आयकर अपीलीय अधिकरण पुणे न्यायपीठ एक-सदस्य मामला पुणे में

IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "SMC", PUNE

सुश्री सुषमा चावला, न्यायिक सदस्य एवं, श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE MS. SUSHMA CHOWLA, JM AND SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA Nos.2622 to 2624/PUN/2016
निर्धारण वर्ष / Assessment Years : 2009-10 to 2011-12

Anita Sanjay Agrawal
(Prop. M/s. A-One Tools),
28, Sharda Nagar,
Near Savarkar Nagar,
Nashik – 422013 …. अपीलार्थी/Appellant

PAN: ADMPA6086H

Vs.

The Income Tax Officer,
Ward 1(1), Nashik …. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.2625 to 2627/PUN/2016
निर्धारण वर्ष / Assessment Years : 2009-10 to 2011-12

Shrawan Keshavlal Agrawal HUF,
(Prop. M/s. Deep Udyog),
28, Sharda Nagar,
Near Savarkar Nagar,
Nashik – 422013 …. अपीलार्थी/Appellant

PAN: AACHA6707N

Vs.

The Income Tax Officer,
Ward 1(1), Nashik …. प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA Nos.2628 to 2630/PUN/2016

निर्धारण वर्ष / Assessment Years : 2009-10 to 2011-12

Sanjay Shrawan Agrawal HUF,
(Prop. M/s. Bharat Industries),
28, Sharda Nagar,
Near Savarkar Nagar,
Nashik – 422013 …. अपीलार्थी/Appellant

PAN: AACHA6711J

Vs.

The Dy. Commissioner of Income Tax,
Circle – 1, Nashik …. प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Pramod Shingte
प्रत्यर्थी की ओर से / Respondent by : Dr. Vivek Agrawal

आयकर अपील सं. / ITA Nos.2510 to 2512/PUN/2016

निर्धारण वर्ष / Assessment Years : 2009-10 to 2011-12

Trimurti Furnance Pvt. Ltd.,
Plot No.G-81, MIDC,
Ambad, Nashik – 422010 …. अपीलार्थी/Appellant

PAN: AACCT1262A

Vs.

The Income Tax Officer,
Ward 1(4), Nashik …. प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : S/Shri Sanket Joshi &
Pranav Shende
प्रत्यर्थी की ओर से / Respondent by : Shri Vivek Agarwal, JCIT

सुनवाई की तारीख / **Date of Hearing : 21.03.2018 / 12.03.2018**		घोषणा की तारीख / **Date of Pronouncement: 28.03.2018**

आदेश / ORDER

PER SUSHMA CHOWLA, JM:

Out of this bunch of twelve appeals, nine appeals filed by different assessee are against respective consolidated orders of CIT(A)-1, Nashik, all dated 08.09.2016 relating to assessment years 2009-10 to 2011-12 against respective orders passed under section 143(3) r.w.s. 147 of the Income-tax Act, 1961 (in short 'the Act').

2. Another assessee Trimurti Furnance Pvt. Ltd has filed separate appeals against consolidated order of CIT(A)-1, Nashik, dated 10.08.2016 relating to assessment years 2009-10 to 2011-12 against respective orders passed under section 143(3) r.w.s. 147 of the Act.

3. This bunch of appeals relating to different assessee on similar issues were heard on different dates and are being disposed of by this consolidated order for the sake of convenience.

4. First, we shall take up the appeals in ITA Nos.2622/PUN/2016 to 2630/PUN/2016. However, in order to adjudicate the issues, reference is being made to the facts in ITA No.2622/PUN/2016, relating to assessment year 2009-10.

ITA Nos.2622 to 2624/PUN/2016 - Anita Sanjay Agrawal

ITA Nos.2625 to 2627/PUN/2016 - Shrawan Keshavlal Agrawal HUF

ITA Nos.2628 to 2630/PUN/2016 - Sanjay Shrawan Agrawal HUF

5. The assessee in ITA No.2622/PUN/2016, relating to assessment year 2009-10 has raised the following grounds of appeal:-

1. *On the basis of facts and in the circumstances of the case and as per law, the Commissioner of Income Tax, (Appeals)-1, Nashik, is not justified in confirming validity of notice issued u/s 148 particularly when AO has issued the said notice on the basis of information received from third party and without application of mind.*

2. *On the basis of facts and in the circumstances of the case and as per law, the Commissioner of Income Tax, (Appeals)-1, Nashik, is not justified in upholding the order passed by the AO u/s. 147 of the Act as the AO has not summarily rejected the objections raised against reasons recorded for the notice issued u/s. 148 of the Act, by way of speaking order.*

