

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

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 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).

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) Section 137

- Examination-in-chief: The examination of a witness by the party who calls him shall be called his examination-in-chief.
- 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 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 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 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 that adversely effects the assessee, shall carry an evidentiary value only if such a statement has been tested in cross-examination.

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