

CROSS EXAMINATION IN INCOME TAX PROCEEDINGS

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Introduction:

The subject of cross-examination is one of vital importance in the conduct of law cases. According to Section 137 of the Indian Evidence Act, the examination of a witness by the adverse party shall be called his cross-examination. Section 138 of Indian Evidence Act states that the witness must first be examined in-chief, then the opposite party cross-examines him and if the party calling him so desires, may re-examine. Section 146 of the said act enables the cross-examiner to put certain questions in addition to the questions based on the relevant facts of the case.

Right to cross-examine also flows from the principles of Natural Justice that evidence may not be read against a party until the same has not been subjected to cross-examination or at least an opportunity has not been given for cross examination. Thus the provisions of section 138 of Indian Evidence Act is not only a technical rule but it is a rule of essential justice. The testimony of a witness is not a legal evidence unless it is subjected to cross-examination. The right of cross-examination is a statutory right which vests in a party to the proceedings. Cross examination is the *sine qua non* of due process of taking evidence. In a plethora of judicial pronouncements, the Supreme Court has held that the tax authority is entrusted with the power to make assessment of tax liability of a person discharging quasi- judicial functions, and such officers are bound to observe the principle of natural justice in reaching their conclusion as regards the tax liability.

Limb to Principles of Natural Justice:

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. These rules are intended to prevent such authority from doing injustice. Cross examination of witness is one of the important aspect of principles of natural justice.

Income Tax & Cross Examination:

In the Income Tax proceedings, the right of cross-examination should be given to the assessee to uphold the principle of natural justice. The power of cross-examining the witness is given from the range of Assessing Officer to the Principal Commissioner of Income Tax. The Commissioner of Income Tax (Appeals) is also authorised to examine the witness. If the opportunity of cross-examination is not given it is treated as violation of natural justice. The right to fair hearing involves the right of the affected

party to cross-examine the deponents. The Tribunal had time and again held that denial of cross examination of witnesses, whose statements were relied upon, amounted to violation of principles of Natural Justice.

Salient Features

The salient features of cross examination are elaborated briefly below:-

1. Questions should be short and brief
2. Language should be plain and simple
3. Only the important and leading questions should be asked
4. Cross-examiner should not quarrel with the witness
5. Cross-examiner should always apply presence of mind
6. Cross-examiner should carefully listen to the reply given by the witness
7. Questions asked should not be vague, ambiguous or confusing

Is cross examination mandatory?

The Madras High Court while relying upon Section 56 of the Indian Evidence Act, 1872, which prescribes facts judicially noticeable need not be proved and Section 157 which provides the necessary and requisite facts of which Courts must take judicial notice, came to the conclusion that the Tribunal had acted arbitrarily. This authority is quoted for the proposition that in view of Sections 56 and 57 of the Indian Evidence Act, facts which are judicially noticeable need not be proved and there is no need for any examination or cross-examination on proved facts. It is further based on the facts that once an admission is made by the assessee, that certain amount be added to his income and that the same is concealed income, then by virtue of Section 58 of the Indian Evidence Act such admitted facts need not be proved.

It is only where facts are disputed and reliance is made on certain documents or statements of third party which are controverted, then there is a need to submit the document and cross-examine the parties.

Denial of Cross Examination

Requests for cross-examination may be denied under the following situations –

- Warranting cross examination of the informer
- When there are enough documentary evidences and the copies of all of which are furnished
- When the witnesses to be made available for cross examination are abroad and the expenditure involved will not be commensurate with the seizure, revenue involved etc. and

- Enough care to be taken in allowing cross examination of experts by another expert which should not unnecessarily protract or prolong the proceedings. The reasons for denial should be clearly detailed in the order passed.

However, refusal of permission to cross-examine witnesses of the party himself would not amount to denial of natural justice (*Ludhiana Food Products 1990 (47) E.L.T. 294*).

Important points to be taken care of relating to cross examination

Cross examination is governed by rules of evidence. Income Tax Act being the law of taxation, a statute, shall also be governed by Rules of Evidence, though not by the strictest application of the Indian Evidence Act. Before cross examination of witness is made, the assessee should be aware of the following acts of the income tax authorities-

- Notice under section 143(2), 142(1), 131 and various other notices are served on the assessee or witnesses to submit evidences. The income tax authorities cannot pass any order without giving an opportunity to the assessee to submit documents, evidences etc. The right of cross examination arises only after the income tax authorities issues notices and preliminary documents are collected by virtue of documents received by such authorities.
- Law can shift the burden of proof on the assessee. A show cause notice is given to the assessee before addition is made to prove that observation of the assessing officer is not correct. The assessee on the basis of show cause notice given can ask for cross examination of witness.
- Evidences gathered behind the back of the assessee cannot be used unless an opportunity of rebutting the same is given and the assessee is entitled to ask for such material before cross examination.
- The income tax authorities can gather materials against the assessee at his back but he cannot use the same without giving an opportunity to the assessee to rebut the same. Any statement which is recorded by the Department, an assessee is entitled to get the copy of the statement so recorded. Using evidence behind the back of the assessee is against the principles of natural justice. Also where copies of reports or documents or statement of third party is relied upon for making an addition, it is the duty of the Department to not only allow the assessee to examine such documents but also to cross-examine such party. The assessee has right to ask for statement of the witness before cross examining him.
- 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 evidences, both oral and documentary, so that he can rebut the same. This

necessarily also postulates that he should cross examine the witness on whose statement AO relies while making addition against him.

- Sometimes it appears that the assessee has made a statement based on ignorance. However, such a statement turns out to be false at a subsequent stage. It may be noted that when the statement was recorded originally, it was made to the best of his knowledge and on ignorance of facts and in such circumstances, since there is no *mens rea*, penalty cannot be levied. This proposition has been laid down in the case **Union of India & Others v. Ganesh Das Bhojraj (2000) 244 ITR 691 (SC)**.

Judicial Pronouncements relating to Cross Examination

From the following cited judicial pronouncements it will be clear that in absence of opportunity of cross examination of the witness to the assessee by the Assessing Officer, the assessment order passed by the A.O. may be set aside or may be treated as null and void:-

- **KISHINCHAND CHELLARAM V . COMMISSIONER OF INCOME TAX, BOMBAY CITY-II (1980) 125 ITR 0713**

In this case the Hon'ble Supreme Court has held as under –

“The burden was on the revenue to show that the amount of Rs.1,07,350 said to have been remitted from Madras to Bombay belonged to the assessee and it was not enough for the revenue to show that the amount was remitted by Tilokchand, an employee of the assessee, to Nathirmal, another employee of the assessee. It is quite possible that Tilokchand had resources of his own from which he could remit the amount of Rs.1,07,350 to Nathirmal. It was for the revenue to rule out this possibility by bringing proper evidence on record, for the burden of showing that the amount was remitted by the assessee was on the revenue. Unfortunately, for the revenue, neither Tilokchand nor Nathirmal was in the service of the assessee at the time when the assessment was reopened and the assessee could not, therefore, be expected to call them in evidence for the purpose of helping the revenue to discharge the burden which lay upon it.

We must, therefore, hold that there was no material evidence at all before the Tribunal in the basis of which the Tribunal could come to the finding that the amount of Rs.1,07,350 was remitted by the assessee from Madras and that it represented the concealed income of the assessee. We accordingly allow the appeal, set aside the judgment of the High Court and answer the question referred by the Tribunal in favour of the assessee and against the revenue. The revenue will pay the costs of the assessee throughout.”

- **UNION OF INDIA & OTHERS V. GANESH DAS BHOJRAJ (SUPRA)**

In this case, the assessee imported consignment of pulses and claimed clearance of goods free of customs duty on the ground of notification which was issued earlier. It appears that on the date of import, a new notification came whereby basic duty at 25% was imposed. The assessee pleaded that he was not aware of the notification and that the notification was not made available to the public on that day. The Supreme Court in this case held that if the notification is published on a particular date, it is presumed to have been known to the Public. However, it was pointed out that non-availability of Gazette is a defence plea of ignorance where *mens rea* is an ingredient of an offence which calls for leniency in punishment. This case lays down the proposition that if an assessee has acted in ignorance based on set of circumstances and facts at a particular point of time, when the plea was recorded, in absence of *mens rea* he cannot be necessarily held guilty or be prosecuted.

- **FIRE ARCOR INFRASTRUCTURE PVT. LTD. VS. COMMISSION OF INCOME TAX, CENTRAL CIRCLE - 2(1), NAGPUR, BOMBAY HIGH COURT, 23.07.2019, ITA NO. 30 OF 2018**

In this case the assessee made grievance about denial of an opportunity to cross-examine the buyers. Denial of such an opportunity is a serious flaw rendering the order as a nullity. The Hon'ble Supreme Court in the case of Andaman Timber Industries V/s Commissioner of C. Ex., Kolkata-II, had set-aside the impugned orders. Failure to give an opinion about this grievance also amounts to refusal of an opportunity to cross-examine which is improper. Hence, all the orders need to be set-aside.

- **SMT. SUNITA DHADDA VS. DY. CIT (ITA NO.751/JP/2011)**

In this case, the Hon'ble ITAT Jaipur while deleting the addition made has held that the principles of natural justice demand that the assessee ought to have been provided evidence used against the assessee and cross examination of persons whose statement was relied on by the AO. The appeal filed by the Revenue against the same was dismissed by the Hon'ble High Court of Rajasthan in **CIT vs. Smt. Sunita Dhadha (D.B. Income Tax Appeal No. 197/2012) (31.07.2017)** and thereafter the Hon'ble Supreme Court also dismissed the special leave petition filed by the Department (**CIT vs. Sunita Dhadha (Diary No (s). 9432/2018) (28.03.2018)**).

- **M/S R. W. PROMOTIONS PVT. LTD., MUMBAI VS. ACIT (ITA NO. 1489 OF 2013) (13/07/2015)**

The Hon'ble High Court of Bombay held that the appellant was entitled to cross examine them before any reliance could be placed upon them to the extent it is adverse to the appellant. This right to cross examine is a part of the *audi altrem partem* principle and the same can be denied only on strong reason to be

recorded and communicated. The impugned order holding that it would have directed cross examination if it felt it was necessary, is hardly a reason in support of coming to the conclusion that no cross examination was called for in the present facts. This reason itself makes the impugned order vulnerable.

- **STATE OF KERALA V. K.T. SHADULI GROCERY DEALER ETC. (1977) 2 SCC 777**

Held: The question is what is the content of this provision which imposes an obligation on the Sales Tax Officer to give and confers a corresponding right on the assessee to be afforded, a reasonable opportunity "to prove the correctness or completeness of such return". Now, obviously "to prove" means to establish the correctness or completeness of the return by any mode permissible under law. The usual mode recognized by law for proving a fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correctness or completeness of the return would, therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to cross-examine witnesses examined by the Sales Tax Officer.

- **ANDAMAN TIMBER INDUSTRIES (2015) 281 CTR 214 (SC)**

The Hon'ble Apex Court has held in this case that denial to the assessee of the right to cross-examine the witness whose statement was made the basis of the impugned order is a serious flaw which renders the order a nullity in as much as it amounted to violation of the principles of natural justice because of which the assessee was adversely affected.

- **M.P. V. CHINTAMANSADASHIVAVAISHAMPAYAN AIR 1961 SC 1623**

A Constitution Bench of this Court in State of, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice.

- **LAKSHMAN EXPORTS LTD. V. COLLECTOR OF CENTRAL EXCISE (2005) 10 SCC 634**

In this case, while dealing with a case under the Central Excise Act, 1944, considered a similar issue i.e. permission with respect to the cross-examination of a witness. In the said case, the Assessee had specifically asked to be allowed to cross-examine the representatives of the firms concern, to establish that the goods in question had been accounted for in their books of accounts, and that excise duty had been paid. The Court held that such a request could not be turned

down, as the denial of the right to cross-examine, would amount to a denial of the right to be heard i.e. *audi alteram partem*.

- **RAJIV ARORA V. UNION OF INDIA AND ORS. AIR 2009SC 1100**

It was held that effective cross-examination could have been done as regards the correctness or otherwise of the report, if the contents of them were proved. The principles analogous to the provisions of the Indian Evidence Act as also the principles of natural justice demand that the maker of the report should be examined, save and except in cases where the facts are admitted or the witnesses are not available for cross-examination or similar situation. The High Court in its impugned judgment proceeded to consider the issue on a technical plea, namely, no prejudice has been caused to the Appellant by such non-examination. If the basic principles of law have not been complied with or there has been a gross violation of the principles of natural justice, the High Court should have exercised its jurisdiction of judicial review.

- **LAXMANBHAI S. PATEL V. CIT 327 ITR 291 (2010)**

The Hon'ble High Court of Gujarat has held that the legal effect of the statement recorded behind the back of the assessee and without furnishing the copy thereof to the assessee or without giving an opportunity of cross-examination, if the addition is made, the same is required to be deleted on the ground of violation of the principles of natural justice.

- **KALRA GLASS FACTORY VS SALES TAX TRIBUNAL - SUPREME COURT 167 ITR 488 OF 1987**

It has been held that the elementary principle of natural justice as applied to Income Tax proceedings, is that the assessee should have the knowledge of the material that is going to be based against him so that he may be able to meet it where for instance the statement of a person is recorded behind the back of the assessee, but not tested by cross examination, such a statement cannot be allowed to be used to the prejudice of the assessee.

- **ALOK AGRAWAL V. DCIT, 67 TTJ 109**

In this case the assessee was not allowed to cross-examine the witness and, therefore, it was held that statement could not be made use of for drawing the adverse inference against the assessee.

- **DHAKESWARI COTTON MILLS LTD. vs. C.I.T., 26 ITR 775 (SC)**

The Hon'ble Supreme Court in this case has emphasized the issue of applicability of "*The Principle of Natural Justice*". Application was filed by the assessee under the

provisions of Article-136 of the Constitution, contended that, the assessment order which was passed u/s. 23 (3) of the Income Tax Act was made in violation of the principles of Natural Justice. It observed:

"It is.....surprising that the Tribunal took from the representative of the department statement of gross profit rates of other cotton mills without showing the statement to the assessee and without giving him an opportunity to show that that statement had no relevancy whatsoever to the case of the mill in question."

Conclusion

Cross examination is a very very important weapon in the hands of the assessee. It is seen that assesses or their authorised representatives are very reluctant in requesting the income tax authorities for cross examination of the witness. Further, it is also seen that the income tax authorities normally do not allow opportunity for cross examination. The authorised representatives dealing in taxation matters are also not expert in cross examining the witness. The Assessing Officer, the C.I.T. (A) and Pr. C.I.T. also do not follow principle of natural justice and judicial precedence by overruling the decisions of Apex Court, High Courts and Tribunals, in the matter related to cross examination. In future, when the assessment proceedings will be made jurisdiction less or face less, how the opportunity of cross examination will be provided? This may be a matter of concern for the Income Tax Authorities.