3. *On the basis of facts and in the circumstances of the case and as per law, the Commissioner of Income Tax, (Appeals)-1, Nashik, is not justified in confirming the disallowance of purchases to the extent of 25%, particularly when the AO has not allowed the appellant the cross-examination of the witness of the revenue i.e. parties from whom the purchases were made as well as the competent Sales Tax Authority on the basis of whose information the notice u/s. 148 of the Act was issued by the AO.*

4. *On the basis of facts and in the circumstances of the case and as per law, the Commissioner of Income Tax, (Appeals)-1, Nashik, is not justified in confirming the disallowance to the extent of 25% i.e. Rs.2,33,270/- of the purchases made from parties called as suspicious parties.*

5. *On the basis of facts and in the circumstances of the case and as per law, the Commissioner of Income Tax, (Appeals)-1, Nashik, is not justified in confirming the disallowance to the extent of 25% i.e. Rs.2,33,270/- of the purchases made from parties called as suspicious parties by holding that the said purchases are inflated particularly when the appellant has made the said purchases at prevailing market rate only.*

6. The issue raised in the present appeal is against reopening of assessment and addition on account of bogus purchases.

7. Briefly, in the facts of the case, the assessee for the year under consideration had furnished return of income declaring total income of ₹ 10,22,560/- on 29.09.2009. Subsequently, information was received from the Director General of Income Tax (Investigation), Pune regarding beneficiaries in the hawala transactions detected by the Sales Tax Department of Maharashtra.

The information contained names, addresses and details of persons who had provided entries for bogus purchase bills and also contained the details of beneficiaries. Further, the persons who had provided entries to various beneficiaries had also filed affidavits (Notarized) before the Sales Tax Department stating that they had merely provided entries to those beneficiaries and no goods as indicated in those purported bills were supplied or delivered by them. The assessee was sole proprietor of M/s. A-One Tool, was one of the alleged beneficiaries in the said hawala transactions. The total amount mentioned in the bill was ₹ 9,33,075/-. On the basis of such information, the Assessing Officer issued notice under section 133(6) of the Act with the approval of CIT-1, Nashik to the assessee dated 06.06.2013 requesting the assessee to submit his explanation on the genuineness of said transactions. In response thereto, the assessee neither attended nor furnished any explanation. Further, another opportunity was given to the assessee and the assessee in the written submissions stated that purchases were duly recorded in the books of account and the payments were made through banking channels. The assessee also explained that material purchased was utilized in production of Tester. The Assessing Officer notes that the assessee failed to produce original bills or copies of purchases made from alleged parties for verification, transport and octroi receipts. The Assessing Officer thereafter, issued notice under section 148 of the Act and asked the assessee to file the return of income on or before 05.12.2013. The assessee neither attended nor furnished any return of income. Thereafter, notice under section 142(1) and 143(1) of the Act were issued to the assessee asking the assessee to explain as to why originally filed return of income should not be treated as filed in response to notice under section 148 of the Act. The assessee was also asked to furnish the details of purchases, sales, transport bills, octroi receipts, etc. The

assessee in response stated that it had already filed the return of income on 26.12.2013 vide e-filing, which may be treated as return in response to notice issued under section 148 of the Act. The assessee also raised objections to re-assessment proceedings and issue of notice under section 148 of the Act, which were specifically redressed by the Assessing Officer. The Assessing Officer asked the assessee as to why purchases made from the alleged parties should not be added to the income of assessee. Vide para 8.1, the Assessing Officer also observes that vide office letter dated 23.12.2014, the assessee was asked to collect copies of statements recorded of hawala dealers during sales tax proceedings but the assessee failed to collect the same till date. The Assessing Officer was of the view that the assessee was not interested in collecting the said statements and then reference was made to different notices of hearing and the adjournment applications moved by the assessee. The Assessing Officer thereafter, issued notice under section 133(6) of the Act to verify the genuineness of purchases made by the assessee from the said parties. The said notices were returned unserved with postal remark 'Not Known' / Unclaimed. Under the said circumstances, the assessee was asked to produce alleged parties for verification along with copies of original bills, transport receipts, octroi receipts, etc. Another opportunity of hearing was given to the assessee in this regard. On a later date of hearing, copies of statements and affidavits filed by hawala dealers before the Sales Tax Authority were provided to the assessee and the case was fixed for hearing on 16.03.2015. However, the assessee did not appear before the Assessing Officer. The Assessing Officer noted that though the assessee had furnished details of cheque payments being made to the party but no other documents such as delivery challans, lorry receipts, transportation details, etc. were produced during the course of assessment proceedings and since the parties

had admitted in front of the Sales Tax Department that they had not made any sales or purchase transactions. The said purchases were held to be bogus. Accordingly, addition of ₹ 9,33,075/- was made in the hands of assessee.

