

## **Is Cross Examination is absolute right at the time of Income Tax Proceedings**

As we all know, Income tax department conducts searches and surveys (also known as raids) every year where they suspect a person or business to be having illegal money. In this context, let us understand an interesting situation with help of an illustration.

Let us assume that a raid is conducted in case of Mr. X. During the course of such raid, some documents are found which proves that **Mr. X** has made financial transactions with **Mr. Y** which Mr. X has not disclosed in his income. As a result of which Mr. X has under-disclosed his actual income and paid less tax. Mr. X has also admitted the said facts at the time of his statement recorded under oath. Thereafter, based on the above material, in addition to Mr. X proceeding, the income tax officers send notice to Mr. Y also for action. This is a standing operating procedure in such cases.

Now the question arises that if Mr. Y also accepts that he is involved in the said financial transactions, then in such a situation action against Mr. Y is legally justified. But if Mr. Y says that I have no business connection with Mr. X, so in such a situation only on the basis of some documents and the statement of Mr. X, is it right to include Mr. Y in the rigors of tax proceedings along with Mr. X.

**Normally, Mr. Y ask the income tax department to cross-examine Mr. X to prove himself not-guilty, so as to ensure natural justice.** Therefore, in this article we will try to understand the concept relating to whether cross-examination is absolute right for anyone under the proceeding of Income Tax Case.

### **Is aggrieved person have absolute right to Cross Examination during the Income Tax Proceedings?**

No, the right to cross-examine a witness is not absolute and is subject to the discretion of the court, which can deny it based on the circumstances of the case and the necessity and relevance of the evidence.

## **Some Judicial Pronouncements of the court where the courts denied**

### **Cross Examination: -**

#### **(1) Punjab & Haryana High Court in the case of CIT v Metal Products of India [150 ITR 714]**

In the context of the Indian Evidence Act, 'evidence' means and includes all statements made before the Court which are called 'oral evidence' and all documents produced before it for inspection which are called 'documentary evidence'. That is a controlled meaning of the word for that Act. Yet, in certain circumstances, evidence in the form of affidavits, declarations and other means of the same kind are allowed to be adduced. But all such exercise is made before a Court or a quasi-judicial Tribunal to make things obvious or manifest. In other words, the effort is to make things plainly visible or conspicuous. The object can also be achieved by a positive suggestion indicating an inference which adds to the plain visibility or manifestation. The Court or the Tribunal must have before it, in all events, the correct perspective of things and what is helpful or valuable in that direction is 'evidence' in the larger context or in the generic sense. As is well known, strict rules of evidence, as are known to the Indian Evidence Act, are not applicable to income-tax proceedings and thus the word 'evidence' in the income-tax proceedings has to be understood in the generic sense.

#### **(2) ITAT Delhi Bench in the case of Nokia India (P.) Ltd. v DDIT [59 taxmann.com 212]**

has held that: Whether cross-examination is to be provided or not depends upon the facts of each case and there is no thumb rule or straight tight jacket formula facts of each case whether principles of natural justice have been complied with or not. If decision making authority has provided due opportunity to the person complaining of non-observance of principles of natural justice then it is for the person so complaining to demonstrate the same and show the prejudice caused to him. Mere bald assertion of non-observance of the principles of natural justice is of no consequence.

**(3) High Court of Delhi in the case of CIT v Kuwer Fibers (P.) Ltd. [77 taxmann.com 345]**

The court has held that: As far as the question relating to cross examination is concerned, the court notices that though the documents were furnished to the assessee, it had not sought opportunity of cross examination; this was made at the fag end, in March, 1997. This court finds no justification to reject the statements, which merely explain the documents seized; the instead of seeking rejection of the documents.

**(4) ITAT Bombay Bench in the case of GTC Industries Ltd. v ACIT [65 ITD 380]**

ITAT Bench has relied upon the judgment of Calcutta High Court in the case of **Kisanlal Agarwalla v. Collector of Land Customs** AIR 1967 & Cal. 80 and quoted this judgment in para 90 which throws light on the right of cross examination–.

“90. There is a good deal of misconception on this question of the right of cross-examination as part of natural justice. Natural justice is fast becoming the most unnatural and artificial justice and for that confusion the Courts are no less responsible than the litigants. Ordinarily the principle of natural justice is that no man shall be a judge in his own cause and that no man should be condemned unheard. This latter doctrine is known as audi alteram partem. It is on this principle that natural justice ensures that both sides should be heard fairly and reasonably. A part of this principle is that if any reliance is placed on evidence or record against a person then that evidence or record must be placed before him for his information, comment and criticism. That is all that is meant by the doctrine of audi alteram partem, that no party should be condemned unheard. No natural justice requires that there should be a kind of a formal cross-examination. Formal cross-examination is procedural justice. It is governed by rules of evidence. It is the creation of Courts and not a part of natural justice but of legal and statutory justice. Natural justice certainly includes that any statement of a person before it is accepted against somebody else, that somebody else should have an opportunity of meeting it whether it (sic), by way of interrogation or

by way of comment does not matter. So long as the party charged has a fair and reasonable opportunity to see, comment and criticise the evidence, statement or record on which the charge is being made against him the demands and the test of natural justice are satisfied. Cross-examination in that sense is not the technical cross-examination in a Court of law in the witness-box.”

ITAT has further held that, “As regards the dictum ‘audi alteram partem’ the assessee’s basic contention was that the statements of witnesses and materials which were relied upon by the Assessing Officer in the assessment order to reach the conclusions and findings which were adverse to the assessee should have been disclosed to the assessee and the witnesses should have been offered for cross-examination. The right to cross-examine the witness who made adverse report is not an invariable attribute of the requirement of the said dictum. The principles of natural justice do not require formal cross-examination. Formal cross-examination is a part of procedural justice. It is governed by the rules of evidence, and is the creation of Court. It is part of legal and statutory justice, and not a part of natural justice, therefore, of law that the revenue could not rely on any evidence which had not been subjected to cross-examination. However, if a witness has given directly incriminating statement and the addition in the assessment is based solely or mainly on such statement, in that eventuality it is incumbent on the Assessing Officer to allow cross-examination. Adverse evidence and material, relied upon in the order, to reach the finality, should be disclosed to the assessee. But this rule is not applicable where the material or evidence used is of collateral nature.”

**(5) Allahabad High Court in the case of Motilal Padampat Udyog Ltd. v CIT [293 ITR 565]**

After considering the judgment of Supreme Court in the case of **Krishna Chand Chela Ram v CIT** has held that right of cross examination from whom the AO has collected the evidence is not required under the income tax law and such assessment was valid under the Act. In the instant case, the copies of the rough cash books and the statements of the partners of ‘V’ which were recorded, had been provided to the

assessee and, in fact, the assessee had also submitted its reply. In the letter an opportunity to cross-examine was asked for only in case the statements had not been recorded. As, in the instant case, the assessee had proper opportunity to controvert the material gathered by the assessing authority and used against it, there had been compliance of the principle of natural justice.

**Some Judicial Pronouncements, where it will be cleared that in absence of opportunity of cross examination of the witness to the assessee by the AO, the assessment order passed by the A.O. may be set aside or may be treated as null and void: -**

**(1) KISHINCHAND CHELLARAM V . COMMISSIONER OF INCOME TAX, BOMBAY CITY-II (1980)**  
**125 ITR 0713**

*In this case the Hon'ble Supreme Court has held as under –*

“The burden was on the revenue to show that the amount of Rs.1,07,350 said to have been remitted from Madras to Bombay belonged to the assessee and it was not enough for the revenue to show that the amount was remitted by Tilokchand, an employee of the assessee, to Nathirmal, another employee of the assessee. It is quite possible that Tilokchand had resources of his own from which he could remit the amount of Rs.1,07,350 to Nathirmal. It was for the revenue to rule out this possibility by bringing proper evidence on record, for the burden of showing that the amount was remitted by the assessee was on the revenue. Unfortunately, for the revenue, neither Tilokchand nor Nathirmal was in the service of the assessee at the time when the assessment was reopened and the assessee could not, therefore, be expected to call them in evidence for the purpose of helping the revenue to discharge the burden which lay upon it.

We must, therefore, hold that there was no material evidence at all before the Tribunal in the basis of which the Tribunal could come to the finding that the amount of Rs.1,07,350 was remitted by the assessee from Madras and that it represented the

concealed income of the assessee. We accordingly allow the appeal, set aside the judgment of the High Court and answer the question referred by the Tribunal in favour of the assessee and against the revenue. The revenue will pay the costs of the assessee throughout.”

**(2) UNION OF INDIA & OTHERS V. GANESH DAS BHOJRAJ (SUPRA)**

In this case, the assessee imported consignment of pulses and claimed clearance of goods free of customs duty on the ground of notification which was issued earlier. It appears that on the date of import, a new notification came whereby basic duty at 25% was imposed. The assessee pleaded that he was not aware of the notification and that the notification was not made available to the public on that day. The Supreme Court in this case held that if the notification is published on a particular date, it is presumed to have been known to the Public. However, it was pointed out that non-availability of Gazette is a defence plea of ignorance where mens rea is an ingredient of an offence which calls for leniency in punishment. This case lays down the proposition that if an assessee has acted in ignorance based on set of circumstances and facts at a particular point of time, when the plea was recorded, in absence of mens rea he cannot be necessarily held guilty or be prosecuted.

**(3) FIRE ARCOR INFRASTRUCTURE PVT. LTD. VS. COMMISSION OF INCOME TAX, CENTRAL CIRCLE – 2(1), NAGPUR, BOMBAY HIGH COURT, 23.07.2019, ITA NO. 30 OF 2018**

In this case the assessee made grievance about denial of an opportunity to cross examine the buyers. Denial of such an opportunity is a serious flaw rendering the order as a nullity. The Hon'ble Supreme Court in the case of Andaman Timber Industries V/s Commissioner of C. Ex., Kolkata-II, had set-aside the impugned orders. Failure to give an opinion about this grievance also amounts to refusal of an opportunity to cross-examine which is improper. Hence, all the orders need to be set-aside.

**(4) ANDAMAN TIMBER INDUSTRIES (2015) 281 CTR 214 (SC)**

The Hon'ble Apex Court has held in this case that denial to the assessee of the right to cross-examine the witness whose statement was made the basis of the impugned order is a serious flaw which renders the order a nullity in as much as it amounted to violation of the principles of natural justice because of which the assessee was adversely affected.

**Conclusion: -**

If we consider from the point of view of aggrieved person, providing cross examination is essential to the principal of natural justice. But on the other hand, the income tax authorities normally do not allow opportunity for cross examination. Now a days assessment proceedings will be made jurisdiction less or face less how the opportunity of cross examination will be provided? This may be a matter of concern for the Income Tax Authorities.