Living Audi Alteram Partem

It is said that even the Almighty acted in compliance of the rule of Audi Alteram Partem when in the Garden of Eden, he asked Adam and Eve, "What do you have to say?" This question was asked in spite of the fact that the Almighty knew that they had eaten the forbidden fruit.

The present endeavour is not an attempt to discuss these principles of natural justice but to understand the consequences of non-compliance in the current scenario. It happens quite often in tax assessment proceedings that assessments are completed without granting a fair and adequate opportunity of hearing to the assessee. The assessee, as a sequel, is agitated when such assessments are to his detriment.

Vardhaman L Jain
The author is the member of the Institute. He can be reached at vljain@vsnl.com

One phrase commonly used in tax proceedings is 'natural justice'. This is a phrase, which is used equally commonly in day-to-day conversation. One of the essential pillars of principles of natural justice is Audi Alteram Partem. It is a Latin phrase meaning that a decision has to be given in the case of any person only after he is heard. Impliedly, any decision proposed to be taken which is adverse to a party should be taken only after giving a hearing prior to taking of such a decision.

The two-fold questions before the Appellate Forums

Whether there was really a case of non-compliance of the principle of natural justice resulting from a non-compliance of the rule of Audi Alteram Partem?

Having arrived at a conclusion that there is a violation of the principles of natural justice in as much as fair and adequate opportunity of hearing was not provided to the appellant, what is the remedy?

In an attempt to discuss the remedy, it would be worthwhile to have a focused analysis of the cases resulting in such lack of opportunity. A survey of the decided cases on the point and a cursory appraisal of the remedies offered would reveal that granting of an opportunity to the assessee by setting aside and restoring the matter to the file of the Assessing Officer would be adequate redressal in most of the cases. However, it appears that doing so in some category of cases would not be doing true justice to the assessee. Legal justice may seem to be done by providing opportunity of hearing, but that would not be the same as natural/fair justice. It is these set of cases that the remedy from the Appellate forums should be different.

Such set of cases result from 'pressure cooker assessments' (if I may so term them). These are assessments completed in a hurry under pressure at a fag end of the limitation period under the Act. It is typically relieving the pressure before or just by the time the cooker whistle is to blow, announcing the expiry of the limitation period.

Such cases have come up before the courts and courts have had occasions to make some very significant comments on the same

The Andhra Pradesh High Court in Berulal Tiwari v. CIT 173 ITR 280:

"We would express our disapproval of the way in which ITOs' drag on the assessment proceedings till almost the last minute and rush through the entire process of assessment when the limitation was about to set in without giving adequate opportunities to the assessee. The CIT, exercising administrative jurisdiction over these officers, should keep a close watch on the proceedings and should discourage any attempt on the part of the tax officers in dragging on the assessment proceedings till the last minute causing difficulties both to the assessee and to the Department".

The Madras Bench of ITAT in T.S. Kumaraswamy v. CIT (65 ITD 188):

"We do not approve making such a huge addition of Rs 1.68 crores on such pretence. The search operations commenced from 17th October 1995 and ended on 3rd November 1995 as mentioned in the impugned order. The notice under s. 158BC r/w s. 142(1) of the Act calling upon the assessee to file the return of the UDI of the block period was issued on 24th July, 1996 that is to say; after nearly eight months of the conclusion of the search operations. The AO instead of waiting till the last date of the limitation period (31st October, 1996) ought to have completed the assessment of the UDI of the block period after the expiry of 15 days period as prescribed in s. 158BC of the Act. The AO could have acted diligently conducting enquiry by issuing further notice under s. 143(2) and completed the block period assessment, even under s. 144 of the Act as provided in s. 158BC(b) of the Act. But he did not do so and waited till the fag end of the limitation period prescribed in s. 158FE of the Act. The addition of Rs 1.68 crores in the impugned order is thus, wholly arbitrary and preposterous addition purely based on assumptions and inferences on the basis of the report given by I.T. Inspectors after making enquiries with the 4 creditors only from out of 43 creditors, without putting the report of I.T. Inspectors and the evidence gathered by them to the assessee for answer and rebuttal.

If the AO had less time at his disposal for making valid and proper enquiries for making assessment he cannot be unfair to the assessee and make unjust and arbitrary addition of Rs 1.68 crores. In our view, the impugned addition of Rs 1.68 crores is vitiated on this count and can be declared as illegal".

The Allahabad Bench of Tribunal in Monga Metals (P) Ltd v. ACIT (67 TT J 247):

"After having held the assessment order to be in violation of the principle of natural justice the next question for our decision is that, should the assessment be quashed?"

"It is now settled law that Tax authorities entrusted with the power to make assessment of tax discharge quasi-judicial functions and they are bound to observe principles of natural justice in reaching their conclusions. A taxing officer is not fettered by technical rules of evidence and pleadings, and he is entitled to act on material, which may not be accepted as evidence in a court of law, but that does not absolve him from the obligation to comply with the principles of natural justice. It must, however, be remembered that the rules of natural justice are not constant; that are not absolute and rigid rules having universal application" (AIR 1969 SC 198).

One of the rules which constitutes a part of the principles of natural justice is the rule of Audi Alteram Partem, which requires that no man should be condemned unheard. It is indeed a requirement of the

duty to act fairly, which lies on all quasi-judicial authorities and this duty has been extended also to the authorities holding administrative enquiries involving civil consequences of affecting rights of parties. The quasi-judicial decision rendered and order made in violation of the Audi Alteram Partem Rule is null and void the order impugned in such case can be struck down as invalid on that score only and this view is fortified by numerous decisions.

"In case of State of Kerala vs. K. T. Shaduli Grocery Dealers, Etc. (AIR 1977 SC 1627), the Hon'ble Supreme Court followed the provision of law laid down in case of Dhakeshwari Cotton Mills Ltd. and Suresh Koshy George and quashed the assessments which were found to be in violation of principle of natural justice."

"In case of Coloniser vs. Asstt. CIT, Tribunal, Special Bench, as per head notes, has also held that an order rendered in violation of rule Audi Alteram Partem is null and void and the order made in such a case can be struck down as invalid on that score only. The relevant part of head notes, which is quite important and worth of noting reads as under:

"In regard to the second point of difference, two segments of it existed. The first segment was as to whether the additions made in violation of the principles of natural justice should be set aside as void ab initio. The second segment was as to whether addition should be deleted or should the case be resorted to the ITO with a direction for redoing. "The rules of natural justice operate as implied mandatory requirement, non-observance of which amounts to arbitrariness and discrimination. The principles of natural justice have been elevated to the status of fundamental rights guaranteed in the Constitution as is evident from the decision of the full Bench of the Supreme Court in the case of union of India vs. Tulsiram Patel (AIR 1985 Sc 1416) at p. 1460, holding that the principles of natural justice have thus come to be recognised as being a part of the guarantee contained in Art. 14 of the Constitution because of the new and dynamic interpretation given by the Supreme Court to the concept of equality, which is the subject-matter of that article and that violation of principles of natural justice by a State action is a violation of Art. 14."

"In fact, the principles of natural justice in the realm of life and liberty would ipso facto even be read into Art. 21 because any procedure, which affected life or liberty had to be a just, fair and reasonable procedure which necessarily meant the observance of the principles of natural justice. That is why these principles have been called as part of the universal law, as part of the rule of law and have also been termed as fair play in action."

"Audi Alteram Partem is one of the fundamental principles of natural justice. A quasi-judicial or administrative decision rendered or an order made in violation of the rule of Audi Alteram Partem is null and void and the order made in such a case can be struck down as invalid on that score alone-Maneka Gandhi vs. Union of India (AIR 1980 SC 597), Gangadharan Pillai vs. Asstt. CED (1978) 8 CTR (Ker) 352: (1980) 126 ITR 356 (Ker) at app. 365 to 367. In other words, the order, which infringes the fundamental principles, passed in violation of Audi Alteram Partem rule, is a nullity. When a Competent Court of authority holds such an order as invalid or sets it aside, the impugned order becomes null and void— Nawabkhan Abbaskhan vs. State of Gujarat AIR 1974 SC 1471 at p. 1479. In the light of these decisions, the additions made by the AO in violation of the principles of natural justice had to be set aside as void only insofar as the additions by way of cash credits alone were concerned, which were separable from the other additions in the order that were not challenged."

"In case of Swadeshi Cotton Mills (p) Ltd; in case of Mankea Gandhi, in case of Smt. Kanti Khare and in other decisions relied upon by the assessee (supra) the courts have followed the same principle and have quashed the order as being a nullity and void."

"In view of aforesaid settled principle of law and various decisions, which we are bound to follow there remains no doubt the answer to the question before us, i.e. our answer to the question is that once the assessment is found to be in violation of principle of natural justice it has to be quashed as being bad in law and void or a nullity".

"As far as the assessment before us is concerned since we have already held in Para 19 the assessment to be in violation of principle of natural justice, we respectfully following the decision of various courts including Hon'ble Supreme court and also the decision of Tribunal (supra), have no hesitation in holding that the AO's action refusing the permission to the assessee for cross-examination of Mr. Madan Hada and others not only constituted infraction of right conferred to the assessee in view of the principles of natural justice, but was in gross violation of the principle of natural justice and has vitiated the assessment on the issues."

"Relating to the undisclosed income referred to in the assessee's arguments and also with respect to the undisclosed income on account of so-called excess stock of scrap alleged to the available on the date of search and the assessment order to that extent has to be declared as bad-in-law, a nullity and void. We, subject to the direction that AO may proceed with the matter afresh if the law so permits, hold accordingly".

The position emanating in such cases if the appellate authorities were to set aside and restore the file to Assessing Officer would be as under:

The Commissioner of Income Tax Appeals is, with the change in law with effect from 01.06.201, denuded of the power of set aside. As such, in a given case before CIT Appeals, the CIT Appeals would be left with no choice but to provide the opportunity at the appellate stage.

However, this course of action is not free from debate. The question that needs to be answered is "can violation of principles of natural justice be made good in appeal?" The Supreme Court had occasion to consider such an eventuality in Tin Box Co. Vs CIT (249 ITR 216).

The Supreme Court held that the only course of action was to set aside the assessments so as to provide an opportunity of hearing after which assessment could be made. The Supreme Court, apparently did not agree with High Court in its conclusion that lack of opportunity can be made good in first appeal.

It appears that the amendment made by Finance Act, 2001 w.e.f 01.06.2001, would bring in a situation where compliance of Supreme Court verdict in Tin Box Co. could be achieved by only annulling the assessment.

The Assessing Officer would be enjoying second innings to redo the assessment. This appears to be unjustified. It is true that the assessee does not get fair justice when adequate opportunity is not provided to him during the course of hearing. Legal justice in achieved by a set aside so as to provide the opportunity of hearing. However, natural justice would demand that in so doing no prejudice is caused to the person seeking natural justice. By providing a second innings to the lower authority, a prejudice is caused to the appellant/assessee in as much as the Department is getting an extension of the limitation period. Such an eventuality is not envisaged by the Act. An undue benefit cannot be passed to an Assessing Officer who himself has brought in such a situation by sitting pretty when he should have acted with diligence within limitation period.

The Rajasthan High Court in Kishormal vs CP Singh vs ITO (140 ITR 195) has held that once the Assessing Officer fails to follow the statutory course prescribed before assessment, it can be said that he misses the bus and cannot be given a second chance to rectify the matters.

Similarly, Jaipur Bench of ITAT in a Third Member judgment in Ambeshwar Grih Nirman Sahkari Samiti Ltd. Vs DCIT (78 TTJ 94) has, in dealing with appeal against block assessment, negated the restoration of matter back to Assessing Officer as that would mean allowing them second innings.

The Delhi High Court in CWT vs Gurdial Singh (123 ITR 483), while dealing with appeal against best judgment assessment, was sitting in judgment to answer following question: "Whether, on the facts and in the circumstances of the case, the Tribunal was correct in law in holding that the assessee was entitled to have a second opportunity in terms of sub – s (5) of section 16 of Wealth Tax Act, 1957 and on that ground setting aside the orders of the authorities below and restoring the cases to the WTO to reframe the assessment?"

The High Court observed thus: "The attitude of the assessee was throughout to sit

on the fence and contemptuously ignore the assessment proceedings and the notices issued by the WTO requiring him to furnish returns and other material in support of his wealth – tax statements. After all, the assessment proceedings could not be converted into a farce of mockery by him. He ought to have shown due regard to them. In the circumstances, there was no justification, to allow him a second innings by setting aside the assessments and requiring the WTO to frame them afresh. For the framing of those best judgment assessments and the situation in which assessee found himself rendered, he was himself to blame. He could not, therefore, be heard to make a grievance of his own defaults. What the principle of natural justice postulate is that a reasonable opportunity should be granted to the assessee of being heard. It is for him to avail that. In case, he does not choose to do so, the orders that follow cannot be held violative of those principles or the requirements of law.

What applies to the assessee should apply with equal force to the Assessing Officer. The observations of the Delhi High Court as reproduced in the preceding para would in all fairness be relevant to the Assessing Officer in a given situation.

The Gujrat High Court in Rajesh B. Damania vs ITO (251 ITR 541) observed as under:

"There was no question of giving more innings to AO. Appeals not to be decided for giving more innings to authorities." The Court further held that the Tribunal committed an error of law in restoring the matter to AO.

The Allahabad High Court in J K Synthetics vs ITO (105 ITR 864) held that an order passed in violation of the principles of natural justice is void. "Even the revised return was filed on 10th April 1974 and the ITO had a period of one year from that date to complete the assessment. But for reasons best known to him he did not take up the assessment proceedings until the fag end of the limitation. Had the ITO taken up the case well in time, this situation might have been averted. Even if there was very little time at the disposal of the ITO, because of the approaching limitation, he could not violate the principles of natural justice. The argument that the ITO was hard pressed for time is an argument of despair, which cannot be allowed to alter the course of justice. The predicament in which the ITO found himself was his own creation. We cannot allow the petitioner to suffer injustice. A similar argument was raised before the Supreme Court in CIT vs. Ranchoddas Karsondas (1959) 36 ITR 569 576 (SC) and this is how the Supreme Court disposed of that objection".

"Mr Rajagopala Sastri pointed out that an assessee might file the 'voluntary' return on the last day showing income less than the taxable limit and the Department would, in that case, be driven to complete the assessment proceedings within a few hours or lose the right to send a notice under s. 34(1). An argument which is inconvenient is not a decisive argument. The ITO could have avoided the result by issuing a notice under s. 23(2) and not remaining, inactive until the period was about to expire."

"The same can be said in the instant case. If the ITO had not remained inactive for such a long time the situation he found himself in would not have been precipitated. We have, therefore, no hesitation in holding that the company was denied a reasonable opportunity and the impugned order contravenes the principles of natural justice and for that reason is void."

The Supreme Court in Sona Builders vs Union of India and Others (251 ITR 197) held that having regard to the statutory limit within which the Appropriate Authority has to act and his failure to act in conformity with the principles of natural justice, matter cannot be remanded to the Appropriate Authority and the order of the Appropriate Authority is quashed.

Conclusion

The Tribunal has wide powers in deciding an appeal before it. Natural Justice, rules of which are supposedly written by the fingers of nature on the heart of man, would be better achieved in appropriate cases by rendering the order a nullity and not being set aside and restored to the Assessing Officer. ❐