8. The first issue decided by the CIT(A) was against re-assessment proceedings initiated and in view of the ratio laid down by the Hon'ble Supreme Court in ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500 (SC), the re-assessment proceedings were held to be valid.

9. The next issue which was raised by the assessee before the CIT(A) was that since the Assessing Officer has failed to allow cross-examination of the witness of the Revenue i.e. the party from whom the purchases were made, then the assessment order passed is to be quashed. The assessee also raised the issue on merits of the disallowance of purchases made in the hands of assessee. The CIT(A) has deliberated on the issue whether the purchases made by the assessee were bogus or were made from bogus parties. Reference was made to various case laws and held that the cases were decided on its facts as no question of law was involved in such cases. It was further held by the CIT(A) that reliable quantitative details and payments by account payee cheques were primary tests, on which the genuineness of purchases, where the suppliers are not available, was required to be tested. The other evidences like statement as to providing ‘hawala’ recorded by Sales Tax Authorities were mere indicators not conclusive. Vide para 6.88, the CIT(A) held that parties who were in dispute, for purchases, were neither produced before her or before the Assessing Officer and in the absence of production of parties, the issue that purchases were indeed from them, could not be verified. The consumption details were held to be no testimony of the

fact that the purchases were not inflated and parties were not bogus. The argument of learned Authorized Representative for the assessee on cross-examination was dismissed, in view of the ratio laid down by the Pune Bench of Tribunal in the case of Kolte Patil Developer in ITA Nos.1478 to 1483/PN/2013, relating to assessment years 2004-05 to 2009-10, order dated 20.02.2015. The relevant findings of Tribunal are reproduced under para 6.88.1. Since the assessee did not produce the parties and where the expenses were claimed by the assessee, then the duty was upon the assessee to produce the parties, such was the order of CIT(A) and it was held that it was not case of bogus purchases but case of inflated purchases and at best from bogus parties. The Assessing Officer was directed to restrict disallowance of purchases to 25% of purchases.

10. The assessee is in appeal against the order of CIT(A).

11. The learned Authorized Representative for the assessee has pointed out that re-assessment proceedings were initiated against the assessee on account of information received from the Sales Tax Department in respect of certain persons who had not paid their VAT. He admitted that the reasons recorded for reopening which are placed at page 60 of Paper Book, were provided to the assessee. Our attention was drawn to pages 71 and 72 of Paper Book, wherein he asked for cross-examination of witness. He further referred to the order of Assessing Officer, which is placed at page 77 of Paper Book, wherein he has passed speaking order against objections raised to reopening of assessment under section 147 of the Act and notice issued under section 148 of the Act. However, no cross-examination was allowed to the assessee, before making the aforesaid addition in the hands of assessee. In this regard,

he placed reliance on the ratio laid down by Pune Bench of Tribunal in Shri Bechan Surajbali Kumbhar Vs. ITO in ITA No.2357/PUN/2016, relating to assessment year 2011-12, order dated 07.03.2018. He further placed reliance on the decision of the Hon'ble Supreme Court in M/s. Andaman Timber Industries Vs. Commissioner of Central Excise in Civil Appeal No.4228 of 2006, judgment dated 02.09.2015. He also placed reliance on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. M/s. Ashish International in Income Tax Appeal No.4299/2009, judgment dated 22.02.2011, wherein the issue raised was against cross-examination not allowed by the authorities below. He further placed reliance on the decision of Pune Bench of Tribunal in Jaydeep M. Kher Vs. DCIT in ITA No.973/PN/2013, relating to assessment year 2003-04, order dated 28.12.2016. He further placed reliance on the ratio laid down by the Hon'ble Supreme Court in Sahara India (Firm) Vs. CIT & Anr. (2008) 300 ITR 403 (SC). The learned Authorized Representative for the assessee pointed out that the Assessing Officer agreed that he would give cross-examination but the Assessing Officer did not allow cross-examination and in the absence of the same, the addition made in the hands of assessee cannot be sustained.

