***IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 7th December, 2012**

\+ **W.P.(C) No.4236/2012**

SALES TAX BAR ASSOCIATION (REGD.) ..... Petitioner

Through: Mrs. P.L. Bansal, Sr. Adv. with Mr. Avadh Kaushik & Mr. Ruchir Bhatia, Advs.

Versus

GOVT. OF NCT OF DELHI & ORS ..... Respondents

Through: Mr. Parag P. Tripathi, Sr. Adv. with Ms. Avnish Ahlawat, Mr. Nitesh Kumar Singh, Adv.

AND

\+ **W.P.(C) No.5711/2012**

M/S LEGRAND INDIA PVT. LTD. & ORS. ..... Petitioners

Through: Mr. Bhagwati Prasad, Adv.

Versus

COMMISSIONER TRADE & TAXES & ANR. ..... Respondents

Through: Mr. Vineet Bhatia, Adv. for R-1.

AND

\+ **W.P.(C) No.10932/2009**

S.D. ENTERPRISES ..... Petitioner

Through: Mr. Avadh Bihari Kaushik, Adv.

Versus

GOVT. OF NCT OF DELHI & ANR ..... Respondents

Through: Mr. Parag P. Tripathi, Sr. Adv. with Ms. Avnish Ahlawat, Mr. Nitesh Kumar Singh, Adv.

AND

\+ **W.P.(C) No.7030/2010**

SUNRISE SPORTS (INDIA) PVT. LTD. ..... Petitioner

Through: Mr. Avadh Bihari Kaushik, Adv.

Versus

GOVT. OF NCT OF DELHI & ANR ..... Respondents

Through: Mr. Parag P. Tripathi, Sr. Adv. with Ms. Avnish Ahlawat, Mr. Nitesh Kumar Singh, Adv.

CORAM :-
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. W.P.(C) No.10932/2009 and W.P.(C) No.7030/2010 were filed impugning, (i) Sections 32 & 33 of Delhi Value Added Tax Act, 2004 (DVAT Act), in so far as enabling imposition of tax, interest or penalty without adequate opportunity to the dealer / assessee, as *ultra vires* the basic structure of the Constitution of India, and (ii) the demands of ₹63,803/- and ₹2,49,58,334/- against the respective petitioners. Notices of the petitions were issued. Though the petitions were also accompanied with applications for interim relief but on the statement of the counsel for the respondent that the petitioners could file objections under Section 74 of the Act before the Objection Hearing Authority and that till the said objections are decided there would be no recovery, the said applications were disposed of giving liberty to the petitioners to avail the remedy of preferring objections. Counter affidavit was filed in W.P.(C) No.10932/2009 to which rejoinder was filed by the petitioner and *Rule* issued on 21st May, 2010. W.P.(C) No.7030/2010 was also similarly admitted for hearing and listed along with the earlier writ petition.

2. W.P.(C) No.4236/2012 was filed as a Public Interest Litigation averring that thousands of registered dealers had in June, 2012 been served

with notices under Section 32 of default assessment of tax and interest and of assessment of penalty under Section 33 on account of non-reconciliation of details of purchase/sales furnished by them; that more than five thousand notices/orders creating demand in crores of rupees had been issued under the name of a single Value Added Tax Officer (VATO) on a single date directing the dealers to pay huge amounts on account of tax, interest and penalties and though the petitioner as well as Tax Payers Association had made representation in this regard but without any avail. Relief, of quashing of all such orders dated 21st June, 2012 for the tax period April, 2012, is claimed in the petition. The said petition came up first before the Court on 18th July, 2012 when on the statement of the counsel for the respondents that the respondents had developed a software which facilitates carrying out assessment at large scale, the matter was adjourned to enable a demonstration to be given to the representatives of the petitioner Association; a statement was also given by the counsel for the respondents that no coercive steps shall be taken for recovery of the amount till the next date of hearing. However the representatives of the petitioner were not satisfied with the demonstration given to them and rather sought amendment of the writ petition to take certain legal pleas and which was allowed. The counsel for the respondents similarly stated that the option of availing of objections under Section 74 was available to the noticees.

3. W.P.(C) No.5711/2012 has been filed by a dealer impugning the amendment carried out in Section 74 of the Act vide Notification dated 28th September, 2011, introducing a provision for pre-deposit for the purpose of

entertainment of objections against the default assessment. *Rule* in the said petition was also issued.

4. When W.P.(C) No.4236/2012 and W.P.(C) No.5711/2012 were listed on 3rd October, 2012, it was informed that W.P.(C) No.10932/2009 and W.P.(C) No.7030/2010 also entail similar issue and they were also accordingly directed to be listed on 4th October, 2012 when the counsels were heard.

5. It is apposite to set-out the provisions concerned, Sections 30 to 35 under Chapter VI titled "Assessment and Payment of Tax, Interest and Penalties in Making Refunds" of the Act are as under:-

> *"**30 Assessment of tax, interest or penalty***
>
> *No claim may be made by the Commissioner for the payment by a person of an amount of tax, interest or penalty or other amount in the nature of tax, interest or penalty due under this Act except by the making of an assessment for the amount.*
>
> ***31 Self assessment***
>
> ***(1)*** *Where a return is furnished by a person as required under section 26 or section 27 of this Act which contains the prescribed information and complies with the requirements of this Act and the rules –*
>
> ***(a)*** *the Commissioner is taken to have made, on the day on which the return is furnished, an assessment of the tax payable of the amount specified in the return;*
>
> ***(b)*** *the return is deemed to be a notice of the assessment and to be under the hand of the Commissioner; and*
>
> ***(c)*** *the notice referred to in clause (b) is deemed to have been served on the person on the day on which the Commissioner is deemed to have made the assessment.*

(2) *No assessment shall arise under sub-section (1) of this section, if the Commissioner has already made an assessment of tax in respect of the same tax period under another section of this Act.*

32 Default assessment of tax payable

(1) *If any person –*

(a) *has not furnished returns required under this Act by the prescribed date; or*

(b) *has furnished incomplete or incorrect returns; or*

(c) *has furnished a return which does not comply with the requirements of this Act; or*

(d) *for any other reason the Commissioner is not satisfied with the return furnished by a person;*

the Commissioner may for reasons to be recorded in writing assess or re-assess to the best of his judgment the amount of net tax due for a tax period or more than one tax period by a single order so long as all such tax periods are comprised in one year.

(1A) *If, upon the information which has come into his possession, the Commissioner is satisfied that any person who has been liable to pay tax under this Act in respect of any period or periods, has failed to get himself registered, the Commissioner may for reasons to be recorded in writing, assess to the best of his judgment the amount of net tax due for such tax period or tax periods and all subsequent tax periods.*

(2) *Where the Commissioner has made an assessment under this section, the Commissioner shall forthwith serve on that person a notice of assessment of the amount of any additional tax due for that tax period.*

(3) *Where the Commissioner has made an assessment under this section and further tax is assessed as owed, the amount of further tax assessed is due and payable on the same date as the date on which the net tax for the tax period was due.*

Explanation- *A person may, if he disagrees with the notice of assessment, file an objection under section 74 of this Act.*

33 Assessment of penalty

(1) *Where the Commissioner has reason to believe that a liability to pay a penalty under this Act has arisen, the Commissioner, after recording the reason in writing, shall make and serve on the person a notice of assessment of the penalty that is due under this Act.*

(2) *The amount of any penalty assessed under this section is due and payable on the date on which the notice of assessment is served by the Commissioner.*

(3) *Any assessment made under this section shall be without prejudice to prosecution for any offence under this Act.*

Explanation.- A person may, if he disagrees with the notice of assessment, file an objection under section 74 of this Act.

34 Limitation on assessment and re-assessment

(1) *No assessment or re-assessment under section 32 of this Act shall be made by the Commissioner after the expiry of four years from –*

(a) *the date on which the person furnished a return under section 26 or sub-section (1) of section 28 of this Act; or*

(b) *the date on which the Commissioner made an assessment of tax for the tax period,*

whichever is the earlier:

PROVIDED that where the Commissioner has reason to believe that tax was not paid by reason of concealment, omission or failure to disclose fully material particulars on the part of the person, the said period shall stand extended to six years.

(2) *Notwithstanding sub-section (1) of this section, the Commissioner may make an assessment of tax within one year after the date of any decision of the Appellate Tribunal or court where the assessment is required to be made in consequence of, or to give effect to, the decision of the Appellate Tribunal or court which requires the re-assessment of the person.*

35 Collection of assessed tax and penalties

(1) *Subject to sub-sections (2) and (4) of this section, where an amount of tax or penalty has been assessed under sections 32 or 33 of this Act, the Commissioner may not proceed to enforce payment of the amount assessed until two months after the date of service of the notice of assessment.*

(2) *Where a person has made an objection to an assessment or part of an assessment in the manner provided in section 74 of this Act, the Commissioner may not enforce the payment of any amount in dispute under that assessment until the objection is resolved by the Commissioner.*

(3) *Nothing in this section shall stay any proceedings by the Commissioner or before a court for the recovery of –*

(a) *any amounts due under this Act that are not the subject of a dispute before the Commissioner; or*

(b) *any amounts due under this Act where the person has made an appeal to the Appellate Tribunal.*

(4) *Notwithstanding sub-section (1) of this section, where an amount of tax or penalty has been assessed by the Commissioner and he is satisfied that there is a likelihood that it may not be possible to recover the amount assessed if collection is delayed, the Commissioner may specify a date in the notice of assessment as the date on which collection of the amounts due and payable may commence which is earlier than two months after the date of service of the notice of assessment."*

Section 74, to the extent relevant, as it now stands under Chapter XII of the Act titled "Objections, Appeals, Disputes and Questions", is as under:-

"74 Objections

(1) *Any person who is dis-satisfied with –*

(a) *an assessment made under this Act (including an assessment under section 33 of this Act); or*

(b) *any other order or decision made under this Act;*

may make an objection against such assessment, or order or decision, as the case may be, to the Commissioner;

PROVIDED *that no objection may be made against a non-appealable order as defined in section 79 of this Act:*

PROVIDED FURTHER *that no objection against an assessment shall be entertained unless the amount of tax, interest or penalty assessed that is not in dispute has been paid failing which the objection shall be deemed to have not been filed:*

PROVIDED ALSO *that the Commissioner may, after giving to the dealer an opportunity of being heard, may direct the dealer to deposit an amount deemed reasonable, out of the amount under dispute, before such objection is entertained.*

PROVIDED ALSO *that only one objection may be made by the person against any assessment, decision or order.*

PROVIDED ALSO *that in the case of an objection to an amended assessment, order, or decision, an objection may be made only to the portion amended.*

PROVIDED ALSO *that no objection shall be made to the Commissioner against an order made under section 84 or section 85 of this Act if the Commissioner has not delegated his power under the said sections to other Value Added Tax authorities.*

(2) *A person who is aggrieved by the failure of the Commissioner to reach a decision or issue any assessment or order, or undertake any other procedure under this Act, within six months after a request in writing was served by the person, may make an objection against such failure.*

(3) *An objection shall be in writing in the prescribed form and shall state fully and in detail the grounds upon which the objection is made.*

(4) *The objection shall be made –*

(a) *in the case of an objection made under sub-section (1) of this section, within two months of the date of service of the assessment, or order or decision, as the case may be,; or*

(b) *in the case of an objection made under sub-section (2) of this section, no sooner than six months and no later than eight months after the written request was served by the person:*

PROVIDED that where the Commissioner is satisfied that the person was prevented for sufficient cause from lodging the objection within the time specified, he may accept an objection within a further period of two months.

(5) *The Commissioner shall conduct its proceedings by an examination of the assessment, or order or decision, as the case may be, the objection and any other document or information as may be relevant:*

PROVIDED that where the person aggrieved, requests a hearing in person, the person shall be afforded an opportunity to be heard in person.

(6) *Where a person has requested a hearing under sub-section (5) of this section and the person fails to attend the hearing at the time and place stipulated, the Commissioner shall proceed and determine the objection in the absence of the person.*

(7) *Within three months after the receipt of the objection, the Commissioner shall either –*

(a) *accept the objection in whole or in part and take appropriate action to give effect to the acceptance (including the remission of any penalty assessed either in whole or in part); or*

(b) *refuse the objection or the remainder of the objection, as the case may be; and in either case, serve on the person objecting, a notice in writing of the decision and the reasons for it, including a statement of the evidence on which it is based:*

PROVIDED *that where the Commissioner within three months of the making of the objection notifies the person in writing, he may continue to consider the objection for a further period of two months:*

PROVIDED FURTHER *that the person may, in writing, request the Commissioner to delay considering the objection for a period of up to three months for the proper preparation of its position, in which case the period of the adjournment shall not be counted towards the period by which the Commissioner shall reach his decision."*

6. Though the petitioners have in the petitions challenged the *vires* of Sections 32 & 33 but during the course of hearing Ms. Prem Lata Bansal, Sr.

Advocate appearing for the Sales Tax Bar Association gave up the challenge to the *vires* of the said provisions and confined the relief in these petitions to a reading of Sections 32&33 in a manner so as to provide opportunity of hearing to the assessee prior to pronouncement of the orders thereunder. The counsels for the petitioners contend:-

a. that Sections 32&33 if literally read enable the assessment, not only where the assessee is in default of filing the return but also when the return though filed is incomplete or incorrect or does not comply with any other requirements or if the VATO is not satisfied therewith , without granting any opportunity of hearing to the assessee and not only of tax but also penalties, to the best of his judgment and to demand the same –the procedure prescribed therein is contrary to the principles of natural justice and cannot be upheld/sustained. It is argued that five thousand odd demands were raised merely because of non-reconciliation of the accounts of the selling and the purchasing dealers even though none of the assessees were in default and which reconciliation had been effected on the assessees preferring objections under Section 74 and pointing out the defects in reconciliation reducing the demand raised from ₹265 crores to ₹6.5 crores. It is argued that had the VATO, prior to the default assessment and penalty assessment under Sections 32 & 33, given opportunity of hearing/explanation to the assessees, the explanation which was furnished during objections under

Section 74 would have been furnished and the huge demands and penalties would not have been raised;

b. that the remedy of preferring objections against a demand under Sections 32 and 33 is not available owing to the first proviso to Section 74 (1) i.e. the same being not available against non-appealable orders as defined in Section 79. It is contended that a decision, making an assessment of tax or penalty, is not appealable under Section 79(1)(a) of the Act;

c. that under Section 32 (1)(d), the VATO can exercise powers of assessment and consequently under Section 33 the powers of imposing penalties, even on the basis of any information in his possession and without confronting the assessee therewith and which is not permissible in law;

d. that under Section 32(3) and under Section 33(2), the tax and penalty becomes due on the date of assessment without hearing and subsequent opportunity of preferring objections, does not cure the malady of assessment of tax and penalty being done without opportunity of hearing;

e. that under the *pari materia* Section 147 of the Income Tax Act, the material in possession of the Assessing Officer is required to be confronted to the assessee;

f. that the aforesaid provisions providing for assessment of tax and penalty without giving even an opportunity of hearing are draconian in nature;

g. that opportunity though given of preferring objections is not *ipso facto* but has to be asked for and thus not sufficient substitute for an inherent right of hearing before any adverse order;

h. it is contended that even the Department till now has been understanding and interpreting Sections 32 and 33 as containing an inbuilt right of opportunity of hearing to be given;

i. attention in this regard is invited to the Circular dated 30th April, 2007 of the Commissioner, VAT and it is contended that such circulars are binding;

j. that VATO has in notices issued under Sections 32 and 33 demanded the tax and penalty so assessed within 15 days i.e. much prior to the period of 2 months provided under Section 74(4)(a) for preferring objections, thereby taking away even the right of the assessees to prefer objections;

k. that the assessment is being done every month when it is permissible to assess for a full year also;

l. a post decisional hearing is generally with a closed mind;

m. that if the assessments under Sections 32 and 33 are done after giving opportunity of hearing, the same will save litigation in the form of objections;

n. that the large number of best judgment assessment orders, which resulted in the filing of the petition, were owing to a mismatch in dates of entry into the computer system of the transactions by the seller and the buyer and which resulted in

the VATO assuming the claims of the assessees to be unsubstantiated and which demands disappeared upon the assessees satisfying the VATO of the reductions claimed being properly matched and the mismatch in dates being responsible, for the VATO forming an opinion of the returns filed by the assessees being inaccurate. Attention is invited to the Circular No.1 of 2007/2008 dated 14th May, 2007 enumerating the Guidelines for framing and issuance of statutory orders/notices under the Act and on the basis whereof it is contended that the Department itself has experienced difficulties on account of non-speaking orders passed by VATOs;

o. from the Order No.F.2(7)/DVAT/LSC/DOT & T/2006-07/1658-1666 dated 22nd December, 2006 it is shown that there is a difference between the Assessing Authority under Sections 32 and 33 and the Objection Hearing Authority under Section 74;

p. that under the erstwhile Delhi Sales Tax Act, 1975 two appeals were provided i.e. the first one to the Prescribed Authority and the second to the Tribunal; now the first appeal has been substituted by objections aforesaid;

q. that the petitioners are not seeking to challenge the provisions of the Act or the Rules but are seeking to 'beautify' them. With reference to Section 36A (6) and (7) and Rule 59 it is contended that the assessee is required to preserve the TDS Certificate for seven years and thus cannot submit the same with the return; it

is shown that the assessee gets only one copy of the TDS Certificate and thus cannot both, retain the certificate as well as submit it along with return; it is shown that VATOs in some cases have made the assessment only for the reason of the original TDS certificate having not been submitted and accordingly raised demand; had opportunity of hearing been given, the assessee would have explained the position and a wrong best judgment assessment would not have been made;

r. that while it is much easier for an assessee to represent against the assessment, objections required to be filed are to be detailed and to be filed in triplicate, increasing the paper work;

s. that Section 74 of the Act though gives nomenclature of objections but the same is really an appeal and thus cannot be a substitute for not giving hearing at the original level;

t. to buttress the contention that the proceedings under Section 74 are not an objection but an appeal, attention is invited to Rules to urge that the evidence taken therein is called additional evidence;

u. attention is invited to Section 59 empowering the VATO to call for any information and it is contended that the same, in the absence of any specific provision in Sections 32 and 33, can be read therein as requiring a VATO to, before passing an order of assessment or imposition of penalty, call for the information from the assessee and it is contended that if the said procedure

were to be followed there would be no scope for any mistakes in the orders under Sections 32 and 33;

v. under the other Statutes also opportunity of hearing is given;

w. that consequence of even a bad order under Sections 32 and 33, is to put an assessee in the list of defaulters and defaulters are unable to stand as surety under the Act;

x. that the Department, in 100% of the cases is invoking the third proviso to Section 74(1) and requiring the objector to deposit amounts which are not due, as a pre-condition for entertaining the objections.

7. Reference is made to the VAT Acts of other States which are all stated to be providing an opportunity of hearing before assessment. Reference is also made to 7th Edition of Blacks's Law Dictionary defining 'opportunity to be heard' as a chance to appear in a Court or other Tribunal and present evidence and argument before being deprived of a right by Governmental Authority.

8. Reliance in this regard is placed on:-

(i). ***Commissioner of Income-Tax Vs. Kelvinator of India Ltd.*** (2002) 256 ITR 1 (Delhi);

(ii). ***The Board of High School and Intermediate Education, U.P. Vs. Kumari Chittra Srivastava*** AIR 1970 SC 1039;

(iii). ***H.L. Trehan Vs. Union of India*** AIR 1989 SC 568;

(iv). ***J.T. (India) Exports Vs. Union of India*** 94 (2001) DLT 301;

(v). ***C.B. Gautam Vs. Union of India*** (1993) 199 ITR 530 (SC);

(vi). ***Sahara India (Firm) Vs. Commissioner of Income Tax, Central-I*** (2008) 300 ITR 403 (SC);

(vii). ***Salem Steel Industries Vs. Union of India*** 2002 (141) ELT 12 (Mad.);

(viii). W.P.(C) No.2659/2012 titled ***Court on its own Motion Vs. Commissioner of Income Tax*** decided on 31st August, 2012 of this Court;

(ix). ***K.I. Shephard V. Union of India*** (1987) 4 SCC 431;

(x). ***Kesar Enterprises Ltd. Vs. State of Uttar Pradesh*** (2011) 13 SCC 733;

(xi). ***Assistant Commissioner, Commercial Tax Department, Works Contract & Leasing, Kota Vs. M/s Shukla & Brothers*** (2010) 4 SCC 785;

(xii). ***A.K. Kraipak Vs. Union of India*** (1969) 2 SCC 262;

(xiii). ***Institute of Chartered Accountants of India Vs. L.K. Ratna*** (1986) 4 SCC 537; and

(xiv). ***Raghunath Thakur Vs. State of Bihar*** (1989) 1 SCC 229.

9. Per contra, the senior counsel for the respondents has contended:

A. that the legislative scheme of assessment under the Act is of a first stage comprising of self-assessment; a second stage, if the Commissioner or his delegatee is satisfied with self-assessment, of completion of assessment; the third stage of, if the

Commissioner or his delegatee is not satisfied with self assessment, of passing of best judgment assessment and order of penalty under Sections 32 and 33 and with which, if the assessee agrees, again the assessment proceedings would stand concluded; and, the fourth stage of, if the assessee disagrees with the best judgment assessment, preferring objections.

B. that the proceedings under Section 74 are not equivalent to an appeal.

C. attention is invited to Section 79 which uses the expression appeal as well as objection which is contended to be indicative of the two being different.

D. that the hearing under Section 74 is not a post decisional hearing but a hearing in completion of the assessment.

E. that the third proviso to Section 74(1) was added to the Act as a deterrent to preferring frivolous objections, merely to gain time.

It is controverted that the third proviso of Section 74 (1) is being invoked in 100% of the cases.

F. that the assessment under Section 32 is in the nature of provisional assessment.

G. that with computerized returns the tallying takes place minute to minute, with the data being fed in regularly and the mistakes, even if any, are corrected from time to time.

H. that the circulars aforesaid are not statutory, not issued by the Authority empowered to issue the circulars and these are not binding and are internal documents of the Department.

I. that the large number of orders which led to the filing of the petition are only an instance of teething problems being faced at the initial stages of implementation; that no steps for recovery in pursuance thereto were taken and as the initial difficulties are being solved, within a period of 15 days, the demand thereunder of ₹265 crores stands reduced to ₹6.5 crores.

J. that the Department is open to changing the language of the notices under Sections 32 and 33.

K. that it is only an order on the objections under Section 74 which results in a final order.

L. that if hearing were to be given at the stage of Sections 32 and 33, the same would make the objections under Section 74 otiose; that legislature having chosen the model as enshrined in the Act and when the same is not causing any prejudice to the assessee, there is no reason to tinker therewith.

M. that the concept of 'best judgment' is necessarily of judgment without hearing and the nomenclature of 'best judgment' itself rules out any hearing.

N. alternatively, the reasons which Sections 32 and 33 required to be given in support of the orders thereunder are a substitute for hearing. Reliance in this regard is placed on paras 10 and 11 of ***Haryana Warehousing Corporation Vs. Ram Avtar*** (1996) 2 SCC 98.

10. The counsels for the petitioners in rejoinder have contended that the objections are not heard by the VATO but by a senior officer; that the

reasons cannot be a substitute for hearing. Reliance in this regard is placed on ***C.B. Gautam*** case and on ***M/s Shukla & Brothers*** supra. They reiterate that default assessments/penalty orders are issued in a mechanical way and claim to have been issued with the prior approval of the Commissioner.

11. We have bestowed our consideration to the matter. Though lengthy arguments have been heard but the gist of the issue is the need if any, to read Sections 32 and 33 of the Act as requiring a hearing to be given prior to assessment and imposition of penalty thereunder and raising of demand thereof.

12. Though the argument of the counsels for the petitioners, of the assessment and imposition of penalty under Sections 32 and 33 without giving an opportunity of hearing to the assessee being contrary to the principles of natural justice, appears attractive at the outset but when the scheme of the legislation is studied, it is in fact not found so. The Act has introduced a regime of self-assessment. All the ingredients of assessment are available to the assessee himself and the return filed by the assessee on the basis thereof, is, under Section 31 given the status of an assessment. The Act thus deems an assessment at the hands of the assessee, even before the Commissioner or his delegatee conferred with the powers of assessment, have had an occasion to lay sight thereon.

13. Having provided so, Section 32 gives a similar opportunity to the Assessing Officer. Just like the assessee, under Section 31 has been given a unilateral power of assessment, the Assessing Officer also, under Section 32, if dissatisfied therewith has been conferred the power of changing the said

assessment as per his best judgment. Undoubtedly no opportunity of hearing is provided to be given to the assessee at this stage. However what we have to remember at this stage is the words of Justice Krishna Iyer in ***Nawabkhan Abbaskhan Vs. The State of Gujarat*** (1974)2SCC121, that not all violations of natural justice knock down the order with nullity and that in Indian Constitutional law, natural justice does not exist as an absolute jural value but is humanistically read by courts into those great rights enshrined in Part III as the quintessence of reasonableness.

14. The Constitution Bench of the Supreme Court, in ***Maneka Gandhi Vs. Union of India*** (1978) 1 SCC 248 which is considered as the Bible on the principles of natural justice, has held that what opportunity may be regarded as reasonable would necessarily depend on the practical necessities of the situation; it may be a sophisticated full-fledged hearing or it may be a hearing which is very brief and minimal; it may be a hearing prior to the decision or it may even be a post-decisional remedial hearing; the *audi alteram partem* rule is sufficiently flexible to permit modifications and variations to suit the exigencies of myriad kinds of situations which may arise.

15. The juristic policy enacted with clarity in the DVAT Act is of unilateral assessment first at the hands of the assessee and if the Assessing Officer is not satisfied therewith, then at the hands of the Assessing Officer. The Assessing Officer, of course while doing his unilateral assessment has the benefit of the assessment done by the assessee as well as any other material which may be available, and has to make the assessment to the best

of his judgment. Only if the assessee remains dissatisfied with such unilateral assessment done by the Assessing Officer does the stage of 'bilateral assessment' in the form of objections under Section 74 comes into play and which undoubtedly provides for an opportunity of hearing as is being demanded by the petitioners.

16. The expression "to the best of his judgment" was in ***State of Kerala Vs. C. Velukutty*** (1966) 60 ITR 239(SC) held as requiring the assessing authority to not act dishonestly or vindictively or capriciously, because he must exercise judgment in the matter. It is thus not as if VATO, while exercising powers under Sections 32 or 33 is rudderless. He is required to exercise judgment in the matter and assess what he honestly believes to be a fair estimate of the proper figure of assessment, taking into consideration local knowledge and repute and his own knowledge of previous returns and assessments and all other matters which he thinks will assist him in arriving at a fair and proper estimate. Guess work though held implicit in best judgment, is required to be honest guess work. The limits of the power are implicit in the expression "best of his judgment". It was held that a judgment is a faculty to decide matters with wisdom truly and legally on settled and invariable principles of justice. The same principles were reiterated in ***State of Kerala Vs. K.T. Shaduli Yusuff*** (1977) 2 SCC 777.

17. What falls for consideration is, whether inspite of Section 74 providing for such an opportunity of hearing, can any fault be found with Sections 32 and 33 in not providing such an opportunity.

18. Though the counsels for the petitioners have argued that the remedy of objections is not available owing to Section 79 of the Act but in the face of the express provision in the explanations to Sections 32 and 33 that a person disagreeing with the notices of assessment thereunder may file an objection under Section 74 of the Act, the said contention is clearly erroneous and is not accepted.

19. The Supreme Court in ***Liberty Oil Mills Vs. Union of India*** (1984) 3 SCC 465 gave illustrations of situations where post-decisional hearing subserves principles of natural justice. It was held that the rule of *audi alteram partem* only requires that a man shall not be subject to final judgment or to punishment without an opportunity of being heard. With reference to orders of suspension without hearing, it was observed that though it may involve hardship but hearing post-suspension suffices. Even in ***Ajit Kumar Nag Vs. General Manager (PJ), Indian Oil Corporation Ltd., Haldia*** (2005) 7 SCC 764 it was held that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket - they must yield to and change with exigencies of situations - they must be confined within their limits and cannot be allowed to run wild - while interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life; the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than precedential.

20. Prof. de Smith, the renowned author of "Judicial Review" (3rd Edition), was in ***Swadeshi Cotton Mills v. Union of India*** (1981) 1 SCC 664

quoted (with approval) as opining that statutory provision for an administrative appeal or even full judicial review on merits are sufficient to negative the existence of any implied duty to hear before the original decision is made; that the said approach is acceptable where the original decision does not cause serious detriment to the person affected. In the same judgment, it was enunciated that where a statute does not, in terms, exclude the rule of prior hearing but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the *audi alteram partem* rule at the pre-decisional stage.

21. Though Sections 32(3) and 33(2) make the additional tax if any due and penalty assessed thereunder payable immediately on such unilateral assessment but Section 35(1) though uses the words "may not proceed to enforce payment of the amount assessed", clearly provides that the recoveries of the said amounts are not to be made until two months after the date of service of the notice of assessment. The second proviso to Section 74(1) requires an assessee preferring the objections to only pay the admitted amount of tax and liability to be paid and not the tax and/or penalty qua which objections have been preferred. Further, as aforesaid a time of two months has been given for preferring the objections. Section 35(2) again provides that where objections have been preferred, the demand under Sections 32 and 33 may not be enforced until the objection is resolved. A conjoint reading of the said provisions clearly shows that enforcement of the demand under Sections 32 and 33 if made the subject matter of objection, is dependent upon the outcome of the objections and till the objections are

decided, the disputed demand under Sections 32 and 33 is not to be enforced. Though undoubtedly the third proviso to Section 74(1) has now given a power to the Objection Hearing Authority to direct the disputed tax or penalty or any part thereof also to be deposited but the very fact that the second proviso as well as Section 35(2) have also been retained along therewith on the statute book is indicative of the invocation of the third proviso being only if the circumstances so demand and not in the usual course. Moreover the order if any under the third proviso to Section 74 (1) is to be after giving an opportunity of hearing to the dealer. The contention of the petitioners that the third proviso to Section 74(1) is being invoked as a matter of routine is not only without any specific pleading and particulars but even otherwise does not constitute a ground for us to interfere with the scheme once the legislative policy is plain and clear. Moreover a law has to be adjudged for its constitutionality by the generality of cases it covers, not by the freaks and exceptions it martyrs (Krishna Iyer,J in ***R.S. Joshi, Sales Tax Officer, Gujarat Vs. Ajit Mills Ltd.*** (1977) 4 SCC 98).

22. In ***Haryana Financial Corporation Vs. Kailash Chandra Ahuja*** (2008) 9 SCC 31, the test of prejudice was applied and it was held that if there is no prejudice, an action cannot be set aside merely on the ground that no hearing was afforded before taking a decision by the authority.

23. To our mind the scheme aforesaid of the Act does not cause any prejudice whatsoever to the assessee. Inspite of our repeated calling, the counsels for the petitioners failed to substantiate the prejudice if any which the assessees suffer in having the opportunity if any required of hearing, at

the stage of objections and not at the stage of assessment under Sections 32 & 33. Though the argument, of the assessee if not complies with demands under Sections 32 and 33 acquiring the status of a defaulter was raised in response thereto, but the counsels were unable to support it with any provision of law. On the contrary a reading of Section 74(1) and Section 35 clearly shows that the liability for payment of the disputed demand under a best judgment assessment under Sections 32 & 33 arises only on the conclusion of objections and which as aforesaid is after the decision on objections and not prior thereto. That being the position, the question of the assessee, during the pendency of objections having the status of a defaulter and thereby suffering any disability does not arise.

24. Even if the hearing, at the stage of objections, is to be treated as a post decisional hearing, we fail to see any effect on the efficacy thereof. Though post decisional hearing was, as aforesaid, held to be not sufficient or effective, being held with a closed mind, after a decision has already been taken but those observations came to be made in the context of a post decisional hearing in the exercise of administrative powers. Here, the scheme of the statute itself is first allowing a unilateral assessment by the assessee, thereafter a unilateral assessment by the Assessing Officer and thereafter providing for a bilateral assessment after opportunity of hearing. With such a statutory scheme, it cannot be said that the post decisional hearing will be farcical or a sham. Moreover such hearing is in exercise of *quasi judicial* power and is subject to an appeal to the Tribunal. Further, it is the contention of the counsels for the petitioners themselves, that the Assessing Authority and the Objection Hearing Authority are different. It

thus cannot be said that the same officer would shy away from admitting mistakes and thereby reducing the hearing to a farce.

25. In ***Union of India Vs. Col. J.N. Sinha*** (1970) 2 SCC 458, the Supreme Court held that if a statutory provision either specifically or by necessary implication excludes the application of any or all the principles of natural justice, then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice and that rules of natural justice can operate only in areas not covered by any law validly made and they do not supplant the law but supplement it. To the same effect is ***Madan Lal Agarwala Vs. The State of West Bengal*** (1975) 3 SCC 198.

26. The House of Lords also in ***Pearlberg Vs. Varty (Inspector of Taxes)*** [1972] 1 W.L.R. 534 held that before the Courts exercise unusual power of supplementing the procedure laid down in legislation, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation. It was further held that one should not start by assuming that what Parliament has done in the lengthy process of legislation is unfair and that one should rather assume that what has been done is fair, until the contrary is shown. It was yet further held that where the person affected can be heard at a later stage and can then put forward all the objections he could have preferred if he had been heard on the making of the assessment, it by no means follows that he suffers an injustice in not being heard on the making of the order. Fairness was held to be not requiring plurality of hearings and it

was observed that if there were too much elaboration of procedural safeguards, nothing would be done simply, quickly and cheaply.

27. Recently in ***Smt. Rasila S. Mehta Vs. Custodian, Nariman Bhavan, Mumbai*** (2011) 6 SCC 220 also the Supreme Court held that the fact that a statute does not provide for a pre-decisional hearing is not contrary to the rules of natural justice because the decision does not *ipso facto* takes away any right and the post-decisional hearing satisfies the principles of natural justice.

28. We are however unable to concur with the contention of the senior counsel for the respondents that the assessment at the stage of Sections 32 and 33 is provisional or an inchoate and/or an incomplete assessment subject to completion at the stage of Section 74. We had during the hearing enquired from the senior counsel for the respondents that how can the tax be said to be due or recoverable if the assessment under Sections 32 and 33 was incomplete or provisional. It was enquired whether a demand could be raised without the assessment being complete. No satisfactory reply was possible; on the contrary we find that Section 30 prohibits any claim for payment by a person of any amount of tax, interest or penalty except by making an assessment for the amount. If the argument of the respondents of the assessment under Sections 32 and 33 being provisional or incomplete were to be accepted, then the demand of the assessment and penalty thereunder would be in contravention of Section 30. We therefore do not accept the said contention and hold the assessment of tax and penalty under Sections 32 and

33 to be complete. Merely because an assessment is subject to objections or appeal does not make it any less complete.

29. We are of the opinion that the legislature has, by the scheme aforesaid merely fixed the date on which the tax falls due. If the assessment of the tax were to await hearings, the date of assessment and hence the date on which the tax can be said to fall due may be unduly deferred. The purpose of introducing the regime of self-assessment appears to be to fix the responsibility of assessing the tax on the assessee and even if in subsequent hearings the self-assessment by the assessee turns out to be wrong and erroneous leading to further tax being found due from the assessee, the same would relate back to the date on which the assess ought to have done the self-assessment and paid tax correctly.

30. As far as the argument regarding circulars is concerned, we find that the circular pertains to the Objection Hearing Authority. Though the Circular dated 30th April, 2007 indeed pertains to VATO but we agree with the contention of the senior counsel for the respondents that the same is not statutory and cannot change the statute, to incorporate in Sections 32 and 33, a provision for hearing which is excluded therefrom. Executive instructions cannot run contrary to statutory provisions or whittle down their effect (***State of Madhya Pradesh Vs. G.S Dall & Flour Mills*** 1992 Supp. (1) SCC 150). Such instructions which have no statutory force, do not give rise to any legal right in favour of the aggrieved party and cannot be enforced in a Court of law against the administration (***The Chief Commercial Manager, South Central Railway Vs. G. Ratnam*** (2007) 8 SCC 212). This was recently

reiterated in ***The Joint Action Committee of Airlines Pilots Associations of India Vs. The Director General of Civil Aviation*** (2011) 5 SCC 435.

31. The fact that the post decisional hearing in the present case is not with a closed mind is apparent from the contention of the petitioners themselves that the demand of ₹265 crores already stands reduced to ₹6.5 crores and may be still further reduced on completion of objections hearing.

32. Once the legislative scheme is not found to be in contravention of the Constitution of India or as causing any prejudice to the assessees, this Court will not interfere therewith merely because the practioners in the field of VAT find themselves reluctant to change to the new law or because it introduces a new scheme. We therefore do not find any merit in these petitions and dismiss the same.

No costs.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

DECEMBER 7, 2012
pp/gsr