

**IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH KOLKATA
BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER**

**ITA No.2592/Kol/2019
Assessment Year: 2015-16**

Amit Agarwal, 49A, Tollygunge Circular Road, New Alipore, Kolkata-700053. (PAN: AGAPA0320R)	Vs.	Assistant Commissioner of Income Tax, Central Circle- 3(4), Kolkata.
(Appellant)		(Respondent)

**&
ITA No.2530/Kol/2019
Assessment Year: 2015-16**

Kishore Kumar Agarwal, 49A, Tollygunge Circular Road, New Alipore, Kolkata-700053. (PAN: ADKPA4764D)	Vs.	Assistant Commissioner of Income Tax, Central Circle- 3(4), Kolkata.
(Appellant)		(Respondent)

**&
ITA No.2522/Kol/2019
Assessment Year: 2015-16**

Kamal Agarwal, 49A, Tollygunge Circular Road, New Alipore, Kolkata-700053. (PAN: ADCPA8445Q)	Vs.	Assistant Commissioner of Income Tax, Central Circle- 3(4), Kolkata.
(Appellant)		(Respondent)

**&
ITA No.2539/Kol/2019
Assessment Year: 2015-16**

Mahesh Agarwal, 49A, Tollygunge Circular Road, New Alipore, Kolkata-700053. (PAN: ADBPA1190P)	Vs.	Assistant Commissioner of Income Tax, Central Circle- 3(4), Kolkata.
(Appellant)		(Respondent)

&
ITA No.2565/Kol/2019
Assessment Year: 2015-16

Shrey Agarwal, 49A, Tollygunge Circular Road, New Alipore, Kolkata-700053. (PAN: AHWPA2854P)	Vs.	Assistant Commissioner of Income Tax, Central Circle- 3(4), Kolkata.
(Appellant)		(Respondent)

&
ITA No.2623/Kol/2019
Assessment Year: 2015-16

Vijay Agarwal, 49A, Tollygunge Circular Road, New Alipore, Kolkata-700053. (PAN: AGBPA2215N)	Vs.	Assistant Commissioner of Income Tax, Central Circle- 3(4), Kolkata.
(Appellant)		(Respondent)

&
ITA No.2624/Kol/2019
Assessment Year: 2015-16

Dinesh Agarwal, 49A, Tollygunge Circular Road, New Alipore, Kolkata-700053. (PAN: ADKPA6950G)	Vs.	Assistant Commissioner of Income Tax, Central Circle- 3(4), Kolkata.
(Appellant)		(Respondent)

Present for:

Appellant by : Shri Miraj D. Shah & Shri S. M. Surana, Advocate
Respondent by : Shri P. P. Barnab, Addl. CIT, Sr. DR

Date of Hearing : 30.01.2024

Date of Pronouncement : 09.04.2024

ORDER**PER BENCH:**

All these appeals filed by the assessee are against the separate orders of Ld. CIT(A)-21, Kolkata dated 18.10.2019, 21.10.2019, 17.10.2019, 21.10.2019, 21.10.2019, 21.10.2019 & 18.10.2019 respectively passed against the separate assessment orders by ACIT, Central Circle-3(4), Kolkata all dated 27.12.2017 u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"). Since grounds are common and facts are identical, we dispose of all these appeals by this consolidated order for the sake of convenience.

2. All these seven appeals by the assessee involve common issue, therefore, we take up appeal in ITA No. 2624/Kol/2019 as the lead case to draw the facts. Observations and findings in this appeal will apply *mutatis mutandis* to all the other six appeals. Grounds of appeal are reproduced below:

"1. For that the Ld. CIT(A) erred in confirming the order of the AO making the addition on account of long term capital gain when the assessee submitted all the evidence to prove the genuineness and discharged the onus whereas the Revenue failed to controvert the same.

2. For that the Ld. CIT(A) erred in confirming the addition of Rs.87,36,730/- on mere surmise, conjectures and hearsay ignoring the fact that the entire transaction was in accordance with the provisions contained in the statute and no violation worth name in the same was pointed out.

3. For that the Ld. CIT(A) erred in confirming the order of the AO which was simply based on the alleged statement of one Debesh Upadhyaya recorded behind the back of assessee and cross examination of the said Debesh Upadhyaya was not allowed inspite of specific request particularly when such statement was recorded in the course of assessment proceedings.