12. The learned Departmental Representative for the Revenue pointed out that the statement recorded was given during assessment proceedings as mentioned by the Assessing Officer in paras 8 and 8.1 of the assessment order. He then stressed that no cross-examination was asked by the assessee after he received the statement. He relied on the ratio laid down by the Hon'ble Supreme Court in ITO Vs. M. Pirai Choodi (2011) 334 ITR 262 (SC), wherein it was held that in case the assessment order has been passed without granting an opportunity to cross-examine, then the matter should be set aside to the

Assessing Officer to grant the assessee an opportunity to cross-examine the witnesses. He further relied on the ratio laid down by the Hon'ble Bombay High Court in M/s. R.W. Promotions P. Ltd. Vs. ACIT in Income Tax Appeal No.1489 of 2013, judgment dated 13.07.2015 and the Hon'ble High Court of Delhi in CIT Vs. PC Chemicals in ITA No.281/2012 & Ors., judgment dated 13.09.2012. He also placed reliance on the ratio laid down by the Hon'ble Supreme Court in M/s. Pebble Investment and Finance Ltd. Vs. ITO in Petition for Special Leave to Appeal No.11784/2017, judgment dated 05.07.2017.

13. The learned Authorized Representative for the assessee in rejoinder pointed out that the latest decision of the Hon'ble Apex Court is in M/s. Andaman Timber Industries Vs. Commissioner of Central Excise (supra), which is delivered on 02.09.2015, whereas the decision in ITO Vs. M. Pirai Choodi (supra) is dated 19.11.2010 and the Hon'ble Bombay High Court in M/s. R.W. Promotions P. Ltd. Vs. ACIT (supra) is dated 13.07.2015.

14. We have heard the rival contentions and perused the record. The issue raised in the present appeal is against information received from the Sales Tax Department in respect of parties who had issued sale bills but had not paid sales tax. When the said parties were confronted, they had admitted to have only issued sale bills but not delivered the goods and such parties were referred to as 'hawala parties'. List of hawala parties and the beneficiaries of sale bills issued were drawn by Sales Tax Department. Information was then shared with the Income Tax Department vis-à-vis beneficiaries of said sale bills. The assessment proceedings were reopened under section 147 / 148 of the Act by the concerned Assessing Officer on receipt of such information. The case of assessee is one of such beneficiaries, wherein the allegation of Revenue is that

it had received the goods from alleged hawala parties. The case of assessee on the other hand, is that it had received the goods against which payment was made through cheque and the corresponding sales were also matching and there was no merit in treating the purchases as bogus in the hands of assessee. The assessment in the case of assessee was reopened on the basis of statement recorded during the course of investigation by the Sales Tax Department.

15. The assessee in the present case before us after filing the return of income in response to notice issued under section 148 of the Act, sought reasons recorded for reopening the assessment and also asked the Assessing Officer to allow cross-examination of the persons whose statements were recorded vis-à-vis alleged bogus purchases. The said letter dated 14.10.2014 is placed at pages 71 and 72 of Paper Book. The assessee vide para 6 of the said letter had requested the Assessing Officer to provide copy of affidavit of the so-called hawala dealer and actual response or information received from the Sales Tax Department, which is mentioned in the reasons recorded for issue of notice under section 148 of the Act. Vide para 7, the assessee also requested the Assessing Officer to allow cross-examination of the said persons i.e. the so-called hawala dealers and also the Sales Tax Authority, who had made reference to the Assessing Officer about the said issue. The assessee filed objections to the reasons recorded for reopening the assessment. In reply, the Assessing Officer issued letter dated 23.12.2014, wherein it was reiterated that on the basis of information received from the Sales Tax Department the Assessing Officer had applied his mind and there was belief that income chargeable to tax had escaped assessment. The other objections raised by the assessee were also point-wise dealt with by the Assessing Officer

in speaking order. In respect of issue of cross-examination of the said persons, the Assessing Officer stated that *assessee has taken the stand that he may allowed an opportunity to cross-examine Sales Tax Department and entry beneficiary*. The Assessing Officer further goes on to say that the assessee was being informed that adequate opportunity of being heard will be given to the assessee as per provisions of the Income Tax Act, during the course of assessment proceedings. The said speaking order of Assessing Officer is placed at pages 73 to 78 of the Paper Book.

16. The grievance of assessee is that though the Assessing Officer agreed that he would give cross-examination of witnesses but where the Assessing Officer does not allow the said cross-examination, then the same is fatal to the assessment proceedings carried out against the assessee. Before moving further, it may be pointed out that vide para 8.1, reference to the letter dated 21.10.2014 i.e. objections filed by the assessee against the issue of notice issued under section 148 of the Act, which was addressed by the Assessing Officer vide letter dated 23.12.2014. The Assessing Officer mentions that in the said letter, the assessee was requested to collect the copies of statement recorded of hawala dealers. However, the assessee had failed to collect the same till date. Thereafter, the case was fixed for hearing in January, 2015 and the assessment was completed by treating the purchases made by the assessee from the alleged hawala dealers as bogus in the hands of assessee.

17. We have already referred to the letter dated 23.12.2014 of the Assessing Officer to the assessee, wherein while deciding objection No.6, reference was made to information collected from the Sales Tax Department and copies of affidavits produced by the suppliers before the Sales Tax Department and the

assessee was advised to collect the same from the office of Assessing Officer at the earliest. However, no such statement has been provided to the assessee. The perusal of assessment order reflects that the said statements and affidavits filed by the hawala dealers before the Sales Tax Authorities were provided to the assessee, when the case was fixed for hearing on 16.03.2015 and on 18.03.2015, assessment order was passed. The affidavits / statements were given as late as on 16.03.2015 and the assessment order was passed on 18.03.2015 without allowing cross-examination to the assessee.

18. The issue which arises in the present appeal is whether where the assessee has not been allowed cross-examination, can the same be held to be fatal to the completion of assessment against the assessee. The issue of allowing cross-examination to the assessee being denial of principles of natural justice was considered by the Pune Bench of Tribunal in Jaydeep M. Kher Vs. DCIT (supra). The Tribunal in turn, relying on the ratio laid down by the Hon'ble Supreme Court in M/s. Andaman Timber Industries Vs. Commissioner of Central Excise (supra) and also the decision of the Hon'ble Supreme Court in Sahara India (Firm) Vs. CIT & Anr. (supra), held as under:-

> *“14. Recently, in Canara Bank v. V. K. Awasthy [2005] 6 SCC 321, the concept, scope, history of development and significance of the principles of natural justice have been discussed in extenso, with reference to earlier cases on the subject. Inter alia, observing that the principles of natural justice are those rules which have been laid down by the courts as being the minimum protection of the rights of the individual against the arbitrary procedure that may be adopted by a judicial, quasi-judicial and administrative authority while making an order affecting those rights, the court said (headnote) :*
>
> > *"Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the frame-work of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order*

which involves civil consequences must be consistent with the rules of natural justice. The expression 'civil consequences' encompasses infrac tion of not merely property or personal rights but of civil liberties, material deprivations, and non-pecuniary damages. In its wide umbrella comes everything that affects a citizen in his civil life."

15. Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of the principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial.

16. We may, however, hasten to add that no general rule of universal application can be laid down as to the applicability of the principle of audi alteram partem, in addition to the language of the provision. Undoubtedly, there can be exceptions to the said doctrine. Therefore, we refrain from giving an exhaustive catalogue of the cases where the said principle should be applied. The question whether the principle has to be applied or not is to be considered bearing in mind the express language and the basic scheme of the provision conferring the power ; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of that power. It is only upon a consideration of all these matters that the question of application of the said principle can be properly determined.

17. In Mohinder Singh Gill v. Chief Election Commissioner, explaining as to what is meant by the expression " civil consequence", Krishna Iyer J., speaking for the majority, said :

"Civil consequences' undoubtedly cover infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil conse quence." (emphasis supplied)

18. The question in regard to the requirement of opportunity of being heard in a particular case, even in the absence of provision for such hearing, has been considered by this court on a number of occasions. In Olga Tellis v. Bombay Municipal Corporation while dealing with the provisions of section 314 of the Bombay Municipal Corporation Act, 1888, which confers discretion on the Commissioner to get any encroachment removed with or without notice, a Constitution Bench of this court observed as follows (page 581) :*

" It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule (' Hear the other side') could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken.

> *The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence."*

19. Again, in C. B. Gautam v. Union of India a question arose whether in the absence of a provision for giving the concerned parties an opportunity of being heard before an order is passed under the provisions of section 269UD of the Act, for purchase by the Central Government of an immovable property agreed to be sold on an agreement to sell, an opportunity of being heard before such an order could be passed should be given or not. Relying on the decisions of this court in Union of India v. Col. J. N. Sinha and Olga Tellis1 it was held that :

> *"Although Chapter XX-C does not contain any express provision for the affected parties being given an opportunity to be heard before an order for purchase is made under section 269UD, not to read the requirement of such an opportunity would be to give too literal and strict an interpretation to the provisions of Chapter XX-C and in the words of Judge Learned Hand of the United States of America ' to make a fortress out of the dictionary.' Again, there is no express pro vision in Chapter XX-C barring the giving of a show-cause notice or reasonable opportunity to show cause nor is there anything in the language of Chapter XX-C which could lead to such an implication. The observance of principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, the requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by an appropriate authority under section 269UD must be read into the provisions of Chapter XX-C. There is nothing in the language of section 269UD or any other provision in the said Chapter which would negate such an opportunity being given. Moreover, if such a requirement were not read into the provisions of the said Chapter, they would be seriously open to challenge on the ground of violations of the provisions of article 14 on the ground of non-compliance with the principles of natural justice. The provision that when an order for purchase is made under section 269UD reasons must be recorded in writing is no substitute for a provision requiring a reasonable opportunity of being heard before such an order is made."*

20. Dealing with the question whether the requirement of affording an opportunity of hearing is to be read into section 142(2A), in Rajesh Kumar it has been held that prejudice to the assessee is apparent on the face of the said statutory provision. It has been observed that on account of the special audit, the assessee has to undergo the process of further accounting despite the fact that his accounts have been audited by a qualified auditor in terms of section 44AB of the Act. An auditor is a professional person. He has to function independently. He is not an employee of the assessee. In case of misconduct, he may become liable to be proceeded against by a statutory authority under the Chartered Accountants Act, 1949. Besides, the assessee has to pay a hefty amount as fee of the special auditor. Moreover, during the audit of the accounts again by the special auditor, he has to answer a large number of questions. Referring to the decision of this court in Binapani Dei wherein it was observed that when by reason of an action on the part of a statutory authority, civil or evil consequences ensue, the principles of natural justice are required to be followed and in such an event, although no express provision is laid down in this behalf, compliance with the principles of natural justice would be implicit, the learned judges held that by virtue of an order under section 142(2A) of the*

Act, the assessee suffers civil consequences and the order passed would be prejudicial to him and, therefore, the principles of natural justice must be held to be implicit. The court has further observed that if the assessee was put to notice, he could show that the nature of accounts is not such which would require appointment of special auditors. He could further show that what the Assessing Officer considers to be complex is, in fact, not so. It was also open to him to show that the same would not be in the interests of the Revenue.

21. In the light of the aforenoted legal position, we are in respectful agreement with the decision of this court in Rajesh Kumar1 that an order under section 142(2A) does entail civil consequences. At this juncture, it would be relevant to take note of the insertion of the proviso to section 142(2D) with effect from June 1, 2007. The proviso provides that the expenses of the auditor appointed in terms of the said provision shall, henceforth, be paid by the Central Government. In view of the said amendment, it can be argued that the main plank of the judgment in Rajesh Kumar1 to the effect that direction under section 142(2A) entails civil consequences because the assessee has to pay substantial fee to the special auditor is knocked off. True it is that the payment of auditor' s fee is a major civil consequence, but it cannot be said to be the sole civil or evil consequence flowing from directions under section 142(2A). We are convinced that special audit has an altogether different connotation and implications from the audit under section 44AB. Unlike the compulsory audit under section 44AB, it is not limited to mere production of the books and vouchers before an auditor and verification thereof. It would involve submission of explanation and clarification which may be required by the special auditor on various issues with relevant data, document, etc., which, in the normal course, an assessee is required to explain before the Assessing Officer. Therefore, special audit is more or less in the nature of an investigation and in some cases may even turn out to be stigmatic. We are, therefore, of the view that even after the obligation to pay auditor' s fees and incidental expenses has been taken over by the Central Government, civil consequences would still ensue on the passing of an order for special audit.

22. We shall now deal with the submission of learned counsel appearing for the Revenue that the order of special audit is only a step towards assessment and being in the nature of an inquiry before assessment, is purely an administrative act giving rise to no civil consequence and, therefore, at that stage a pre-decisional hearing is not required. In Rajesh Kumar it has been held that in view of section 136 of the Act, proceedings before an Assessing Officer are deemed to be judicial proceedings. Section 136 of the Act stipulates that any proceeding before an Income-tax authority shall be deemed to be judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code, 1860, and also for the purpose of section 196 of the Indian Penal Code and every Income-tax authority is a court for the purpose of section 195 of the Code of Criminal Procedure, 1973. Though having regard to the language of the provision, we have some reservations on the said view expressed in Rajesh Kumar' s case, but having held that when civil consequences ensue, no distinction between quasi-judicial and administrative order survives, we deem it unnecessary to dilate on the scope of section 136 of the Act. It is the civil consequence which obliterates the distinction between quasi-judicial and administrative function. Moreover, with the growth of the administrative law, the old distinction between a judicial act and an administrative act has withered away. Therefore, it hardly needs reiteration that even a purely administrative order which entails civil consequences, must be consistent with the rules of natural justice. (Also see : Mrs. Maneka Gandhi v. Union of India and S. L. Kapoor v. Jagmohan. As already noted above, the expression " civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages.*

Anything which affects a citizen in his civil life comes under its wide umbrella. Accordingly, we reject the argument and hold that since an order under section 142(2A) does entail civil consequences, the rule audi alteram partem is required to be observed."

19. The Hon'ble Supreme Court in M/s. Andaman Timber Industries Vs. Commissioner of Central Excise (supra) had held that *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.* The said judgment is dated 02.09.2015.

20. The Pune Bench of Tribunal has also decided similar issue in Shri Bechan Surajbali Kumbhar Vs. ITO (supra) vide paras 9 to 11. The same are being referred, but for the sake of brevity, not being reproduced.

21. The Hon'ble Supreme Court in Sahara India (Firm) Vs. CIT & Anr. (supra) had while explaining the rules of natural justice laid down that the underlying principle of natural justice was to check arbitrary exercise of power by the State or its functionaries.

22. Now, coming to the facts of present case, the assessee had sought copy of statement and had also asked for cross-examination. Even if the copy of statement is provided to the assessee, but in case no opportunity to cross-examine the witnesses is provided, then the order passed by the Assessing Officer suffers from infirmity, in view of the dictate of the Hon'ble Supreme Court in M/s. Andaman Timber Industries Vs. Commissioner of Central Excise (supra). The learned Departmental Representative for the Revenue has relied

on the ratio laid down by the Hon'ble Supreme Court in ITO Vs. M. Pirai Choodi (supra), wherein it was held that an opportunity to cross-examine the witness should be allowed and matter was set aside. The said decision of the Hon'ble Supreme Court is dated 19.11.2010 and by a later decision dated 02.09.2015, the Hon'ble Supreme Court in M/s. Andaman Timber Industries Vs. Commissioner of Central Excise (supra) has held that in the absence of allowing cross-examination, there is no merit in the exercise of jurisdiction by the Adjudicating Authority.

23. The learned Departmental Representative for the Revenue has further placed reliance on the ratio laid down by the Hon'ble Bombay High Court in M/s. R.W. Promotions P. Ltd. Vs. ACIT (supra), which decision is of the jurisdictional High Court and vide para 11, it was held that there was breach of principles of natural justice in as much as the Assessing Officer had placed reliance upon the statements of certain persons to come to the conclusion that claim for expenditure made by the assessee was not genuine. The Hon'ble High Court held that the assessee was entitled to cross-examine them before any reliance could be placed upon them to the extent it was adverse to the assessee. It was further observed that the right to cross-examine was a part of the *audi alteram partem* principle and the same could be denied only on strong reasons to be recorded and communicated. Further, vide para 12, the Hon'ble High Court notes that the assessee had filed affidavit of representative which indicated that they had received the payments from the person for rendering of services to the assessee. These affidavits were also not taken into account. The Hon'ble High Court in view thereof i.e. no opportunity to cross-examine the witnesses and the evidence led by the assessee having not been considered, held that it was clearly a breach of principles of natural justice. The matter was

set aside to the file of Assessing Officer for fresh disposal after following the principles of natural justice. The learned Departmental Representative for the Revenue has strongly stated that in view of the ratio laid down by the jurisdictional High Court, there is no merit in the pleadings of learned Authorized Representative for the assessee. He also placed reliance on the decision of the Hon'ble High Court of Delhi in CIT Vs. PC Chemicals (supra), wherein the issue was whether the Tribunal was in error in no remanding the matter to the Assessing Officer for providing opportunity to the assessee to furnish relevant and material documents instead of deleting the addition. The matter was remitted back to the Assessing Officer, in view of the ratio laid down by the Hon'ble Supreme Court in ITO Vs. M. Pirai Choodi (supra). Further reliance was placed on the ratio laid down by the Hon'ble Supreme Court in M/s. Pebble Investment and Finance Ltd. Vs. ITO (supra), where Special Leave Petition has been dismissed. The judgment of the Hon'ble Bombay High Court in Income Tax Appeal No.988 of 2014, judgment dated 17.01.2017 clearly mentions the fact that the assessee in that case had not requested for cross-examination during first round of proceedings before the Assessing Officer and hence, the statement which was recorded was acted upon. The facts of the said case are at variance and hence, not applicable.

24. In the facts before the Hon'ble Supreme Court in M/s. Andaman Timber Industries Vs. Commissioner of Central Excise (supra), the plea of appellant was that it was not allowed to cross-examine the dealers whose statements were relied upon by the Adjudicating Authority in passing the orders. The said plea of appellant was rejected by the Tribunal. The Hon'ble Apex Court observed that not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the

basis for impugned order was a serious flaw which makes the order nullity in as much as it amounted to violation of principles of natural justice because of which, the assessee has adversely affected. The Hon'ble Apex Court also noted that the order of Commissioner was based on the statement given by the aforesaid two witnesses. The assessee therein had disputed the correctness of statement and wanted to cross-examine, which opportunity was not allowed to the assessee. The Hon'ble Supreme Court thus, held that if the testimony of two witnesses was disregarded, there was no material with the Department, on the basis of which it could justify its action, as the statement of aforesaid two witnesses was the only basis for issuing the show cause notice. Hence, the order passed by the Tribunal in that case was set aside and appeal of assessee was allowed.

25. The facts and issues arising before us are squarely covered by the facts and issues before the Hon'ble Supreme Court in M/s. Andaman Timber Industries Vs. Commissioner of Central Excise (supra) and applying the said principle / ratio to the facts of the present case, we hold that where the assessee had sought cross-examination of the witnesses at the earliest stage i.e. while objecting to the reasons recorded for reopening the assessment, which duly has been acknowledged by the Assessing Officer in his order disposing of objections raised by the assessee against reopening of assessment. But the Assessing Officer though asked the assessee to collect the statement but failed to allow cross-examination though he admitted that the same would be allowed in due course of time. On a later date, the Assessing Officer concludes that the letters sent under section 133(6) of the Act to the dealer were returned back. But the same cannot be reason for denying cross-examination. In the absence of allowing cross-examination of witnesses used

against the assessee, where the addition was made in the hands of assessee on the basis of aforesaid statements recorded by the Sales Tax Department, we hold that no addition on account of bogus purchases can be made in the hands of assessee. The assessee had also established factum of trail of goods. Accordingly, we delete the addition made on account of bogus purchases. The grounds of appeal raised by the assessee are thus, allowed.

26. The facts and issues in ITA Nos.2623/PUN/2016 to 2630/PUN/2016 are similar to the facts and issues in ITA No.2622/PUN/2016 and our decision in ITA No.2622/PUN/2016 shall apply *mutatis mutandis* to ITA Nos.2623/PUN/2016 to 2630/PUN/2016

ITA Nos.2510 to 2512/PUN/2016 - Trimurti Furnance Pvt. Ltd.

27. The issue arising in this bunch of appeals relating to the same assessee is also against the addition made on account of purchases made from the alleged hawala parties.

28. The learned Authorized Representative for the assessee pointed out that the copies of statement recorded were not provided to the assessee and even cross-examination of witnesses was not allowed. He also stated that the assessee was engaged in the manufacturing of furnace and had filed the evidence of trail of goods. However, the Assessing Officer had made the addition at 100% of purchase value of the said goods and the CIT(A) had restricted to 25%. The learned Authorized Representative for the assessee before us has urged that the issue of non-allowance of cross-examination and no addition being made is squarely covered by the decision of Pune Bench of Tribunal in Shri Bechan Surajbali Kumbhar Vs. ITO (supra).

29. The learned Departmental Representative for the Revenue on the other hand, pointed out that notice under section 133(6) of the Act was issued to the parties, who were not traceable and hence, no merit in the plea of assessee.

30. We have already adjudicated this issue in another bunch of appeals and the issue being same, our decision in ITA No.2622/PUN/2016 shall apply *mutatis mutandis* to ITA Nos.2510 to 2512/PUN/2016.

31. In the result, all the appeals of assessee are allowed.

Order pronounced on this 28th day of March, 2018.

Sd/-	**Sd/-**
(D.KARUNAKARA RAO)	**(SUSHMA CHOWLA)**
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य / JUDICIAL MEMBER**

पुणे / Pune; दिनांक Dated : 28th March, 2018.
GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to :

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-1, Nashik;
4. The Pr.CIT-1, Nashik;
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे, एक-सदस्य मामला / DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune