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W.P.No.2225 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 31.10.2023

Coram

The Hon'ble Mr.Justice **KRISHNAN RAMASAMY**

W.P.Nos.2225, 2094, 21844, 21568 and 21571 of 2023
and
W.M.P.Nos.2298, 2182, 11294, 11296, 21169, 20941 and
20945 of 2023

SKM Animal Feeds and Foods (India) Pvt.Ltd.,
Rep. By its Managing Director,
Dr.M.Chandrasekar,
No.613, Chavadipalayam Pudur Road,
Nanjaiuthukuli, Modakkurichi,
Erode-638 104.

...Petitioner in W.P.Nos .2225,
21568, 21571 of 2023

Sivan Ramesh,
No.2 2, Kulathukarai Sakthi Road,
Sakthi Nagar, Anthiyur Taluk,
Tamil Nadu- 638 315.

...Petitioner in W.P.Nos. 2094,
21844 of 2023

Vs.

1. The Assistant Commissioner of Income Tax,
Central Circle,
No.3, Gandhi Road,
Salem -636 007.

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2. The Deputy Commissioner of Income Tax,
Central Circle,
No.2, Race Course Road,
Coimbatore-641 018.

...Respondents in W.P.Nos.2225,
21568, 21571 of 2023.

1. The Assistant Commissioner of Income Tax,
Central Circle,
No.3, Gandhi Road,
Salem -636 007.

2. The Joint Commissioner of Income Tax,
Central Range,
No.2, Race Course Road,
Coimbatore-641 018.

...Respondents in W.P. Nos.
2094,21844 of 2023

Prayer in W.P.No.2225 of 2023 :

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records in DIN ITBA/AST/S 143(3) / 2022-23/ 1048350023(1) dated 30.12.2022 on the file of the 1st respondent relating to A.Y. 2021-2022 and quash the same.



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Prayer in W.P.No.21568 of 2023:

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records in DIN ITBA/PNL/F/271AAB/2023-24/1054034886(1) dated 28.06.2023 on the file of the 1st respondent relating to A.Y. 2021-2022 and quash the same.

Prayer in W.P.No.21571 of 2023:

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records in DIN ITBA/PNL/F/271AAD(1)(i)/2023-24/1054034897(1) dated 28.06.2023 on the file of the 1st respondent relating to A.Y. 2021-2022 and quash the same.

Prayer in W.P.No.2094 of 2023:

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records in DIN ITBA/AST/S 143(3) / 2022-23 / 1048347029 (1) dated 29.12.2022 on the file of the 1st respondent relating to A.Y. 2021-2022 and quash the same.

Prayer in W.P.No.21844 of 2023:

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records in DIN



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ITBA/PNL/F/271AAB/2023-24/1054034880(1) dated 28.06.2023 on the file of the 1st respondent relating to A.Y. 2021-2022 and quash the same.

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For Petitioner : Mr.R.V.Eashwar Sr. Counsel,
for Mr. G.Baskar and I.Dinesh.
For Respondents : Mr.A.P.Srinivas Sr.St. Counsel
Mr.A.N.R.Jayaprathap
Standing Counsel.

W.P.Nos. 2094,201844,21568,21571 of 2023

For Petitioner : Mr.M.P.Senthil Kumar,
I. Dinesh.
For Respondents : Mr.A.P.Srinivas,
Sr.Standing Counsel and
Mr.A.N.R.Jayaprathap
Standing Counsel

COMMON ORDER

Since the facts and circumstances are similar and also as common issues are involved in these Writ Petitions, they are taken up together for final disposal.

2. For effective disposal of these Writ Petitions on hand, it would be appropriate at first to deal with the Writ Petition in W.P.No.2225 of 2023.



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3. This Writ Petition has been filed, praying for issuance of a Writ of Certiorari, to call for the records in DIN ITBA/AST/S143(3)/2022-23/1048350023(1) dated 30.12.2022, DIN ITBA/ PNL/ F/ 271AAD (1)(i)/ 2023-24/ 1054034897(1) dated 28.06.2023, DIN ITBA/PNL/F/271AAD(1)(i)/2023-24/1054034897(1) dated 28.06.2023, DIN ITBA/AST/S 143(3) / 2022-23 / 1048347029 (1) dated 29.12.2022 and DIN ITBA/PNL/F/271AAB/2023-24/1054034880(1) dated 28.06.2023 on the files of the 1st respondent relating to A.Y. 2021-2022 and to quash them all.

4. The facts of case in W.P.2225 of 2023 are as follows:

4.1. The Petitioner is a company, engaged in the business of manufacture and sale of poultry and cattle feeds, processing of vegetable oils, trading of eggs and feed raw materials, operating of petrol bunk, processing of chicken and operation of cold storage facilities. The Petitioner has e-filed its return of income on 16.12.2022 for the A.Y. 2021-2022, admitting an income of Rs.2,63,03,81,820/-.

4.2. As per section 132 of Income Tax Act, 1961, a search was conducted in the premises of the petitioner between 27.10.2021 and



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31.10.2021 where certain loose excel sheets and pen-drive were seized and statements were also obtained from the Managing Director and certain other employees for which some of them have given their retractions too.

4.3. The notice under section 143(2) of the Act dated 27.06.2022 which was digitally signed on 28.06.2022 at 12:40 p.m. by the 1st Respondent vide DIN: ITA/AST/S143(2)2022-23/1043581549(1), acknowledging the return filed on 16.12.2021 without specifically requiring any details from the Petitioner, but requiring to submit evidence in support of return on or before 14.07.2022. The notice under section 143(2) of the Act dated 28.06.2022 which was digitally signed on 28.06.2022 at 5:54 p.m was also issued by the Assistant Commissioner of Income Tax/ Deputy Commissioner of Income Delhi, acknowledging the return filed on 16.12.2021 without specifically requiring any details from the Petitioner, but requiring to submit evidence in support of return on or before 13.07.2022. The Petitioner's Authorised Representative also has filed a response on 13.07.2022.



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4.4. The petitioner requested the 1st respondent to furnish the copies of documents which were seized during the course of search operation and the statements obtained from the connected persons vide a letter dated 11.07.2022. In a reply letter dated 29.07.2022, the 1st respondent directed to collect the same on 01.08.2022. According to the petitioner they received the materials only on 23.08.2022 and the entire seized materials and some of the sworn statements i.e P.Mohandas AGM dated 29.11.2021 and T.Mohanraj dated 09.02.2022 were not furnished.

4.5. The 1st respondent had vide notice under section 142(1) dated 26.10.2022, required the petitioner to file a response on or before 04.11.2022 regarding the materials seized and the statements recorded from certain employees during the the search. The petitioner has, vide response dated 04.11.2022 requested for 3 weeks adjournment. The 1st Respondent in a reply notice dated 14.11.2022, cited the limitation of time required for the Petitioner to file the details required vide notice dated 26.10.2022 on or before 17.11.2022, by stating that details sworn statements / hard / soft copies are given already and most of the basic



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details are already available with the petitioner. In response, the petitioner through a notice dated 17.11.2022 filed the required details in elaboration. Again the 1st respondent has sent a notice u/S.142(1) dated 08.12.2022 required petitioner for various details to be filed on or before 12.12.2022. Then the petitioner responded through the a letter dated 10.12.2022 stating that the details were already filed in previous response dated 17.11.2022 and also attached the covering letter and annexures thereto once again. This pattern didn't stop and 1st respondent again requested the petitioner for various details to be filed on or before 16.11.2022. The petitioner had also responded vide a letter dated 16.12.2022 on 19.12.2022 after handing over the annexures to the response in a pen drive.

4.6. Thereafter, a Show-Cause Notice (hereinafter called as SCN) dated 19.12.2022 was issued wherein for the very first time where the statement of T. Mohanraj dated 09.02.2022 was relied on which was never provided to the petitioner and provided 3 days time to file a reply. The petitioner submits that he sought for a statement of T.Mohanraj vide



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his letter dated 21.12.2022 and thereafter filed a detailed response to the SCN uploaded on 24.12.2022 objecting the additions added in SCN after handing over the annexures through pen drive and seeking opportunity to cross-examine the employees whose sworn statements are relied upon. The petitioner vide correspondence dated 25.12.2022, stated that in case of non-acceptance of submissions and if there is any proposal to make addition for the alleged business income earned by the petitioner, petitioner sincerely requested the AO to consider various expenses which are relatable to the business which have been spent out of the alleged unaccounted business income and allowed as business expenditure.

4.7. The sworn statement of T.Mohanraj dated 09.02.2022 was provided via e-mail only on 26.12.2022. The 1st respondent completed the scrutiny assessment under Section 143(3) of the Income Tax Act, 1961 on 30.12.2022, claiming to have obtained the prior approval of 2nd respondent as required under Section 153D of the Income Tax Act, 1961 dated 29.12.2022 making additions by claiming that it was based on certain incriminating materials pertaining to bogus purchase, suppressed



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sales, unaccounted money and unaccounted investments and arrived at at the impugned assessed income of Rs.2,96,03,67,820/- where admitted income as per e-filed return is Rs.2,63,03,81,820/- only leaving an impugned difference of Rs. 32,99,86,000. Hence, the petitioner prays to quash the impugned order passed by the 1st respondent.

5. A counter affidavit has been filed on behalf of the 1st respondent, wherein, it is stated that since during a search under Section 132 of the IT Act, certain incriminating materials pertaining to bogus purchases, suppressed sales, unaccounted money and investments were found, petitioner's case was selected for compulsory scrutiny for AY 2021-22 and accordingly, a notice u/s 143(2) was issued and served on the assessee electronically on 27.06.2022 and in response to the same, the assessee filed their response on 13.07.2022.

6. Mr.R.V.Eashwar, learned Senior counsel contends that the 1st respondent passed an impugned assessment order in a hurried manner without providing an opportunity for cross-examination and without even



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referring to the petitioner's request for cross examination which is illegal, contrary to law and in gross violation to the principles of natural justice and thus the impugned assessment order passed by the 1st respondent is liable to be quashed. He also contends that how can the 1st respondent put forth questions to the employees who do not even have the locus standi for replying such questions and such the statements of the employees cannot be relied on unless the veracity of the same is tested by way of cross examination.

7. The Learned Senior Counsel would further contend that the petitioner is not seeking cross-examination as a ritualistic formality to delay the proceedings, but certain relevant and crucial questions have to be put forth to the witnesses to test the veracity of the statements given by them to the 1st respondents during the search conducted under Section 132 of the Income Tax Act, 1961. He conceded that the witnesses are the employees of the petitioner Company, but contends that their statements cannot be relied upon since they were alleged to have given statements pertaining to the transactions of the past years during which period, they



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were not employed at all. The witnesses nos.1 and 2 who haven't handled the cash, have no locus standi to give the statements about the receipts and cash payments regarding the alleged unaccounted transactions. Further, witness nos. 3, 4 and 5 where one of them has joined during Jan 2014 and the other was transferred to the cash section only in March 2016, and the other one had taken over his work in June 2021, thereby it is obvious that neither of them can give their statements for all past ten years thereby, the their statements have no value. He further contends that witness no.5 is Deputy Manager of Export and Imports and it is out of his domain to give statements, not connected with his official duty and witness no.6 is employed as Manager-Purchase and his statement has nothing to do with sale of oil. Hence all the witnesses neither have locus standi for the above said reasons nor their statements have weight to prove the alleged unaccounted transactions. He firmly contends that the petitioner needs an opportunity to cross examine those witness to verify the veracity of their statements inasmuch as the same witnesses have made retraction statements to their original statements. He would also contend that the respondents relied upon electronic devices in the form of



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Pen drive/hard disks, Excel sheets, which are secondary evidence and admissibility of the same is uncalled for in the absence of mandatory certificate under Section 65B(4) of the Indian Evidence Act.

8. In support of his contentions, the learned Senior counsel relied upon the following decisions, viz., “*Thilagarathina Match Works and others vs CCE*” (2013) 2 CTC 369; “*Arjan Panditrao Khotkar vs Kailash Kushanrao*” (2020) 7 SCC1; and “*Vetrivel Minerals vs ACIT*” (2021) 129.

9. Mr.A.P.Srinivas, learned Senior standing counsel would submit that the Managing Director of the petitioner company, himself admits the *modus operandi* of the petitioner and the statement was recorded on 27.10.2021 which was rebutted only on 16.11.2022 which is clearly an afterthought. He pleaded that cross-examining his own employees would be an exercise in futility when his own employees have also admitted everything stating that all the acts were done under the instructions of the Managing Director. He further pleaded that MS Excel



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sheet contains the chart of unaccounted receipts and payments which were shown to the employees as well as the Managing Director who admitted that the *modus operandi* and the accumulation of unaccounted money. He also pleaded that the petitioners have an alternative remedy before the Commissioner of Income Tax (Appeals) whose powers are co-terminus with that of the Assessing Officer and therefore, prayed for dismissal of the Writ Petitions while directing the petitioners to work out their remedy by way of appeal before the Commissioner of Income Tax (Appeals).

10. Heard the learned Senior counsel and the learned counsel appearing for the petitioners and the learned Senior Standing counsel appearing for the respondents and peruse the entire materials placed on record.

11. In the present case, a challenge was made to the impugned order dated 30.12.2022 passed by the 1st respondent pertaining to the assessment year 2021-22. The 1st respondent issued a show cause notice



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on 19.12.2022 directing the petitioner to file reply on or before 23.12.2022. Pursuant to the same, on 21.12.2022, the petitioner sought for the statement of T.Mohanraj and also made a request for cross-examination of the employees whose statements were relied upon. In the assessment order, statements of certain employees have been relied upon by the 1st respondent against the petitioner company and also the electronic devices. Therefore, the petitioner specifically made a request on 21.12.2022 to cross-examine the witnesses. In the show cause notice, dated 19.12.2022, the 1st respondent sought for reply from the petitioner. While so, the 1st respondent was supposed to have provided a personal hearing apart from considering the request of the petitioner for cross-examination of the witnesses. But in the present case, the 1st respondent failed to provide any opportunity of personal hearing and also permission for cross-examination of the employees whose statements have been relied upon by the 1st respondent, based on which, the impugned reassessment order came to be passed. The petitioner filed their reply on 24.12.2022 and 27.12.2022, while so, the impugned order came to be passed on 30.12.2022, i.e. within a span of 3 days from the date of the



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last reply made by the petitioner. In the show cause notice, dated 19.12.2022, the 1st respondent relied upon the statement of one Mr.T.Mohanraj for the first time, which is said to have been recorded on 09.02.2022 and the said sworn statement was requested by the petitioner and the same was served on through e-mail on 26.12.2022. Thereafter, the petitioner filed their reply on 27.12.2022. In spite of the request made by the petitioner to provide an opportunity for cross-examination of the witnesses, but the 1st respondent failed to provide any such opportunity to the petitioner and ultimately passed the impugned assessment order. Therefore, the acts of the 1st respondent would clearly amount to violation of principles of natural justice.

12. According to the petitioner, unless the veracity of the statements of the employees is tested by cross-examination, the same cannot be relied upon. The petitioner sought for cross-examination of the following witnesses for the reasons stated as below:



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Sl. No.	Name of the person	Designation	Sr No additions related	Points for cross-examination
1.	Mr.K.Thirunavakkarasu	DGM Accounts	1 to 6 (all)	He has not handled cash and therefore has no Locus standi to give statement about the receipts and payments of cash alleged to be representing unaccounted transactions. Need to verify the veracity of facts given in the statements.
2.	Mr.T.Mohanraj	AGM Accounts	3	The Statements recorded on 30.10.2021 and on 09.02.22 as far as the alleged payments made to contractors appears to be contradictory. As he has not handled cash, he does not have the "Locus Standi" to give statements about the receipts and payments of cash concerning the alleged unaccounted transactions. Need to verify the veracity of the facts given in the statements.
3.	Mr.P.Mohandas	AGM, Purchase	1.2	He Joined the service of the company only during January 2014. Therefore obviously and logically his statement cannot be taken as sacrosanct for the alleged unaccounted transactions for all the ten years.



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Sl. No.	Name of the person	Designation	Sr No additions related	Points for cross-examination
4.	Mr.K.S.Gopalakrishnan	Assistant Manager-Cash	1 to 6 (all)	He was transferred to Cash Section only on 1.3.2016. Therefore he cannot give statement for 10 years. For Example; 1) with reference to the cash memo dated 16.03.2020 mentioning the name of the purchaser of old culled birds, along with the total amount and denomination of the currency, he has stated it is unaccounted, which is contrary to the fact. This cash memo is seized vide <i>ANN/KK/SFMK/LS/S</i>, on <i>page no.15</i>. 2) The amount of Rs. 10,02,97,132/-being the total of the alleged unaccounted birds as per the noting in the diary seized, are nothing but the handled by him and total of some random figures and does not represent the unaccounted sales. Further the figure mentioned in the sworn statement as per noting in diary and the assessment order does not match. 3) Some of the statements



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Sl. No.	Name of the person	Designation	Sr No additions related	Points for cross-examination
				given by him concerning purchase of Urea, Molasses etc are not in his office domain and he does not work in tandem with the accounts department and therefore he does not have any Locus standi to make statements.
5.	Mr.S.Mohanraju	AGM, Accountant	1 to 6 (all)	He had taken over the work of Mr. ?. Thirunavukkarasu only during the Month of June, 2021. That being the case his statement with regard to the work done by Mr. K. Thirunavukkarasu does not hold good. He does not have any locus standi to say about the statement prepared by Mr. K Thirunavukkarasu since it was not in his knowledge and domain.
6.	Mr.S.Sundaravelan	Deputy Manager (Exports)	5	His Designation is Deputy Manager- Export and Imports and it is out of his office domain to give statements not connected with his official duty. Hence, the statement given by him does not have any value or weight.
7.	Mr.Karunanithi	Manager Purchase	4	He is employed as Manager-Purchase. Hence



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<i>Sl. No.</i>	<i>Name of the person</i>	<i>Designation</i>	<i>Sr No additions related</i>	<i>Points for cross-examination</i>
				there is no locus standi to rely upon the statement given by him on sale of Oil and therefore does not have any value or weight.

13. It is pertinent to note that it is not necessary to provide any reason by the petitioner while seeking to provide an opportunity for cross-examination of the witnesses. However, in the present case, the petitioner has provided the reasons as could be seen from the above mentioned table, for which, they required to cross-examine the seven witnesses of their employees who made statements before the 1st respondent, which were relied upon as documents and proof for passing the impugned assessment order. When the 1st respondent has relied upon the statements of the seven witnesses mentioned above, no doubt certainly, to find out the veracity of the statements, the petitioner is entitled to cross-examine the witnesses and to file their effective reply. Therefore, it is bounden duty of the 1st respondent to provide a personal



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hearing and an opportunity to the petitioner to cross-examine the witnesses. Nowhere in the correspondence, the 1st respondent ever mentioned about the personal hearing and providing opportunity for cross-examination. These are all admitted facts and not denied on behalf of the respondents. This attitude of the 1st respondent clearly amounts to violation of principles of natural justice which would ultimately deprive of the legal rights of the petitioner. Further, the time provided to the petitioner for filing the reply was hardly 3 days, which in the opinion of this Court, is not reasonable one and it appears to be only a nominal in nature. Even though, the 1st respondent provided very short time of 3 days, the petitioner filed their reply, but what they sought for was only personal hearing as well as cross-examination of the witnesses.

14. The law has been well settled by this Court as well as Apex Court in umpteen number of cases that right of cross-examination is part of one of the most essential rights and whenever a request is made for cross-examination of the witnesses to test the veracity of their statements, the authority have to necessarily grant the said request. In the case of



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“Thilagarathinam Match Works & others vs CCE” (2013) 2 CTC 369 =

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2013 SCCOL Mad 333, this Court has held in para 9 as under:

“9. Petitioners have not stated any reason for cross-examination of those persons. No reason need be stated by any person for requiring cross-examination in an enquiry. A person gets two kinds of rights. The first set of right revolves around the right to peruse the documents relied upon by the department and the right to cross-examine the witnesses on whose statements, the enquiry or prosecution is based. The second set of right revolves around the right to produce the witnesses and documents in defence. If a person facing an enquiry seeks to summon some persons to be examined in his defence or seeks to summon some documents to be produced in support of his defence, it is open to the Enquiry Officer to ask the delinquent to justify such a request by adducing reason. But, insofar as cross-examination is concerned, no justification need be provided in the form of reasons by a delinquent. The very fact that some statements of some officers are relied upon is good enough reason for permitting cross-examination. The very fact that the right of cross-examination is part of the most essential rights is sufficient to grant the request. But, the enquiry officer cannot test the request for cross-examination on the strength of the reasons. Therefore, the second ground on which the request of the Petitioners is rejected, cannot also be sustained.”



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15. A perusal of the above, it is clear that no justification need to be provided in the form of reasons by the petitioner while seeking for cross-examination of the witnesses. In the present case, the petitioner, in fact, provided the reasons which necessitated to cross-examine the witnesses whose statements were relied upon by the 1st respondent and a perusal of the reasons mentioned by the petitioner, appear to be just and reasonable and the 1st respondent ought to have provided the opportunity, but unfortunately, no opportunity was provided by which, right to lead rebuttal evidence is deprived of. In the case of “*Andaman Timer Industries versus Commissioner of Central Excise*” (2015) 94 CCH 0187 ISCC, the Hon'ble Supreme Court of India, has held as under in para 6:

“6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was



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based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them.”

16. A perusal of the above, it is clear that not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. In the present case, the statements of the employees of



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the petitioner company have been relied upon by the Assessing Officer while passing the impugned order of assessment. When such being the situation, it is bounden duty of the Assessing Officer to permit the petitioner to cross-examine the witnesses and not allowing the petitioner to cross-examine the said witnesses whose statements were made the basis of the impugned order, is no doubt, a serious flaw, by itself makes the order nullity inasmuch as it would amount to violation of principles of natural justice.

17. This Court, in *“Vetrivel Minerals vs ACIT” (2021) 129*, has dealt with the issue of failure to provide opportunity to the petitioner therein, for cross-examination of its own employees pursuant to search where it has been held as under in paragraphs 22 and 23:

“22.On the next issue of refusal of cross examination of the persons whose statements were recorded during the time of search under Section 132(4) of the Income Tax Act, it is trite law that the person against whom a statement is used, should be given opportunity to counter and contest the same. I am unable to accept the contention of the learned Senior Counsel that since the



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statements recorded were of persons who were employees of the assessee and therefore the assessee cannot seek for cross examination of them. The basic principles of jurisprudence governing the law of evidence can in no way interfered and could not be by the Income Tax Act provisions and neither the authorities functioning under the Income Tax Act has any discretion in such matters. The Supreme Court in the judgment Kishan Chadr Chellaram reported in 125 ITR 713 at page 720 which is also followed in the judgments cited by the petitioner in the case of Deputy Commissioner of Income Tax vs. M/s.Roger Enterprises (P) Ltd., reported in 2012 SCC Online ITAT 11821 and in the case of Brij Bhushan Singal vs. Assistant Commissioner of Income Tax reported in 2018 SCC Online ITAT 2891, held as follows:~

“It is true that the proceedings under the Income Tax Act law are not governed by the strict rules of evidence and therefore, it may be said that even without calling the Manager of the bank in evidence to prove this letter, it could be taken into account as evidence. But before the Income Tax authorities could rely upon it, they were bound to produce it before the assessee so that the assessee could controvert the statements contained in it by asking for the opportunity to cross examine the Manager of the bank with reference to the statement made by him.”

“23.The counsel for the petitioners also placed the



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recent judgment of the Supreme Court in the case of ICDS Ltd., reported in 2020 10 SCC 529, wherein, the Apex Court has remanded back the matter on account of the assessee being deprived of cross examination. Therefore, the respondent either should not have relied on the statements recorded under Section 132(4) or in case, if they want to rely on the same, they should not have denied the opportunity to the petitioners when they demanded of cross examining the persons who gave the statement. When the department has taken a stand that there are two groups which were searched by a single warrant and that the companies of one group should not be given to another, as rightly pointed out by the learned counsel for the petitioners, the assessing officer should not have discussed the statement of the other group for framing the assessment of the petitioners. This completely vitiates the entire assessment proceedings.”

18. In view of the law laid down by this Court as well as the Hon'ble Apex Court and in view of the fact that the 1st respondent failed to provide the opportunity to the petitioner for cross-examination of their seven employees who made sworn statements based on which, the 1st respondent formed an opinion and passed the impugned assessment order



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on 30.12.2022, which, in the opinion of this Court, clearly amounts to violation of principles of natural justice.

19. The learned Senior Standing counsel appearing for the respondents made submissions on the aspect of effective alternative remedy available before the Commissioner of Income Tax (Appeals) whose powers are co-terminus with that of the Assessing Officer and therefore, prayed for dismissal of the Writ Petitions while directing the petitioners to work out their remedy by way of appeal before the Commissioner of Income Tax (Appeals).

20. As far as this submission is concerned, by virtue of Finance Bill 2001, Section 251(1A) of the Income Tax has been amended, by which, the power of the Commissioner (Appeals) remanding the matter for fresh assessment, has been taken away with effect from 01.06.2001. It reads as follows:

“Under the existing provisions contained in sub-section (1), where an appeal is filed before the Commissioner (Appeals), against an order of assessment, the Commissioner



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(Appeals) may confirm, reduce, enhance or annul the assessment, or he may set aside the assessment and refer the case back to the Assessing Officer for making a fresh assessment in accordance with the directions given by him and after making such further enquiry as may be necessary.

With a view to help bringing an early finalisation to the assessment and to avoid prolonging the process litigation, it is proposed to amend clause (a) of the aforesaid section so as to provide that, where an appeal is filed before the Commissioner (Appeals), against an order of assessment, the Commissioner (Appeals) may not set aside the assessment or refer the case back to the Assessing Officer for making fresh assessment,

This amendment will take effect from 1st June, 2001.”

21. By not providing an opportunity of hearing, the person can approach the appellate authority, who in turn can permit him to cross examine the witnesses and thereafter he can pass orders. The cross-examination conducted before the Assessment Officer before making assessment and the cross-examination to be conducted before the



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appellate authority after the assessment which was passed without cross-examination, cannot be equated. That apart, under the frame work of law, it is a legal right of the petitioner before concluding the assessment to provide reply. In the event if anything is required for cross-examination, the same has to be permitted to putforth his case and thereafter, the Assessment Officer has to give his opinion. In the event of failure to provide an opportunity for cross-examination of the witnesses, no doubt the petitioner will loose the opportunity of well considered assessment order to be made by the Assessment Officer along with his points raised in the cross-examination. By loosing this opportunity before the Assessing Officer, the petitioner has to approach the Appellate Authority for cross-examination. Thereby, he is loosing the considered opinion of the Assessing Officer, which he is equally entitled to, for no mistake of him. When a person is having legal right, he is certainly entitled to such right and the said right cannot be deprived of by the Courts holding that the Appellate Authority is also having equal power to provide an opportunity to the petitioner, which means, he is deprived of his first opportunity before Assessing Officer at first stage for no mistake



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of the petitioner and permitted to have only the second opportunity before the Appellate Authority. The Court should refrain itself from passing any such mechanical orders merely because a similar opportunity is available to the petitioner/assessee before the Appellate Authority by depriving his first right of getting opinion from the Assessing Officer.

22. Yet another submission was made on behalf of the petitioner with regard to the admissibility of electronic evidence. In the present case, it appears that the 1st respondent seized Pen-drive and other electronic equipments and based on the material available therein, the impugned order came to be passed. It is to be noted that when the 1st respondent had chosen to rely upon the electronic evidence which is available in the form of Pen-drive and other electronic equipments, the contents contained therein, have to be certified in terms of Section 65B of the Indian Evidence Act, which, admittedly, no such certification was done. Under the Indian Evidence Act, 1872, Section 65B prescribes a distinct framework that governs the admissibility of electronic evidence. In this regard, it is worthwhile to extract paragraphs 24 and 25 from a



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decision rendered by this Court in ***“Vetrivel Minerals vs ACIT” (2021)***

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129, which read as under:

“24.As contended by the writ petitioners, when the entire assessment has been framed only on the basis of the so~called electronic record which are said to be copies of Excel Sheet, Excel work note book etc., non compliance of Section 65(B) of the Indian Evidence Act renders the document inadmissible in the eye of law as held by the Supreme Court in the judgment reported in Anvar P.V vs. P.K.Basheer and others reported in (2014) 10 SCC 473.

“14.Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the conditions mentioned under sub~ Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:



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(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

(a) There must be a certificate which identifies the electronic record containing the statement;

(b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in



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relation to the operation of the relevant device.

16.It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17.Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A opinion of examiner of electronic evidence.

18.The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.

“25.In view of the violation of the principles of natural justice and also due to the non compliance of Section 65(B) of the Indian Evidence Act, this Court feels that it is a fit case for setting aside the assessment orders. The alternative remedy under the statute is in the case of violation of principles of natural justice should be an effective one capable of remedying the violations by



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providing afresh, but however, it remains the fact that after amendment to Section 251(1)(a) of the Income Tax Act on 01.06.2001, the CIT(Appeals) does not have the power of remand. Therefore, in the facts and circumstances of the case, since the petitioners have made out a clear case of violation of principles of natural justice and the statute, this Court feels that it is a fit case for interfering with the impugned orders. In such circumstances, plea of alternative remedy which is also an effective one to undo the violations committed by the respondent, cannot be sustained. This Court is well within its power to set aside the impugned orders and remand back the same for fresh consideration. The Supreme Court in the recent judgment reported in (2020) 13 SCC 285, Maharashtra Chess Association vs. Union of India and others, negatived the contention of restriction on the exercise of the powers of the High Court under Article 226 of the Constitution of India and in this regard has held as follows:~

“19.This argument of the second respondent is misconceived. The existence of an alternative remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court-s writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.



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22.The mere existence of alternative forums where the aggrieved party may seek relief does not create a legal bar on a High Court to exercise its writ jurisdiction.”

23. In the light of the above discussion and in view of the law laid down by this Court as well as the Hon'ble Apex Court and since the impugned order has been passed in violation of principles of natural justice and due to non-compliance of Section 65(B) of the Indian Evidence Act, this Court has no hesitation to hold that the impugned order is liable to be set aside.

24. Accordingly, the impugned order dated 30.12.2022 passed by the 1st respondent relating to assessment year 2021-22 is hereby set aside.

25. In the result, the Writ Petition in W.P.No.2225 of 2023 is allowed. No costs.

26. As far as the Writ Petitions in W.P.Nos.21568 of 2023 is concerned, consequent to the impugned assessment order, dated



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30.12.2022, which is subject matter of challenge in W.P.No.2225 of 2023, the 1st respondent initiated the penalty proceedings under Section 271AAB(1A) of the Act by issuing a show cause notice dated 06.01.2023. It appears that the petitioner filed their detailed reply on 28.06.2023 and also brought to the notice of the 1st respondent that the Writ Petition in W.P.No.2225 of 2023 has been filed challenging the original assessment order dated 30.12.2022 and requested to keep the present penalty proceedings in abeyance till disposal of the said Writ Petition. However, the 1st respondent proceeded with the matter and by proceedings dated 28.06.2023, levied penalty of Rs.19,79,91,600/- . Challenging the same, the present Writ Petition has been filed by the petitioner.

27. As far as the Writ Petition in W.P.No.21571 of 2023 is concerned, consequent to the impugned assessment order, dated 30.12.2022, which is subject matter of challenge in W.P.No.2225 of 2023, the 1st respondent initiated the penalty proceedings under Section 271 AAD (1)(i) of the Act by issuing a show cause notice dated



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20.01.2023 on the ground that during the course of proceedings under the Act for the A.Y.2021-22, there was a false entry within the meaning of the provisions Clause (i) to Sub Section (1) of Section 271AAD of the Act, which invites penalty. It appears that the petitioner filed their detailed reply on 26.06.2023 and also brought to the notice of the 1st respondent that the Writ Petition in W.P.No.2225 of 2023 has been filed challenging the original assessment order dated 30.12.2022 and requested to keep the present penalty proceedings in abeyance till disposal of the said Writ Petition. However, the 1st respondent proceeded with the matter and by proceedings dated 28.06.2023, levied penalty of Rs.32,99,86,000/- . Challenging the same, the present Writ Petition has been filed by the petitioner.

28. Inasmuch as this Court, after a detailed discussion, set aside the main impugned original assessment order, dated 30.12.2022 on the ground that it has been passed in violation of principles of natural justice and due to non-compliance of Section 65(B) of the Indian Evidence Act, 1872, the present impugned orders, dated 28.06.2023, challenged in



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W.P.Nos.21568 and 21571 of 2023, which were passed based on the original impugned assessment order, dated 30.12.2022, the same cannot be sustained and liable to be set aside.

29. Accordingly, the said impugned orders dated 28.06.2022 are hereby set aside.

30. In the result, the Writ Petitions in W.P.Nos.21568 and 21571 of 2023 are allowed. No costs.

31. As far as the Writ Petition in W.P.No.2094 of 2023 is concerned, there was a search under Section 132 of the Act in the case of M/s.SKM Group of Companies from 27.10.2021 to 31.10.2021. During the course of search, certain loose excel sheets and pen-drive were seized from the business premises of M/s.SKM Animal Feeds and Foods India Pvt.Ltd. (petitioner in W.P.No.2225 of 2023 etc.) and sworn statements were recorded from the Managing Director and certain other employees and the premises of the present petitioner were also searched and certain



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sheets and electronic devices were seized and sworn statements were also recorded. Based on the same, a show cause notice under Section 143(2) of the Act dated 29.06.2022 was issued by the 1st respondent. The petitioner filed their reply on 09.11.2022. Later, vide communication dated 14.12.2022 and 23.12.2022, the petitioner requested the 1st respondent to furnish the copies of statements and other evidences seized from M/s.SKM Group and also for providing an opportunity to cross-examine the witnesses, more particularly, T.Mohanraj, Asst.General Manager of M/s.SKM Animal Feeds and Foods (India) Private Limited since the 1st respondent relied upon his statement. However, without acceding to the request made by the petitioner, the 1st respondent completed the scrutiny assessment under Section 143(3) of the Act vide proceedings dated 29.12.2022, wherein, while making additions, determined the assessed income at Rs.1,35,64,710/-. Challenging the same, the petitioner has come forward with the present Writ Petition.