4. For that the Ld. CIT(A) erred in confirming the addition when the when the sales were made on the system of the Stock Exchange, the purchaser's identity is never disclosed to the seller.

5. For that the Ld. CIT(A) perverse and on the facts and circumstances of the case the addition of Rs.87,36,730/- was not in accordance with law, Tax effect is stated in Ground No.2.

6. For that the Ld. CIT(A) erred in confirming the addition of Rs.4,36,837/- under sec 69C when no such payment was made nor there was any evidence of such payment having been made."

3. Brief facts of the case are that assessee filed his return of income on 28.08.2015 reporting total income at Rs.6,77,710/-. In the course of assessment, AO noted that assessee has claimed to have earned exempt income from transaction of long term capital assets by selling the shares. Details of which are tabulated as under:

DP & Share Broker	Date of Purchase	Scrip	Purchase Quantity	Final Quantity	Purchase value	Remarks
Ashika Stock Broking Ltd	2012-13	GCM Securities Ltd	12,000	1,20,000	2,40,000	Share buy OFFLINE & Share split 10:1 ratio dt. 28/10/14

DP & Share Broker	Date of Sale	Scrip	Sale Quantity	Sale Value	Gain
Ashika Stock Broking Ltd	2014-15	GCM Securities Ltd	1,20,000	89,76,729.86	87,36,729.86

3.1. In respect of the aforesaid transaction, Ld. AO observed that a search and seizure operation u/s. 132 of the Act and survey operations u/s. 133A of the Act were conducted by the Directorate of Income Tax (Inv.), Kolkata in certain cases. He noted that such operation resulted in unearthing of a large syndicate of entry operators, share brokers and money launderers etc. involved in providing bogus accommodation entries on account of exempt income, short term capital loss, business loss etc. AO doubted the transaction of sale of shares by the assessee based on the investigation carried out by the DDIT, Kolkata and alleged

that bogus entry of capital gain which is claimed as exempt u/s. 10(38) by the beneficiaries in order to facilitate the beneficiaries for converting their unaccounted money into good without paying income-tax.

3.2. Ld. AO narrated the *modus oprandi* of various entry providers for the indulgence of certain persons in providing the accommodation entry of bogus long term capital gain as well as other transaction. Assessee submitted before the AO that the transactions were executed in normal course of investment through stock exchange with a view to earn profits. Shares were sold through registered stock brokers and contract notes were obtained against the trade executed. All the relevant supporting documents in relation to transaction undertaken which substantiated the trades were furnished in the course of assessment. Assessee submitted that till the date of assessment, trading in these shares was not banned by the regulator SEBI and that these shares were available for trading.

3.3. In the course of assessment, assessee vide letter dated 22.09.2017 strongly asserted to provide any such report or any basis which has led to draw an adverse inference for the assessee. Specific request was made to provide opportunity of cross examination of the persons whose statements were relied upon while taking the adverse view against the assessee.

3.4. The said letter is placed at pages 125 and 126 of the paper book and its contentions are extracted below:

From

Date : 22.09.2017

Dinesh Kumar Agarwal
49A, Tollygunge Circular Road,
New Alipore
Kolkata - 700053

To,
The Dy. Commissioner of Income Tax,
Central Circle - 3 (4), Kolkata
Aayakar Bhawan Poorva,
110, Shantipally,
Kolkata - 700107,

Respected Sir,

Sub: Your Show cause Notice U/s-142(1) for Rejection of Long Term Capital gain claimed in the return of income for A.Y. 2015-16
Ref: Mr. Mr. Dinesh Kumar Agarwal, (PAN - ADKPA6950G) for A.Y. 2015-16.

Kindly refer to above.

This is with reference to your Show cause Notice dated 04th September, 2017 received by us on 08.09.2017 (Friday, Evening) for rejection of claim of Long Term Capital Gain in the Income Tax Return for the AY 2015-16 .Your honour has fixed the date of hearing with the reply to this show cause notice on 11-09-2017 and our subsequent discussion about this on our visit to your good self at your office on the same date.

Respected Sir, I had earned Long Term Capital Gain during my transactions in the shares in the normal course of business. I had purchased such shares during the F Y 2012-13 and sold during the F Y 2014-15. Further while going through your above show cause notice consisting of 50 pages being issued to me in this relation, I came to know that your honour has referred a few alleged investigation related documents etc of others. I request your honour to please be kind enough to provide some more documents in relation to the below mentioned queries to enable me to prepare the reply to your above said Show cause Notice :-

1. At Page No. 3 of the Show cause Notice; your good self has mentioned that Directorate of Investigation, Kolkata had investigated the transactions in 84 (eighty four) so called penny stock shares (companies); please provide the list of such eighty four companies and the final investigation report including of SEBI & office of the Income tax investigation in this regard and alleged list of eleven entities in cases of whom it was found correct by the SEBI as alleged . Further, please also provide us

any documentary evidence that the company GCM features in it and the current status of the said investigation, if any.

2. Please be kind to provide, if the directors/ promoters of GCM were confronted in course of any such investigation and the final outcome and / or any statements provided by them naming me. Further, Such as the copy of the statement provided in the show cause notice of one Sri Bikash Sureka dated 24.02.2015, Devesh Upadhyay dated 01-05-2015, dated 02-03-2015 dated 30-12-2014 and Ashok Kumar Jalan dated 15-06-2015, please provide in which case/cases the said statement were obtained and whether the said Sri Bikash Sureka, Sri Devesh Upadhyay and Sri Ashok Kumar Jalan are related with my relevant assessment. If there is any dialogue related, Your honour is requested with folded hands to please arrange for cross verifications in your presence.

Further, please also be kind enough to provide us the final and current status of the above said deponent of the above said statement.

3. Further, sir, as per my little knowledge & belief, "if few persons involved in any illegalities are found to be guilty, then on such basis and apprehensions, all other persons with the same trade / profession can not be treated guilty and shall not be punished without any fault of theirs." Please be kind enough to provide, if such belief has no footings and/or other wise under any Law of Land.

Your honour is humbly requested to kindly provide for these details, so that a proper reply can be submitted to your good office in this regard.

Thanking You in anticipation.

Yours Truly,



(DINESH KUMAR AGARWAL)

3.5. Assessee reiterated the submissions for providing copy of the statements and opportunity to cross examine the same vide letter dated 13.10.2017. Yet another submission was made by the assessee vide letter dated 21.12.2017 asking for the reports and other details along with opportunity for cross

examination. First two pages of this submission are also extracted below for ready reference:

Date: 21.12.2017

To
The Asstt. / Dy. Commissioner of Income Tax,
Central Circle - 3(4) / Kolkata
5th Floor, Aayakar Bhawan Poorva,
110, Shantipally,
Kolkata-700 107

Respected Sir,

Sub: Rejection of Long Term Capital Gain claimed in the return of Income for the Assessment Year 2015-16 – Show Cause

Ref: Letter No. DCIT/CEN. CIR – 3(4)/Kol./Showcause/2017-18/ dated 04.09.2017 and letter No DCIT,CC-3(4)/Kol/Dinesh Agarwal/2017-18/1143 dated 13th December, 2017, and our various letters & visits in the case of Mr. Dinesh Agarwal (PAN –ADKPA6950G) for A.Y. 2015-16.

Kindly refer to above.

This is with reference to the above referred show cause notices issued in the course of hearing at your good office in relation to inadmissibility of the exemption claimed on account of Long Term Capital Gains during the F.Y. 2014-15 and in continuation of our various letters and visits at your good office, we further wants to submit as below:-

1. That, I had furnished the Return of Income for the A.Y. 2015-16 vide Ack No.730698521280815 in which I had claimed Exemption on account of Long term Capital Gains u/s 10(38) of the Income Tax Act, 1961 earned by me during the F.Y. 2014-15 in the normal course of investment. During the course of the scrutiny assessment, your honor had issued a show cause notice dated 04-09-17, alleging:

- (i) That, Directorate of Investigation, Kolkata had investigated the transactions in 84 (eighty four) so called penny stock shares (companies); but even on our written demand, your good self have not provided any such report and list of such companies, till date.
- (ii) That, even the alleged list of eleven entities in cases of whom it was found correct by the SEBI as alleged, was also not provided. Further, no any documentary evidence was provided that the company GCM features if it and the current status of the said investigation was also not provided so that its connection with us can be established.

कार्यालय प्रधान आयकर आयुक्त, केन्द्रीय, कोलकाता-३
Office of the Pr. Commissioner of Income Tax, Central, Kolkata-3
प्राप्त / RECEIVED

22 DEC 2017

DY. No.
Initial:

RECEIVED

22 DEC 2017

- (iii) That, you are also tightlipped regarding our query as if the directors/ promoters of GCM were confronted in course of any such investigation and the final outcome and / or any statements provided by them naming me.
- (iv) That, Further no respose was provided to our query as- "Such as the copy of the statement provided in the show cause notice of one Sri BikashSureka dated 24.02.2015, DeveshUpadhyay dated 01-05-2015, dated 02-03-2015 dated 30-12-2014 and Ashok Kumar Jalan dated 15-06-2015, please provide in which case/cases the said statement were obtained and whether the said Sri BikashSureka, Sri DeveshUpadhyay and Sri Ashok Kumar Jalan are related with my relevant assessment. If there is any dialogue related, Yourhonour is requested with folded hands to please arrange for cross verifications in your presence".But on the contrary as nothing was found in these statements, but to prove something from nothing, you have further staged a fresh statement dated 22-09-17 of above named DeveshUpadhyay, whether if at all it was necessary? thenit could have been done in our presence with option of cross-verification, but it was denied?
- (v) That, Further, No answer to our question was provided as "sir, as per my little knowledge & belief, "if few persons involved in any illegalities are found to be guilty, then on such basis and apprehensions, all other persons with the same trade / profession cannot be treated guilty and shall not be punished without any fault of theirs." Please be kind enough to provide, if such belief has no footings and/or otherwise under any Law of Land."
2. That, your goodself had also issued another showcause dated 13th December,2017 as referred above, and instructed me to present these persons to your good office for cross examination alleging that I am engaged with them (contrary to the proven facts that the department has full control over them), failing which I will lose the opportunity to cross examine these persons in this regard.
3. That, further along with the above mentioned showcause notice dated 13th December,2017, which was handed over to our representative, you have also supplied a freshly obtained/recorded statement u/s 131 at your office of the same ShriDeveshUpadhyaya(although his demanded cross-verification by us was denied-reason best known to you) but refused to hand over the copy of such notice calling upon the said deponent and the copy of the documents alleged to have been annexed to this deposition were also not supplied till date.

3.6. In the same letter, assessee gave explanation with regard to the statement recorded u/s. 131 of Shri Debesh

Upadhayay whose statement was recorded in the course of assessment, behind the back of the assessee. Ld. AO asked the assessee to bring Shri Debesh Upadhyay and other persons for cross-examination vide his letter dated 13.12.2017. The Ld. AO thus, cast the onus on the assessee to bring the witnesses of the department i.e. Shri Debesh Upadhyay for the conduct of cross examination of the statement recorded by the AO in the course of assessment proceedings. Assessee strongly opposed such an approach adopted by the Ld. AO by making a submission that asking the assessee to produce the person whose cross examination is to be undertaken by the assessee is erroneous, improbable and depicts unrealistic opportunity given to the assessee.

3.7. In the assessment order, Ld. AO observed that cross examination of Shri Debesh Upadhyay and other persons are of corroborative value only for which opportunity had been granted to the assessee to bring the witness if he wants to examine. Negating the submissions made by the assessee, Ld. AO completed the assessment by making an addition of Rs.87,36,730/- by holding that bogus pre-arranged exemption on account of income from long term capital asset is disallowed and is treated as unexplained cash credit in the hands of the assessee u/s. 68 of the Act. He also made an addition of Rs.4,31,837/- towards unexplained expenditure u/s. 69C by adopting an ad hoc rate of 5% on the amount of Rs.87,36,730/- towards commission charged by the entry operator for providing and facilitating accommodation entry. Aggrieved, assessee went in appeal before the Ld. CIT(A) who

dismissed the same. Aggrieved, assessee is in appeal before the Tribunal.

4. Before us, Ld. Counsel for the assessee reiterated the facts of the case and demonstrated by referring to various requests made before the authorities below of providing opportunity to cross examine the third parties on the basis of whose statement adverse view had been adopted. According to the Ld. Counsel, Ld. AO has relied on the statement given by one Shri Debesh Upadhyay and his associate companies providing capital gain entry and exist to the assessee and his family members. He further submitted that in the assessment order, there is general statement reproduced from the report of DIT (Inv.) . Ld. AO did not examine the veracity of any of the evidence filed before him to prima facie come to the conclusion that the same was make believe. Further, he submitted that AO had not issued any summon to examine the stock exchange or the share broker of the assessee to find out the genuinness of the transaction or to prove that the general statement in the report by the Investigation Wing fit in the case of the assessee.

4.1. In reference to the statement of Shri Debesh Upadhyay recorded by the AO on 22.09.2017 in the course of assessment proceedings, ld. Counsel submitted that assessee was never informed of issue of notice u/s. 131 to Shri Debesh Upadhyay nor assessee was asked to be present in the course of recording of statement for cross examination.

He further asserted that AO had asked the assessee to bring Shri Debesh Upadhyay on 13.12. 2017 for cross examination when it was for the AO to bring him and make him available to the assessee for cross examination. Thus, no effective opportunity of cross examination was made available to the assessee. He also referred to the specific request made for providing the alleged direct or circumstantial evidence referred by the AO for dislodging the claim made by the assessee which were never provided.

5. Ld. Counsel placed strong reliance on the decision of Hon'ble Supreme Court in the case of Andaman Timber Industries Ltd. Vs. Commissioner of Central Excise [2015] 281 CTR 241 (SC) wherein it is held as under:

"5. We have heard Mr. Kavim Gulati, learned senior counsel appearing for the assessee, and Mr. K. Radhakrishnan, learned senior counsel who appeared for the Revenue.

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 is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guesswork as to

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 presuppose 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 Shaw-Cause Notice.

9. We, thus, set aside the impugned order as passed by the Tribunal and allow this appeal. No costs."

6. According to Ld. Counsel, the theory of preponderance of probability is applied to weigh the evidence of either side and draw a conclusion in favour of a party which has more favourable factor in his side. The conclusions have to be drawn on the basis of certain admitted facts and materials and not on the basis of presumption of fact that might go against the assessee. Once nothing has been proved against the assessee with the aid of any direct material, nothing can be implicated against the assessee on the presumption or suspicion, howsoever, strong it might appear to be true.

6.1. Ld. Counsel without going into the merits of the case, pleaded to remit the matter back to the file of Ld. AO. In this respect, Ld. Counsel stated that material relied upon, on the basis of which Ld. AO has passed the impugned assessment order are collected behind the back of the assessee and were not provided during the course of assessment proceedings. The same is not in compliance with the provisions of section 142(3) of the Act which is a statutory mandatory procedural requirement.

7. Per contra, Ld. DR placed reliance on the orders of the authorities below. He also placed reliance on the decision of Hon'ble jurisdictional High Court of Calcutta in the case of PCIT Vs. Swati Bajaj (2020) 139 taxmann.com 352 (Cal) which deals with the issues in the present set of appeals.

8. We have heard the rival contentions and perused the material available on record. It is evident from the records some of which have been extracted above in this order whereby the assessee has made request at all stages of the proceedings to provide opportunity of cross examine of all the persons whose statements have been used against the assessee which were recorded in his absentia. On the plea taken by the assessee to remit the matter back to the Ld. AO in absence of the material made available to the assessee which ought to have been provided by complying with the specific provisions of section 142(3) of the Act, we note that the required compliance with section 142(3) has not been met.

9. Before considering the plea as stated above, we refer to the relevant provisions of sec. 142 which are reproduced as under:

Sec. 142 (1) For the purpose of making an assessment under this Act, the Assessing Officer may serve on any person who has made a return under section 139 or in whose case the time allowed under sub-section (1) of that section for furnishing the return has expired a notice requiring him, on a date to be therein specified,-

142(2) For the purpose of obtaining full information in respect of the income or loss of any person, the Assessing Officer may make such inquiry as he considers necessary.

142(3) The assessee shall, except where the assessment is made under section 144, be given an opportunity of being heard in respect of any material gathered on the basis of any inquiry under sub-section (2) or any audit under sub-section (2A) and proposed to be utilised for the purpose of the assessment.

[emphasis supplied by us by bold and underline]

10. From the above and in the present context, we note that section 142(2) empowers the AO to make such enquiry as he considers necessary. The discretion is on the AO under the said section. However, having conducted such enquiry as provided in Sec. 142(2), then it is incumbent upon the AO u/s. 142(3) to give an opportunity of being heard in respect of any material gathered on the basis of any enquiry done u/s. 142(2) and proposed to be utilised for the purpose of the assessment. It is important to note that Sec. 142(3) uses the word “shall” which makes it mandatory requirement on the part of the AO to comply with it.

10.1. We also take note of the provisions of Sec. 143(3) wherein the assessment is to be completed by the AO which also provides in sub-section (3) that AO shall make an

assessment by an order in writing, inter alia, “*after taking into account all relevant material which he has gathered.*” Thus, by keeping the provisions of Sec. 142(3) read with section 142(2) and Sec. 143(3) in juxtaposition, we understand that it is a mandatory statutory requirement on the part of the AO to comply with the provisions of Sec. 142(3) in completing the assessment proceeding, failure of which may vitiate the entire assessment itself.

11. In the present case before us, we note that assessee has made specific request multiple times before the authorities below, which has not been entertained effectively for the assessee. We note that compliance of provisions of sec. 142(3) is a mandatory statutory procedural requirement in completing the assessment proceeding, failure of which may vitiate the entire assessment itself since this sub-section uses the word “shall”. The only exception to this requirement is where an assessment is made u/s 144 which is not so in the present appeal before us.

12. We observe that in terms of the above mandatory statutory procedural requirement in completing the assessment proceeding, material gathered by the Ld. AO by conducting enquiry u/s. 142(2) has not been supplied to the assessee for which specific request has been made by the assessee before the authorities below. It is a fact on record that ld. AO has recorded the statement of Shri Debesh Upadhyay on 22.09.2017 in the course of impugned assessment proceeding without the knowledge of the

assessee and collected the details and material utilised for the purpose of the assessment. In the present case before us, thus, the requirement mandated by section 142(3) has not been complied with in completing the impugned assessment.

13. We refer to the decision of Hon'ble jurisdictional High Court of Calcutta in the case of PCIT Vs. Swati Bajaj (2020) 139 taxmann.com 352 (Cal) wherein the plea of the assessee on the supply of material has been considered by the Hon'ble High Court which is essentially based on the principle of natural justice contained in *audialterem partem* rule. Specific reference is made to para 57 of the said order wherein while addressing the prejudice caused to the assessee in breach of the *audialterem partem* rule, it is stated that "*prejudice must be caused to the litigant except in the case of a mandatory provision of law which is conceived not only in individual interest but also in public interest.*" (emphasis supplied by us by underline). Hon'ble Court took note of the exception to *audialterem partem* rule by taking into account the mandatory provision of law. In the same para, Hon'ble Court referred to the decision in State of Uttar Pradesh Vs. Sudhir Kr. Singh (2020) SCC Online SC 847, wherein it was held that the "prejudice exception" must be more than a mere apprehension or even a reasonable suspicion of a litigant, which should exist as a "matter of fact", or to be cast upon a definite inference and likelihood of prejudice flowing from the non-observance of natural justice.

13.1. Thus, in the context of the present case, our view as stated herein is confined to the non-supply of material gathered by the ld. AO from the enquiries conducted by him in the course of assessment and utilised for the purpose of assessment without complying with the mandatory statutory procedural requirement stated in section 142(3). In the present case before us, from the perusal of the impugned assessment order, as a matter of fact, it is noted that Ld. AO has not provided the effective opportunity of cross examination and other material relied upon for taking the adverse view.

13.2. Considering the above discussion in respect of provisions contained in sec. 142(3) read with sec. 142(2), we are inclined to consider the plea taken by the ld. Counsel to remit the matter back to the file of Ld. AO and direct the Ld. AO to make available the material gathered by him in the course of enquiry conducted in terms of sec. 142(2) and provide a reasonable opportunity of being heard to the assessee as enunciated u/s. 142(3) of the Act along with effective opportunity of cross examination as requested several times by the assessee. Thereafter, Ld. AO may complete the assessment in accordance with the provisions of law. Accordingly, ground no. 3 taken by the assessee is allowed for statistical purposes.

14. Since the matter has been remitted back to the file of Ld. AO in terms of above observations and finding, all other grounds taken by the assessee are rendered academic in

nature and are, therefore, not adjudicated upon. Accordingly, appeal of the assessee is allowed for statistical purposes. The above observations and finding apply mutatis mutandis all the other six appeals in this consolidated order.

15. In the result, all the seven appeals of the assessee are allowed for statistical purposes.

Order is pronounced in the open court on 09th April, 2024.

Sd/-
(Sanjay Garg)
Judicial Member

Sd/-
(Girish Agrawal)
Accountant Member

Dated 09th April, 2024

JD, Sr. P.S.

Copy to:

1. The Appellant:
 2. The Respondent.
 3. CIT(A)-21, Kolkata
 4. CIT, Kolkata.
 5. DR, ITAT, Kolkata Bench, Kolkata
- //True Copy//

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata