Various Notices under Income Tax Act, 1961 : How to respond Astutely

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1.Introduction and Background

Since under the present provisions of the Act , various notices are prescribed conferring different authorities on the Act , it remains a matter of keen and regular interest as to how to respond lawfully to various notices, from perspective of tax payer and his tax consultants. This is more when now a days various notices are issued by tax authorities in electronic mode making the subject more dynamic and multidimensional. Reference may be made to detailed provisions of section 282 and 282A of the Act dealing with various modes of notice etc service and their authentication etc. Rule 127 of Income Tax Rules is made in pursuance to section 282(2) of the Act further prescribing various addresses (incl electronic mail address) to which communication referred therein may be delivered or transmitted. Rule 127A specifies procedure about authentication of notices and other documents in pursuance to section 282A of the Act. Courts have ingeminated on strict adherence to aforesaid rules in absence of which subject proceedings have been quashed. Refer Paragraph 3 below for detailed discussion on requirement of valid issue and service of notice under the provisions of the Act. Although there is no definition of notice in the Act but Karnataka high court in case of in Mr. S.N.Sinha vs. The State of Kar. (ILR 2012 KAR 448) at para 4 has observed as follows:

"4.....When a notice can be said to be valid in law? The term 'Notice' originated from the Latin word 'Notitia' which means 'being known'. It is equivalent to information, intelligence or knowledge. Notice is the starting point of any hearing. The right to fair hearing covers every stage through which an administrative adjudication passes, starting from notice to final determination. Notice embodies rule of fairness and must precede an adverse order. It should clearly state the reason as to why a party is required to appear and/or his reply is required. The party concerned should be apprised of the evidence on which the case against him is based and be given an opportunity to rebut the said evidence. A notice, to be valid in law, should be clear and precise so as to give the party concerned adequate information of the case he has to meet. The adequacy of notice is a relative term and must be decided with reference to

each case. The test of adequacy of notice will be whether it gives sufficient information so as to enable the person concerned to put up an effective defence. If a notice is vague or it contains unspecified or unintelligible allegations, it would imply a denial of proper opportunity of being heard. Natural justice is not only a requirement of proper legal procedure but also a vital element of good administration."

Apex court in one of the old case in old income tax law in case of . Narayana Chetty v. ITO [1959] 35 ITR 388 (SC) has held that:

“The first point raised by Mr. Sastri is that the proceedings taken by respondent I under s. 34 of the Act are invalid because the notice required to be issued under the said section has not been issued against the assessees contemplated therein. In the, present case the Income-tax Officer has purported to act under s. 34(I)(a) against the three firms. The said sub-section provides inter alia that " if the Income-tax Officer has reason to believe that by reason of the omission or failure on the part of the assessee to make a return of his income under s. 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax has been under-.assessed", he may, within the nine prescribed, " serve on the assessee a notice containing all or any of the requirements which may be included in the notice under sub-s. (2) of s..22 and may proceed to reassess such income, -profits or gains." The argument is that the service of the requisite notice on the assessee is a condition precedent to the validity Of any reassessment made under s. 34; and if a valid notice is not issued as required, proceedings taken by the Income-tax Officer in pursuance of an invalid notice and consequent orders of reassessment passed 'by him would be void and inoperative. In our opinion, this contention is well- founded. The notice prescribed by s. 34 cannot be regarded as a more procedural requirement; it is only if the said notice is served on the assessee as required that the lncome-tax Officer would be justified in taking proceedings against him. If no notice is issued or if the notice issued is shown to be invalid then the validity of the proceedings taken by the Income-tax Officer without a notice or in pursuance of an invalid notice would be illegal and void. That is the view taken by the Bombay and Calcutta High Courts in-the Commissioner of Incometax, Bombay City v. Ramsukh Motilal (1) and B. K. Das & Co. v. Commissioner of Income-tax, West Bengal (2) and we think that that view is right.”

In Indian constitution, as observed by Apex court in dissenting order of His lordship Justice Nariman in case of KANTARU RAJEEVARU (order dated

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14/11/2019) lucidly it is held that "…. After all, in India's tryst with destiny, we have chosen to be wedded to the rule of law as laid down by the Constitution of India. Let every person remember that the "holy book" is the Constitution of India, and it is with this book in hand that the citizens of India march together as a nation, so that they may move forward in all spheres of human endeavour to achieve the great goals set out by this "Magna Carta" or Great Charter of India.." , this rule of law which we follow in our jurisprudence is further supported from article 14 of Indian constitution which guarantees equality before law and equal protection of laws on which it has been in case of Shayaran Banu 22/08/2017 (9 SCC 1 2017) in judgment of His lordship Justice Nariman has observed that "41. That the arbitrariness doctrine contained in Article 14 would apply to negate legislation, subordinate legislation and executive action is clear from a celebrated passage in the case of Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1 SCC 722 (at pages 740-741):

……. Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution." [Emphasis Supplied]" In above decision of Ajay Hasia, reference was made to Royappa case [(1975) 1 SCC 485: 1975 SCC (L&S) 99: (1975) 3 SCR 616] which was reaffirmed and elaborated by Apex court Court in Maneka Gandhi v. Union of India [(1978) 1 SCC 248 in following words ""Now the question immediately arises as to what is the requirement of Article 14: What is the content and reach of the great equalising principle enunciated in this Article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning, for to do so would be to violate its activist magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits.... Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence."

So requirement of notice in a statutory proceedings aims to negate any arbitrariness in decision making and achieve constitutional equality enshrined in

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article 14 by meeting principles of natural justice and audi altrem partem (reasonable opportunity of being heard/show cause notice etc) which are integral part of article 14, thereby further promoting fair , reasonable and equitable procedure which is a guaranteed fundamental right that right to life and liberty shall not be deprived except according to procedure established by law , so notice requirement is a salutary constitutional norm. (dealt in detail in next paragraphs). Also authority of law to be basis of valid tax collection as per article 265 of indian constitution is also reflected in notice requirement in law. Importance of article 265 of indian constitution in matter of tax levy and collection is reiterated recently by constitution bench of apex court in case of Dilip Kumar vs commissioner of customs reported at 9 SCC 1 (2019) in para 21 by holding that "... *No tax shall be levied or collected except by authority of law. prohibits the State from extracting tax from the citizens without authority of law. It is axiomatic that taxation statute has to be interpreted strictly because State cannot at their whims and fancies burden the citizens without authority of law. In other words, when competent Legislature mandates taxing certain persons/certain objects in certain circumstances, it cannot be expanded/interpreted to include those, which were not intended by the Legislature."*

Further requirement of notice in a law also sometime relates to assumption of jurisdiction on part of a adjudicating authority to which assumption jurisdiction aspect one may gainfully allude to:Apropos meaning of word jurisdiction in context of notice issued by an authority one may refer to :

In Harpal Singh vs. State of Pubjab (4/12/2007) Supreme Court extracted how world 'jurisdiction' is defined. Paragraph-10 reads as under:

"10. At this stage it will be useful to refer to the dictionary meaning of the word "jurisdiction":

Black's Law Dictionary:

"A court's power to decide a case or issue a decree." Words and Phrases — Legally defined, Third Edition (p. 497): "By 'jurisdiction' is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by similar means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the

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particular court has cognizance, or as to the area over which the jurisdiction extends."

Law Lexicon by P. Ramanatha Aiyar, 2nd Edn., Reprint 2000:

"An authority or power, which a man hath to do justice in causes of complaint brought before him. (Tomlin's Law Dictionary) The power to hear and determine the particular case involved; the power of a court or a Judge to entertain an action, petition, or other proceeding; the legal power of hearing and determining controversies. As applied to a particular claim or controversy, jurisdiction is the power to hear and determine that controversy."

Jurisdiction, therefore, means the authority or power to entertain, hear and decide a case and to do justice in the case and determine the controversy. In absence of jurisdiction the court has no power to hear and decide the matter and the order passed by it would be a nullity."

Further very recently in income tax act decision Karnataka high court in an elaborate order in case of Epson India Pvt Limited (9/12/2019) in para 3 to 8 has explained on concept of jurisdiction (subject matter jurisdiction , parties jurisdiction and particular question which calls for decision, are three broad heads of jurisdiction) , crux of which is distinction between existence/assumption of jurisdiction and exercise of jurisdiction where in former (which relates to the authority to decide the cause at all) if any error happens entire decision is null and void whereas in later (which relates to decision of all other questions arising in the case) decision would be voidable only.

Error of jurisdiction and error within jurisdiction are two different concepts having different implications which are adumbrated in recent Apex court verdict in case of Embassy Property Developments Pvt Ltd (3/12/2019) wherein bench comprising three of their lordships on question "Whether the High Court ought to interfere, under Article 226/227 of the Constitution, with an Order passed by the National Company Law Tribunal in a proceeding under the Insolvency and Bankruptcy Code,2016, ignoring the availability of a statutory remedy of appeal to the National Company Law Appellate Tribunal and if so, under what circumstances? Observing inter-alia that "... The distinction between the lack of jurisdiction and the wrongful exercise of the available jurisdiction, should certainly be taken into account by High Courts, when Article226 is sought to be invoked bypassing a statutory alternative remedy provided by a special statute.." finally concluded on the said issue that "... 45. Therefore, in fine, our answer to the first question would be that NCLT did not have jurisdiction

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to entertain an application against the Government of Karnataka for a direction to execute Supplemental Lease Deeds for the extension of the mining lease. Since NCLT chose to exercise a jurisdiction not vested in it in law, the High Court of Karnataka was justified in entertaining the writ petition, onthe basis that NCLT was coram non judice".

So whenever a notice is recd. Issue relating to valid jurisdiction being there needs to examined at threshhold itself. Even in income tax act decision Apex court on two occasions atleast has defined and given importance to jurisdictional fact which existence is sine qua non for valid assumption of jurisdiction. Reference is made to Arun Kumar vs Union of India 286 ITR 89 wherein it is inter-alia held that "A "jurisdictional fact" is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not posses.

In Halsbury's Laws of England, it has been stated; "Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of, the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive".

The existence of jurisdictional fact is thus sine qua non or condition precedent for the exercise of power by a court of limited jurisdiction..... From the above decisions, it is clear that existence of 'jurisdictional fact' is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."

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.In Raza Textiles Ltd. vs. Income Tax Officer, reported in (1973) 1 SCC 633, the Supreme Court held that no authority, much less a quasi-judicial authority could confer jurisdiction on itself by deciding a jurisdictional fact wrongly. The question whether the jurisdictional fact had been rightly decided or not was a question that was open for examination by the High Court in an application for a Writ of Certiorari. If the High Court came to the conclusion that the Income Tax Officer had clutched at the jurisdiction by deciding a jurisdictional fact erroneously, then the assessee was entitled for a writ of certiorari prayed for by him. The Supreme Court observed that it is incomprehensible to think that a quasi-judicial authority like the I.T.O. can erroneously decide a jurisdictional fact and thereafter proceed to impose a levy on a citizen.

Applying above case of Raza Textiles, Madras high court in recent case of Wabco India limited 407 ITR 317 has eloquently held that "Allowing the writ petition the high Court held that ; ***question was whether the show-cause notice was at all without jurisdiction, whether the respondent wrongly assumed jurisdiction by erroneously deciding jurisdictional facts, whether in the facts and circumstances of the case, the appellant at all had any liability in respect of the capital gains in question, and whether the appellant could be said to be an agent under section 163(1)(c) . The High Court had jurisdiction to consider the question in writ proceedings.*** Court also observed that , no case was made out by the Department that in respect of transfer of shares to a third party, that too outside India, the Indian company could be taxed when the Indian company had no role in the transfer. Merely because those shares related to the Indian company, that would not make the Indian company an agent qua deemed capital gains purportedly earned by the foreign company. The notice was not valid.:

With above introduction of concept of notice, related constitutional angle , natural justice angle , applicable provisions in act for issue and service , concept of jurisdiction and jurisdictional fact in valid issue of notice, with possible challenge in article 226 before high court in writ jurisdiction (although one may first lodge preliminary jurisdictional objection before concerned authority and afters its disposal/ dismissal only writ option in article 226 may be explored) , it is apt to highlight here recent concept of Document Identification Number (DIN) introduced for every document generated by income tax department including all notices (refer cbdt circular no 19/2019) wherein it is categorically stated that without valid DIN communication/document (after 1.10.2019) shall be deemed to have been never issued.

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2. Notice and principle of natural justice and reasonable opportunity of being heard and valid show cause notice etc various related aspects

In Dhakeshwari Cotton Mills v. Commissioner of Income-tax, [1954] 26 I.T.R. 775, 783 (S.C.) the Supreme Court re-emphasised that the principles of natural justice are applicable to the proceedings under the Income-tax Act. It observed : *" It is... ...surprising that the Tribunal took from the representative of the department statement of gross profit rates of other cotton mills without showing the statement to the assessee and without giving him an opportunity to show that that statement had no relevancy whatsoever to the case of the mill in question."*

In Suraj Mall Mohta and Co. v. A. V. Viswanatha Sastry, (1954] 26 I.T.R. 1 (S.C.) the Supreme Court has ruled that assessment proceedings before the Income-tax Officer are judicial proceedings and all the incidents of such judicial proceedings have to be observed before the result is arrived at. ***The assessee has a right to inspect the record and all relevant documents before he is called upon to lead evidence in rebuttal. This right has not been taken away by any express provision of the Income-tax Act.***

It may be apt to recall in hindsight here illuminating observations from Apex court locus classicus in case of C.B.Gautam case reported at 199 ITR 530 on reading of natural justice in a provision of income tax act (which was otherwise silent on natural justice requirement), giving of show cause notice to affected person, and interplay with article 14 of indian constitution, it was observed that "*... although Chapter XX-C does not contain any express provision for the affected parties being given an opportunity to be heard before an order for purchase is made under Section 269UD, not to read the requirement of such an opportunity would be to give too literal and strict an interpretation to the provisions of Chapter XX-C and in the words of Judge Learned Hand of the United States of America "to make a fortress out of the dictionary." Again, there is no express provision in Chapter XX-C barring the giving of a show cause notice or reasonable opportunity to show cause nor is there anything in the language of Chapter XX-C which could lead to such an implication. The observance of principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, the requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by an appropriate authority under Section 269UD must be read into the provisions of Chapter XX-C. There is nothing in the language of Section 269UD or any other provision in the said Chapter which would negate such an opportunity being given. Moreover, if such a requirement were not read into the provisions of the said Chapter, they would be seriously open to challenge on the ground of violations of the provisions of Article 14 on the ground of non-compliance with principles of natural justice. The provision that when an order for purchase is made under Section 269UD-reasons must*

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be recorded in writing is no substitute for a provision requiring a reasonable opportunity of being heard before such an order is made..."

Even in above case of C.BGautam , it was held that *"..... We are, of the view, that reasons for the order must be communicated to the affected party."* This decision of C.B.Gautam subsequently has been followed in another locuss classcus of Apex court ruling in case of Sahara India 300 ITR 403 which extensively discusses on principle of natural justice holding that even if a provision does not expressly contain natural justice and also does not exclude it, it is held that "Thus, it is trite that unless a statutory provision either specifically or by necessary implication excludes the application of the principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences for the party affected. The principle will hold good irrespective of whether the power conferred on a statutory body or tribunal is administrative or quasi-judicial."

Then to same effect is Apex court ruling in case of Ajantha Industries reported at 102 ITR 281 in context of section 127 of the Act, holding that "T he question then arises whether the reasons are at all required to be communicated to the assessee. It is submitted, on behalf of the Revenue, that the very fact that reasons are recorded in the file, although these are not communicated to the assessee, fully meets the requirement section 127(1). We are unable to accept this submission. …..The reason for recording of reasons in the order and making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under its writ jurisdiction under article 226 of the Constitution or even this Court under Article 136 of the Constitution in an appropriate case for challenging the order, inter alia, either on the ground that it is based on irrelevant and extraneous condonations Whether such a writ or special leave application ultimately fails is not relevant for a decision of the question We are clearly of opinion that the requirement of recording reasons under section 127(1) is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee..... When law requires reasons to be recorded in a particular order affecting prejudicially the interests of any person, who can challenge the order in court, it ceases to be a mere administrative order and the vice of violation of the principles of natural justice on account of omission to communicate the reasons is not expiated"

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Further Apex court in case of Oriental Rubber 145 ITR 477 in context of section 132 (8) of the Act dealing with retention of books /documents beyond a specified period at the relevant time, has held that "It is true that sub-sec.(8) does not in terms provide that the Commissioner's approval or the recorded reasons on which it might be based should be communicated to the concerned person but in our view since the person concerned is bound to be materially prejudiced in the enforcement of his right to have such books and documents returned to him by being kept ignorant about the factum of fulfilment of either of the conditions it is obligatory upon the Revenue to communicate the Commissioner's approval as also the recorded reasons to the person concerned. In the absence of such communication the Commissioner's decision according his approval will not become effective."

At this juncture it may be apposite that when qualities of notice is talked about , one needs to keep in mind Apex court dictum in case of Oryx fisheries vs UOI (29/10/2010) wherein it is held that (where requirement of natural justice is dealt at length):

"*24. It is well settled that a quasi-judicial authority, while acting in exercise of its statutory power must act fairly and must act with an open mind while initiating a show cause proceeding. A show cause proceeding is meant to give the person proceeded against a reasonable opportunity of making his objection against the proposed charges indicated in the notice.*

25. Expressions like "a reasonable opportunity of making objection" or "a reasonable opportunity of defence" have come up for consideration before this Court in the context of several statutes.

26. A Constitution Bench of this Court in Khem Chand v. Union of India and others, reported in AIR 1958 SC 300, of course in the context of service jurisprudence, reiterated certain principles which are applicable in the present case also.

27. Chief Justice S.R. Das speaking for the unanimous Constitution Bench in Khem Chand (supra) held that the concept of `reasonable opportunity' includes various safeguards and one of them, in the words of the learned Chief Justice, is: "(a) An opportunity to deny his guilt and establish his innocence, which he can only do if he is told what the charges leveled against him are and the allegations on which such charges are based;"

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28. It is no doubt true that at the stage of show cause, the person proceeded against must be told the charges against him so that he can take his defence and prove his innocence. It is obvious that at that stage the authority issuing the charge- sheet, cannot, instead of telling him the charges, confront him with definite conclusions of his alleged guilt. If that is done, as has been done in this instant case, the entire proceeding initiated by the show cause notice gets vitiated by unfairness and bias and the subsequent proceeding become an idle ceremony.

29. Justice is rooted in confidence and justice is the goal of a quasi-judicial proceeding also. If the functioning of a quasi- judicial authority has to inspire confidence in the minds of those subjected to its jurisdiction, such authority must act with utmost fairness. Its fairness is obviously to be manifested by the language in which charges are couched and conveyed to the person proceeded against. In the instant case from the underlined portion of the show cause notice it is clear that the third respondent has demonstrated a totally close mind at the stage of show cause notice itself. Such a close mind is inconsistent with the scheme of Rule 43 which is set out below. The aforesaid rule has been framed in exercise of the power conferred under Section 33 of The Marine Products Export Development Authority Act, 1972 and as such that Rule is statutory in nature.

30. Rule 43 of the MPEDA Rules provides as follows:

"43. Cancellation of registration Where the Secretary or other officer is satisfied that any person has obtained a certificate of registration by furnishing incorrect information or that he has contravened any of the provisions of this rule or of the conditions mentioned in the certificate of registration, or any person who has been registered as an exporter fails during the period of twelve consecutive months to export any of the marine products in respect of which he is registered, or if the secretary or other officer is satisfied that such person has become disqualified to continue as an exporter, the Secretary or such officer may, after giving the person who holds a certificate a reasonable opportunity of making his objections, by order, cancel the registration and communicate to him a copy of such order."

31. It is of course true that the show cause notice cannot be read hyper-technically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will

merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi- judicial proceeding under a statutory regulation which promises to give the person proceeded against a reasonable opportunity of defence.

32. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show cause notice.

33. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it.

34. A somewhat similar observation was made by this Court in the case of Kumaon Mandal Vikas Nigam Limited v. Girja Shankar Pant & others, (2001) 1 SCC 182. In that case, this court was dealing with a show cause notice cum charge-sheet issued to an employee. While dealing with the same, this Court in paragraph 25 (page 198 of the report) by referring to the language in the show cause notice observed as follows: "25. Upon consideration of the language in the show-cause notice-cum-charge-sheet, it has been very strongly contended that it is clear that the Officer concerned has a mindset even at the stage of framing of charges and we also do find some justification in such a submission since the chain is otherwise complete."

35. After paragraph 25, this Court discussed in detail the emerging law of bias in different jurisdictions and ultimately held in paragraph 35 (page 201 of the report), the true test of bias is:

"35. The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom -- in the event however the conclusion is otherwise inescapable that there is existing a real danger of bias, the administrative action cannot be sustained:"

36. Going by the aforesaid test any man of ordinary prudence would come to a conclusion that in the instant case the alleged guilt of the appellant has been prejudged at the stage of show cause notice itself.

37. The appellant gave a reply to the show cause notice but in the order of the third respondent by which registration certificate of the appellant was cancelled,

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no reference was made to the reply of the appellant, except saying that it is not satisfactory. The cancellation order is totally a non-speaking one. The relevant portion of the cancellation order is set out:-

"Sub: Registration as an Exporter of Marine Products under MPEDA Rules 1972. Please refer to the Show Cause Notice No.10/3/MS/2006/MS/3634 dated 23.01.2008 acknowledged by you on 28/01/2008 directing you to show cause why the certificate of registration as an exporter No.MAI/ME/119/06 dated 03/03/2006 granted to you as Merchant Exporter should not be cancelled for the following reasons:-

1. It has been proved beyond doubt that you have sent sub-standard material to M/s. Cascade Marine Foods, L.L.C., Sharjah.

2. You have dishonoured your written agreement with M/s. Cascade Marine Foods, L.L.C, Sharjah to settle the complaint made by the buyer as you had agreed to compensate to the extent of the value of the defective cargo sent by you and have now evaded from the responsibility.

3. This irresponsible action has brought irreparable damage to India's trade relation with UAE.

Your reply dated 04/02/2008 to the Show Cause Notice is not satisfactory because the quality complaint raised by M/s. Cascade Marine Foods, L.L.C, Sharjah have not been resolved amicably. Therefore, in exercise of the power conferred on me vide Rule 43 of the MPEDA Rules, read with office order Part II No.1840/2005 dated 25/11/2006, I hereby cancel the Registration Certificate No.MAI/ME/119/06 dated 03/03/2006 issued to you. The original Certificate of Registration issued should be returned to this office for cancellation immediately.

In case you are aggrieved by this order of cancellation, you may prefer an appeal to the Chairman within 30 days of the date of receipt of this order vide Rule 44 of the MPEDA Rules.

38. Therefore, the bias of the third respondent which was latent in the show cause notice became patent in the order of cancellation of the registration certificate. The cancellation order quotes the show cause notice and is a non-speaking one and is virtually no order in the eye of law. Since the same order is an appealable one it is incumbent on the third respondent to give adequate reasons.

39. On the question whether the entire proceeding for cancellation of registration initiated by the show cause notice and culminating in the order of cancellation is vitiated by bias we can appropriately refer to the succinct formulation of the

principle by Lord Reid in Ridge v. Baldwin and others (1964 A.C. 40). The Learned Law Lord, while dealing with several concepts, which are not susceptible of exact definition, held that by fair procedure one would mean that what a reasonable man would regard as fair in the particular circumstances (see page 65 of the Report). If we follow the aforesaid test, we are bound to hold that the procedure of cancellation registration in this case was not a fair one.

40. On the requirement of disclosing reasons by a quasi- judicial authority in support of its order, this Court has recently delivered a judgment in the case of Kranti Associates Pvt. Ltd. & Anr. v. Sh. Masood Ahmed Khan & Others on 8th September 2010.

42. In the instant case the appellate order contains reasons. However, absence of reasons in the original order cannot be compensated by disclosure of reason in the appellate order.

43. In Institute of Chartered Accountants of India v. L.K. Ratna and others,(1986) 4 SCC 537, it has been held:

".....after the blow suffered by the initial decision, it is difficult to contemplate complete restitution through an appellate decision. Such a case is unlike an action for money or recovery of property, where the execution of the trial decree may be stayed pending appeal, or a successful appeal may result in refund of the money or restitution of the property, with appropriate compensation by way of interest or mesne profits for the period of deprivation. And, therefore, it seems to us, there is manifest need to ensure that there is no breach of fundamental procedure in the original proceeding, and to avoid treating an appeal as an overall substitute for the original proceeding." (See para 18, pages 553-554 of the report)

44. For the reasons aforesaid, this Court quashes the show cause notice as also the order dated 19.03.2008 passed by the third respondent. In view of that, the appellate order has no legs to stand and accordingly is quashed."

Further in context of requirement of notice and natural justice principle it is held in case of Sona Builder vs UOI reported at 251 ITR 197 that ".... Further, the notice alleged that the apparent consideration of the transaction between the appellant and the transferor was low based on the sale instance mentioned thereon. To be able adequately to respond to that allegation, it was necessary for the appellant to ascertain what the merits and demerits were of that property which had been auctioned, and to know what were the terms and conditions of the auction. No copy of any document relating to the sale instance was furnished

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by the Appropriate Authority to the appellant along with the notice, or at any time whatsoever....There is no doubt in our minds that on both counts there has been a gross breach of the principles of natural justice because adequate opportunity to meet the case made out in the notice was not given to the appellant....Having regard to the statutory limit within which the Appropriate Authority has to act and his failure to act in conformity with the principles of natural justice, we do not think we can remand the matter to the Appropriate Authority. We must set his order aside. The appeal is accordingly allowed. The judgment and order under appeal is set aside. The order of the Appropriate Authority dated May 31, 1993, is quashed"

Further one may gainfully refer to Supreme court verdict in case of State Of Kerala vs K.T. Shaduli Yusuff Etc on 15 March, 1977Held that:

"Now, the law is well settled that tax authorities entrusted with the power to make assessment of tax discharge quasi- judicial functions and they are bound to observe principles of natural justice in reaching their conclusions. It is true, as pointed out by this Court in Dhakeswari Cotton Mills Ltd. v. Commissioner of Income Tax, West Bengal(1) that a taxing officer "is not lettered by technical rules of evidence and pleadings, and that he is entitled to act on material which may not be accepted as evidence in a court of law", but that does not absolve him from the obligation to comply with the fundamental rules of justice which have come to be known in the jurisprudence of administrative law as principles of natural justice. It is, however, necessary to remember that the rules of natural justice are not a con- stant: they are not absolute and rigid rules having univer- sal application. It was pointed out by this Court in Suresh Koshy George v. The University of Kerala & Ors.(2) that "the rules of natural justice are not embodied rules" and in the same case this Court approved the following observations from the judgment of Tucker, L.J. in Russel v. Duke of Norfolk and Ors."There are in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, 1 do not' derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case." One of the rules which constitutes a part of the principles of natural justice is the rule of audi alterem partera which requires that no man should be: condemned unheard. It is indeed a re- quirement of the duty to act fairly which lies on all quasi judicial authorities and this duty has been

extended also to the authorities holding administrative enquiries involving civil consequences or affecting rights of parties because, as pointed out by this Court in A.K. Kraipak and Ors. v. Union of India, "the aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice" and justice, in a society which has accepted socialism _as its article of faith in the Constitution, is dispensed not only by judicial or quasi judicial authorities but also by authorities discharging administrative functions. This rule which requires an opportunity to be heard to be given to a person likely to be affected by a decision is also, like the genus of which it is a species, not an inflexible rule having a fixed connotation. It has a variable content depending on the nature of the inquiry, the framework of the law under which it is held, the constitution of the authority holding the inquiry, the nature and character of the rights affected and the consequences flow- ing from the decision. It iS, therefore, not possible to say that in every case the rule of audi alterem partem requires [that] a particular specified procedure to be followed. It may be that in a given case the rule of audi alterem partem may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the in- quiry should be permitted to be cross-examined by the party affected while in some other case it may not. The procedure required to be adopted for giving an opportunity to a person to be heard must necessarily depend on the facts and circumstances of each case.

Now, in the present case, we are not concerned with a situation where the rule of audi alterem partem has to be read _into the statutory provision empowering the taxing authorities to assess the tax. Section 17, sub-section (3), under which the assessment to sales tax ha's been made on the assessee provides as follows:

"If no return is submitted by the dealer under subsection (1) within the pre- scribed period, or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing author- ity shall, after making such enquiry as it may consider necessary and after taking into account all relevant materials gathered by it, assess the dealer to the best of its judgment: Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of being heard and, where a return has been submitted, to prove the correctness or completeness of such return."

It is clear on a plain natural construction of the language of this provision that it empowers the Sales Tax Officer to make a best judgment assessment only where one of two condi- tions is satisfied:

(1) [1970] 1 S.C.R. 457.

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either no return is submitted by the assessee or the return submitted by him appears to the Sales Tax Officer to be incorrect or incomplete. It is only on the existence of one of these two conditions that the Sales Tax Officer gets the jurisdiction to make a best judgment assessment. The ful- filment of one of these two pre-requisites is, therefore, a condition precedent to the assumption of jurisdiction by the Sales Tax Officer to make assessment to the best of his judgment. Now, where no return has been submitted by the assessee, one of the two conditions necessary for the applicability of section 17, subsection (3) being satisfied, the Sales Tax Officer can, after making such inquiry as he may consider necessary and after taking into account all relevant materials gathered by him, proceed to make the best judgment assessment and in such a case, he would be bound under the proviso to give a reasonable opportunity of being heard to the assessee. But in the other case, where a return has been submitted by the assessee, the Sales Tax Officer would first have to satisfy himself that the return is incorrect or incomplete before he can proceed to make the best judgment assessment. The decision making process in such a case would really be in two stages, though the in- quiry may be continuous and uninterrupted: the first stage would be the reaching of satisfaction by the Sales Tax Officer that the return is incorrect or incomplete and the second stage would be. the making of the best judgment assessment. The first part of the proviso which requires that before taking action under sub-section (3) of section 17, the assessee should be given a reasonable opportunity of being heard would obviously apply not only at the second stage but also at the first stage of the inquiry, because the best judgment assessment, which is the action under section 17, sub-section (3), follows upon the inquiry and the "reasonable opportunity of being heard" must extend to the whole of the inquiry, including both stages. The requirement of the first part of the proviso that the asses- see should be given a "reasonable opportunity of being heard" before making best judgment assessment merely em- bodies the audi alterem partem rule and what is the content of this opportunity would depend, as pointed out above, to a great extent on the facts and circumstances of each case. The question debated before us was whether this opportunity of being heard granted under the first part of the proviso included an opportunity to cross-examine Haji Usmankutty and other wholesale dealers on the basis of whose books of accounts the Sales Tax Officer disbelieved the account of the assessee and came to the finding that the return submit- ted by the assessee were incorrect and incomplete. But it is not necessary for the purpose of the present appeals to decide this question since we find that in any event the assessee was entitled to this opportunity under the 'second part of the proviso.

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The second part of the proviso lays down that where a return has been submitted, the assessee should be given a reasona- ble opportunity to prove the correctness or completeness of such return. This requirement obviously applies at the first stage of the enquiry before the Sales Tax Officer comes to the conclusion that the return submitted by the assessee is incorrect or incomplete so as to warrant the making of a best judgment assessment. The question is what is the content of this provision which imposes an obligation on the Sales Tax Officer to give and confers a corresponding right on the assessee to be afforded, a reasonable opportunity "to prove the correctness or completeness of such return". Now, obviously "to prove" means to establish the correctness ,or completeness of the return by any mode permissible under law. The usual mode recognised by law for proving a fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correct- ness or completeness of the return would, therefore, neces- sarily carry with it the right to examine witnesses and that would include equally the right to Cross-examine witnesses examined by the Sales Tax Officer. Here, in the present case, the return filed by the assessee appeared to the Sales Tax Officer to be incorrect or incomplete because certain sales appearing in the books of Hazi Usmankutty and other wholesale dealers were not shown in the book's of account of the assessee. The Sales Tax Officer relied on the evidence furnished by the entries in the books of account of Hazi Usmankutty and other wholesale dealers for the purpose of coming to the conclusion that the return filed by the assessee was incorrect or incomplete. Placed in these circumstances, the assessee could prove the correctness and completeness of his return only by showing that the entries in the books of account of Hazi Usmankutty and other whole- sale dealers were false, bogus or manipulated and that the return submitted by the assessee should not be disbelieved on the basis of such entries, and this obviously, the assessee could not do, unless he was given an opportunity of cross-examining Hazi Usmankutty and other wholesale dealers with reference to their accounts. Since the evidentiary material procured from or produced by Hazi Usmankutty and other wholesale dealers was sought to be relied upon for showing that the return submitted by the assessee was incor- rect and incomplete, the assessee was entitled to have Hazi Usmankutty and other wholesale dealers summoned as witnesses for cross-examination. It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood. Here, it was not disputed on behalf of the Revenue that the assessee in both cases applied to the Sales Tax Officer for summoning Hazi Usmankutty and other wholesale dealers for cross-examination, but his application was turned down by the Sales Tax Officer. This act of the Sales Tax Officer in refusing to summon Hazi

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Usmankutty and other wholesale dealers for cross-examination by the assessee clearly constituted in- fraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee.

We do not wish to refer to the decisions of various High Courts on this point Since our learned brother has dis- cussed them in his judgment-. We are of the opinion that the view taken by the Orissa High Court in Muralimohan Prabhudayal v. State of Orissa(1) and the Kerala High Court in M. Appukutty v. State of Kerala(2) and the present cases represents the correct law on the subject. We accordingly dismiss the appeals with no order as to costs. (1) 26 S.T,C, 22. (2) 14 S.T.C, 489."

We may further refer to Apex court verdict in case of Sohan Lal Gupta (Dead) Thru L.R vs Asha Devi Gupta on connotation of reasonable opportuiny of being heard ;Held that: For constituting a reasonable opportunity, the following conditions are required to be observed :

1. Each party must have notice that the hearing is to take place.

2. Each party must have a reasonable opportunity to be present at the hearing, together with his advisers and witnesses.

3. Each party must have the opportunity to be present throughout the hearing

4. Each party must have a reasonable opportunity to present evidence and argument in support of his own case.

5. Each party must have a reasonable opportunity to test his opponent's case by cross-examining his witnesses, presenting rebutting evidence and addressing oral argument.

6. The hearing must, unless the contrary is expressly agreed, be the occasion on which the parties present the whole of their evidence and argument."

Likewise recent apex court verdict in case of Amitabh Bachan reported at 384 ITR 200 may be referred wherein context of section 263 of the Act it is held that *""...11. It may be that in a given case and in most cases it is so done a notice proposing the revisional exercise is given to the Assessee indicating therein broadly or even specifically the grounds on which the exercise is felt necessary. But there is nothing in the section (Section 263) to raise the said notice to the status of a mandatory show-cause notice affecting the initiation of the exercise in the absence thereof or to require the Commissioner of Income-tax to confine himself to the terms of the notice and foreclosing consideration of any other issue*

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or question of fact. This is not the purport of Section 263. Of course, there can be no dispute that while the Commissioner of Income-tax is free to exercise his jurisdiction on consideration of all relevant facts, a full opportunity to controvert the same and to explain the circumstances surrounding such facts, as maybe considered relevant by the Assessee, must be afforded to him by the Commissioner of Income-tax prior to the finalisation of the decision...."

So requirement of giving notice is very much integrated to principe of natural justice which sometime is referred by reasonable opportunity of being heard in a provision and sometime it is referred by mandatory jurisdictional notice whereby jurisdiction is assumed and further natural justice opportunity is given to affected assessee/tax payer.

3. Notice : Requirement of valid Issue and service etc in provisions of Income Tax Act

Illustratively , one may refer to Delhi high court detailed verdict in case of Veena Devi Karnani reported at 410 ITR 23 wherein it is held that: *Allowing the writ petition, the Court held that, rule 127(2) states that the addresses to which a notice or summons or requisition or order or any other communication may be delivered or transmitted shall be either available in the permanent account number database of the assessee or the address available in the Income-tax return to which the communication relates or the address available in the last Income-tax return filed by the assessee : all these options have to be resorted to by the concerned authority, in this case the Assessing Officer. On facts the Assessing Officer had omitted to access the changed permanent account database and had mechanically sent notices to the old address of the assessee. The subsequent notices under section 142(1) were also sent to the old address and the reassessment proceedings were completed on best judgment basis. The Assessing Officer had mechanically proceeded on the information supplied to him by the bank without following the correct procedure in law and had failed to ensure that the reassessment notice was issued properly and served at the correct address in the manner known to law. The reassessment notice issued under section 148 , the subsequent order under section 144 read with section 147 and the consequential action of attachment of the assessee's bank accounts were quashed. (AY. 2010-11).* This delhi high court ruling amplifies strict adherence to rule 127 of income tax rules, in matter of notice issue and service. In same ruling , delhi high court on revenue's reliance on section 292B has succinctly noted that ." Given these compulsions, the *Revenue's argument is a desperate "fall back" of the last resort*

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i.e. the notice which was never under Section 292-B of the Act is one of despair. It amounts to saying that a notice which was never sent or received is deemed to have been sent and all proceedings despite such lack of notice and despite the Revenue's fragrant violation of law are deemed to be justified. In such circumstances, the argument, i.e. the Revenue's invocation of Section 292-B only needs to be noticed in order to be rejected as countenancing it, would mean that all illegalities are deemed to be tapered over, in its favour. Section 292-B in the opinion of the Court would admit that no controversy with respect to the question of notice or proper service of summons, if at all were issued in the proper manner, known to law. Here clearly that is not the case.' which are very important findings to invoke protection of section 292B of the Act often relied by revenue .

Further Bombay high court in case of Harjeet Surajprakash Girotra v. UOI (2019) 180 DTR 257 /266 Taxman 29 (Bom.) (HC) has also similarly held that . *The postal authorities returned the notice with a remark 'left'. AO did not take any further steps and carried on assessment and made additions to assessee's income. High Court held that where delivery of notice could not be made at address of assessee available in PAN database, communication had to be delivered at address available with banking companies.*In this ruling also court took cognizance of rule 127 of income tax rules. This was also in a writ petititon under article 226 where court quashed the impugned notice and reassessment order like in case of veena devi (supra).

Even Pune bench of ITAT in recent case of Anil Kisanlal Marda Order dated 1/07/2019 , has held in context of rule 127 of income tax rules that *" It shows that a notice etc. can be delivered to an assessee at any of the addresses given in rule 127(2)(a) which, inter alia, include address available in the PAN and also the address available in the income-tax return. It means that if a notice etc. is delivered at the address given in PAN, even if such address is at variance with the address given in the income-tax return, it shall be considered as a valid delivery of notice. What emerges from rule 127 is that it simply provides different addresses of the assessee at which a notice etc. can be delivered or in other words served. This rule does not dispense with the otherwise legal requirement of serving the notice. Its effect is limited to the extent that if a notice etc. is delivered or served at the address given in the PAN, which may be different from the address given in the return of income, the assessee cannot assail the valid service of such a notice. But the fact of the matter is that the notice etc. must be delivered at the one of addresses given in the rule. Simply issuing a notice at the address given in PAN etc., which is not delivered to the assessee, may satisfy the requirement of the initial issue of notice at the correct address but not that of*

service of such notice until such notice is actually delivered or served. It can be seen from the discussion made above that no notice u/s 143(2) was delivered or served upon the assessee. Thus rule 127 does not assist the case of the Revenue in any manner." This *pune bench of* ITAT ruling apart from noticing rule 127 of income tax ru*les has also noted* at *length provisions of* Section 27 of the General Clauses Act, 1897, deals with the *meaning of `service by post'. It states that: `Where any (Central Act) or Regulation made after the commencement of this Act authorizes of requires any document to be served by post, where the expression "serve" or either of the expressions "give" or "send" or any other expression in used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post'.* Finally after noting that given jurisdictional notice was returned back by postal authorities and no further attempt was made to serve another notice, Pune bench of ITAT in above case has finally quashed the impugned order and proceedings after rejecting revenue' reliance on section 292BB for which it is held that said provision does not dispense with requirement to establish valid issue of jurisdictional notice by revenue.

Even one may allude for similar observations on valid issue of notice to detailed Chhatisgarh high court recent ruling in case of Ardent Steel Limited 405 ITR 422 wherein it is observed inter-alia that "

"26. The expression "issue" has been defined in Black's Law Dictionary to mean "To send forth; to emit; to promulgate; as, an officer issues order, process issues from court. To put into circulation; as, the treasury issues notes. To send out, to send out officially; to deliver, for use, or authoritatively; to go forth as authoritative or binding. When used with reference to writs, process, and the like, the term is ordinarily construed as importing delivery to the proper person, or to the proper officer for service etc." 27. In P. Ramanathan Aiyer's Law Lexicon, the word "issue" has been defined as follows: - "Issue. As a noun, the act of sending or causing to go forth; a moving out of any enclosed place; egress; the act of passing out; exit, egress or passage out (Worcester Dict.); the ultimate result or end. As a verb, 'To issue' means to send out, to send out officially; to send forth; to put forth; to deliver, for use, or unauthoritatively; to put into circulation; to emit; to go out (Burrill); to go forth as a authoritative or binding, to proceed or arise from; to proceed as from a source (Century Dict.) Issue of Process. Going out of the hands of the clerk, expressed or implied, to be delivered to the Sheriff for service. A writ or notice is issued when it is put in proper form

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and placed in an officer's hands for service, at the time it becomes a perfected process. Any process may be considered 'issued' if made out and placed in the hands of a person authorised to serve it, and with a bona fide intent to have it served." 28. Thus, the expression "to issue" in the context of issuance of notice, writs and process, has been attributed the meaning, to send out; to place in the hands of the proper officer for service. The expression "shall be issued" as used in Section 149 of the IT Act would therefore have to be read in the aforesaid context. Thus, the expression "shall be issued" would mean to send out to the place in the hands of the proper official for service. After issuing notice and after due dispatch, it must be placed in hands of the serving officer like the post office by speed post or by registered post etc., by which the officer issuing notice may not have control over the said notice after issuance of the said notice. It must be properly stamped and issued on the correct address to whom it has been addressed. Mere signing of notice cannot be equated with the issuance of notice as contemplated under Section 149 of the IT Act." Further it is held in same decision on valid requirement of notice issue that *"Therefore, I have no hesitation to hold that no notice under Section 149(1)(b) read with Section 148(1) of the IT Act was issued to the petitioner well within the period of limitation on or before 31-3-2016 on the officially notified correct address available in the official record for service of notice to the petitioner which is a jurisdictional fact and condition precedent for initiation of assessment proceeding under Section 148(1) of the IT Act. Thus, the first question is answered accordingly."*

Very recently Apex court in case of Iven Interactive 418 ITR 662 in context of service of notice u/s 143(2) of the Act has after highlighting in detail the primary onus on assessee to update correct address in PAN database and/or directly intimate the concerned AO about latest address , without which mere address change in subsequent year ITR's and company database (Form 18 filed with ROC) is held , not to be adequate intimation to concerned AO to require service of notice at latest/correct address. This apex court ruling in Iven case in authors humble opinion does not dispense with firstly valid and timely issue of notice which remains sine qua non for valid assumption of jurisdiciton, as in Iven case above only service of notice aspect was adjudicated by Apex court and it does not deal with valid/timely issue of notice aspect for which reference may be made to another apex court recent ruling in case of Lakshman Dass Khandelwal case reported at 417 ITR 325 holding that "The failure to issue a notice u/s 143(2) renders the assessment order void even if the assessee has participated in the proceedings. S. 292BB does not save complete absence of notice." which

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reinforces jurisdictional requirement of valid issue of mandatory notice. Secondly one may make out that in Iven case it was not established that subject jurisdictional notice of section 143(2) has come back/returned unserved which factor if present in any other case (one may recourse to RTI etc to retrieve factual/ relevant information like postal/dispatch records of AO etc to bring home exact status of notice issue/service etc) might distinguish it from Iven case and other high court/ITAT rulings as discussed above would apply. Thirdly in Iven case , one may further make out that requirement to issual of notice by competent AO having jurisdiction over the case was also not in issue before the Apex court as mandatory requirement to issue notice by correct and proper jurisdictional AO remains undisturbed by Iven case for which rulings in cases of a) Allahabad high court in Md Rizwan order dated 30/03/17 in ITA100/2015 b)Gujarat highcourt in Pankajbhai Shah **reported at *(2019) 110 Taxmann.com 51 (Gujarat) / (2020) 312 CTR (Guj) 300, Special Civil Application No.230 of 2019 dated 19th April, 2019.*** T & c) Bombay high court in Lalit Bardia 404 ITR 63 may be gainfully referred to. Notably in cases of notice issue by wrong and incorrect AO one may be advised to timely take objection at asst stage before very same AO within 30 days of subject notice service. Further definition of AO is given in the Act in section 2(7A) of the Act.

Very recently Kolkata bench of ITAT in case of K.A.wires in ITA 1149/Kol/2019 (order dated 22.01.2020) in Para 8.27 on revenue reliance on apex court Iven ruling has jettisoned it by holding that *"... It is therefore clear that the issue in the case before the Hon'ble Supreme Court was not with regard to the jurisdiction of the officer in issuing the notice but was with regard to the service of notice on the proper address. The said judgement therefore does not help the department on this issue of jurisdiction now before us. Jurisdiction has to be conferred u/s 120 o off the Act. Any act by an authority without jurisdiction is ab-initio void."*

4. Once important general concepts applicable to notices at large stands dilated above, it may be apt to now peek into various provisions of the Act wherein notices are issued by authorities :

Notice under section	Purpose /Objective /applicable/ key jurisdictional fact	Competent authority & Time limit if any prescribed in Act	Whether any prior satisfaction/reasons in writing required to be

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			recorded if yes how to contest the same?
Section 2(35)(b)	Notice to treat any person connected with management /administration of concerned person as principal officer Intention of Assessing officer to be reflected in notice which must be SERVED on concerned person Mostly referred in TDS proceedings before lauch of prosecution in section 276B (read with section 204(iii), 278AA,278B & Sec 278E)	Assessing Officer (refer sec. 2(7A))	Leading decisions in case of Madras high court in 405 ITR 356 (Kalanidhi maran) **Principal officer – Notice must mention some connection with the management or administration of the company – Merely on surmises and conjectures, no person shall be treated as a Principal officer [Art. 226]** (*A. Harish Bhat v. ACIT (2019) CTCJ-December-P. 170 (Karn)(HC)*) **Eckhard Garbers Vs Shri Shubham Agrawal (Sessions Court Mumbai)** Appeal Number : Criminal Revision Application No. 267 of 2019 Date of Judgement/Order : 16/12/2019 **Held:** 17. In view of the aforesaid legal ratio, the Chief Finance Officer, who was responsible for the day to day finance matters including recovery of TDS

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			from the customers and to deposit in the account of the Central Government, was prima facie responsible for the criminal prosecution for the alleged default committed, but, certainly, the Director, who is not in-charge of and not responsible for day to day business of the Company, is not liable for criminal prosecution, unless specifically it is described in the complaint how he is involved in day to day conduct of the business of the Company
10(23C) proviso & 12AA(3)/(4)	**Withdrawal of approval of registration by govt./prescribed authority** **Only on objective satisfaction drawn on any of conditions stipulated in law** **Discretionary power to be exercised as per norms spelt in**	Govt/Prescribed authority	. 10(23C) : Educational institution – Withdrawal of exemption – Collection of capitation fee – Notice of withdrawal containing unspecified allegation – Notice and consequent order is held to be not valid. [S.10 (23C) (vi) S. 132] A writ petition against the order

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	APex court verdict in case of Mahindra & Mahindra 15 Taxman 1 (see note below) & recent Apex court verdict on word satisfied explained in great length in 63 Moons technology case (see note below)		was dismissed. On appeal against the single judge order allowing the appeal the Court held that, in the notice for withdrawal of exemption except stating that there was a raid on December 16, 2015 and documents were seized from the premises and that a considerable part of the amount belonging to the assessee-trust had been misused for personal use of the trustees, no other details were forthcoming. The Revenue had not given reasonable opportunity to the assessee to put forth its case effectively. In the circumstances, the notice dated November 28, 2017 was unsustainable in law. The consequent order of withdrawal of exemption was also not valid. Court also observed that a notice to be valid in law, should be

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			clear and precise so as to give the party concerned adequate information of the case he has to meet. The adequacy of notice is a relative term and must be decided with reference to each case. The test of adequacy of the notice will be whether it gives sufficient information so as to enable the person concerned to put up an effective defence. If a notice is vague or it contains unspecified or unintelligible allegations, it would imply a denial of proper opportunity of being heard. Natural justice is not only a requirement of proper legal procedure but also a vital element of good administration. Navodaya Education Trust. v. UOI (2019) 417 ITR 157 (Karn)(HC)

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			Even it is held in some cases that ITO (Hq) cant issue notice on behalf of competent authority and also retrospective withdrawal of registration is held to be not permissible refer ACIT Vs. Agra Development Authority – [2018] 407 ITR 562 (Allahabad) & Indian Medical Trust v. CIT (2019) 414 ITR 296 (Raj.)
Section 127	Transfer of case If transfer between authorities subordinate to same /one authority : Recording of reasons for transfer must & reasonable opportunity of being heard (wherever possible) to be given If transfer made in authorities not subordinate to	PDGIT/DGIT/PCCIT/CCIT/PCIT/CIT	Apex court verdict in case of Noorul Islam case 388 ITR 208 (positive agreement exist between two authorities where transfer is made u/s 127(2)(a) must be reflected in show cause notice with adequate reasons as per Ajantha case (supra) Refer recent Bombay high court decision in case of

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	same authority then reasonable opportunity must		Parappurathu Varghese Mathai order dated 13/03/2020
Section 131(1) & (1A)	Power regarding discovery, production of evidence etc (cant be made as a mini assessment	131(1) : AO, JCIT, CIT-A,PCCIT or CCIT,PCIT,CIT or DRP Vested with power to court in CPC for prescribed matters 131(1A):PDGIT, DGIT,PDIT,DIT, JDIT,ADIT, DDIT or authorised officer in sec.132(1)	Calcutta high court in 112 ITR 568 Bombay high court in 162 ITR 331 Calcutta high court in 87 ITR 655 Allahabad high court in 19 ITR 114 (Application of mind on part of notice issuing authority vis a vis documents called for is critical) Chandigarh ITAT in 65 ITD 359 Ahmendabad ITAT in case of Ghanshyambhai Popatbhai Patel order dated 12.05.2016 deleted penalty for non compliance to summon u/s 131 & notice u/s 142 etc as asst was framed in sec. 143(3)

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			Reply with relevant and important facts that assessee is regular tax assessee duly compliant with no hidden/surreptitious transactions (as the case may be) so that subsequent exposure u/s 148 etc is mitigated as per law
Section 133	Power to call for information	AO/JCIT/CIT-A Section 133(6): Widely used :	Supreme court in Kathiroor Service reported at 360 ITR 243 (See note below) Kerala high court 387 ITR 299 On constitutional validity of amendment in section 133(6) adding words inquiry to : Upholding it held When a legislation, especially one in the fiscal realm is being examined by courts to check whether it infringes the right of individuals to privacy in own affairs, it has to be borne in mind that the larger public

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			and economic interest of nation is to be balanced against such right to privacy. All decisions which have espoused the right to privacy have been cautious in pointing out that such rights would not extend to militate against right of the State to gather information under its fiscal administration
Section 139(9) Section 143(1)	Generally now days these notices for defective return u/s 139(9) and intimation to process ITR u/s 143(1) are issued online by CPC where also one may find requirement of notice and principle of natural justice is there before a return is held as defective and processed for upward adjustment	CPC (possible remedies : to apply online for section 154 & simultaneously file appeal u/s 246A to CIT-A)	It is held in various cases that in such summary proceedings u/s 143(1) etc debatable/contentious issues which otherwise fall in scope of scrutiny in sec 143(2) must not be taken and only apparent issues can be taken up in sec. 143(1) Refer recent Apex court verdict in Vodafone case of 29/04/2020 & Kolkata ITAT in case of (14/08/2015)

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			Murshidabad Gramin Bank & Evergreen Pvt Ltd (27/07/2015) & Held Hon'ble Bombay High Court in the case of Khatau Junkar Ltd. v. K.S. Pathania, (1992) 196 ITR 55(Bom). Under the guise of effecting an adjustment under the first proviso to section 143(1)(a), the Assessing Officer could not decide debatable issues. Unless the inadmissibility of a deduction was evident and obvious (as in the case of section 154) from the return and its annexures, the Assessing Officer who wanted to disallow a deduction or a claim, was bound to follow the procedure under section 143(2) of giving a notice to the assessee; and that no substantial

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			adjustments, which required examination of evidence or which would require a hearing, were contemplated under section 143(1)(a) (Also see Gujarat high court Integrated proteins case order dated 23/08/2016) (Also see Calcutta high court in case of Peerless General 228 CTR 72)
Section 142	142(1)(i) : Notice calling for return of assessee 142(1)(ii) & iii: infomration calling in asst proceedings 142(2) : Enquiry by AO 142(3): Natural justice requirement in the Act	AO Significantly sec. 142(1)(iii) calling for assets and liabilities (with previous approval of JCIT subject to limit of three years from subject year) (Application of mind must) Section 142(3) : Natural justice prescription is of utmost significance to be strictly adhered	Default in compliance can lead to best judgment asst in sec. 144(1)(b) & penalty u/s 271(1)(b) for non appearance/compliance u/s 142(1) & prosecution in sec. 276CC

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Section 142(2A)	Special audit	Having regard to: Nature and complexity of accounts; Volume of accounts; Doubt about correctness of accounts; Multiplicity of transaction in the accounts; Specialised nature of business activity of assessee; & Interests of revenue AO (at any stage of proceedings before him) With previous approval of higher authority as specified therein Opinion to be formed (after reasonable opportunity of being heard) May direct for special audit	Delhi high court in Sahara case 399 ITR 81 (See note below)
143(2)	Scrutiny assessment proceedings	AO or prescribed income tax authority	If return fliled is non est then notice u/s 143(2)

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		Considers it necessary or expedient (apex court in 63 Moons technology case applies) Within six months from end of financial year in which return u/s 139 or142(1) has been filed Notice to be served on assessee concerned within prescribed time (refer above discussion on issue and service of notice)	would itself become invalid However a valid return filed u/s 139/ 142/148 notice (where return in sec. 148 is at par with return u/s 139) is required to be assessed by valid notice u/s 143(2) for asst in sec. 143(3) Notification no 62/2019 specifying procedure of e assessment (dated 12/09/2019) in furtherance to section 143(3A) to (3C) of the Act Assessment proceedings in income tax act to be strictly conducted in spirit of article 265 of indian constitution Refer: Supreme court in Shelly products 261 ITR 367; Kerala high court in 402 ITR 400;

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			Allahabad high court in 392 ITR 518; Bombay high court in 269 ITR 1; Madras high court in 319 ITR 1; MADRAS high court in Sharp Tools (23.10.2019) Mumbai ITAT in Mentor Capital (03/08/2016) Mumbai ITAT in chicago Pneumatic (15 SOT 252) Same article 265 applies at CIT-A & ITAT stages & further refer Madras high court in 140 ITR 705 No estoppel against law (refer sc in 416 ITR 1) CBDT Circular 14/1955 CBDT instruction 7/2014; 20/2015 & 5/2016 for scope of limited vs complete

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			scrutiny may be referred In 'Amal Kumar Ghosh vs. Addl. CIT', 361 ITR 458 (Cal.), it has been held that when the department has set down a standard for itself, the department is bound by that standard and it cannot act with discrimination. Principle of natural justice fully applies to all income tax assessments refer above discussion (plus section 142(3) of the Act) Refer: • Odeon Builders Pvt. Ltd. …Hon'ble Supreme court of India recent verdict reported at 418 ITR 315 • Hon'ble Allahabad high court order reported at 96 ITR 97 in turn relying on

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			Constitution bench supreme court decision reported at 26 ITR 1: • Hon'ble Supreme Court in case of Anadaman Timber industries vs. Commissioner of Central Excise (2015) 281 CTR 241 (SC); • Hon'ble Supreme Court in case of Kishinchand Chellaram v. CIT (1980) 125 ITR 713 (SC); • The Hon'ble Bombay High Court in the case of H.R. Mehta vs. ACIT, 387 ITR 561 (Bombay); • Hon'ble Supreme court in NDTV case of 3rd April 2020 In all above citations it may be found that violation of principle of natural justice is held fatal to addition and assessment made as after

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			expunging stated unconfronted material being only referred in assessment order, nothing was there in the assessment order to support addition made Section 65B electronic evidence concept in light of Anvar PV vs Basheer case may be looked into Principle of real income to be kept in mind (358 ITR 295 ; 398 ITR 531 & 406 ITR 1 & 416 ITR 1)
144	Best Judgment Assessment	AO	It is not best punishment assessment and guidance of apex court in 60 ITR 239 (see note below) Should not be manifestly arbitrary as per article 14 of indian constitution
145(3)	Rejection of books of accounts	AO (only income to be computed in	Objective dis-satisfaction before rejecting

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		manner provided in section 144 of the Act)	books must on part of conerned AO (refer meaning of satisfied in 63 Moons technology and Mahindra and Mahindra case supra) Even SC in Godrej & Boyce on dissatisfaction u/s 14A on part of AO held must (394 ITR 449) this sec. 14A dissatisfaction cant be recorded by CIT-A as dissatisfaction to be of AO only
147/148	Reopening of assessment Section 147 is subject to provisions of section 148 to sec 153 Two key phrases One reasons to believe (concept of wednesburry reasonableness be applied) Second income chargeable to tax	Assessing Officer (AO) Time limit : Section 149 (generally six years from end of asst year) Prior Sanction from higher authority (sec.151) : In case reopening made after 4 years then regular PCCIT/CCIT/PCIT /CIT	Section 148(2) is the starting point that "The Assessing officer shall before issuing any notice under this section record his reasons for doing so" Procedure of GKN Driveshaft 259 ITR 19 further elaborated in 308 ITR 38 & recently in 418 ITR 427 (Held if

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	has escaped assessment Section 147 is a loaded provision with 3 provisos and 4 explanations which needs to be interpreted in integrated manner	Otherwise: JCIT Sec 152: Dropping of proceedings Section 150: reopening in consequence to finding/direction in appeal order etc	GKN violated entire asst nullity) SOP laid down in 398 ITR 198(Sabh infr case by Delhi high court) One needs to be careful for interplay of I) sec. 147 vs sec. 143(2) Ii) Section 147 vs 154 Iii) Section 147 vs section 153A/153C Iv) section 147 vs 263 (refer SC in Amitabh Bachan case 384 ITR 200) Concept of borrowed satisfaction to be kept in mind (384 ITR 147; 395 ITR 677; 396 ITR 5) (apart from apex court in 63 Moons technology and Mahindra and Mahindra case) Reopening on non existing

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			grounds (refer 293 ITR 548; 411 ITR 207 & 180 ITR 319) (doctrine of sublato fundamento cadit opus) Reopening on stale information : 365 ITR 477 Reopening on basis of *mere* change of opinion : 320 ITR 561; 404 ITR 10 & NDTV case (3rd April 2020) Reopening on basis of infraction of ist proviso to sec. 147 (refer SC NDTV Case supra) Scope of explanation 3 to section 147 refer Allahabad high court in Dr Shiv Kant Mishra case & Delhi ITAT Devki nandan Bindal case Leading decisions from apex court;