32. As far as the Writ Petition in W.P.No.21844 of 2023 is concerned, consequent to the issuance of the impugned assessment order,



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dated 30.12.2023, which is the subject matter of challenge in W.P.No.2094 of 2023, the 1st respondent initiated the penalty proceedings under Section 271AAB(1A) of the Act by issuing a show cause notice dated 06.01.2023. It appears that the petitioner filed their detailed reply on 31.01.2023 and also brought to the notice of the 1st respondent that the Writ Petition in W.P.No.2094 of 2023 has been filed challenging the original assessment order dated 30.12.2022 and requested to keep the present penalty proceedings in abeyance till disposal of the said Writ Petition. However, the 1st respondent proceeded with the matter and by proceedings dated 28.06.2023, levied penalty of Rs.79,20,000/-. Challenging the same, the present Writ Petition has been filed by the petitioner.

33. In fact, during the course of same search conducted in respect of M/s.SKM Animal Feeds and Foods (India) Private Limited, the respondent officials also conducted the search in respect of the premises of the petitioner in the above two said Writ Petitions and based on the sworn statements of the employees, particularly, Mr.T.Mohanraj, AGM



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and also the same material, viz., pen-drive and excel sheets seized during the course of search of M/s.SKM Animal Feeds and Foods (India) Pvt.Ltd., the 1st respondent issued impugned orders dated 30.12.2022 and 28.06.2022.

34. It is not in dispute that pursuant to the notice dated 08.12.2022 issued under Section 142(1), the petitioner filed their reply on 14.12.2022, wherein, the petitioner has specifically requested to furnish the copies of statements and other evidence and to provide an opportunity for cross-examination of Mr.T.Mohan Raj. However, without providing the same, a show cause notice dated 20.12.2022 with a span of 6 days, was issued by the 1st respondent proposing 8% addition. The petitioner filed reply on 23.12.2022, wherein also, same request was made to furnish copies of seized materials and opportunity to cross-examine the witnesses whose statements were relied upon by the 1st respondent. This time also, the 1st respondent not provided the same, but issued another show cause notice on the same day, i.e. 23.12.2022 proposing addition of alleged receipt for which, the petitioner filed their reply on 26.12.2022.



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However, within a span of 3 days, the 1st respondent issued impugned order on 29.12.2022 wherein, while making additions, determined the assessed income at Rs.1,35,64,710/-.

35. In the present Writ Petitions also, the petitioner has raised similar contentions, viz., violation of principles of natural justice and non-compliance of Section 65B(4) of the Indian Evidence Act,1872, which were exhaustively dealt with while disposing of the Writ Petition in W.P.No.2225 of 2022. Therefore, this Court is of the view that the order passed in W.P.No.2225 of 2022 will hold good in respect of these Writ Petitions, viz., W.P.Nos.2094 and 21844 of 2023 also and the impugned orders are liable to be set aside.

36. Accordingly, the impugned orders dated 30.12.2022 and 28.06.2023 are hereby set aside.

37. In the result, the Writ Petition in W.P.No.2094 and 21844 of 2023 are allowed. No costs.



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38. To sum up,

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i) All the Writ Petitions, viz., W.P.Nos.2225, 2094, 21844, 21568 and 21571 of 2023 are allowed and the respective impugned orders dated 30.12.2022 and 28.06.2022 are set aside.

ii) Inasmuch as the impugned orders are set aside on the grounds of violation of principles of natural justice and also due to non-compliance of Section 65(B) of the Indian Evidence Act, this Court feels it appropriate to remand the matters back to the 1st respondent Assessing Officer for *de novo* assessment.

iii) While venturing to *de novo* assessment, the 1st respondent shall,

a) provide all the details of the seized materials and furnish copies of the sworn statements of the witnesses;

b) afford an opportunity to the petitioners to cross-examine the persons whose statements are relied upon by the 1st respondent for making additions or dis-allowances;

c) strictly comply with Section 65-B of the Indian Evidence Act in case the 1st respondent wants to use the electronic



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document way of secondary evidence;

d) after cross-examination by the petitioner, 1st respondent shall provide a personal hearing to the petitioner or their representative to advance their submissions in person;

iv) The 1st respondent shall pass a fresh assessment order after taking into consideration the replies as well as arguments to be made on behalf of the petitioners in accordance with law, without insisting upon the aspect of limitation.

v) All the connected WMPs are closed. No costs.

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W.P.No.2225 of 2023

KRISHNAN RAMASAMY, J.

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**W.P.Nos.2225, 2094, 21844,
21568 and 21571 of 2023**

and

**W.M.P.Nos.2298,2182,11294,
11296, 21169, 20941,
and 20945 of 2023.**

31.10.2023