

Gtc Industries Ltd. Vs. Assistant Commissioner of Income-tax.

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Court : Mumbai

Decided On : Feb-28-1995

Reported in : (1998)60TTJ(Mumbai)308

Appeal No. : ITA No. 1055/Bom/1994; Asst. yr. 1985-86

Appellant : Gtc Industries Ltd.

Respondent : Assistant Commissioner of Income-tax.

Judgement :

ORDER

M. K. CHATURVEDI, J.M. :

This appeal by the assessee is directed against the order of the CIT(A), Central IV, Bombay, and pertains to the asst. yr. 1985-86.

2. The assessment was completed under s. 143(3) r/w s. 145(2) of the IT Act, 1961. The accounting year of the assessee ended on 30th June, 1984. The assessee is a company in which public are substantially interested. The assessee-company is following the mercantile system of accounting. It filed its return of income for the relevant year of assessment on 28th June, 1985, reflecting therein income of Rs. 3,84,14,220. The AO made an addition of Rs. 26,20,51,000 in the total income of the assessee under the head 'premium on sale of cigarettes'. The AO deducted the amount of commission and trading income alleged to be reintroduced by means of havala entries, and advertisement expenses alleged to

be used out of secret bank accounts. The assessee being aggrieved of the assessment order, preferred appeal there against before the CIT(A). The claim of the assessee was rejected by the CIT(A). The assessee preferred appeal against that order before the Tribunal. The validity of the order was assailed, inter alia, on the ground of natural justice. The assessee disputed the additions on merits also.

3. At the outset, both the parties requested that first the decisions be rendered on the preliminary issue concerning the observance of the principles of natural justice while framing the order of assessment. On merits, it was requested that the case may be heard after the deliverance of decision on the preliminary issue. The appeal was, therefore, heard apropos the grounds concerning the canons of natural justice.

4. Briefly the facts -

The assessee is engaged in the business of manufacturing of cigarettes. The factories are situated at Bombay and Baroda. Tobacco processing units are at Guntur and Hyderabad. It also gets the cigarettes manufactured through a number of jobs working units. Its popular brands are sold under the trade names, Panama, Blue Bird, A-1, Golden Lion, Style, Taj Mahal, etc.

The selling arrangement of the cigarettes is through the wholesale buyers (hereinafter referred to as 'WB'). The sale network includes wholesale dealers, semi-wholesale dealers and voluntary retailers. The company delivers the goods to the WBs.

In the month of September, 1982, the office of the assessee-company along with the office of several WBs were searched by the Anti-Evasion Wing of the Directorate of Revenue Intelligence (Central Excise). Another search took place by the said anti-evasion wing in January, 1986. The material gathered by the DRI in the course of search was passed on to the IT Department.

5. Taking the clue from the excise authorities the AO investigated the matter. The outcome of the investigation according to the assessee is based on the following four factors :

- (i) The assessee collected clandestine and unaccounted premium on the lower price brands of the cigarettes;
- (ii) the premium so collected was deposited in secret bank accounts;
- (iii) the assessee-company spent large amount for advertising its products. The amount so spent was alleged to be used out of deposits in the secret bank account;
- (iv) such amounts withdrawn from these bank accounts alleged to be reintroduced in the assessee's account by means of havalas and reflected as commission and trading income which according to the Revenue represents bogus entries.

6. The assessee is a leading manufacturer of cigarettes. To ascertain the profits from the tobacco business, AO analysed the assessee's financial results by scrutinising the P&L; a/c. The following facts emerged :

Rs.

Rs.

Profit before tax

3,75,54,059

Less : Other income included in the above :

Interest from others

15,68,79,801

Commission and other charges

6,01,99,307

Profit in trading of goods other than cigarettes

2,17,96,516

Supervision and technical know-how fees

46,36,348

24,35,11,972

Loss from sale of cigarettes

(Not excluding various other miscellaneous incomes)

(-)

20,59,57,913

7. The abovesaid analysis thus germinated the seed of suspicion in the mind of the AO. He, therefore, proceeded further to find out the truth. The results were again viewed from a different angle. It came out that the invoice price of the cigarettes as reflected by the assessee in its record was less than the manufacturing cost. The element of excise duty was included while working the manufacturing cost. The working as done by the AO is reproduced here as under :

Rs.

Rs.

Sale price of cigarettes (as per annual statement of accounts)

1,52,80,40,371

Materials cost

22,49,29,508

Manufacturing expenses

11,79,70,764

Excise duty

1,26,12,53,572

1,60,41,53,844

Difference

(-)

7,61,13,473

8. The result of the enquiry was considered in the light of the materials gathered by the excise authorities also. The impact of excise duty on the trade was studied. Upto 28th February, 1983, the basis of charge of excise duty on cigarettes was ad valorem. In 1982, the rate of excise duty was approximately 33 per cent of the assessable value. In 1983 Budget, the duty on cigarettes was converted to specific rates in a graded scale according to slabs, which were relatable to the maximum price required to be printed on the retail packs in compliance with Weights and Measures (Packaged Commodities) Rules, 1977. Progression in duty burden was sought to be maintained by adopting telescopic rate structure. For every entries of five paise in the maximum retail price of 10 cigarettes printed on the pack, there was a corresponding increase in the effective duty rate. The AO reflected the relationship between printed prices and duty at selected points under this tax structure in the following chart :

Relationship between printed price and duty in relation to the tax structure prior to September, 1985 :

Printed maximum retail price

Excise duty (Rs. Per 1,000)

Realisation by the manufacturer and traders (Rs./1,000)

Percentage of Col. (2) divided by Col. (3)

Percentage of Col. (2) divided by Col.(1)

35.00

15.00

233

70

75

55.75

19.25

290

74

100

74.50

25.50

292

74

150

112.00

38.00

295

75

200

149.50

50.50

296

75

260

194.50

65.50

297

75

310

232.00

78.00

297

75

360

270.00

90.00

300

75

460

346.00

114.00

304

75

510

384.00

126.00

305

75

610

464.00

146.00

318

76

810

624.00

186.00

336

77

910

701.00

206.00

342

77

With effect from 2nd September, 1985, only five slabs were retained as follows :

Maximum retail price per 1,000 cigarette

Excise duty

Upto Rs. 60

Rs. 42

Rs. 61 to 170

Rs. 125

Rs. 171 to Rs. 300

Rs. 225

Rs. 501 to Rs. 550

Rs. 400

Rs. 551 and above

Rs. 600

With effect from 1st March, 1987, the basis of charge of excise duty has been shifted to the length of the cigarettes, whether filter or non-filter categories.

9. The AO studied the system in the light of the material available. He did investigation of his own. It was observed by him that in reality the law was defiled. The power to enforce the Act vested with the State Government. In the absence of

adequate machinery, malpractices prevalent in trading could not be controlled. To support this viewpoint, reliance was placed on the following observation of the Technical Study Group of Central Excise Tariff, 1985 :

'The motivation was provided by the heavy incidence of duty which worked out to between 70 per cent and 77 per cent of the retail price and from 230 per cent to 340 per cent on the assessable aforesaid provisions could invite penal action, but only against the petty retailer who in situations where the sale price to him itself was at a price equal to or higher than the printed price leaving him no or inadequate margin, would be virtually helpless, and the wholesaler or the manufacturer who may have been privy to, or an abettor in, such infringement and indirectly its ultimate beneficiary would not get touched under this law.'

10. It was alleged that the assessee-company devised 'clever contrivances' to cause generation of premium on the sale of cigarettes. The word 'clever contrivances' was borrowed from the report of Technical Study Group of Central Excise Tariff, 1985. Such contrivances were alleged to be used to cause additional generation of premium by exploiting the market situation. The WB/dealers were found to be privy to such transaction. The contrivance was catalysed. It was recognized under the nomenclature 'Twin Branding System'. The modus operandi of this system was described as under :

(i) To begin with, an existing brand having an established market price was replaced on the sly by what was, on paper, a new brand having a lesser price but having the same generic name as the former. The two brands, however, had identical packet designs and colour scheme of the packet. Only a suffix like special, premium, regular, etc., was added to the original brand name. No announcement was made regarding the reduction in prices. The brands continued to be advertised by their generic names. The smoking population was left totally unaware about the launch of the so-called new brand or the reduction on its price. They being habituated to paying a particular price for their brand continued to pay the same. Also they identified the brands by the common names by which they were being sold in the streets like Panama for Panama Plain cigarettes comprising of Panama Virginia Special and Panama Special Virginia categories; Panama

Filter for Panama Filter, Panama Filter Special and Panama Filter Premium categories, Panama Filter Kings for Panama Filter Kings, Panama Filter Kings Special and Panama Filter Kings Premium categories, Blue Bird for Blue Bird, Blue Bird Regular, Blue Bird Standard; Taj Mahal for Taj Mahal, Taj Mahal Special and Taj Mahal Regular; A-1 Filter for A-1 Filter, A-1 Filters Premium and A-1 Filter Standard, etc. This phenomenon of twin branding was started during the period 1981-82 when e.g., Panama Virginia having ex-factory price of Rs. 85.11 per m. and retail price of Re. 1 per packet of 10 cigarettes was replaced by Panama Virginia Special having ex-factory price of 60.87 and a retail price of 0.75 per packet of 10 cigarettes and Panama Filter Kings having an ex-factory price of Rs. 173.46 per m. and retail price of Rs. 1.85 per packet of 10 cigarettes was replaced first by Panama Filter Kings Special having ex-factory price of Rs. 121.43 per m. and retail price of Rs. 1.45 per packet of 10 cigarettes and then by Panama Filter Kings Premium having an ex-factory price of Rs. 94.16 per m. and a retail price of Rs. 1.10 per packet of 10 cigarettes.

11. It was observed by the AO that the twin brands were introduced with some purpose. Packets were of identical designs and colour scheme.

The change in the brand nomenclature was subtle.

It was not easily detectable. The AO reproduced the photographs of packets in the order of assessment. There is a famous Chinese saying that a picture is equivalent to thousand words. We are also reminded of the well known dictum of law 'Res Ipsa Loquitur' (the things speak for itself). We, therefore, reproduce the pictures along with the observation of the AO as given in the order (pages 119, 120, 121 and 122), vide Annexure.

12. Delving deep into the design of the 'twin brand theory' the AO found that with the change in regard to the basis of the charge of excise duty w.e.f. 1st March, 1983, the prices of all existing brands were required to be revised upwards, e.g., the price of Panama Virginia Special had to be revised upwards from an ex-factory price of Rs. 60.87 and a printed price of 0.75 to an ex-factory price of Rs. 102 and printed price of Rs. 1.25. No premium was charged from the trade for the sale of Panama plain cigarettes marketed to them under the brand name Panama Virginia

Special during the period commencing from 1st March, 1983. However, the moment the revised prices were accepted by the trade and the consumers, the assessee marketed 'Panama' plain cigarettes under another brand name 'Panama Special Virginia'. The only difference between the 'Panama Virginia Special' and 'Panama Special Virginia' was the subtle interpolation of the words 'Virginia Special' printed in a very fine print in the reverse of the packets by the words 'Special Virginia'.

This new brand bore an ex-factory price of Rs. 88 and a printed price of Re. 1. It quickly replaced the higher priced brand 'Panama Virginia Special' which continued to be marketed simultaneously throughout the subsequent period (upto 1st September, 1985) but with a dwindled volume. Actually what was done is that the two brands which were identified by the trade and consumers alike only as one brand viz., 'Panama' plain cigarettes, were sold by the WBs of the assessee at the same price namely, that of the higher priced brand i.e., 'Panama Virginia Special', but at different invoice rates. The differential price in the case of Panama Special Virginia was collected by the WBs in cash. The same modus operandi was repeated with regard to almost all other brands marketed by the assessee, e.g., in the case of 'Panama Filter Kings', the price of the existing brand, 'Panama Filter Kings Premium' was jacked up from an ex-factory price of Rs. 94.16 per m. and printed price of Rs. 1.10 to an ex-factory price of Rs. 163 and a printed price of Rs. 1.85, but soon thereafter, a lower priced twin 'Panama Filter Kings Special' was introduced in the market with an ex-factory price of Rs. 145 per m. and a printed price of Rs. 1.65 (later revised to Rs. 90 and Rs. 1.05 w.e.f. 7th August, 1993). Both brands were sold to the trade as one brand and one price, the lower priced brand entailing premium on it.

13. Whenever on a future date, the assessee sought to increase its realisation on sale of a brand, the same was invariably done at the cost of Central Excise revenue. Here another sub-brand having a different permutation or combination of suffixes like Premium, Special, Standard, Regular, etc. to the generic name of a brand introduced at an even lower printed price, but was once again available to the consumer at the price of a higher priced brand bearing the same generic name, which was being marketed simultaneously, or else which after having set a

standard for the market price of the brand of that generic name was withdrawn. Example may be given here of the withdrawal of 'Panama Special Virginia' (ex-factory price of Rs. 88 per m. and a printed price of Rs. 1.00) by 'Panama Virginia' (ex-factory price of Rs. 72 per m. and a printed price of Rs. 80) w.e.f. June 1984.

14. Briefly, while making the addition on account of premium on sale of cigarettes, AO considered the following facts :

(i) assessee-company is a leading manufacturer of cigarettes in the country, from the scrutiny of the financial results it appears that the assessee sustained loss on the sale of cigarettes;

(ii) the invoice price of cigarettes is lower than the direct manufacturing cost;

(iii) the high incidence of excise duty-the basis of charging of excise duty was the printed price of cigarettes, it was, therefore, convenient for the assessee to under-invoice the product;

(iv) the assessee adopted a 'dubious market strategy' by introducing the 'twin branding system'.

15. The aforesaid factors were alleged to be the bedrock for making addition. In order to fortify the foundation, the AO relied on various documents, evidence and material. It was concluded that the twin branding system was contrivance, which was used for the generation of clandestine premium. This premium was charged by WBs. Material of the nature that on-money on sale of the assessee's products was charged, was gathered from various sources. AO also relied on the finding given in the asst. yr. 1984-85. The material collected by the Central excise authorities was also viewed and considered, this include -

1. Statement of Shri P. Pandian, sales manager of M/s. Shivani Trading Co. (P) Ltd., WB of the assessee at Trivandrum;

2. Statement of Shri P. O. Mani, Proprietor of P. S. Mani, WB of the assessee at Quilon;

3. Statement of Ashakinwasti, managing partner of M/s. Karpasam Traders, Trivandrum;
4. Statement of Shri Chandramohan, managing partner of K. K. Viswanathan, WB of the assessee at Ernakulam;
5. Statement of E. P. Jacob, alias Georgekutty, partner, M.C. and EMCEES Stores, Kottayam;
6. Statement of Shri Ashok Goenka, officer-incharge, M/s. Durga Trading Co., WB of the assessee at Thirunelvally;
7. Statement of Navrathanmal Tahleswaran, Manager, Casino Business (P) Ltd., Madurai;
8. Statement of Dancichan, director, M/s. Nellai Marketing (P) Ltd., Sivakashi;
9. Statement of Shri H. Farookh, Local Field Officer of GTC, Sivakashi.

These statements were recorded simultaneously at different places during the course of search proceedings by the Central excise authorities on 21st January, 1986.

16. The assessee denied the charges. Sale was explained to be through WBs only on principal to principal basis. Once the goods sold out, assessee had no interest in it. A bleak awareness was admitted as to the charge of premium. It was attributed to the greed of the retailers. The charging of premium by WBs was said to be not within the knowledge of the assessee. It was stated that the assessee was monitoring advertisement and other expenses incurred by WBs for the sake of negotiating the consideration.

17. Apropos the package designs and blended formula, it was stated that the twin brands got approved by the Central excise authorities. The blend specifications of the twin brand were different. The chemical analyses reports obtained by the assessee from Etta Laboratories (P) Ltd. for Panama Virginia and Panama Virginia Special and Panama Special Virginia was relied upon.

The AO did not accept this report because the samples for testing were given by the assessee. These were not drawn by the Central excise authorities.

Apropos the twin brand theory, it was contended before the AO that smokers are very choosy about the brand and they know the difference. The words twin brand, according to the learned counsel, was a misnomer. Actually the brands were different. Not the same brand. Besides on well known consumer products charge of premium is a universal phenomena. Manufacturer cannot be held responsible for that.

18. In order to buttress the existence of the twin branding theory, AO relied, inter alia, on following facts :

- (a) the reduction of price of newly introduced one was never announced;
- (b) the brand was always advertised by general particulars, viz.
 - (i) Panama is a good cigarette good to the last puff;
 - (ii) Panama-mondy selection Gold Medal winning good to the last puff;
- (c) the prices on packages were illegibly imposed without ink.

Accordingly, it was concluded that the distinction of brands on the basis of specific names like Special, Premium, etc. was only an eyewash for evasion of taxes.

AO conducted enquiry. He received information from excise authorities. Affairs of the assessee-company were looked into and investigated on the basis of available information. The position of the connected parties were brought on record. Taking the compendious view of the overall situation, the AO considered the following facts also to justify the generation of premium.

- (i) The basis of charge of excise duty on cigarettes during the relevant period provided motivation to the manufacturer and the trade to sell the products above the printed price to increase their realisation in a competitive market;

(ii) the products actually sold in the market above the printed price, and various clever contrivances were devised by the manufacturer to generate additional amounts of such premium;

(iii) the premium so generated were collected by the WBs of the assessee;

(iv) the WBs in turn remitted the premium in the form of demand drafts in fictitious names to Bombay, Calcutta, Delhi, etc. These demand drafts were negotiated either through Bank accounts standing in the same names as that of the payees of discounted elsewhere;

(v) The question now arises for whose benefit these drafts were remitted; whether for the benefit of the assessee or for the benefit of the WBs. It is pertinent to note that the demand drafts were remitted by different unrelated and unconnected WBs. These were negotiated through the same accounts;

(vi) The advertisement expenses incurred through the secret accounts clearly revealed that these were incurred on behalf of the assessee;

(vii) The donation to Methodist Church out of transfer of funds from account of H. K. Patel revealed that the same was made by the assessee;

(viii) The donation given by Shri Sanjay Dalmia, president-cum-director general of the company to the Festival of India Committee out of transfer of accounts from Associates also support the view that the secret accounts belongs to the assessee.

(ix) The address of the account of Moonlight Finances given to Punjab and Sind Bank, Scindia House Branch, New Delhi, which is B-72, Himalaya House, 7th floor, 23, Kasturba Marg, New Delhi (C.A. No. 787) which is the specific office address of Mr. Umesh Khaitan, sitting director of GTC, once again establishes the nexus of the assessee.

(x) The bogus commission receipts and profit on trading of goods other than cigarettes and tobacco shown by the assessee reveals that the assessee had access to large sums of unaccounted money which was brought to it books, in the

guise of income.

19. On the conspectus of these facts and considering the totality of circumstances, AO held that the assessee was the beneficiary of the remittances of the drafts by its WBs. The concept of principal to principal basis for sale of goods or the operation of the bank accounts by persons outside the employment of the company were just legal facades used by the assessee to mask its clandestine operations. The assessee was thus the ultimate beneficiary of the premium generated on the twin branding principle, AO on that basis made addition in its income. As in the preceding assessment year, a deduction of 10 per cent of the total generation was being left untaxed as the share of WBs, who were privy to such clandestine operations. Thus the clandestine premium on the sale of cigarettes amounting to Rs. 26,20,51,000 was added to the income of the assessee for the relevant year of assessment.

20. The case was heard at length. On 4th July, 1994, Shri Salve appeared on behalf of the assessee. The case was argued on 4th, 5th, 6th, 7th, 12th and 13th July, 1994, by Shri Salve. He argued the case for the asst. yr. 1984-85. On 13th July, 1994, Shri Desai appearing for the Revenue desired to file paper book Nos. 8 and 9 containing assessment order for the asst. yr. 1985-86 together with certain evidence. Initially, Mr. Salve objected. It was pointed out by Shri Desai that the finding given in 1985-86 is very much relevant for deciding the issues. Mr. Salve suggested that the appeal for the asst. yr. 1985-86 be heard together. After discussion we decided to hear the appeals for all the three years i.e., asst. yrs. 1984-85 to 1986-87 together. Hence, direction were rendered to fix all the appeals together. Later on, it was decided by the Bench that appeal for the asst. yr. 1986-87 is to be delinked. As Mr. Salve wanted to continue submissions after the study of case reports for all the three years, the case was adjourned to 17th August, 1994.

On 16th August, 1994, the assessee made a prayer for adjournment, the case was adjourned. Again on 19th September, 1994, the assessee's counsel had made a request for adjournment in the Court. The hearing was adjourned. On 5th October, 1994, Sri Ganeshan, learned advocate for the assessee appeared before us. A

copy of the High Court order dt. 5th September, 1994, in writ petition under Excise Act was placed before the Bench. High Court directed the excise authorities to allow cross-examination of three persons. The assessee wanted cross-examination of these persons in income-tax proceedings also. The case was adjourned to 21st October, 1994. Both the parties desired discussion.

On 21st October, 1994, Mr. Irani, authorised representative for the assessee appeared before the Tribunal.

Mr. Desai on behalf of the Revenue fairly stated that in view of High Court order dt. 5th September, 1994, it would be proper to hear the parties on preliminary issue. Though, on query, he stated that the Revenue had enough material in possession to prove Revenues case even if evidence as collected from three persons as mentioned in High Court order dt. 5th September, 1994, is ignored. The case was adjourned to 21st November, 1994. It was heard on that day and it continued on 22nd November, 1994. It further continued on 29th and 30th November, 1st December, 5th, 6th, 7th and 8th December, again from 12th to 15th December, 19th, 21st and 22nd December, 1994. The arguments were concluded by both the parties. Finally the case was argued by Shri S. E. Dastur, Shri S. Ganeshan and Shri F. V. Irani. The Revenue was represented by Sri R. C. Desai, Sri R. H. Toprani and Sri Rajkumar Lachhiramka. On 6th January, 1995, written arguments were filed on behalf of the assessee. The Revenue also filed written arguments. In view of the same the case was again fixed. Finally the hearing was concluded on 30th January, 1995.

21. The learned counsel for the assessee vehemently argued that the additions made by the AO to the appellants assessable income in respect of alleged clandestine premium on sale of cigarettes are in gross breach of the principles of natural justice as they are based on :

(a) Statement of witnesses, copies of which were not even given to the appellant prior to the passing of the assessment order;

(b) In fact, some of the statements relied upon by the Department have not been furnished even as of now;

(c) Statements of witnesses which were not offered for cross-examination though asked for by the appellant;

(d) Materials which were not intimated to the appellant prior to passing of the assessment order but copiously used in support of the conclusion reached in the order. In fact, some of these materials have not been communicated to the appellant till this date.

It was submitted that none of these tainted materials can at all be relied upon by the respondents.

22. Sri Dastur submitted that the statement of witnesses and other material used by the AO to reach conclusion and finding adverse to the assessee, should be disclosed to the appellant and the witnesses should be offered for cross-examination. Reliance was placed on the ratio of the following decisions :

(1) Surajmal Mohta & Co. v. CIT : [1954]26ITR1(SC) , State of Kerala v. K. T. Shaduli : AIR 1977 SC1627 , Kishanchand Chellaram & Co. v. CIT : [1980]125ITR713(SC) , Dr. Rash Lal Yadav v. State of Bihar J T (1994) 7 62, Vassanji Ghela & Co. v. CST 40 STC 544 (Bom), Mahendra Electricals Ltd. v. Union of India : 1986(26)ELT882(Bom) .

23. Our attention was also invited on the judgment of Justice Pendse in the assessee's own case. The minutes of the order is reproduced here as under :

'In the High Court of Judicature at Bombay ordinary original civil jurisdiction writ petition No. 1805 of 1994.

GTC Industries Ltd. & Anr. Petitioners v. Union of India & Ors. Respondents

Coram : Pendse and Jhunjhunwala JJ.

Date : 5th September, 1994.

Minutes of order

Mr. Rafiq Dada with Mr. J. J. Bhatt i/b M/s. Federal & Rashmikant for the petitioners.

Mr. R. V. Desai for Respondents.

1. Rule. Returnable forthwith, Respondents waive service.

2. Ordered that the adjudicating authority viz., Respondent No. 3 shall not rely or upon or take into account for passing the adjudication order the statements of any witness who is not tendered for cross-examination by the petitioners'.

24. Shri Dastur also invited our attention on the letter dt. 14th December, 1993, and 5th January, 1994, addressed to the CIT(A). These letters are at pages 126-158 and 162-207 of the paper book (hereinafter referred as 'PB') bearing No. A-12.

It was submitted that the assessee made a request for cross-examination of all the witnesses. The assessee also asked for the disclosure of all the materials, which may be relied upon against him. It was further submitted that the said letter should be read along with the appellants subsequent letter dt. 5th January, 1994 (A-12 page 162-207) and the general request for disclosure and cross-examination contained in the letter dt. 16th February, 1988 (A-13, p. 97-99) addressed to the AO. It is not correct to say that the assessee did not comply with certain notices and letters issued to it by the IT Department. On this ground cross-examination of witnesses and disclosure of materials cannot be denied. Sri Dastur said that the proceedings were effectively started by the AO only in December, 1987 (as per record these were started in March, 1987), and most of the notices were issued in January/February, 1988.

25. According to Sri Dastur the AO denied cross-examination to the assessee only on the ground that the 'conclusions have been arrived at mainly on the basis of documentary evidence and the fact of remittance of demand drafts in fictitious names by WBs of the assessee' and that 'secondary support is being taken from the statement of witnesses'. It was argued that reasons given by the AO have no substance. The AOs concept of documentary evidence is misconceived and is directly contrary to the judgment of the Supreme Court in Shadulis case (supra).

26. The learned counsel stated that the CIT(A) justified non-grant of cross-examination on entirely different grounds, which were never raised or applied or even contemplated by the AO.

(a) that the relevant facts were fully established in asst. yr. 1984-85;

(b) that the matter stands concluded by the Tribunal order for the asst. yr. 1984-85;

(c) that the appellant made the request at the eleventh hour and only as a device for gaining time.

It is significant to note that the CIT(A) nowhere sought to justify the non-grant of cross-examination on the ground that the assessee allegedly did not comply with certain letters or notices. Even before the Tribunal, it was contended on behalf of the Revenue that more extensive material was gathered in the course of proceedings for the asst. yr. 1985-86 and in fact the Revenue intends to rely on the same for the asst. yr. 1984-85. The assessee did not ask for cross-examination at the eleventh hour. The purpose was not to gain time. The assessee by letter dt. 16th February, 1988 (A-13 p. 97-99), addressed to the AO requested for cross-examination of all witnesses. In this connection, our attention was invited on the ratio of the Honble Bombay High Court in Vassanji Ghela's case (*supra*), wherein it was held that if a demand for cross-examination is made on the original stage of the proceeding, the demand can thereafter be revived upon at all subsequent stages. This is also in line with the decision of the Supreme Court in the case of *CWT v. Vimlaben Vadilal Mehta* (1984) 145 ITR 11 (SC), wherein the apex Court has held that the appellate proceedings constitute continuation of the assessment proceeding. The AO has specifically stated in the order that the assessee had asked for cross-examination of all witnesses, but that he had not granted the same on the ground that 'secondary support was being taken from their statements'. Even with regard to Alok Dhandhanias, the AO granted the right of cross-examination only to Ashish Trading without issuing notice to them and without even giving them a copy of Dhandhanias statement and merely permitted the assessee to put certain questions afterwards. These restrictions rendered the entire exercise meaningless. Ashish Trading had no interest whatsoever in the

cross-examination of Alok Dhandhanias, as no addition was being made to their assessment and it was the assessee who was sought to be made liable on account of Dhandhanias statement.

27. Proper opportunity aspect was stated to be provided in order to ensure that a just decision be given on the dispute in hand. It relates to the correctness and fairness of the decision-making process. It does not depend on the view taken by the authority on the merits of the case. A litigant is entitled to natural justice even if the authority is of the view that the litigant has no case at all. For this proposition reliance was placed on the decision of the apex Court rendered in the case of S. K. Kapoor v. Jagmohan (1984) 4 SCC 379. We reproduce the portion read before us from the said judgment :

'19. Megarry J. discussed the question in John v. Rees. He said -

'It may be that there are some who would decry the importance which the Courts attach to the observance of the rules of natural justice. When something is obvious, they may say, why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard The result is obvious from the start. Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law, well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events'.

Further at page 395, it is stated that :

'In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any

man and proof of prejudice independently of proof of denial of natural justice is unnecessary'.

On the basis of the abovesaid observation it was argued that opportunity cannot be denied on the allegation that the assessee did not fully comply with the certain letters/notices issued to it or that the assessee has not rebutted the allegations made against it. Natural justice is not a privilege or benefit which is conferred on deserving or to obtain which, certain pre-conditions have to be fulfilled. Rather, it is an obligation which the authority imposes on itself in the interest of a fair and proper decision.

28. The correct principles and legal position regarding natural justice in a quasi-judicial assessment proceeding were summarised by Sri Dastur as under :

- (a) 'The assessee has a right to know and rebut all material relied upon by the Revenue against the assessee;
- (b) If the material consists only of circumstances as opposed to the say of persons, this should be disclosed to the assessee so that he can rebut the same;
- (c) If the material consists of the say of persons, which may be in the form of statements or letters, the assessee has a right to cross-examine the persons concerned'.

The principles of law of evidence recognise a distinction only between circumstantial evidence and the statement of witnesses. The former is described as indirect and the latter as direct evidence. The Tribunal in the asst. yr. 1984-85 considered this distinction. There is no distinction within the sphere of statements of witnesses between direct and indirect witnesses. All witnesses who deposed to relevant facts and whose statements are relied upon by the Revenue have to be offered for cross-examination. The apex Court in the case of K. T. Shaduli (supra) made it clear that cross-examination has to be afforded where the statements/materials relied upon form an integral part of the materials on the basis of which the order by the taxing authorities has been passed.

29. Coming to the judgment of Bombay High Court (see para 23) given in the assessee's own case by Justice Pendse, the learned counsel submitted that this judgment directly covers the present case. It is important to note that the judgment

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(a) is of jurisdictional High Court;

(b) is in the appellant's own case;

(c) deals with the same allegations; and

(d) is concerned with the same witnesses.

30. It was further stated that the Revenue cannot rely on certain statements or materials to bolster or strengthen its case against the assessee and seek to contend at the same time that the statements or materials only indirectly support the Department's case, and the assessee has no right to cross-examination or inspection. No principle of law and not a solitary judicial decision supports the approach of the Revenue.

The correct and settled rule is that if a statement or material is an integral part of the case of the Department or is relied upon to draw an adverse inference, cross-examination of the person making the statement must be given. The Department cannot rely on a statement or material and at the same time seek to deny cross-examination on the ground that the statement is relied upon indirectly or for support or that the Department also relies on some other documents or material. In so far as oral evidence is concerned, the aforementioned decisions, and in particular, the judgment in *Shadulis* case (*supra*), make it clear that if it is an integral part of the Department's case, natural justice requires that cross-examination, if asked for, must be granted. The Revenue should make up its mind, if it is of the opinion that it can make good its case against the appellant by relying on materials other than statement of persons, then, it should base its case only on such materials and not rely on the statements of any witnesses. However, it is reiterated that the appellant should be afforded an opportunity to deal with and rebut such materials. It was further submitted that a letter written by a person and

relied against the assessee stands on the same footing as a statement made by the person, from the point of view of allowing cross-examination. In Shadulis case (supra), cross-examination was allowed of the dealers when their accounts were relied upon by the ST Department, though they had not made any statements as such.

31. Learned counsel further stated that reliance on the Tribunal order for the asst. yr. 1984-85 cannot be placed for the following reasons :

(a) The extent of disclosure and compliance with natural justice required in a particular proceeding is not a point of law. It is basically and essentially a matter of fact depending on the extent and nature of the material relied upon by the authority in the proceeding. One has to consider the proceedings and materials for the relevant year of assessment on their own.

(b) The IT Departments own case is that the assessment order for the asst. yr. 1985-86 is based on further investigations and additional materials as compared to asst. yr. 1985-86.

(c) The very fact that the Department seeks to rely on the materials and evidence relied upon in the order for the asst. yr. 1985-86 in the hearing of the appeal for the asst. yr. 1984-85 speaks for itself. If the factual position and the record were the same in these two assessment years, then there would be no need to consider the record of the asst. yr. 1985-86 for deciding the appeal for the asst. yr. 1984-85. Further, the Department should then agree to :

(i) the appeal for the asst. yr. 1984-85 being decided on the record for that assessment only;

(ii) the decision for the asst. yr. 1984-85 is concluding and covering subsequent years as well;

(iii) in the said order of the Tribunal paras 1 to 50 show that the Tribunal considered payments made to certain alleged fictitious accounts and withdrawals therefrom for meeting of expenses allegedly by GTC and alleged collection of premium, the Tribunal did not consider the case of the Department, as in the

present appeals, which is built, inter alia, on statements of bank managers concerned payments into these accounts and operations of these accounts, the Tribunal allowed cross examination of persons who spoke about the generation of premium and payments from these accounts;

(iv) in the asst. yr. 1984-85, the Department did not make out any case against the assessee, on the basis of commission, trading income or interest income. In the asst. yr. 1985-86, this is the important limb of the Departments case against the GTC, in fact the rejection of assessee's books of account by the AO in the relevant assessment year is based on this factor;

32. Sri Dastur submitted that even as per the test laid down by the Tribunal for the asst. yr. 1984-85, the assessee is entitled to the cross-examination. He referred the letter to the CIT(A), dt. 3rd August, 1992, (A-4 pp. 84-87), and the letters of the CIT(A), dt. 14th December, 1993, 5th January, 1994 (at p. 126 to 158 and pages 162 to 207 of A-12). In para. 61 of the Tribunal order (A-1 p. 324), it was laid down that in respect of material from which an inference has been drawn against the assessee, he is entitled to cross-examination. Further, the Tribunal also decided that the assessee is entitled to cross-examination in respect of material which incriminate the assessee. The materials and statements referred to in the said lists are relied upon by the Revenue to incriminate the assessee. Consequently, the assessee is entitled to cross-examination. Apropos the alleged 'havala transactions', the letters written and the statements given by the third parties, to the effect that the appellant was not involved in the transactions, directly affect the appellant. Similarly, the statements of persons, who were allegedly instrumental in collection of premium, are the very basis of the case of the Department. Haji Umer and Chitalangia, who deposed the collection of premium were directed by the Tribunal to be offered for cross-examination. The statements/materials of bank managers and employees of wholesale buyers to the effect that the drafts were purchased by them and bank accounts were operated by persons, having a nexus with GTCs wholesale buyers directly affect the appellant. Therefore, the witness mentioned in the statement filed before the Tribunal and in the letter dt. 3rd August, 1992 (pp. 74 to 87 - A-4) and 14th December, 1993, 23rd December, 1993 and 5th January, 1994, addressed to the CIT(A) (pp. 126 to 158, 159 to 161

and pp. 162 to 207 of A-12), should be allowed to be cross-examined and all the materials allegedly gathered and relied upon in the assessment order need to be disclosed before passing the orders.

33. Without prejudice to the above, that it was prayed that in case the view is taken as per the decision of the Tribunal for the asst. yr. 1984-85, that the assessee is not entitled to cross-examination, *et hoc genus omne*, the matter should be tested on the touchstone of the ratio laid down by the Courts in several decisions relied upon. These decisions were not available before the Tribunal for the asst. yr. 1984-85.

34. Sri Dastur pointed out those cases where an absolute right of cross-examination cannot be claimed by the subject :

(a) where the statement of the witness relates to general trade opinions on some general matters concerning the trade or industry as a whole and does not concern the assessee specifically. *Manindra Nath Chatterjee v. Collector* (1977) TLR 1751.

(b) where it is known that giving cross-examination would expose the witness to a danger to life or limb (as in the case of *Hira Nath Misra v. Rajendra Medical College* AIR 1973 SC 1260;

(c) where it should not be granted for the reason that the source of information would otherwise cease to exist as in the case of *Satellite Engineering Ltd. v. Union of India* (1983) ELT 2177 (Bom);

(d) where the cross-examination asked for is meaningless, as for example, where the assessee does not dispute the fact deposed to by the witness (as in *Kishanlal Agarwal v. Collector of Customs*, AIR 1967 Cal 80;

(e) where the assessee had not asked for cross-examination as in the case of *Mr. M. K. Thomas v. State of Kerala* 40 STC 278 (Ker) (FB);

(f) where the Department accepts the correctness of the assessee's contention.

35. The normal principle is that ordinarily cross-examination has to be granted when asked for. These exceptions prove the normal rule. If the Department seeks

to rely on any of these exceptions, the burden is squarely on the Department to establish the existence of any of them.

It was contended that the authorities relied upon by the Department, in respect of cross-examination, were rendered entirely on their own peculiar facts, and are clearly distinguishable. None of the authorities cited on behalf of the Department can possibly be considered as diluting the ratio of *Shaduli, K. Chellaram, Vassanji Ghela and Mahendra Electricals (supra)*.

36. Next, the assessment was assailed by alleging bias against the AO. It was contended that justice should not only be done but should be seen to have been done. This inculcates the idea of fair hearing and a fair adjudication.

Let there be no apprehension in the mind of the affected party that the adjudicating authority did not treat him fairly and had a bias against him. It was contended that even if there is a reasonable apprehension of bias in the mind of the assessee, the order is to be set aside. It is not necessary to prove the actual bias on the part of the adjudicating officer. Learned counsel relied on the following precedents :

Manak Lal v. Premchand, AIR 1957 SC 425-429, *Institute of Chartered Accountants of India v. L. K. Ratna* (1987) 164 ITR 1 (SC) at p. 14-15, *R. Arunagiri & Ors. v. C. Ranganathan & Ors.* (1987) Supp. SCC 48.

37. On 4th December, 1994, Sri Dastur produced before us a chart. The chart was alleged to have been prepared on the basis of chronology of relevant dates in order to demonstrate patent bias and mala fides on the part of the AO. A perusal of the said chart reveals that the first show cause notice was issued on 23rd February, 1988. On 14th March, 1988, the case was attended, some requisition was made and the case adjourned to 18th March, 1988. On that day, the GTCs advocate attended the office of the ITO and handed over a notice to the inward clerk of the ITOs office informing the ITO that assessee is moving before the High Court.

On 21st March, 1988 (9.30 A.M.), ITO completed the assessment.

38. Bias was apprehended on the basis of the following :

(i) The contents of the news report of November, 87 and March, 1988. The conduct of the AO in declining to disclose material and permit cross-examination.

(ii) the conduct of the AO of allowing cross-examination only of Alok Dhandania and that too in convoluted and restricted manner so that in effect it is rendered meaningless.

(iii) commencement of dictation of assessment order without even waiting for the assessee to reply to the show cause dt. 14th March, 1988.

(iv) passing of assessment order at 9.30 A.M. on 21st March, 1988, and posting the same by insured and registered post notwithstanding the notice served on him by the appellants advocate regarding High Court suit.

These facts according to Sri Dastur are objective factors which created reasonable apprehension of bias in the mind of any reasonable person.

39. Our attention was also invited on the letter dt. 17th March, 1988 (A-13, p. 46 to 48).

This letter reads as under :

'EXTREMELY CONFIDENTIAL

Bombay, 17th March, 1988.

To

Shri Gautam Kar,

ITO, Central circle-IX,

Range-II, Bombay-400 020.

Sir,

We wish to place on record as under :

1. Since a few months prior to November, 1987, when a false report was published in newspapers implicating us in a purported bank account, purported to be yours, the attitude towards our company is absolutely changed. You have been giving us short notices. You have been demanding information at a short notice. Sometimes you send oral instructions calling upon us to produce records immediately. You have been seeking reference to show cause notice without giving us enough time to prepare etc. etc. We have in fact informed you time and again that you appear to be biased against us for which we are extremely sorry.

2. On 14th March, 1988 our representative, Mr. Kamdar attended your office with our replies and for personal hearing. When he attended your office, instead of hearing him, you handed over another show cause notice dt. 14th March, 1988 listing a number of queries to be replied before 18th March, 1988. On 16th March, 1988, in the morning, we learnt that you refused to meet our representative. We also learnt that you were busy dictating orders in our matter. We, therefore, had to forward our letter dt. 16th March, 1988 in the evening. It appears that you are bent on framing orders against us without hearing us. We have, therefore, to place on record and request you not to pass any orders against us since, we have been given a right to send a reply to your notices of 14th March, 1988 on or before 18th March, 1988, 18th March is a holiday in Bombay, 19th March is a Saturday and 20th March is Sunday and therefore, the earliest we could give a reply will be 21st March, 1988. After giving a reply, we would like to be heard on 22nd March, 1988 and thereafter.

We also desire to obtain clarification about our request for transfer of our assessment to any other ITO.

We hope that in the interest of justice and fairplay the hearing will be given as requested.

Yours faithfully,

For GTC Industries Limited'.

40. Learned counsel submitted that the area of compliance, with the rules and principles of natural justice, is so wide that there is no alternative except to set aside the assessment orders and remand the matter to the AO so that the assessment could be completed de novo, in compliance with the canons of natural justice. It was stated that apart from numerous witnesses whose statements were relied upon by the Revenue there is also considerable material which must be disclosed to the assessee and which on disclosure could lead to the need for further cross-examination of witnesses. It was, therefore, submitted that this is not a case where a remand report can be called for by the Tribunal or where the matter can be sent to the CIT(A) or where the Tribunal itself can record evidence and offer cross-examination.

41. Shri R. C. Desai, learned Standing Counsel for the Revenue appeared along with Shri R. H. Toprani. The relevant documents and papers were filed. First Sri Desai dealt with the point apropos the existence of bias. Our attention was invited on the news item in the Times of India dt. 21st November, 1987 (A-13 p. 22). This is reproduced here as under :

'The Times of India, dt. 22nd November, 1987.

By S. Kumar Bombay, November 21.

An ITO probing corporate tax evasion is finding himself in trouble.

Someone is alleged to have forged his signature, opened a bank account in his name and deposited Rs. 9 lakhs. The pay-in-slips were promptly supplied to a member of Parliament who complained to the Union Finance Minister. The episode came to light last week.

Mr. Gautam Kar, the ITO in the Central Wing, lives in Bhandup. The two companies exclusively under his charge are Golden Tobacco Company and Godfrey Philips (India) Ltd.

Following a complaint that the ITO has been holding huge deposits, the minister, Mr. N. D. Tiwari, forwarded the matter to the Central Board of Direct Taxes. The vigilance wing of the CBDT began its investigation which showed that someone

sought to implicate the officer in a trumped up case.

The pay-in-slips showed that the account was being operated at the Bhandup Branch of the Union Bank of India. The account was in the name of one Gautam (Gangeswar) Kar. The account opening form, introductory signature and specimen signature were examined; since the opening of the account on 21st September, 1987, Rs. 9 lakhs have been deposited in cash on different occasions and the amount has also been withdrawn.

The signature of Mr. Kar has been forged, according to the investigation team. Bank officials said that the real Mr. Kar was not the one who opened and operated the account, but it was a middle-aged dhoti clad man.

The man who introduced the account-holder said he signed in a blank form as requested by a friend who was a cigarette distributor of Bhandup.

The distributor in his statement said the dhoti-clad man was introduced to him by a wholesale buyer of GTC cigarettes. The dhoti-clad man is yet to be traced.

Meanwhile the vigilance Department has found that the officer was not guilty and sent a report accordingly to the CBDT. But income-tax sources say that only a police inquiry will help catch the persons behind this scheme to frame Mr. Kar.

They say that the MP hailing from Uttar Pradesh who brought the bank pay-in-slips should now identify the complainant. A request has been made to the MP to reveal the identity of the person who supplied the slips. Further action has awaited from Delhi.

Mr. Kar had, after thorough investigation of the GTC affairs, established tax evasion of Rs. 20 crores for the asst. yr. 1984-85. About 70 bogus accounts were opened to receive the premium sent by GTC dealers back to the manufacturers, according to the IT Department, but GTC disowned these accounts.

Colleagues of Mr. Kar fear that his life also could be threatened and several attempts had been made to remove him from the post. But, Mr. Kar, with a good service record, continues his investigation into the affairs of the company'.

42. Shri Desai referred to the assessee's denial in the news item of 'Times of India' dt. 27th November, 1987 (A-13 p. 25-26). This is reproduced as under :

'The Times of India, Bombay, Friday, 27th November, 1987.

Bombay

FALSE CHARGES

Sir - Our Attention has been drawn to your news item (22nd/23rd November) in which a reference is purported to have been made by your correspondent to a statement attributed to a cigarette distributor of GTC Industries Limited saying that he was introduced to a dhoti-clad individual by a person purported to be a wholesale buyer of GTC for opening an account in a bank in the name of an ITO having exclusive assessment jurisdiction over GTC and Godfrey Philips India Limited.

The item has also made a reference to alleged tax evasion by GTC Industries Limited in respect of the asst. yr. 1984-85.

Neither your correspondent nor anybody from your editorial desk cared to get in touch with us to cross-check the correctness or otherwise of these serious allegations against our company.

We state that the item casts aspersions on and implicates GTC in the reported incident and is totally devoid of any truth and is designed to malign and defame our company.

We reiterate that our company has nothing to do in any manner with the alleged opening or operation of any bank account in the name of the ITO earlier mentioned in the item.

Further reference in the item to the Income-tax assessment of our Company for the asst. yr. 1984-85 is clearly motivated to defame and malign the company as the said assessment is sub judice and the presumption made, including that of our company having undisclosed bank accounts are wholly without any foundation of truth and factual evidence. As you are aware high patched tax assessments and

arbitrary additions are a common phenomenon and such assessments have to be rectified by taking recourse to the process of law.

The oblique insinuation in the item that our company had a hand in fixing up an ITO this to say the least, utterly false mischievous and malicious. We believe in the rule of law and there is no question whatsoever of any threat having been given or caused to be given by anyone in our company to any officer or persons. We categorically state that the allegations made in the item in so far as they are meant to implicate our company in the incident referred to in it are entirely false and clearly meant to cause prejudice against us in the minds of Government officials as also the appellate authorities and to defame us in the eyes of the public at large.

P. P. Bhandari,

President & Director-General,

GTC Industries Limited'.

43. Shri Desai pointed out that besides the assessee-company, and one other cigarette manufacturing company, certain WBs of assessee were also assessed by Sri Gautam Kar, (ITP). It is not known who is at the root of opening the alleged bank account. The opening of account is a fact. This fact was investigated. It was made abundantly clear that attempt was made to tarnish the reputation of Shri Gautam Kar. But at no point of time Sri Kar made any allegation against the assessee. From this newspaper report, it cannot be concluded that Sri Kar developed bias against the assessee. The news report was not given by Sri Kar. It was not at the behest of the Department. How it has come to the newspaper is best known to the press only. According to Sri Desai, the assessee's contention apropos the bias is without any merit. It is merely based on bare allegation without any iota of evidence even to suggest that there was reasonable ground for assuming possibility of bias. Shri Desai referred to the subsequent conduct of the assessee and stressed that had there been the slightest possibility of bias, the assessee would have immediately asked for transfer of the case and would not have allowed the proceedings to continue without any contention of bias being

raised. In this connection, following documents were produced before us.

(i) Letter dt. 19th December, 1987 (R-10 p. 147) wherein the assessee stated as under :

'We wish to bring to your notice the fact that the show cause notice F. No. V/PI/15-6/86/B-II dt. 4th April, 1986 forms part of adjudication proceedings which are subjudice and our parting with the copy is likely to cause prejudice to our hearing before the various authorities. As such, kindly do not insist on us to provide you the copy of the above show cause notice'.

(ii) Letter dt. 20th January, 1988 (A-12, p. 33).

This was not given in reply to show cause notice dt. 30th December, 1987).

(iii) Letter dt. 4th February, 1988 (A-12 p. 36)

This is reproduced here as under :

'The ITO, Central Circle-IX, Range-II, Old CGO Bldg., Annexure, M.K. Road, Bombay-400 020.

Dear Sir :

Kindly refer to your show cause letter No. CC-IX/Show Cause/87-88 dt. 12th February, 1988 received by us in the late hours of 15th January, 1988. The material furnished in the aforesaid letter is directly connected with the material furnished in your previous show cause letters No. CC-IX/87-88 dt. 9th December, 1987 and CC-IX/87-88 dt. 30th December, 1987 to which we have already furnished a reply asking for certain vital information, clarifications and requesting you to furnish us separate show cause notice for each year. In absence of any reply from your end it is not possible for us to proceed further in examining the material furnished by you and preparing just and proper reply for the same. We would request you to expedite your reply

(iv) Letter dt. 16th February, 1988 (A-12) (R-10 - p. 149)

This was given in reply to ITOs letter dt. 10th February, 1988.

(v) Letter dt. 16th March, 1988 (A-13 p. 148).

This letter was addressed to CIT, Central-I. Assessee made a request to transfer the file from Sri Gautam Kar to another ITO.

Sri Desai submitted that copy of the said letter was not endorsed to the ITO, therefore he had no knowledge at all about the letter to the CIT about the transfer of the file. The assessee made allegation against the ITO in its letter dt. 17th March, 1988 (A-13 p. 46).

44. Mr. Desai submitted that Mr. Gautam Kar spontaneously replied that letter denying any bias in his mind. It was submitted that whatever Sri Kar did was in the execution of his official duty. He had absolutely no bias against the assessee. In the assessment order also at page A-4 Sri Gautam Kar has stated as under :

'... All that the undersigned would like to clarify is that the assessee has written a letter marked strictly confidential dt. 17th March, 1988. The allegations made by the assessee about the conduct of the undersigned in the said letter is not correct. The investigation history and various other related issues in this case is being diarised separately in the form of an office note and kept in a sealed cover marked Y and is being appended to the office copy of the assessment order. This is for the review of the appellate authorities. Further, the undersigned apprehends sinister motives on the part of the assessee in the letter marked Strictly confidential dt. 17th March, 1988. The undersigned understands that the Central Excise authorities at Baroda have already issued show cause notice to the assessee for evasion of a few hundred crore of rupees during the period under review. Since crores of rupees of revenue by way of income-tax is also involved, the undersigned is of the opinion that in public interest, the assessment order for this and the succeeding year for which assessment proceedings have been taken up simultaneously should be passed expeditiously'.

45. Shri Desai also invited our attention to the letter dt. 22nd March, 1988, to CIT (A-13 p. 74). Our attention was also invited to the report appeared in the Times of

India dt. 23rd March, 1988. This reads as under :

'Times of India dt. 23rd March, 1988.

HC stay comes too late in IT case.

By S. Kumar.

Bombay, March, 22.

Hours before the Bombay High Court restrained the assessment of income of the Golden Tobacco Company (GTC) by an ITO, the officer concerned completed the assessment here yesterday and held that the company had concealed income of about Rs. 52 crores in two years.

The dramatic developments in the case resemble the proverbial tale of the hare and the tortoise.

The proceedings between the IT Department and the GTC regarding assessments for the years 1985-86 and 1986-87 began a year ago and the ITO sought a reply from the company on some pending issues.

The reply was to be filed before 18th March. The company sent a letter on 17th March, seeking extension of time till 21st March as 18th March was a State holiday. Also the company has been pressing for the transfer of the case from the ITO concerned, Mr. Gautam Kar.

The ITO, having not received the reply on the stipulated time, continued his assessment, completed the order in the morning of 21st March and posted it to the assessee.

The same day, in the afternoon the GTC apparently unaware of the developments in the IT Department, filed a writ petition in the High Court seeking to restrain the ITO from processing the assessment of the company. Mr. Justice G. H. Guttal, passed an order restraining the ITO from processing the assessment of the petitioner-company.

The company in the writ petition alleged that the officer was 'prejudiced and biased' against the company and 'no justice can be expected from him'. The company wrote to the Commissioner to transfer the case from him to another ITO, but the Commissioner did not reply. Because of the 'rigid stand' taken by the ITO and because of his 'animosity', he should be restrained from processing the assessment files of the company, it was stated.

The company also quoted the reported instance of a bogus bank account opened in the name of the ITO concerned by someone to malign his reputation. The report hinted that one of the aggrieved assessee could have set a trap for the ITO. The GTC had strongly denied its alleged involvement in the episode.

The GTC also denied its links with the alleged bogus accounts detected by the IT Department.

The same officer had passed an order against the GTC for the year 1984-85 establishing undisclosed income of Rs. 33 crores. The company earned about Rs. 23 crores by way of premium and about Rs. 10 crores by suppressing production, he held. The company has challenged this order before the Appellate Commissioner.

The company had earlier filed writ petitions challenging the ITOs order of imposing a penalty of 150 per cent on this disputed amount of income.

On 23rd February, another writ petition was filed by the company accusing the Department of illegally withholding income-tax refund of Rs. 78 lakhs due for the earlier years. The Department filed an affidavit saying that the company had agreed to adjust the refund towards the fresh tax dues and there was no illegality of withholding the refund.

A spokesman for the Department said though the company served notice yesterday, the matter was not on the board and the Government counsel was unaware of the petition. The order was passed ex-parte'.

46. Sri Desai contended that there is absolutely no material on record to impute bias against the ITO. The assessee contended on the baseless assumption that

there was reasonable apprehension in its mind about the fairness of the administrative justice. One cannot imagine things which do not exist and then make it a foundation for its apprehension. Sri Desai vehemently contended that if it is left to litigant to imagine bias in the mind of the judge without any proof and if he complains of apprehension about the fairness of justice, it would be impossible for a judge to render justice. In that eventuality, a judge who is not favourable will be termed as a biased judge.

47. Coming to the suit proceedings vide advocates note dt. 18th March, 1988, Sri Desai submitted that AO was not legally bound to take cognizance of suit proposed to be filed by the assessee, as the same was barred by s. 293 of the IT Act, 1961. The section reads as under :

'Sec. 293. No suit shall be brought in any civil Court to set aside or modify any proceeding taken or order made under this Act, and no prosecution, suit, or other proceedings, shall lie against the Government or any Officer of the Government for anything in good faith done or intended to be done under this Act'.

48. Reliance was placed on the ratio laid down in Shri Sukhdev Chand v. Shri Kashmir Singh Bhullar (1984) 150 ITR 578 (P&H;). Notice was said to be riddled with infirmities. No suit number was mentioned on the same. Assessee did not comply with the provisions of s. 81 of the CPC. Mandatory leave of the Court as required by s. 80(2) of the CPC was not obtained. Defendant No. 2 (Union of India) was not served with the required notice. It was, therefore, submitted that mere lodging of the suit papers in the office of the High Court is not sufficient to initiate suit proceedings. There was no evidence that the suit proceedings were initiated before 9.30 A.M. on 21st March, 1988. It could not be presumed beforehand that Court will dispense with the requirement of notice as required under s. 80(2) of the CPC. It was assumed that Court would not issue even ad interim stay order without complying with the mandate of s. 80(2) to first serve notice of defendants. ITO could not have anticipated that the Court would issue ad interim injunction ignoring mandatory provision in s. 80(2) of the CPC without first issuing notice to defendants. ITO was concerned with time-barring assessment. He was very much concerned with the interest of Revenue. He did thorough investigation

over a period of two years in the matter. The matter was about to be barred by limitation on 31st March, 1988. According to Sri Desai, the ground apropos bias was not tenable before the Honble High Court, that is how the assessee had withdrawn the suit.

49. Coming to the aspect of haste in making assessment, Sri Desai argued that it was not unusual for the Government officer to put the time of making the order on the order itself. It was explained that in the instant case ITO had to take the most elementary precaution of not only mentioning the date as normally done, but also to indicate the time to avoid any possibility of any charge for having flouted the High Courts order.

50. Sri Desai distinguished the case law relied upon by the counsel for the assessee. He placed reliance on the following precedents :

(i) Duncan Agro Ind. Ltd. v. Union of India 1989 (39) ELT 211 (Del),

(ii) ITC Ltd. v. Union of India AIR 1989 Cal 294.

It was vehemently argued that there was absolutely no ground whatsoever either on facts or in law for alleging bias on the part of the ITO and the assessee's contention in this regard was baseless and untenable.

51. Apropos, the applicability of the dictum *Audi alteram partem*, Shri Desai submitted that right of cross-examination does not come within the ambit of the rules concerning the natural justice. This right depends upon the facts and circumstances of each case. Shri Desai distinguished the cases relied upon by Sri Dastur on this aspect and submitted that there is no force in the contention that ratio of the decisions cited supra, support the view that right of cross-examination is part of natural justice. Sri Desai relied on the following precedents.

State of Gujarat v. Shri Mohanlal Jitmalji Porwal (1987) 29 ELT 483 (SC), Kishanlal Agarwal v. Collector Land Customs AIR 1967 Cal 80, Satellite Eng. Ltd. v. Union of India (1983) ELT 2177 (Bom), Kanungo & Co. v. Collector of Customs (1983) ELT 1486 (SC), Union of India v. Tulsiram Patel AIR 1985 SC 1416, DCW Ltd. v. Collector of Central Excise (1990) (46) ELT 233 (Mad).

52. In regard to the applicability of Justice Pendses order dt. 5th September, 1994, in excise matter [writ petition No. 1805 of 1994], Sri Desai submitted that it did not set out facts of the case, question arising in the case, reasons for the decision and it did not satisfy the tests laid down by the apex Court in the case of Arun Mahadeo Danuka v. Addl. Inspector General of Police & Anr., AIR 1986 SC 1497, laying down the need for stating reasons in the orders in writ petitions. He further relied on CIT v. Minal Rameshchandra (1987) 167 ITR 507 (Guj), and submitted that the order of Justice Pendse does not lay down ratio or principle which is of binding nature and of universal application as a precedent. Facts were not stated in the order. The distinction between the judgment in rem and judgment in personem was made. According to Sri Desai the order dt. 5th September, 1994, was made in regard to the facts stated in the concerned writ petition. It comes under the category judgment in personem. Therefore, the ratio of the said order cannot be applied in the present case. As such, it is not binding. To support this contention Sri Desai relied on the following precedents.

CIT v. Sun Engineering Works (P) Ltd. (1992) 198 ITR 297 (SC), Oberoi Hotels (India) (P) Ltd. v. CBDT (1982) 135 ITR 257 (Del), Goodyear India Ltd. v. State of Haryana & Ors. (1991) 188 ITR 402 (SC), K.T.M.T.M. Abdul Kayoom v. CIT (1962) 44 ITR 689 (SC), CIT v. K. Ramakrishnan (1993) 202 ITR 997 (Ker), CIT v. Thana Electricity Supply Ltd. (1994) 206 ITR 727 (Bom).

53. Our attention was further invited on the prescriptions of s. 142(3). This section reads as under :

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

It was submitted that the section does not provide for cross-examination. Had it been the intention of legislature to provide for cross-examination in all cases, it would have expressly stated so in this provision and would not have used the words 'an opportunity of being heard'.

Without prejudice to the above, Sri Desai submitted on facts that the Tribunal is required to follow its decision rendered for the asst. yr. 1984-85. For this, Sri Desai relied on the decision rendered in the case of S. P. Gramophone Co. v. ITAT (1986) 160 ITR 417 (P&H;) and M. K. Mohammed Kunhi v. CIT (1973) 92 ITR 341 (Ker).

It was stated that the assessee was evading cross-examination of its WBs. In reply to CIT(A)s notice dt. 3rd March, 1992 (A-IV, p. 1 to 8), the assessee selected only 2 WBs out of 100 WBs for cross-examination. The first one from Bombay (Uma Maheshwari) was not traceable. The other Tobaccowalla of Lucknow, had dissolved its firm and was not having books of accounts for the relevant periods.

The assessee merely made a show of comply with the said notice.

Shri Desai also referred to the ITOs notice dt. 18th March, 1987 (R-11 p. 23), to show that the assessee did not file affidavits which it had agreed to file in support of its claim that no premium was being generated or charged on sale of cigarettes. Sri Desai also invited our attention on assessee's letter dt. 3/6th August, 1992, addressed to the CIT(A) (A-4 p. 74-86).

'Further, since it has all along been the case of the assessee that the cigarettes manufactured by it were sold at a premium as alleged and further that no part of such premium ever came back to the assessee, the assessee would like to adduce evidence both oral and documentary in support of its defence before your good-self'.

It was submitted with reference to that letter that AO has given reasonable opportunity to the assessee of being heard. Sri Desai also referred and read out ITOs summons and assessee's replies (R-6, p. 279-281), ITOs letter regarding excise notice (R-10, p. 148), assessee's reply (R-12 p. 533).

54. Our attention was invited on the prescription of ss. 101, 103 and 106 of the Evidence Act. It was submitted that the law has cast initial onus on the assessee and the assessee failed to discharge its burden. It was submitted that all the evidence and material relating to other income and sale of other goods were within

the special knowledge of the assessee, the onus to produce the same as per s. 106 was upon the assessee which it had failed to discharge. Sri Desai relied on the decision of Rampyari Devi Saraogi v. CIT (1968) 67 ITR 84 (SC).

55. Coming to the request for cross-examination made by the assessee, Sri Desai submitted as under :

(i) No witness has alleged the generation and receipt by the assessee on the sale of its cigarettes to its WBs. Therefore, request for cross-examination is not relevant;

(ii) No witness has alleged the ownership of the Bank accounts with the assessee. Therefore, no purpose will be served by allowing the assessee to cross-examine the witnesses;

(iii) No witness has made any statement in support of the ITOs presumption that the transaction in which the assessee-company received commission were not genuine transaction but were havala transactions. Hence, no purpose will be served by allowing cross-examination. Sri Desai emphasised that demand for cross examination had been made in respect of commission income and not other incomes for rendering services, etc.

56. Regarding statements/letters of various persons referred to in the statements filed, Sri Desai submitted that they were not primary evidence but were 'supporting statements/evidence' and were not directly against the assessee.

Sri Desai raised the fundamental issue as to whether the assessee could claim right of cross-examination in respect of witnesses whom it should have produced in proof of other receipts of income merely because ITO examined them to satisfy himself. The assessee cannot take advantage of its deliberate omission to examine them. In fact, the assessee should have examined them as its witnesses.

57. Sri Desai read out the statements of Sri V. Sunder and of Damji D. Haria (who did not cross-examine V. Sunder). Sri Desai also dealt with each of the items given in the list. He read out the statements/letters of Pawan Bhartya, Ramchandra Bhambhid Mittal, Sunil Bubna and Mukesh Agarwal, which were part

of assessment proceedings for the asst. yr. 1984-85.

58. Sri Desai explained that it was not possible for the Revenue to trace credits for drafts to bank accounts because of several factors, such as there was considerable time gap between the date of purchase of drafts and their deposit, there were accounts in the same name in different branches or banks, the drafts were often discounted and were deposited in bunches. Referring to the list filed by the assessee concerning the violation of principles of natural justice, Sri Desai invited our attention on -

(a) ITOs notice dt. 13th March, 1987 (R-1 p. 1)

(b) Copies of 265 drafts handed over to Mr. Kamdar (R-10 p. 83, 89)

(c) ITOs notice dt. 16th February, 1988 (A-12 p. 18, 26) in regard to income from redistribution of liquor.

Sri Desai also invited our attention on letter dt. 12th January, 1988, given by the ITO (para. 11 of A-12 p. 28). The said letter is reproduced here as under :

'11. In ground No. 12 of your grounds of appeal before CIT(A), Central-I, Bombay, for asst. yr. 1984-85, you had mentioned :

'The learned ITO failed to appreciate that the assessee-companies activities were under the constant control of the Central excise authorities and that such Central excise authorities, even after making extensive searches on the assessee-company in 1982 and 1986, had accepted its production figures and had not made any allegations whatsoever that the assessee-company was earning premium on the sale of its products'.

The facts mentioned in this ground of appeal are incorrect to the extent that you were already in receipt of show cause notice issued by various Collectors of Central Excise for charging premium on sale of your different brands of cigarettes. The receipt of show cause notices has since been confirmed by you though you have refused to give a copy of the same to the undersigned on grounds that the same will prejudice your adjudication proceedings. I would like to utilise any

findings made independently by the Central excise authorities with regard to charging of premium and/or suppression of production against you if the material is relevant for any assessment year for which assessment is pending'.

59. On 5th December, 1994, and again on 30th December, 1994, the counsel for the assessee filed the list of statement/information/material for the first time and all material relied upon but not furnished, witnesses not offered for cross-examination. Sri Desai objected the revision of lists. Sri Desai pointed out that the list finally given on 30th December, 1994, does not bear even the signature of the competent person. Even the written submissions are signed by some person without any designation, whether he is authorised to sign. From the scribbles it is difficult to find out even the name of the signatory.

60. Sri Desai dealt with Sr. No. 1 to 4 of item-A regarding the alleged havala income of the said list as given on 5th December, 1994, and pointed out that all items regarding bank accounts and premium arising from the asst. yr. 1984-85 were considered by the Tribunal and no cross-examination was allowed. Sri Desai strongly refuted the assessee's contention that cross-examination of Shri Alok Dhandhanias was not allowed though the ITO held that he would allow Dhandhanias cross-examination. Apropos the same Sri Desai referred to ITO's letter dt. 25th February, 1988 (R-10 p. 92), whereby the ITO fixed 3rd March, 1988, as the date for cross-examination of Dhandhanias. Neither the assessee nor Ashish Trading Co. appeared on 3rd March, 1988, though Mr. Dhandhanias was present, in response to ITO's summons. ITO on his own accord, provided a second opportunity to the assessee by fixing date for cross-examination on 10th March, 1988, by his letter (R-10 p. 93). Even on that date neither assessee nor Ashish Trading Co. appeared for cross-examination of Mr. Dhandhanias, who had appeared before the ITO. It was only on the following date that the assessee raised untenable objection that ITO had not issued notice to Ashish Trading Co. to remain present for cross-examination of Mr. Dhandhanias. It was pointed out by Sri Desai that assessee claimed that Ashish Trading Co. was its pucca adatiya and all the transactions of purchase and sales were carried by Ashish Trading Co. in its own name. It was submitted that in these circumstances, it was possible on the part of assessee to enforce the presence of Ashish Trading Co. for the conduct of

cross-examination of Mr. Dhandhanian on his behalf. ITO was under no obligation to call upon Ashish Trading Co. in these circumstances.

61. Sri Desai vehemently contended that principles of natural justice cannot be used to the advantage of person who wants to defeat the very purpose of justice. The principles of natural justice cannot be used to prolong litigation and to gain advantage by dragging the matter. It contemplates the procedural fairness. Assessee was non-co-operative. He did not supply the information required. He evaded all information under one or other excuse or pretext. Intention was to gain time. According to Sri Desai, ITO acted in consonance with the canons of law. There is no flaw in the order. There is no violation of the principles of natural justice.

62. We have heard the rival submissions in the light of the material placed before us and the precedents relied upon. The essential characteristic of what is often called 'Natural justice' is put by Romans in two maxims -

(1) *Nemo iudex in causa sua*

No man can be judge in his own cause; and

(2) *Audi alteram partem*

No man shall be condemned unheard.

This may be put in two words 'Impartiality' and 'Fairness'. Natural justice shot into prominence for the first time through the decision given by Lord Coke in Dr. Bonham's case (1619) 8 Co. Rep. 107. Henry VIII had granted to the Royal College of Physicians, the power to licence persons to practice medicine in London. Among the powers granted was the power to fine and imprison any one who practised medicine without obtaining permission of the Royal College. The fine levied by the College was to be shared equally between the King and the College. Thomas Bonham, who was a Doctor of Medicine of Cambridge University, ignored the Royal College of Physicians and set up practice in London without taking the required certificate from the College. Dr. Bonham was fined by the College and was imprisoned. A suit for false imprisonment was filed by him.

Chief Justice Coke gave judgment in favour of Dr. Bonham and stated :

'The censors (of the Royal College) cannot be judges, ministers and parties; Judges to give sentence or judgment, ministers to make summons and parties to have the moiety of the forfeiture; and one cannot be judge an attorney for any of the parties'.

63. This case did not propound for the first time the principles of natural justice. It only lime lighted a principle of Roman law which is embodied in the dictum : *nemo judex in causa sua*. This rule was accepted under the common law also. Thus, though this rule judicially noted by Lord Coke in 1610, the second rule of natural justice i.e., *audi alteram partem* had to wait for judicial notice till 1723.

One Dr. Bentley was served with an originating process from the University of Cambridge. He not only ignored the process but went even to the extent of suggesting that the Vice-Chancellor acted like a fool. Without hearing Mr. Bentley in his defence the University straightway deprived him of his degrees. Thereupon, Dr. Bentley sought redress in the Court of Justice. The Court of Kings Bench declared the action of the University a nullity on the ground that they had failed to give Dr. Bentley an opportunity of appearing before the University and presenting his case. The principle of *audi alteram partem* was enunciated with religious refinement by Fortescue, J. in these terms :

'The laws of God and man both give the party an opportunity to make his defence if he has any. I remember to have heard it observed by very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence. Adam (says God) where art thou Has thou not eaten of the tree, whereof I commanded thee that thou should not eat And the same question was put to Eve also. (R.V. The Chancellor, Master and Scholars of the University of Cambridge 1723-IS Lr. 557)'.

64. The twin principles that constitute the rules of natural justice received particular attention from judges for the purpose of exercising their supervisory jurisdiction.

Lord Hewart, C.J. in 1924 stretched Bias into a tight rope when he said in *R. V. Sussex Justice, Ex parte McCarthy* (1924) 1 KB 256 :

'A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.

'Audi alteram partem', contemplates that notice of the case to be met and opportunity to explain the same be given. This rule is universally respected. Duty to offer a fair hearing is duty lying upon everyone who decides something in exercise of legal power. Rule of natural justice cannot be sacrificed at the altar of administrative convenience or celerity; Convenience and justice - as Lord Atkin felicitously put it - are often not on speaking terms. It is said that the rules of natural justice are written by the fingers of the nature upon the heart of a man. A judge of the Supreme Court of the United States of America, said 'Procedural fairness and regularity are indisputable essence of liberty ... substantive laws can be endured if they are fairly and impartially applied'. He went on to say 'that it might be preferable to live under Russian laws applied by common law procedures' than under the common law, enforced by the Russian procedures. Another judge observed : 'The history of liberty is largely been the history of observance of procedural safeguards'.

65. The basic principles of natural justice are -

(i) that the parties should be given fair hearing;

(ii) the hearing must be before an impartial judge;

(iii) the judge should have no bias i.e., pecuniary bias, or personal bias; and

(iv) the decision given must be reasoned one and, therefore, the decision must be evidenced by a speaking order, which enumerates the reason for coming to a particular conclusion. The 'American due process of law' postulates :- (a) notice, (b) opportunity to be heard; (c) an impartial Tribunal and (d) an orderly course of procedure.

66. The concept of natural justice is comprised of many colours and shades and many forms and shapes, it is easy to proclaim, but very difficult to define. No doubt, it is true that the concept of natural justice is not very clear and, therefore, it is not possible to define it; yet the principles of natural justice are universally accepted and enforced. As against criticism of vagueness of concept of natural justice, Lord Reid in the historic decision of *Ridge v. Baldwin* (1964) AC 40 observed :

'In the modern times opinions have sometimes been expressed to the effect that natural justice is so vague as to be practically meaningless. But I would regard these as tainted by the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured, therefore, it does not exist'

67. We now proceed to decide the issue apropos the existence of Bias as alleged by the assessee against Shri Gautam Kar (ITO). The first maxim of natural justice 'Nemo iudex in causa sua' is based on three principles :

(i) no man shall be a judge in his own cause;

(ii) justice should not only be done but manifestly and undoubtedly be seen to be done;

(iii) judges, like Caesars wife should be above suspicion and therefore, anything which tends or may be regarded as tending to cause such a person to decide a case otherwise than on evidence must be held to be biased.

The word bias as a noun is derived from the French word bias meaning oblique as opposed to straight. The English term bias has reference to the game of bowls wherein it means the weight on one side of a bowl, which gives it a tendency to diverge from straight line when running. Hence, the word has come to mean prejudice; show of favour or disfavour; antagonism; spite; hostility; prepossession that sways the mind. As a verb it means to influence; to prejudice; to prepossess (often unduly).

68. The bias which will violate the principles of natural justice may be of three types :

- (a) pecuniary bias;
- (b) personal bias; and
- (c) official bias or bias as to subject-matter.

It is well settled that as regards pecuniary interest, the least pecuniary interest in the subject-matter of the litigation will disqualify any person from acting as a judge. At the outset, it was made clear that the assessee had absolutely no allegation in regard to the pecuniary bias.

The personal bias may be due to pre-dialectal or personal relationships to one of the parties. Here, the judge may be a relative, friend or business associate of a party or he may be personally hostile as a result of an event occurring either or before or during the course of trial.

Official bias, may arise when the judge has a general interest in the subject-matter. In the instant case only personal bias was alleged against the ITO.

69. We have heard Shri Gautam Kar also against whom the bias was alleged. It was stated by him that he had absolutely no personal bias against the assessee. He only discharged his duty in conformity with the canons of law.

70. Sri Dastur adumbrated the existence of bias on the basis of the following facts :

- (i) news items in the Times of India dt. 21st November, 1987 (A-13 p. 22);
- (ii) sequence of events leading to the passing of the assessment order go to show that the ITO had bias against the assessee;
- (iii) conduct of the ITO in declining to disclose material and prayer of cross-examination reflects bias;
- (iv) the conduct of the ITO in allowing cross-examination only to Alok Dhandhanania and that too in a restricted manner shows bias;

(v) commencement of dictation of assessment order without being waiting for the assessee to reply for the show cause notice dt. 14th March, 1988;

(vi) passing of the assessment order at 9.30 A.M. on 21st March, 1988, and posting the same by insured and registered post, notwithstanding the fact that the notice was served on him by the appellants advocate-regarding High Court suit;

(vii) the contents of the news report of March, 1988 showing that the AO went to the press.

71. Sri Dastur placed strong reliance on the decisions rendered by the apex Court in the case of *Institute of Chartered Accountants of India v. L. K. Ratna & Ors.* (supra) and *Manak Lal v. Dr. Prem Chand Singhvi* (supra).

According to Sri Dastur, these decisions laid down the general proposition that reasonable apprehension of the existence of bias, vitiates order. The bias need not arise only because the adjudicating authority had previously participated in the proceedings. In the case of *L. K. Ratna*, the apex Court observed thus (at p. 14) :

'The nature of the function discharged by the Council in rendering its finding is quasi-judicial, and we are reminded of the observations of this Court as far back as *Manak Lal v. Dr. Prem Chand* (1957) SCR 575 at p. 580 & 581, AIR 1957 SC 5 at page 429 :

'It is well settled that every member of a Tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the Tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done'.

72. Contextually, it would be apt to consider the facts on the basis of which the abovesaid observation was made by the Supreme Court. We find that the facts as

given in the case are (at p. 426 - AIR 1957 SC 5) :

'The Bar Council Tribunal appointed to make enquiry into the alleged misconduct of the appellant who was an advocate of the Rajasthan High Court, consisted of three members with one C as its Chairman. C had filed his Vakalat on behalf of the opposite parties in proceedings under s. 145, Cr PC on 23rd August, 1952 and had in fact argued the case on that date. The appellant had acted as a pleader for applicants in s. 145 proceedings out of which the misconduct proceedings arose'.

73. Reading the facts of the case, we find that the observation : justice should not only be done but should be seen to have been done', was made contextually. It is important that no room be left for causing any doubt or suspicion, while discharging the judicial functions. Judges like Censors wife should be above suspicion. If son of a judge appears before him to plead a case as an advocate, it is not always necessary that the judge will bestow favour to him. A judge of integrity will remain impartial. But the mere proximity of relationship may create doubt in the minds of the people. They may think that the scale of justice tilted because of the closeness or kinship; and the case was decided not on the basis of case law but face law. In the background of like situation the apex Court laid down that a reasonable apprehension of existence of bias vitiates an order. It is important that assessee must have sufficient grounds to conceive such apprehension. He cannot put such a grave charge in a light manner.

74. We now come to the various aspects dealt with at the time of hearing concerning the apprehension of bias. First we come to the news item in the Times of India dt. 21st November, 1987. This is reproduced at page 41 of the order. This news item was given by Sri S. Kumar. He is not connected with the assessee. The news item describes that some one opened a bank account in the name of Sri Gautam Kar and deposited Rs. 9 lakhs. Complaint was made with the Minister Shri N. D. Tiwari, against the officer. Investigation made against officer revealed that Sri Gautam Kar was innocent. The signature of Sri Kar was forged by some dhoti clad man. It is not known who did this mischief. ITO did not make any allegation against the assessee. The matter was left to be investigated by the due procedure of law.

Sri Desai relied on the case of Duncan Agro Industries Ltd. v. Union of India (supra), wherein it was held that mere possibility of bias is not enough to disqualify director (audit) to function as adjudicating officer-strong probability required for disqualification when institutional bias alleged. This judgment was rendered in the context of reward scheme.

In the case of ITC Ltd. v. Union of India (supra), the Calcutta High Court has held :

'Ordinarily an authority is disqualified from adjudicating whenever circumstance points to a real likelihood that he will have a bias, by which is meant an operative prejudice whether conscious or unconscious in relation to a party or issue before him'.

Honble High Court further observed (pat page 326) :

'But in case of the nature before me for upholding an abstract principle of law the Court will not allow such a plea to be raised at the instance of a party against whom large scale evasion of public revenue is alleged. If in such a case a party is granted relief on this score that would shake the public confidence in the judicial process of this country'.

75. In regard to the news item appeared in the Times of India dt. 23rd March, 1988 (vide para-45), Sri Dastur alleged that facts in question were within the knowledge of the ITO. He has gone to the extent of saying that AO himself went to the press to tell this news. We find absolutely no merit in this contention. There is no material on record to show that the news was given to the press at the behest of the ITO. Press collects information from various sources. It cannot be said that news was parted by Sri Gautam Kar and more so, this reflects bias in his mind. It would be injustice to Sri Gautam Kar to say that he was instrumental in bringing out the news. We, therefore, find no merit in this argument of the assessee.

76. We now come to the chronology of relevant dates, which according to Sri Dastur, demonstrate patent bias. It is to be kept in mind that matter was getting time-barred on 31st day of March, 1988. The AO was given exclusive jurisdiction, of the assessment of cigarette manufacturing units, having their registered office at

Bombay. Necessary infrastructure was provided to him to enable him to conduct investigation in an organised and systematic manner. The result of investigation we find is reflected in the order also. In this case we find that some problem cropped up in the preceding year, when on the basis of material supplied by the excise authorities, Revenue proceeded investigation against the assessee. For the relevant assessment year, show-cause notice, was issued on 23rd February, 1988.

On 14th March, 1988, ITO had given the letter to the assessee, (A-13 p. 44). The assessee did not give any reply as to the desired informations. Instead by letter dt. 17th March, 1988, he alleged bias against the ITO, on the basis of newspaper report. We find nothing wrong in asking for the details. These details were asked on the basis of some information. It was incumbent on the assessee to meet with the requisition. The assessment was completed as it was getting time-barred.

77. In regard to the contention that bias can be apprehended because ITO declined to disclose material and permit cross-examination and allowed cross-examination of Alok Dhandhanian in a restricted manner, we are of the opinion that this does not prove the existence of bias.

78. Apropos the cognizance of suit, proposed to be filed by the assessee, our attention was invited on the decision of Punjab and Haryana High Court, in the case of Shri Sukhdev Chand, Asstt. CIT v. Shri Kashmir Singh Bhultar & Ors. (supra). In this case it was held that mere allegations of mala fide cannot confer jurisdiction on a Court which it otherwise lacks. Sec. 293 of the IT Act, 1961, specifically bars the jurisdiction of civil Courts in proceedings under the IT Act and hence an allegation of mala fides on the part of the authorities, will not invest the civil Court with jurisdiction to try such a suit.

We have also noted that suit proceedings vide advocates note dt. 18th March, 1988, were not initiated in the Court or filed in the Court. No suit number was mentioned on the notice. Provisions of s. 81 of the CPC was not complied with. Mandatory leave of the Court, as required under s. 82 of the CPC, was not obtained. This could as well turn to be a mere threat for stopping the proceedings. Since the case was getting time-barred by limitation, ITO with a view to safeguard

the interest of Revenue proceeded to complete the case. There is nothing wrong in mentioning the time. This was probably done by way of abundant caution. We find that ITO did not disobey the order of any Court. No malice or bias can be inferred against the ITO on this Count. The integrity of the officer was not questioned. He was discharging his duties in the lawful manner. No material was placed before us to show that at any point of time ITO defied the norms of law. Having regard to the facts and circumstances of the case and after considering the precedents relied upon, we are of the opinion that the case of the assessee does not come within the ken of the maxim : *nemo judex in causa sua*'. Appellant failed to prove bias against Sri Gautam Kar, ITO. The assessment order is, therefore, not vitiated by bias.

79. Now we come to the applicability of the judgment of the Bombay High Court rendered by Justice Pendse. We have reproduced the copy of the judgment at para 23. Admittedly, the judgment was rendered in the context of Excise Writ Petition No. 1805 of 1994. It transpires from the perusal of the order that it did not set out the facts of the case, question arising in the case, reasons for the decision. The tests laid down by the apex Court in the case of *Arun Mahadeo Rao Danuka v. Addl. IGP (supra)*, was not satisfied.

80. The Honble Bombay High Court in the case of *CIT v. Thana Electricity Supply Ltd. (supra)*, followed the following observation of the apex Court in *Mumbai Kamgar Sabha v. Abdulbhai Faizullabhai*, AIR 1976 SC 1455 (at pages 1467-1468) :

'It is trite, going by Anglophonic principles, that a ruling of a superior Court is binding law. It is not of scriptural sanctity but is of ratio wise luminosity within the edifice of facts where the judicial lamp plays the legal flame. Beyond those walls and de hors the milieu we cannot impart eternal vernal value of the decision exalting the doctrine of precedents into a prison-house of bigotry, regardless of varying circumstances and myriad developments. Realism dictates that a judgment has to be read, subject to the facts directly presented for consideration and not affecting those matters which may lurk in the record. Whatever be the position of a subordinate Courts casual observations, generalisations and sub

silentio determinations must be judiciously read by Courts of co-ordinate jurisdiction'.

81. In the case of CIT v. K. Ramakrishnan (supra) it was held that :

'A case is a precedent for what it explicitly decides and nothing more. The words used by judges are not to be read as if they are words used in an Act of Parliament. These words are not used after weighing the pros and cons of all conceivable situations that may arise. They constitute just the reasoning of the judges in the particular case, tailored to a given set of facts and circumstances. What is made relevant and binding is only the ratio decidendi and no more. The careful drafting - perhaps with reference to analogous statutes - the multiple reading in the legislature and the discussions which go behind the making of a statute inject a certain degree of sanctity and definiteness of meaning to the words used by the legislature. The same cannot be said of a judgment which deals only with the particular fact situation on hand. It will be too much to ascribe and read precise meaning to words in a precedent which the judges who wrote them may not have had in mind at all. Equally, it is not possible to impute an intent to render a decision on a point which was not before them and which they never intended to deal with, even though such an inference may seem to flow logically from the ratio decidendi of the case'.

82. In the case of CIT v. Sun Engg. Works (P) Ltd. (supra), the Supreme Court has held as under :

'It is neither desirable nor permissible to pick out a word or a sentence from the judgment of the Supreme Court divorced from the context of the question under consideration and treat it to be the complete law declared by the Court. The judgment must be read as a whole and the observations from the judgment have to be considered in the light of the questions which were before the Court. A decision of the Supreme Court takes its colour from the questions involved in the case in which it is rendered and while applying the decision to a later case, Courts must carefully try to ascertain the true principle laid down by the decision'.

83. In the case of Goodyear India Ltd. v. State of Haryana (supra), it was held that :

'A precedent is an authority only for what it actually decides and not what may remotely or even logically follow from it'.

84. We are reminded of the Heraclitus, who said :

'You never go down the same river twice'.

What the great philosopher said about time and flux can relate to law as well. A ruling of the superior Court is not of scriptural sanctity but is of ratio-wise luminosity within the edifice of facts where the judicial lamp plays the legal flame.

It is important to note that the decision of Justice Pendse was rendered in the context of excise laws. Not in the context of IT Act. Facts are not discussed in the order. Reasons are not given. It is binding on the excise authorities. Its scope cannot be elongated so as to include the IT authorities also.

85. We now deal with the dictum : Audi alteram partem'. While arguing the opportunity aspect, Shri Dastur stated that the principles of natural justice have been denied, inasmuch as, right to cross-examination was not given to the assessee. To support this the learned counsel relied on precedents. We examine the applicability of the same in the facts of the present case.

86. In the case of Vassanji Ghela & Co. v. CST (supra), the Court held :

'The rules of natural justice do require that normally speaking, if the statement of a person is intended to be used as evidence against a party, it must be made available to the party against whom it is intended to be used and such party must be given a fair opportunity to explain the same or comment on it. What would amount to fair opportunity would depend upon the facts and circumstances of each case. If such a party makes a request to be allowed to cross-examine the person, who made the statement, for the purpose of meeting the statement or with a view to commenting thereon, such a request cannot, save in exceptional or special cases, be denied without violating the principles of natural justice'.

87. In the case of *V. K. Batcha Mohideen v. Jt. CTO*, 28 STC 450 (Mad), the Court held :

'The principles of natural justice have a very wide and extensive field for action. They enfold within their net the activities of the Revenue in problems of taxation as well. They are not circumscribed to civil actions, since their arms can extend even to correct errors committed by taxing authorities in exercise of statutory powers under the taxation laws of the State'.

88. Shri Desai in this connection invited our attention on the ratio of *T. Devasahaya Nadar v. CIT* (1964) 51 ITR 20 (Mad), wherein it was held :

'It cannot be laid down as a general proposition of law that the IT Department cannot rely upon any evidence which has not been subjected to cross-examination.

An ITO occupies the position of a quasi-judicial Tribunal and is not bound by the rules of the Evidence Act, but he must act in consonance with natural justice, and one such rule is that he should not use any material against an assessee without giving the assessee an opportunity to meet it. He is not bound to divulge the source of his information. There is no denial of natural justice if the ITO refuses to produce an information for cross-examination though if a witness is examined in the presence of the assessee, the assessee must be allowed to cross-examine him. The range of natural justice is wide and whether or not there has been violation of natural justice would depend on the facts and circumstances of the case.'

89. In the case of *the State of Punjab v. Bhagat Ram* (1975) 1 SCC 155 (SC), the respondent was dismissed as a result of Departmental enquiry and he filed a suit for declaration that his dismissal was illegal on the ground that copies of the statements recorded by the Vigilance Department during preliminary enquiry were not supplied. The dismissal was set aside by the trial Court and the decision was upheld by the Court. Thereafter the State filed appeal for the certificate. The apex Court held that :

'Unless the previous statements of witnesses are supplied the dismissed person will not be able to have an effective and useful cross-examination and, therefore, it is unfair to deny the Government servant copies of the earlier statements of witnesses. Synopsis of the statements will not satisfy the requirements of reasonable opportunity to show cause against the action proposed to be taken.'

We now come to the cases relied upon by the Revenue.

90. In the case of *State of Gujarat v. Shri Mohanlal Jitmalji Porwal & Anr.* (supra). It was held as under (at page 488) :

'Ends of justice are not satisfied only when the accused in a criminal case is acquitted. The community acting through the State and the Public Prosecutor is also entitled to justice. The cause of the community deserves equal treatment at the hands of the Court in the discharge of its judicial functions. The community of the State is not a *persona non grata* whose cause may be treated with disdain. The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to books. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an evenhanded manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the National Economy and National interest.'

91. In the case of *Kishanlal Agarwalla v. Collector of Land Customs* (supra), the Court held :

'Ordinarily the principle of natural justice is that no man shall be a judge in his own cause and that no man should be condemned unheard. This latter doctrine is known as *audi alteram partem*. It is on this principle that natural justice ensures that both sides should be heard fairly and reasonably. A part of this principle is that if any reliance is - record must be placed on evidence or record against a person

then that evidence or record must be placed before him for his information, comment and criticism. That is all that is meant by the doctrine of, *audi alteram partem*. That no party should be condemned unheard. No natural justice requires that there should be a kind of a formal cross-examination. Formal cross-examination is procedural justice. It is governed by rules of evidence. It is the creation of Courts and not a part of natural justice but of legal and statutory justice. Natural justice certainly includes that any statement of a person before it is accepted against somebody else, that somebody else should have an opportunity of meeting it whether it (*sic*), by way of interrogation or by way of comment does not matter. So long as the party charged has a fair and reasonable opportunity to see, comment and criticise the evidence, statement, or record on which the charge is being made against him, the demands and the test of natural justice are satisfied. Cross-examination in that sense is not the technical cross examination in a Court of law in the witness box.'

92. In the case of *Satellite Engineering Ltd. v. Union of India & Ors.* (*supra*), the jurisdictional High Court has held that -

'It is true that the Department must disclose every information to the petitioner in which the Department intend to rely in the Departmental proceedings. If the copies of the letters containing the price offered were handed over to the petitioner with a slip pasted on the name of the intended importer. From this material, it was for the petitioners to establish that the value quoted in these quotations was not the proper value and in case the Department is compelled to give the name or to produce such intending importers for cross-examination in Departmental proceedings, it will well nigh be impossible to gather any material in future. Therefore, it cannot be said that there was violation of natural justice specially when the name of the exporter sending the quotations was disclosed to the petitioner.'

93. In the case of *Kanungo & Co. v. Collector of Central Excise* (*supra*), it was held -

'.... the complaint of the appellant now is that all the persons from whom enquiries were alleged to have been made by the authorities should have been produced to

enable it to cross-examine them.'

In our opinion, the principles of natural justice do not require that in matters like this the persons who have been given information should be examined in the presence of the appellant or should be allowed to be cross-examined by them on the statement made before the customs authorities. Accordingly, we hold that there is no force in the third contention of the appellant.

There is no force in the second point because we do not read the impugned order as having wrongly placed the burden on the appellant. What the impugned order does is that it refers to the evidence on the record which militates against the version of the appellant and then states that the appellant had not been able to meet the inferences arising therefrom. In our opinion, the High Court was right in holding that the burden of proof had shifted on to the appellant after the Customs authorities had informed appellant of the results of the enquiries and investigations.

94. In the case of *Union of India & Anr. v. Tulsiram Patel* (supra), the apex Court has held that :

'So far as the audi alteram partem rule is concerned, both in England and in India, it is well established that where a right to a prior notice and an opportunity to be heard before an order is passed would obstruct the taking of prompt action, such a right can be excluded. This right can also be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion; nor can the audi alteram partem rule be invoked if importing it would have the effect of paralysing the administrative process or where the need for promptitude or the urgency of taking action so demands.'

95. *DCW Ltd. v. Collector of Central Excise* (supra). Para 11 of the said decision is reproduced here as under :

'The Supreme Court had an occasion to consider the applicability of the principles of natural justice in a recent case in *R. S. Dass v. Union of India* AIR 1967 SC 593. The Supreme Court in *Chairman, Board of Mining Examination v. Ramjee* AIR

1977 SC 965 held as follows :

'Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision maker to the man proceeded against, the form, features and the fundamentals of such essential procedural propriety being conditional by the facts and circumstances of such situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor financial but should be flexible yet firm in this jurisdiction ...'

96. Sri Desai submitted that the rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and background of statutory provision, nature of the right which may be effected and the consequences which may entail its application depending upon the facts and circumstances of each case. It was stressed that natural justice is mistress and not the master of justice. It is used to support the cause of justice. It can never be used to defeat the cause of Justice.

Sri Dastur pointed out that the apex Court in Shaduli's case (supra) made it clear that cross-examination, if asked for, must be granted. In the case of Hira Nath Mishra v. Rajendra Medical College (supra), the Supreme Court came across with an unusual situation which demanded a highly particular approach. The Court was concerned with the complaints regarding molestation of girl students. In exceptional cases the requirement may be waived. The case of the assessee does not fall in the category of exceptional cases. In the light of cases discussed hereinbefore, it was pleaded that great injustice will be done if right to cross-examination be not given to the assessee.

We have perused the decisions cited before us. The judicial climate on this point is thickly clouded with plethora of precedents. This point has created chaos in judicial cosmos. The result is that, as was observed in the case of Kishanlal Agarwalla (supra), 'the danger of confusion has become real and natural justice is on the misleading road of sentimental potentiatives.'

We recollect the famous saying of Justice Bernard Botein :

'The law will never be entirely clear to any judge, just as a beautiful women is always a bit of mystery to her lover. Were it otherwise each would lose part of her charm. But the wise judge, like the wise lover, will be the master of his true love, although he may not understand her completely and though she is sometimes too difficult for him.'

- Trial Judge (at page 27)

97. The appellants basic contention is that the statement of witnesses and materials which are relied upon by the AO in the assessment order to reach the conclusions and findings which are adverse to the assessee should be disclosed to the appellant and the witnesses should be offered for cross-examination. The Supreme Court in the case of *Suraj Mall Mohta & Co. v. A. V. Visvanatha Sastri & Anr.* (supra) at p. 13, laid down :

'the assessee ordinarily has the fullest right to inspect the records and all documents and materials that are to be used against him. Under the provisions of s. 37 of the Indian IT Act the proceedings before the ITO are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at. In other words, the assessee would have a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal.'

98. In the case of *State of Kerala v. K. T. Shauduli Grocery Dealer, etc.* (supra), it was held :

'the usual mode recognised by law for proving the fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correctness of 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 STO. Here in the present case the return filed by the assessee appeared to the STO to be incorrect and incomplete because certain sales appearing in the books of Hazi Usmankutty and other wholesale

dealers were not shown in the books of account of the assessee. The STO relied on the evidence furnished by the entires in the books of account of Hazi Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Hazi Usmankutty and other wholesale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously, the assessee could not do, unless he was given an opportunity of cross-examining Hazi Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Hazi Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incorrect and incomplete the assessee was entitled to an opportunity to have Hazi Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood. Here, it was not disputed on behalf of the Revenue that the assessee in both cases applied to the STO for summoning Hazi Usmankutty and other wholesale dealers for cross-examination but his application was turned down by the STO. This act of the STO in refusing to summon Hazi Usmankutty and other wholesale dealers for cross-examination by the assessee clearly constituted infraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee.'

99. It is pertinent to note that in the case of *M. K. Thomas v. State of Kerala* (supra), it was held that the decision in *K. T. Shaduli's case* (supra) cannot be understood as recognising a right of cross-examination as an invariable attribute of the requirements of reasonable opportunity. The apex Court has stated the rule with sufficient elasticity and amplitude as to make the right depend on the terms of the statute, the nature of the proceedings or of the function exercised, the conduct of the party and the circumstances of the case.

100. 'Whether in a particular case the particular party should have the right to cross-examine or not depends upon the facts and circumstances of a particular case. This is so, because the right to cross-examine is not necessarily a part of reasonable opportunity'. This view was taken by the Calcutta High Court in the case of Manindra Nath Chatterjee v. Collector of Central Excise & Anr. (supra). Thus, in a given case the rule of audi alteram partem may impose a requirement that witnesses whose statements are sought to be relied upon by the authority holding the enquiry should be permitted to be cross-examined by the party affected while in some other case it may not.

101. In the case of Krishinchand Chellaram v. CIT (supra), the apex Court was concerned with the evidence which was to be used against the assessee. This was in the form of letter from the manager of bank through which money was remitted. This letter was not shown to the assessee. Therefore, evidence was held not to be admissible. It was held that opportunity to controvert should be given to the assessee.

102. In the case of Dr. Rash Lal Yadav v. State of Bihar & Ors. (supra), it was held :

'The concept of natural justice is not a static one but is an ever-expanding concept. In the initial stages it was thought that it had only two elements, namely, (i) no one shall be a judge in his own cause, and (ii) no one shall be condemned unheard. With the passage of time a third element was introduced, namely of procedural reasonableness because the main objective of the requirement of rule of natural justice is to promote justice and prevent its miscarriage.'

103. In the case of Mahendra Electricals Ltd. v. Union of India & Anr. (supra), it was held that :

'The opportunity to cross-examine the witness who has made adverse report should not be denied, to the opposite party.'

104. The concept and contents of natural justice go on changing. Natural justice is a living organism, advanced from time to time. Courts are giving new dimensions

to the principles of natural justice. The principles embodied reflect the value of the society accepted for the time being. The change is a fact of life. Every living thing takes new shape, new dimension with the flux of time. Honble Supreme Court has observed in 44 STC 61 (SC) :

'It must be remembered that law is not a mausoleum. It is not an antique to be taken down, dusted, admired and put back on the shelf. It is rather like an old but vigorous tree, having its roots in history yet continuously taking new grafts and putting out new sprouts and occasionally dropping dead woods. It is essentially a social process, the end product of which is justice and hence, it must keep on growing and developing with changing social concepts and values. Otherwise, there will be estrangement between law and justice and law will cease to have legitimacy.'

105. No riddle is more difficult to solve, none has more persistently engaged the attention of thoughtful mind, says Allen, than the problem of the natural sense of justice. We have carefully considered the profile of the subject in the light of the latest developments. Principles of justice prohibits determination without hearing [terminer sans oyer]. Similarly, hearing without determination [oyer sans terminer] is also interdicted by the finer norms of justice. What all is required is impartial and fair hearing, and determination of disputes with utmost promptitude. The question whether or not any rules of natural justice had been contravened, should be decided not under any preconceived notions but in the light of the statutory rules and provisions. The violation or otherwise of any rule of natural justice must be a matter of substance not of mere form. It is important to keep in mind the caveat issued by the apex Court (AIR 1977 SC 965) that unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating.

106. In our opinion, right to cross-examine the witness who made adverse report, is not an invariable attribute of the requirement of the dictum, audi alteram partem. The principles of natural justice do not require formal cross-examination. Formal cross-examination is a part of procedural justice. It is governed by the rules of evidence, and is the creation of Court. It is part of legal and statutory justice, and

not a part of natural justice, therefore, it cannot be laid down as a general proposition of law that the Revenue cannot rely on any evidence which has not been subjected to cross-examination.

However, if a witness has given directly incriminating statement and the addition in the assessment is based solely or mainly on the basis of such statement, in that eventuality it is incumbent on the AO to allow cross-examination.

Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of collateral nature.

107. Adverting to the facts of the present case, we find that the AO made addition on account of the clandestine premium alleged to have been received by the assessee on the sale of cigarettes. The factum of the premium collection is mainly based on the edifice of the following facts :

- (i) Analysis of the assessee's finance results revealed that the assessee sustained 'Loss from sale of cigarettes', to the tune of Rs. 20,59,57,913;
- (ii) Invoice price of the cigarettes as reflected by the assessee in its record was less than the manufacturing cost; (see para 7)
- (iii) Impact of excise duty on the trade, and the observation of the Technical Study Group of Central Excise Tariff, 1985; (see paras 8 & 9)
- (iv) Twin Branding System.

108. It is relevant to see that how the amount of premium was calculated. On what basis it was worked out. We find that the entire calculation [as given on page No. G-22A, of the assessment order] is based on the 'Twin Branding Principle'. First the difference between the ex-factory price of a particular brand and its high price twin was worked out. Amount so arrived at was multiplied by the volume. Resultantly came the figure of Rs. 29,11,68,078. Out of that Rs. 2,91,16,807 [10 per cent.] got deducted. It was attributed to the share of WBs who were privy to such clandestine operations.

Finally a sum of Rs. [29,11,68,078 - 2,91,16,807] = Rs. 26,20,51,271 rounded off to Rs. 26,20,51,000 added in the total income.

109. To support the addition on account of premium, recourse was made to the pricing and marketing policies, adopted by the assessee and other incidental details. Modus operandi was examined. It was found that -

(i) Large amount was remitted by different unrelated and unconnected WBs, in the form of demand drafts, in fictitious names to Bombay, Calcutta, Delhi, etc., and these demand drafts were encashed either through bank account standing in the same name as that of the payee or else were discounted.

(ii) The advertisement expenses of the assessee-company were incurred through these secret bank accounts.

(iii) Assessee-company donated the funds out of these secret bank accounts, viz., donation to Methodist Church out of transfer of funds from the a/c of H. K. Patel (in asst. yr. 1984-85) and donation to the Festival of India Committee out of transfer of funds from the account of Shree Associated (Current A/c No. 1724 in Indian Overseas Bank, Bandra West).

This amount was given at the behest of Sri Sanjay Dalmia, President-Cum-Director-General of the company.

(iv) One of such bank account was in the name of Moonlight Finance. This was with the Punjab & Sind Bank, Scindia House Branch, New Delhi. The account holder was given the following address :

B=72, Himalaya House

(7th floor) 23-Kasturba Marg,

New Delhi.

(Current A/c No. 787)

This was also the office address of Mr. Umesh Khaitan, Sitting Director of the assessee-company.

(v) Amount in the shape of commissions, profits on sale of goods other than cigarettes, technical and supervision charges, etc.; were reintroduced in the assessee's a/c, by means of havala entries.

In view of the above, AO concluded that assessee-company had nexus with the secret bank accounts. Thus, he supported the premium theory with reference to the above said facts. Out of the total amount of addition on account of premium, AO deducted, inter alia, the following :

Rs.

(i) Bogus income shown from commission, trading and supervision charges

8,66,32,171

(ii) Advertisement expenses outside books

2,60,00,000

110. The material gathered by the DRI in the course of search which was passed on to the IT Department has given the clue. AO made independent investigation. The analysis of the financial results revealed that the assessee sustained loss from the sale of cigarettes to the tune of Rs. 20,59,57,973. Besides, the invoice price of the cigarettes as reflected in the records was less than the manufacturing cost. These facts were examined with reference to the observation of the Technical Study Group of Central Excise Tariff, 1985. The impact of the excise duty on the trade was considered. The outcome of the enquiry indicated that the premium was generated by the use of the Twin Branding System. The basis of addition was the difference between the ex-factory price of a particular brand and its high price twin.

There was no addition on account of alleged bogus income shown from commissions, trading and supervision charges. Similarly advertisement expenses found outside the books were not considered for the purpose of addition. These

amounts were considered for the purpose of deduction from the so-called clandestine commission.

In short, the case of the Revenue is, that the assessee-company by using Twin Branding System, collected clandestine premium on the sale of cigarettes. This commission was collected through the WBs. It was kept in the secret bank accounts. It was utilised for meeting the expenditure, viz., advertisement, donation, etc. Some amount was reintroduced in the assessee's account by means of havala entries and reflected as commission and trading income.

111. From the aforesaid discussion, it is clear that addition was not made merely on the basis of findings given apropos the secret bank accounts, disbursement made out of such accounts or on the strength of havala entries, by which the bogus commission and trading income said to have been reintroduced in the books of the assessee. These aspects are only secondary, subordinate and were used to buttress the main matter connected with the amount of addition.

The violation or otherwise of any rule of natural justice must be a matter of substance not of mere form. Natural justice should always be used for the furtherance of the cause of justice. The palladium of justice requires, that law suits be not protracted, otherwise great oppression might be done under the colour and pretence of law [*interest republica ut sit finis litum*]. These lofty principles which are harbingers of justice cannot be used for dragging the justice in the labyrinth. We have already indicated that adverse evidence and material, relied upon in the order, to reach the finality should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of collateral nature. Having regard to the facts and circumstances of the case, we are of the opinion that there was no denial of the principles of natural justice.

112. In the result, the preliminary issue connected with the applicability of the principles of natural justice stands adjudicated against the assessee. On merits the appeal shall be heard in normal course.