

**IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE**

Present :

The Hon'ble Mr. Justice K. J. Sengupta

The Hon'ble Mr. Justice Joymalya Bagchi

I.T.A. No. 267 of 2003

**Hindusthan Tobacco Company
Vs.
Commissioner of Income Tax, West Bengal - IV**

For the Appellant : Mr. J.P. Khaitan, Sr. Advocate,
Mr. Sourav Bagaria, Advocate.

For the Revenue : Mr. R. N. Bandhopadhyay, Sr. Advocate,
S. B. Sarof, Advocate.

Heard on :

Judgement on : 30.08.2012

Joymalya Bagchi :- The instant appeal was admitted on the following substantial questions

of law :

- (i) Whether the tribunal was justified in law in restoring the disallowance of business expenditure of Rs. 52,21,367/- incurred by the appellant for car hire, printing, hire of manpower and sampling and display of the goods dealt with by it which was deleted by the Commissioner of Income Tax (Appeals) and its purported findings in that behalf are arbitrary, unreasonable and perverse ?
- (ii) Whether and in any event the said disallowance was made by the Assessing Officer in violation of the principles of natural justice -
 - a) by relying upon enquires conducted from Banks in respect of parties to whom car hire charges, printing charges and manpower hire charges were paid behind the appellant's bank, without disclosing the same to it or affording to it any opportunity to controvert or deal with the same;
 - b) by relying upon enquiries conducted in respect of sampling and display of the goods dealt with by the appellant without disclosing the same to the appellant or affording it any opportunity to controvert or deal with the same;
 - c) by not providing to the appellant copies of the reports relating to local enquires conducted in respect of the three concerns to whom car hire charges, printing charges and manpower hire charges were paid and without affording to the appellant an opportunity to cross-examine the persons from whom such enquiries were alleged to have been made.

The appellant assessee filed return of income on 28.10.1994 in respect of assessment year 1994-95 showing a total income of Rs. 15,464,906/-. On perusal of the profit and loss account it was found that the appellant had debited a sum of Rs. 69,59,507/- towards advertisement and sale. In the assessment year 1993-94 the amount so debited was Rs. 14,19,197/- and in the assessment year 1992-93 was Rs. 2,03,507/-. In the course of scrutiny of such return, the

assessee was called upon to furnish necessary details of expenditure as to how such steep rise had occurred on advertisement and sale promotion in that year.

The assessee stated that the sale had gone up by nearly 17% in that year and hence the sales promotion and advertisement expenses had to be increased correspondingly. It was found that although the sales in the said year had in fact gone up net profit had suffered a drastic fall. Enquiry was made in the course of the assessment as to whether the assessee who is a wholesale dealer of cigarettes of I.T.C. Ltd. was required to incur expenditure on advertisement and sales promotion and assessee was called upon to furnish a confirmation in this regard from its principal, namely, ITC. The appellant assessee did not submit such confirmation whereupon the Assessing Officer wrote to ITC seeking clarification.

A reply was received on 25.02.1997 wherein it was stated that wholesale dealers were free to undertake such expenditure at their own risk but was under no obligation to do so. In view of the substantial increase in the matter of expenses on account of sales promotion and advertisement which was claimed to have been voluntarily undertaken by the appellant assessee, the Assessing Officer decided to verify the items of expenditure claimed by the assessee. In course of such verification, the Assessing Officer called upon the assessee to submit details of advertisement, sales promotion and sampling and display expenditure. Subsequent to the submission of details the Inspector of Income Tax conducted enquires about the parties with whom the assessee claimed to have had transactions in that regard.

Pursuant to the enquiries so conducted the Assessing Officer in the course of assessment pointed out to the material collected against the assessee and called upon him to respond thereto. This fact is evident from the order dated 11.03.1997 maintained by the Assessing Officer in the course of his assessment proceeding. Thereafter, by letter dated 12.03.1997 the Assessing Officer communicated to the appellant assessee the materials collected against him in the course of such enquiry by the Inspectors and called upon the assessee to respond to the same.

In reply to such letter, the assessee claimed that it had provided all information which was in its possession and control and claimed since the payments were made by account payee cheque such the deductions as claimed ought to be allowed.

With regard to the expenses relating to sampling and display of products, the appellant assessee claimed that the cigarettes were distributed through hawkers, sales representatives and that they have no record in respect of each individual shop.

It is relevant to note that in the aforesaid reply the appellant assessee did not call upon the Assessing Officer to give a copy of the Inspector's Report or any other or further material. Nor did the assessee call upon the Assessing Officer to summon the individuals interrogated by the Inspector for cross-examination in the course of the assessment proceeding.

The Assessing Officer in conclusion of its assessment by the assessment order dated 31.03.1997 disallowed the various deductions claimed by the assessee particularly deduction on account of expenses incurred through M/s. Grafic Circle, being expenses incurred for hiring of vehicles to the tune of Rs. 5,69,000/-, through M/s. Universal Printers to the tune of Rs. 15,56,658/- on account of expenses incurred for printing through M/s. Ma Tara Enterprises to the tune of Rs. 5,93,900/- on account of hiring manpower and on account of expenses incurred for sampling and displays to the tune of Rs. 27,68,607/-.

The appellant assessee being aggrieved by such order of assessment appealed before the CIT (Appeals) wherein the appellant assessee, inter alia, claimed that the Assessing Officer had proceeded with the assessment proceeding in violation of the principles of natural justice inasmuch as copy of the Inspector's report was not supplied to it and the persons who had been interrogated were not called for cross-examination. The appellant assessee also claimed that the enquires in the bank accounts of various entities through whom such expenditure were made were undertaken behind back of the appellant assessee.

Before the CIT (Appeals), it was admitted by the parties that the deduction claimed towards expenses for car hire through M/s. Grafic Circle ought to be Rs. 3,59,000/- instead of Rs. 5,69,000/- as claimed before the Assessing Officer.

CIT (Appeals) in its order dated 13.04.1998 set aside the assessment order, inter alia, on the ground that the payments to M/s. M/s. Grafic Circle, M/s. Universal Printers, M/s. Ma Tara Enterprises were by account payee cheques and hence the deduction of such expenditure ought not to have been disallowed. The disallowance of expenditure on the ground of display and sampling was also set aside by CIT (Appeals) on the ground that the Assessing Officer erred in law in rejecting such expenditure as unnecessary.

The revenue appealed against such order before the learned tribunal being I.T.A. No. 868 (Cal) of 1998. The learned Judicial Member of the tribunal in its order opined that the disallowance of expenditure by the Assessing Officer through M/s. Grafic Circle through M/s. Universal Printers and M/s. Ma Tara Enterprises required to be set aside and the matter required to be remanded for fresh consideration in view of the fact that the copy of the Inspector's report and an opportunity to cross-examine the persons interrogated by the inspector had not been provided to the assessee resulting in a denial of an opportunity of fair hearing. The learned Judicial Member was also of the opinion that with regard to the expenses undertaken on the ground of display and sampling the matter required to be remanded to give the assessee an opportunity to file the list of shops where the assessee distributed the packets of cigarette for display as well as sampling and to produce all documents and evidence in support thereof.

The learned accounting member, however, did not agree with the learned Judicial Member that there was violation of principles of natural justices in the assessment proceeding and was of the opinion that the assessee was duly confronted with the inspector's report by Assessing Officer in his letter dated 12.03.1997 and the assessee's response thereto was duly considered by the Assessing Officer before passing the assessment order.

With regard to the expenses incurred for display and sampling it was the opinion of the accounting member that the assessee had not discharged its initial

burden by adducing adequate and cogent materials in support of such claim for deduction and therefore the finding of the CIT (Appeals) in this regard was completely unjustified.

The learned accounting member further held that in view of the failure of the assessee to discharge its initial onus regarding his claim towards expenses on account of display and sampling the disallowance of such expenditure could be made even without considering the inspector's report.

In view of the difference between the learned members of the tribunal the matter was referred to a third member on the following issues :-

- I. Whether on the facts and in the circumstances of the case the tribunal should have restored the matter regarding disallowance of following expenditure, to the file of the Assessing Officer with a direction to find out whether the bank account of the recipient was opened with proper direction and, if so, allow the relief as per the law, and to decide the matter de novo after confronting the assessee with the inspector's report, or whether the tribunal should have restored the disallowances deleted by the CIT (A) :

Payment to Grafic Circle for car hire	Rs. 3,59,000/-
Payment to Universal Printers for printing work	Rs. 14,99,860/-

- II. Whether on the facts and in the circumstances of the case the tribunal should have restored the matter regarding disallowances of following expenditure, to the file of the Assessing Officer with a direction to decide the matter de novo or whether the tribunal should have restored the disallowances deleted by the CIT (A) :

Payment to Ma Tara Enterprises	Rs. 5,93,000/-
For supply of temporary workers Sampling and display expenses for	

The learned third member upheld the disallowance of expenses by the Assessing Officer, inter alia, on the ground that the appellant assessee was given adequate opportunity to rebut the materials collected against him and that it was the appellant assessee who failed to discharge his initial onus to establish such claims for deduction.

Being aggrieved by such finding, the instant appeal has been filed on behalf of the appellant assessee.

Mr. Khaitan, learned counsel appearing for the appellant assessee has focused his challenge to the impugned decision of the learned tribunal on the ground that the appellant assessee was not granted adequate opportunity to rebut the materials collected against him inasmuch as he was not given a copy of the inspector's report and no opportunity was given to him to cross-examine the persons interrogated by the inspector.

It was also his contention that the enquiry in the bank accounts of the entities through whom the expenses were made were also conducted behind the back of the appellant assessee and he was not given an opportunity to rebut the same.

Mr. Khaitan has referred to section 142(3) of the Income Tax Act in support of his contention.

Mr. Bandopadhyay, appearing on behalf of the department submitted that the appellant assessee had been given ample opportunity to rebut the materials collected in the course of enquiry against him and the contents of the inspector's report were substantially communicated to him by the letter dated 12.03.1997. The assessee did not ask for the inspector's report nor prayed for summoning any person for cross-examination in the course of the assessment

proceedings and did not suffer any prejudice in that regard. Hence the assessee is precluded from raising such issue at the appellate stage.

It was further submitted by Mr. Bandopadhyay that the burden lay on the assessee to establish the claim for deduction as held in 208 ITR 468 and mere payment through account payee cheques was not sufficient to discharge such onus.

We have considered the submissions of the parties. The issue which falls for decision is primarily whether the assessment proceeding in the instant case was conducted in a fair manner so much so conforming to principles of natural justice.

It is settled law that principles of natural justice cannot be construed in isolation from the factual matrix of the case or it has many a facets.

In the case of reported in 1977 (2) SCC 256 the Supreme Court succinctly summarized the concept of natural justice 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 processual propriety being conditioned by the facts and circumstances of each 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 financial nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt – that is the conscience of the matter.”

It is therefore to be seen as to whether in the factual backdrop of the instant case the claim of the appellant/assessee for the first time before the CIT

(Appeals) that he was not given an adequate opportunity of hearing in respect of the materials collected against him is justified or not.

To arrive at such conclusion let us examine the manner in which the Assessing Officer conducted the assessment proceeding. It appears from the assessment order that the appellant assessee was confronted with the contents of the inspection report by the Assessing Officer as would appear from the order dated 11.03.1997 recorded in course of such proceeding. Thereafter the Assessing Officer by a letter dated 12.03.1997 communicated to appellant assessee the contents of the inspector's report which mentioned in great details how enquiry was held and then called upon the assessee to respond to the same.

In response to such letter the assessee sought for an adjournment to respond to the same. Such adjournment was duly granted by the Assessing Officer. On the adjourned date the assessee gave a reply to the said letter relevant extracts whereof are set out hereinbelow :

“We give below our reply to the various queries raised by you.

Point Nos. A,B & C : a)

We have furnished all information to you, which was in our possession and control i.e. we submitted to you copies of bills and payment details. We would bring to your kind attention that all payments were made by Account Payee Cheques.

5. Sampling/Display

We would bring to your kind attention that sampling/display expenses have been genuinely incurred during the year from time to time, which we

have already explained to you. These cigarettes were distributed through Hawkers, Sales Representatives. We have however not maintained the records, in respect of distribution for each individual shop.”

From the aforesaid correspondence, we have no doubt in our mind that the principles of natural justice have been substantially complied with in the instant case. The appellant assessee was duly communicated with the substance of the inspector’s report, the identity of the persons who had been interrogated by the inspector and also repeatedly called upon to furnish necessary particulars of the shops through which the expenses on account of sampling and display were made.

An adjournment was sought for to respond to the contents of the inspector’s report which was duly granted. A perusal of the reply to the said letter dated 12.03.1997 makes it evident that the assessee did not feel prejudiced in any way in the manner of conduction of such proceeding and categorically indicated that it has submitted whatever materials were within their possession and control in support of their claim and did not have anything more to submit. We think in the present situation adequate compliance of natural justice was made. In order to have benefit of complete compliance of natural justice active cooperation by way of effective response to the queries ought to have been furnished.

It is apposite to mention that neither the appellant assessee at that stage called upon the Assessing Officer to furnish a copy of the inspector’s report nor did it call upon the Assessing Officer to produce the persons who were examined by the inspector in course of enquiry for cross-

examination. Such conduct of the appellant assessee clearly establishes that there was compliance of the principles of natural justice as far as the Assessing Officer is concerned and the assessee did not suffer any prejudice in the manner in which the assessment proceeding was conducted. Furthermore non-supply of the copy of the inspector's report did not cause any prejudice to the assessee inasmuch as the contents thereof were in fact substantially communicated to the assessee by the aforesaid letter of the Assessing Officer dated 12.07.1997 to which the assessee was given adequate opportunity to respond.

If the assessee felt that cross-examining of any person was necessary for establishing its case it was incumbent upon the assessee to make such prayer before the Assessing officer during the assessment proceeding. If a party fails to avail of the opportunity to cross-examine a person at the appropriate stage in the proceeding, the said party would be precluded from raising such issue at a latter stage of the proceeding. Therefore the belated claim of the assessee at the appellate stage that it was denied the opportunity of cross-examining witnesses in the assessment proceeding is wholly untenable in law.

Plea of violation of natural justice taken at the appellate stage appears to be belated and clearly an afterthought. It appears that no prejudice had been suffered by the appellant assessee in the manner the proceeding was conducted by the Assessing Officer and the assessee was not aggrieved at that stage. Only when the assessment order went against it, the assessee conveniently raised such belated plea of denial of opportunity of fair hearing and breach of principles of natural justice.

With regard to the enquiries made in respect of the bank accounts of the entities through which expenditure has been made, we are of the view that no prejudice is caused to the appellant assessee. Such enquiries were made to ascertain the address of the said entities for serving

notices upon them under Section 131 of the Income Tax Act. Repeated opportunities to the appellant assessee to disclose the identity of the said entities and/or to bring them before the Assessing Officer had yielded no result. Undoubtedly it was the initial burden of the assessee to establish the identity of such persons and/or to produce them to support its claim. The assessee having failed to do so the Assessing Officer had no alternative but to make enquiries in the bank accounts of those entities to establish their identities. However, such effort also proved futile inasmuch as neither any address was given in the said account opening forms nor there was no introducer to such account.

In this backdrop it cannot be said that enquiries made by the inspector in respect of the bank accounts of those entities were in violation of principle of natural justice or caused any prejudiced to the assessee.

We have already indicated the purpose of such enquiry was to issue notices under Section 131 of the Income Tax Act upon such entities, whose identities the assessee ought to have divulged in the first place. The learned third member rightly held that such enquiries have not caused any prejudiced to the appellant assessee and remanding the case would serve no worthwhile purpose inasmuch as the appellant assessee inspite of repeated opportunities have failed to produce the said entities before the Assessing Officer.

When the identity of the entities though whom such expenses were made were doubtful and the assessee had failed to dispel such doubt by discharging its initial onus, mere fact that payments were made through account payee cheques would not be the sole criteria to accept the genuineness of such transaction. Reliance in this regard has been rightly made to the ratio of a decision of this Court reported in 208 ITR 465 wherein this Court did not accept transactions through account payee cheques when the identity of the creditors to whom such payments were made were doubtful.

On the issue of the remand of the case to enable the appellant assessee to produce the list of shops where the assessee supplied cigarettes for display and sampling one may refer to the reply given the assessee to the letter dated 12.03.1997 on this score. In the said reply the assessee had admitted they had no record of the individual shops where such distributions were

made. If that is so, no purpose would be served in remanding the case after a lapse of almost two decades for production of self-same evidence which the assessee expressed inability to produce during the assessment proceeding. It is settled law that the principles of natural justice is to achieve purpose of logical conclusion and in the facts of this case it is clear the remand of the case would not serve any purpose at all as the assessee inspite of opportunity had failed to produce such evidence and discharge its onus during the assessment proceeding itself. In view of its failure to produce adequate and cogent material to establish the claim of expenses on sampling and display, the learned accounting member had rightly held disallowance can be made on that ground itself without even considering the inspector's report.

Furthermore, the issue as to whether such expenses were necessary or not in terms of the commercial expediency under section 37 (1) of the Income Tax Act would arise only after the assessee had discharged its initial onus to prima facie establish such claim. If the assessee had failed to discharge its primary onus to establish such claim as in the present case, the question as to its commercial expediency does not arise at all.

In view of such finding we are in opinion that remand of the case in the facts of the case is wholly unjustified and is not necessary in view of the fact that there is no violation of principle of natural or denial of an opportunity of fair hearing to assessee.

For the aforesaid reasons we confirm the opinion of the learned third member of the tribunal.

The question is answered against the appellant assessee and in favour of the revenue and the appeal stands dismissed accordingly.

I agree

(K. J. Sengupta, J)

(Joymalya Bagchi, J)