meet it. The Income-tax Officer (ITO) in that case was placing reliance on the statements of certain witnesses. He had permitted the assessee to cross-examine the witnesses but he did not supply copies of the statements of those witnesses although the assessee had requested for it. He did not even supply the substance of the contents of the statements as recorded. The court was also apprised of the correspondence between the ITO and the assessee but in none of the letters of the ITO there was any indication as to what was the name of the witnesses, much less any semblance of indication as to what he had stated. Under these circumstances the mere grant of the permission to cross-examine those witnesses, held was an eye-wash. The assessee could not have effectively cross-examined any particular person. The assessee was not told the names of witnesses or apprised of the contents of their statements. It was therefore clear that an adequate opportunity to cross-

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examine was denied. The ITO had refused to give copies of the statements of the witnesses on the view that they formed part of the record. Even so, he refused permission to the assessee to inspect the record. It is evident that the proceedings were vitiated by violation of the principles of natural justice.

- In ***M.Pirai Choodi vs. Income Tax Officer (2008) 302 ITR 40 (Mad)***, the respondent department having refused to accept the agricultural income shown by the petitioner (assessee) by placing reliance on the statement of the Village Administrative Officer obtained behind the back of the petitioner, overlooking the materials furnished by the petitioner to substantiate his agricultural activity and without giving the petitioner an opportunity to cross-examine the Village Administrative Officer, the High Court of Madras had held that there was a glaring violation of the principles of natural justice and therefore, the writ petition filed by the petitioner-assessee held could not be dismissed on the ground of availability of alternative remedy and consequently the impugned assessment order was quashed.

- Stressing the need for cross-examination, the Apex Court in ***C.Vasantlal & Co. vs. CIT (1962) 45 ITR 206 (SC)*** observed as follows:

"The Income-tax Officer is not bound by any technical rules of the law of evidence. It is open to him to collect materials to facilitate assessment even by private enquiry. But if he desires to use the material so collected, the assessee must be informed of the material and must be given an adequate opportunity of explaining it'. Accordingly, denial of opportunity to cross-examine has been held to be clearly illegal and unsustainable apart from being violative of natural justice."

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- In ***P.S. Abdul Majeed vs. Agricultural Income Tax & Sales Tax Officer & Ors. (1994) 209ITR 821 (Ker)***, the High Court of Kerala relying on the judgment and order passed in Shaduli Yusuf's case (supra) declared the order passed in violation of the principles of natural justice a nullity. In that case the order of reassessment was made without any reference to inspection reports relating to the periods both before and after the relevant assessment year, but merely on the strength of the entries in the auctioneers' records. It was therefore, held that reliance on the auctioneers' records and treating them as if they were conclusive and as gospel truth is doing violence to the principles of the natural justice more so when the petitioner had in fact questioned the correctness of those records and stated that he had not made any sales suggested by the assessing authority through auctioneers. He also prayed for an opportunity to cross-examine the auctioneers. Failure to accede to the petitioner's request to cross-examine the auctioneers is denial of reasonable opportunity to the petitioner to put forward and prove his case, which, held is the desideratum of a quasi-judicial enquiry which an assessing authority is expected to hold. Petitioner was thus held to have been denied such reasonable opportunity in relation to the assessment and that was sufficient to vitiate the impugned order which was based merely on the auctioneers' records. The confirmation thereof in appeal and revision does not have any sanctity since confirmation of a nullity as impugned order, an order passed in violation of the principles of natural justice, is only a nullity. If the assessing authority intends to proceed against the petitioner with reassessment, he should summon the auctioneers in question and afford the petitioner an opportunity to cross-examine them in relation to those books. If the authors of the entries at the relevant time are not available the entries cannot be relied on for any purpose whatsoever, in the absence of an opportunity to the petitioner to cross-examine them. Whether those entries are still reliable

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as evidence against the petitioner is a matter which will have to be adjudicated upon after affording such opportunity to the petitioner to cross-examine the authors of those books. Reassessment merely on the basis of entries in auctioneer's records, without affording opportunity to cross-examine the auctioneer, even when a request thereof was made by the assessee, was not valid and, therefore, was vitiated.

- In ***CIT vs. Eastern Commercial Enterprises (1994) 210 ITR 103 (Cal)*** it was held that if an assessing authority is relying on the testimony of a witness, the assessee is to be afforded an opportunity to cross-examine him. Again, recognising the right to cross-examination as an essential attribute of adjudication by the Revenue authorities, the courts have even held that it is not open to the assessing authority to get over this hurdle on the plea that the witness had not been produced by the assessee in the cases of ***Pahar Chand & Sons vs. State of Punjab (1972) 30 STC 211 (Punj)***; ***Banwarilal Sitaram vs. State of Orissa (1974) Tax LR 1960 (On)***; ***Gargi Din Jwala Prasad vs. CIT (1974) 96 ITR 97 (All)***, ***R.C. Bandari & Co. vs. Jt. CTO (1971) 28 STC 465 (Mad)*** and ***V.K. Batcha Mohideen vs. Jt. CTO (1971) 28 STC 450 (Mad)***.

- In ***CIT vs. Goverdhan India (P) Ltd. 177 Taxman 29 (Del)***, there was a discrepancy in the accounts supplied by third party with that of the assessee. Assessee stated to have made sales of Rs. 50,36,600 to one 'A'. Copy of accounts sent by the said party 'A' disclosed purchase of Rs. 28,19,400 from the assessee.

The Assessing Officer treated the difference as unexplained credit and made addition to assessee's income under Section 68 of the Income-tax Act, 1961 by relying on the copy of the accounts submitted by 'A' even when the same were disputed

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by the assessee as not reflecting true and correct position. In addition, the assessee's request for cross-examining 'A' was also not allowed. The Tribunal deleted the said addition. On an appeal by the Revenue, the Delhi High Court held that since examining of 'A' was not allowed, addition was rightly deleted by the tribunal.

Similarly, the requirement of cross-examination as the requirement of the rules of natural justice has been underlined by the Bombay High Court in ***Vasanji Ghela and Co. v. CST [1977] 40 STC 544.***

Apart from the aforementioned landmark judicial precedents, the right to cross examine has been propounded in numerous other judicial decisions, few of them are relied herein under:-

a) PRARTHANA CONSTRUCTION (P.) LTD V. DCIT [2001] 118 TAXMAN 112 (AHD.) (MAG.)

It was held that the loose papers and documents seized from premises of third parties and statements recorded at back of assessee without it being afforded opportunity to interrogate said deponents and without bringing on record any supporting evidence could not be made basis for adding undisclosed income in hands of assessee.

b) Commissioner of Income-tax, Delhi*v.SMC Share Brokers Ltd [2007] 159 TAXMAN 306 (DELHI)

The jurisdictional High Court of Delhi held that weight could not be given to the statement in the proceedings against the assessee unless and until it being tested under cross-examination. In the absence of the

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statement being tested, it cannot be said that it should be believed completely to the prejudice of the assessee.

c) **Commissioner of Income-tax v. Ashwani Gupta**
[2010] 191 TAXMAN 51 (DELHI)

The jurisdictional High Court of Delhi held that once there is a violation of the principles of natural justice in as much as seized material is not provided to an assessee nor is cross-examination of the person on whose statement the Assessing Officer relies upon, granted, then, such deficiencies would amount to a denial of opportunity and, consequently, would be fatal to the assessment proceedings. Based on the above finding, the Hon'ble Court upheld the order of the tribunal wherein the tribunal confirmed the order passed by the Commissioner of Income-tax (Appeals) which held the entire addition made by the Assessing Officer to be invalid and had deleted the same.

d) **Commissioner of Income-tax v. Rajesh Kumar**
[2008] 172 TAXMAN 74 (DELHI)

The jurisdictional High Court of Delhi held as under:-

"The Tribunal had, on those facts, rightly come to the conclusion that since the revenue had relied upon the statement of 'M', it should have been made available to the assessee with an opportunity of cross-examining him. That was not done by the Assessing Officer. It clearly showed that the principles of natural justice had been violated. [Para 11]

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There was no infirmity in the view taken by the Tribunal on the facts of the case. It was quite clear that material collected by the revenue behind the back of the assessee was used against him without disclosing that material to him or giving any opportunity to him to cross-examine the person whose statement had been used by the revenue against the interests of the assessee [Para 12]"

Based on the aforementioned findings, the appeal of the revenue was dismissed and upheld the order of the tribunal wherein the tribunal deleted the additions since the material collected by revenue behind the back of assessee was used against him without disclosing such material or giving any opportunity to him to cross-examine the person whose statement had been used by revenue against his interests and thereby principles of natural justice had been violated.

**e) [2011] 43 SOT 32 (Delhi) (URO)ITAT DELHI BENCH
'F' Income-tax Officer v.Pawan Kumar Gupta**

The Hon'ble bench of Delhi ITAT held as under:-

The issue was as to whether the Commissioner (Appeals) was justified in deleting the addition made by the Assessing Officer on the basis of the statements which were neither confronted to the assessee for rebuttal nor any opportunity was granted to the assessee to cross-examine the deponents in spite of repeated requests by the assessee to the Assessing Officer to allow such opportunity. Undeniably, the statements of 'B', his son 'R' and the accountant, were the basis of the addition made by the Assessing Officer under section 69A. Undeniably again, those statements were never provided to the assessee for rebuttal. Also, he was not afforded any opportunity to cross-examine the deponents of these statements. This was

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despite the fact that the assessee had made repeated requests to the Assessing Officer for providing the statements to him and for affording him an opportunity to cross-examine those deponents. Pertinently, even at the first appellate stage, the matter was remitted by the Commissioner (Appeals) to the Assessing Officer, however, once again, no such opportunity was provided to the assessee.

It was on account of these facts that the Commissioner (Appeals) deleted the addition. The Commissioner (Appeals) further observed that the Assessing Officer had failed to establish any case against the assessee, nor was any corroborative evidence gathered by the Assessing Officer in relation to the assessee. The Assessing Officer, as observed by the Commissioner (Appeals), merely summarized the salient features of the assessment proceedings relating to 'B' and thereafter, summarily rejected the reply of the assessee as not acceptable. Though the Assessing Officer referred to the statements of 'B' and others admitting their involvement in cash loan transactions, these statements were not provided to the assessee. The allegation on the assessee having entered into loan transaction with 'B' was not proved, since nothing was brought on record by the Assessing Officer regarding any further investigations to confirm any such loan transaction.

In view of the above, no error whatsoever, was found with the order of the Commissioner (Appeals), and therefore, the same was hereby confirmed.

f) CIT v. Pradeep Kumar Gupta [2008] 303 ITR 95 (Delhi):-

The jurisdictional High Court of Delhi held that the reassessment based on deposition of third party without allowing opportunity to assessee to cross examine third party is not valid.

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g) Hamish Engineering Industries (P)Ltd v Dy. CIT (2010) 34 DTR 490 (Mumbai) (Trib).

It was held that the statements recorded from third parties which have been relied upon by the Assessing Officer for the purpose of assessment without having been provided to the assessee, the order of Assessing Officer is bad in law to that extent.

Having laid down above the catena of judgments wherein it was held that cross-examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the witness is cross-examined, certain courts have held that non affording of cross examination is an irregularity which can be cured by the Assessing Officer by setting aside the matter back to the Assessing Officer. In the case of **ITO v. M. Pirai Choodi 334 ITR 262(2011)(SC)** where the High Court has set aside the order of assessment on the ground that no opportunity to cross-examine was granted, as sought by the assessee, the Supreme Court of India has held:-

In this case, the High Court has set aside the order of assessment on the ground that no opportunity to cross-examine was granted, as sought by the assessee. We are of the view that the High Court should not have set aside the entire assessment order. At the highest, the High Court should have directed the Assessing Officer to grant an opportunity to the assessee to cross-examine the concerned witness. Be that as it may, we are of the view that, even on this particular aspect, the assessee could have gone in appeal to the Commissioner of Income-tax (Appeals). The assessee has failed to avail of the statutory remedy. In the circumstances, we are of the view that the High Court should not have quashed the assessment proceedings vide the impugned order.

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Similarly, the Hon'ble Delhi ITAT in case of **Centurion Investment and International Trading Co. (P) Ltd. V ITO 126 ITD 356 (2010)** held that failure to allow cross examination will not vitiate the assessment itself as void. In such cases, the assessment can be set aside for curing the irregularity.

However, the recent judgement of the Hon'ble Supreme Court in case of *Andaman Timber Industries v. CCE [2015] 62 taxmann.com 3* has settled the issue.

Recent landmark judgement delivered by the Hon'ble Supreme Court in case of Andaman Timber Industries v. CCE [2015] 62 taxmann.com 3

The Hon'ble Apex Court in case of **Andaman Timber Industries v. CCE [2015] 62 taxmann.com 3** observed as under in context to cross-examination:-

"6. 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 because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even 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 would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea was not even dealt with by the Adjudicating Authority. As far as the Tribunal was concerned, rejection of this plea was totally untenable. The Tribunal had simply stated that cross-examination of the said dealers could

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not have brought out any material which would not be in possession of the appellants themselves to explain as to why their ex-factory prices remained static. It was not for the Tribunal to have guesswork for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.

7. As mentioned above, the appellant had contested the truthfulness of the statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the Adjudicating Authority simply relied upon the price-list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price-list itself could be the subject matter of cross-examination. Therefore, it was not for the Adjudicating Authority to pre-suppose as to what could be the subject matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No. 2216 of 2000, order dated 17.03.2005 was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.

8. In view the above, we are of the opinion that if the testimony of these two witnesses is discredited, there was no material with the Department on the basis of which it could justify its action, as the statement of the aforesaid two witnesses was the only basis of issuing the Show-Cause Notice."

Therefore, the Hon'ble Supreme Court affirmed the legal position that when statements of witnesses are made the basis of addition, not allowing assessee to cross-examine witnesses is a serious flaw which makes order nullity, as it amounts to violation of principles of natural justice.

Following the decision of the Hon'ble Apex Court in *Andaman Timber Industries* case (*supra*), in the under mentioned cases the addition was deleted, or assessment was quashed which was

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based on statement of a witness and assessee was not offered opportunity of cross-examination:-

- *Amitabh Bansal v. ITO*
- *Pratik Suryakant Shah v. ITO* [2017] 77 taxmann.com 260 (Ahd. - Trib.)
- *Smt. Madhu Killa v. Asstt. CIT* [2018] 100 taxmann.com 264 (Kol. - Trib.)
- *Ramprasad Agarwal v. ITO* [2018] 100 taxmann.com 172/[2019] 174 ITD 286 (Mum. - Trib.)
- *H.R. Mehta v. Asstt. CIT* [2016] 72 taxmann.com 110 (Bom.)
- *Meghraj Singh Shekhawat v. Dy. CIT* [2019] 103 taxmann.com 374/175 ITD 693 (Jp. - Trib.)
- *CCE v. Shyam Traders* 2016 (333) ELT 389 (All.)
- *P.R. Rolling Mills (P.) Ltd. v. Dy. CIT* [2018] 96 taxmann.com 185 (Jp. - Trib.)
- *Fateh Chand Charitable Trust v. CIT* [2017] 83 taxmann.com 33 (Luck. - Trib.)
- *ITO v. Karsan Nandu* [2017] 77 taxmann.com 275 (Mum. - Trib.)
- *ITO v. Softline Creations (P.) Ltd.* [2017] 81 taxmann.com 139 (Delhi - Trib.)
- *Mohan Meakin Ltd. v. Asstt. CIT* [2017] 87 taxmann.com 171 (Delhi - Trib.)
- *Fancy Wear v. ITO* [2017] 87 taxmann.com 183 (Mum. - Trib.)
- *Pavitra Realcon (P.) Ltd. v. Asstt. CIT* [2017] 87 taxmann.com 142 (Delhi - Trib.)
- *Apeejay Education Society v. Asstt. CIT* [2017] 81 taxmann.com 289 (Asr. - Trib.)
- *ITO v. Shreedham Construction Pvt. Ltd.* [ITA No. 2948/Mum/2017]
- *Pr. CIT v. Kanubhai Maganlal Patel* [2017] 79 taxmann.com 257 (Guj.)
- *Obulapuram Mining Co. (P.) Ltd. v. Dy. CIT* [2016] 72 taxmann.com 73 /160 ITD 224 (Bang. - Trib.)

Cross-examination at the appellate stage

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In cases where assessee demands at the appellate stage, cross-examination of the witness, the CBDT has advised CIT(A) to provide such opportunity.

In Instruction F. No. DGIT(Vig.)/HQ/SI/Appeals/2017-18/9959, dated March 8, 2018, the Board has instructed that-

".....In some other cases, the additions were deleted in a summary manner solely on the ground that opportunity of cross-examination was not given to the assessee. The CIT (Appeals) could have given the opportunity of cross-examination to the assessee rather than summarily deleting the additions in such cases since it has been held by Hon'ble Apex Court in a number of cases that the scope of power of CIT (Appeals) is coterminous with that of the Assessing Officer...."

Having said so, it is always advisable to raise a claim for seeking cross examination of witness before the Assessing Officer and not before the appellate authorities. In the case of ***Hindusthan Tobacco Company v CIT 27 taxmann.com 155 (2012)*** the Calcutta High Court has held that if the assessee feels that cross-examining of any person is necessary for establishing its case it is incumbent upon assessee to make such prayer before Assessing officer during the assessment proceeding and if a party fails to avail of opportunity to cross-examine a person at that stage in proceeding, the said party would be precluded from raising such issue at a later stage of proceeding. Therefore, the belated claim of assessee at appellate stage that it is denied the opportunity of cross-examining witnesses in assessment proceeding is wholly untenable in law. Plea of violation of natural justice taken at the appellate stage appears to be belated and clearly an afterthought. It appears that no prejudice had been suffered by the appellant assessee in the manner the proceeding was conducted by the Assessing Officer and the assessee was not aggrieved at that stage. Only when the assessment order went against it, the assessee conveniently raised such belated plea of denial of

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opportunity of fair hearing and breach of principles of natural justice.

It is also pertinent to mention here is that the Assessing Officer should also provide the impugned material and the copies of the statement which is sought to be cross examined by the assessee. Merely allowing the opportunity to cross examine a witness without supplying the underlying material shall serve no legal purpose and will be merely be a formality. Secondly, the notice to cross examine should also afford reasonable time and reasonable opportunity. It has been seen in practice that mechanical opportunities are provided to assessee to cross examine the witness or a statement with only one or two day notice that too without supplying the copies of the alleged material or statement due to which the assessee's are not able to come up to cross examine such witnesses. In such circumstances absence of the assessee can't be treated as denial of cross examination. Reasonable opportunity does not merely mean an opportunity being given. The opportunity has to be reasonable. There should be adequate notice. The notice must be of sufficient length to enable the defense or the case to be prepared. Not only should a person know the case which is made against him but he must also know what evidence has been considered for drawing a presumption affecting him and he must be given a fair and reasonable opportunity to rebut the presumption. Furnishing specific and intelligible reasons for the proposed action is the concomitant of the concept of reasonable opportunity. It is necessary because the person could make an effective representation only with reference to reasons set out. Omission to comply with the requirement of audi alteram partem, as a general rule, vitiates a decision. When there is violation of natural justice no resultant or independent prejudice need be shown as the denial of natural justice is in itself a prejudice. Rule of law and not the rule of discretion is the basic feature of Constitution of India. Reference can be made to the decision of Hon'ble Delhi ITAT in rendered in case of ***Jai Karan Sharma V. DCIT [2012] 23 taxmann.com 300 (Delhi)***.

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Conclusion

Thus after going through catena of judgments and also the recent judgment of the apex court in case of *Andaman Timber Industries (supra)*, the judicial position that emerges is that the cross-examination is the sine qua non of due process of taking evidence and no adverse inference can be drawn against a party unless the party is put on notice of the case made out against him. He must be supplied the contents of all such evidence, both oral and documentary, so that he can prepare to meet the case against him. This necessarily, also postulates that he should also cross-examine the witnesses. So, if an assessing authority is relying on the testimony of a witness, the assessee has to be afforded an opportunity to cross-examine him. It is not open to the assessing authority to get over this hurdle on the plea that the witness had not been produced by the assessee. Thus, depending upon the facts and circumstances of a particular case, the rule of audi alteram partem may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the inquiry should be permitted to be cross-examined by the party affected. Again, since the taxing authorities entrusted with the powers to make assessment for taxes discharge quasi-judicial functions, they are bound to observe the principles of natural justice in reaching their conclusions. It is also at the same time true that the taxing authorities are not fettered by technical rules of evidence and pleadings and are entitled to act on material which may not be accepted as evidence in a court of law but that does not absolve them from the obligation to comply with the principles of natural justice. It may, therefore, be concluded that in cases where the assessing authority has collected some information from a third party then the assessee is entitled to apply for cross-examination of such person for the purpose of eliciting the truth or for proving that the information furnished by such person is not genuine. And, refusal to permit cross-examination shall vitiate the proceedings. As already discussed

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above, there is a massive body of accepted decisions establishing that natural justice requires that party be given an opportunity of challenging by cross-examination witnesses called by the other party on relevant issue. Therefore, bestowing the opportunity of cross-examination is a necessary corollary to the principles of natural justice.

[This article has been initially published at Taxmann- Citation 2022 134 Taxmann.Com 25(Article) and again re-published only for wider circulation with due permission of the author]

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Mr. Mohit Gupta is a Fellow Member of the Institute of Chartered Accountants of India, a commerce graduate from prestigious Ramjas College, Delhi University and an alumni of St. Xavier's School, New Delhi. He is practicing as a Chartered Accountant for more than 15 years and managing the Direct Tax Advisory and Litigation practice of M/s. Dhanesh Gupta & Co., Chartered Accountants, New Delhi a renowned Chartered Accountancy firm in the core domain of direct taxation established in 1978.

His forte is handling Income Tax Search and Seizure matters, matters before the Income Tax Settlement Commission, other direct tax litigation matters and legal representation before various authorities enforcing economic and tax laws incl. under PMLA, SFIO, EOW, DRI, SEBI, CCI, Benami Laws and Black Money etc. As on today, he has wide experience of handling Income Tax Search and Seizure Cases across the country, represented matters before the Income Tax Settlement Commission, ITAT and other appellate tribunals constituted under various economic laws. He has been contributing articles in various professional magazines/journals and addressing various seminars on topics relating to Income Tax Search and Seizure, allied tax matters and economic laws. He has to his credit plethora of well researched articles out of which many have appeared in leading journals. In Addition to the above, Mr. Mohit Gupta is also a Special Auditor of the Income Tax Department and has carried out numerous Special Audits across the country on being appointed by the Income Tax Department which have plugged tax evasions, tax base erosion and other tax manipulative practices and in turn facilitated the Income Tax Department to collect huge tax revenues. Mr. Mohit Gupta has also been appointed as Special Auditor under other economic statutes and by other Investigation Agencies of the Government of India. Mr. Mohit Gupta has also authored the periodical Newsletter on Income Tax Search and Seizure. The said newsletter contained well researched write ups / articles and judicial developments on the matters of Direct Taxation.

Mr. Mohit Gupta is also a renowned author on Direct Tax Subjects. His books received extremely overwhelming responses from the readers including the tax payers, tax administration, tax professionals, corporate houses and academicians. The said books were released by erstwhile Hon'ble Union Finance Minister, Shri. Arun Jaitley, Shri.Arjun Ram Meghwal, Minister of State for Finance and the Chairman of Central Board of Direct Taxes and many other dignitaries.

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