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			36 ITR 569 (Escapement of income when & held where return on record not considered reopening not valid : argument of ab inconventii rejected and locus ponetentia applied) 88 ITR 200 (Burden on revenue to establish reopening valid & based on requisitie reasons etc) 103 ITR 437 (quality of reasons to belive & live nexus test) 106 ITR 1 (Importance to finality of proceedings) 120 ITR 1 etc Latest important detailed orders on sec. 148: Bombay high court Sesa Sterlite 417 ITR 334

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			Karnataka high court in 404 ITR 747 *Ravindra Kumar (HUF) @ Rabindra Kumar (HUF) v. CIT (2019) 266 Taxman 506 (Patna) (HC)* On approval u/s 151 : refer 391 ITR 11 TIME LIMIT ; Section 153
Section 153A/153C	Search based assessments 153A: on person on whom search u/s 132/132A is conducted 153C: assessment in consequence to search action u/s 132 on other person who was not subject to search action	Time limit sec. 153B	Leading decision of Apex court in Singhad Technical Education society case 397 ITR 344 Assessment in consequence to search u/s 153A/153C requires positive incriminating material emanating from search operation u/s 132 (more so when asst unabated on date of search) Also refer latest Madras high court order in

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			case of 418 ITR 530 that even settlement commission in search cases bound to settle on basis of incriminating material only Delhi high court in Best city case 397 ITR 82 that mere statement u/s 132(4) is not akin to incriminating material u/s 153A/153C etc Delhi high court Manoj Hora case reported at 402 ITR 175 that statement of other person unless corroborated properly by independent material same cant be applied against other person Hon'ble Supreme court, in the case of Common Cause (A Registered Society) vs. Union of India,

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			394 ITR 220 Held*:* *Entries in loose papers/ sheets are irrelevant and inadmissible as evidence. Such loose papers are not "books of account" and the entries therein are not sufficient to charge a person with liability. Even if books of account are regularly kept in the ordinary course of business, the entries therein shall not alone be sufficient evidence to charge any person with liability. It is incumbent upon the person relying upon those entries to prove that they are in accordance with facts. Finding of Settlement Commission disregarding such evidence as in admissible and unreliable . The materials in question were not good enough to constitute offences to direct the registration of a first information report and investigation therein. (C.B.I. v. V.C. Shukla (1998)3 SCC 410 (SC) followed)*

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			Proper approval required to final order to be passed u/s 153A/153C or 143(3) which is covered in sec. 153B: From JCIT (Lot many orders quashed for want of valid approval u/s 153D refer recent decision of Delhi ITAT in Rishabh Buildwell and Mumbai ITAT in 173 TTJ 332 (Approved by Bombay high court)
SECTION 154	Mistake apparent from record	Income tax authority referred in section 116 Within 4 years from end of financial year in which subject order containing mistake was passed Doctrine of partial merger in sec. 154(1A)	• Mistake • Apparent • Record Are three important key phrases to be amplified (only glaring and patent mistakes covered not arguable , debatable and complex issues) Leading decision 82 ITR 50 (SC) 305 ITR 227 (SC) 295 ITR 466(SC)

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			382 ITR 25 (Delhi high court) & Delhi high court in Pawan Kr Aggarwal (06.05.2014)
Sec. 159 to 170 etc	Notice to legal representative Notice on succession to business otherwise than on death		Refer SC in 416 ITR 613 in asst on dead person/non living person
Section 179	Liability of director on private company	Concept of vicarious liability needs to be strictly interpreted on basis of fulfillment of stipulated conditions of "tax cant be recovered" and director at operative time to be made liable unless director proves innocence	Bombay high court in 403 ITR 157 & 403 ITR 201 on requirement of valid show cause notice in sec. 179 analysed with clarity
Section 201	TDS Default assessment on payer/deductor	AO Time limit Sec. 201(3)	Important if payer shows by form 26A that payee has paid tax on stated amount in his return filed than no TDS to be collected (Also refer SC in 327 ITR 456 & 312 ITR 225 SC

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			rulings on sec. 201) Other consequences in section 201(1A) interest liabiity held to be compensatory in nature (loss to revenue to be seen) Section 271C penalty is subject to reasonable cause of sec. 273B (refer Madras high court in 288 ITR 289, 255 ITR 471 & 118 Taxman 433 & SC in 380 ITR 550 (Bank of nova scotia : angle of contumacious conduct)
Section 241A	Refund blocking power conferred on AO	AO On basis of his opinion That refund grant would aversely effect revenue For reasons to be recorded in writing with prior approval of higher authority	Delhi high court in 420 ITR 258 Supreme court in Vodafone case on 29/04/2020 P&H high court in Huawei Telecommunicati ons (India) Company Private

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			Limited 06/03/2020 Held/observed that: Before parting, it is pertinent to note that in the present case and also from number of cases, it is evident that procedure for refund and withholding of refund is often being used as delaying tactics for various reasons including window dressing of collection of revenue. The method adopted is a short sighted vision. Apart from harassment to the assessee, it results in paying interest on the delayed amount of refund putting further burden on the exchequer. It cannot be lost sight of that trade and commerce is a life blood of the system, if the excess amount deposited as tax is not refunded to the entrepreneur/assess ee, it has effect on the liquidity and business. There cannot be second opinion that the revenue collection

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			and securing the interest of the revenue is of great importance, at the same time the revenue is to be collected like an apiarist extracts honey from beehive without destroying it. Considering the facts that in spite of there being no justifiable reason as per provisions of the statute, yet the refund was withheld for which the petitioner would be entitled to statutory interest, we deem it appropriate to further consider if costs should be imposed on the officer(s) (in their personal capacity) and consequently issue notice to Mr. Krinwant Sahay, Principal Commissioner of Income Tax, Rohtak and Mr. Dipin Goel, Assistant Commissioner of Income Tax, Circle 4(1), Gurugram to show cause why this should not be done and for this limited purpose, adjourn the matter to 28.4.2020. Let

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			them be served through the counsel. Bombay high court on sec. 241A: When Section 241A confers the Assessing Officer with wide discretionary powers and at the same time, puts conditions for exercise of such powers, such exercise under no circumstances can be taken over by computerized system. The very essence of passing of the order under Section 241A is application of mind by the Assessing Officer to the issues which are germane for withholding the refund on the basis of statutory prescription contained in the said Section. We must, therefore, deprecate the practice of the department in sending such auto-generated response to the assessees for withholding the returns. (in case of Vodaofone Idea 14/10/2019)

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Sec.245	Refund adjustment	By CPC	In the case of *Hindustan Unilever Limited v. Dy. CIT [2015] 60 taxmann.com 326*, the Bombay High Court held that the Assessing Officer can't proceed to adjust the refund against demand without taking assessee's objections into consideration. The Honorable Delhi High Court in the case of *Court on its Own Motion v. UOI [2012] 25 taxmann.com 131 (Delhi)* held that the Department must send prior intimation to the assessee and an opportunity is to be given. After considering the stand and pleas of assessee, the department can

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			order for adjustment of refund with tax payable. Also refer: decision in Genpact India v. ACIT (2012) 205 Taxman 51 (Del) and an order dated 16th October 2014 in Writ Petition (Civil) No. 6172 of 2014 (The Oriental Insurance Co. Ltd. v. DCIT).
Sec. 251	Enhancement of Income by CIT-A		Limitation is One CIT-A in grab of enhancement cant confer jurisdiction on AO which he does not have like CIT-A cant go beyond reasons to believe u/s 148 (where AO himself could not travel beyond reasons recorded in light of expl III to sec. 147) refer 336 ITR 136 Ranbaxy case; and cit-a cant

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			transgress limited scrutiny scope (as circumscribed by cbdt instructions supra) once AO becomes functus officio Second CIT-A is duty bound to give prior show cause notice before making enhancement ; Third CIT-A cant go beyond subject matter of assessment while including new items as explained by Kerala high court IN 399 ITR 524 & Delhi high court citations in 240 ITR 556; 251 ITR 864; 348 ITR 170 & SC in 66 ITR 443 That CIT-A in garb of enhancement cant go into areas falling in exclusive domain of CIT in sec. 263 and in sec. 148/154 (That is in authors opinion

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			CIT-A cant go into issues where AO has neither made any inquiry nor applied any mind just because they are part of audited books/ITR /final a/c etc) Contra : Adverse order in Allahabad high court case of S.D.Traders 267 Taxman 631
Sec. 263	Revision of orders by PCIT which	New explanation added by Finance Act 2015 in sec. 263	Unless both the conditions of subject order being erroneous and prejudicial to interest of revenue as explained by Apex court in rulings of Malabar Industrial 243 ITR 83; Max India 295 ITR 282; Amitabh Bachan 384 ITR 200; Kwaltiy Steel 395 ITR 1 & Bombay high court in Nirav Modi 390 ITR 292

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			Burden on CIT to establish how subject order is erroneous and prejudicial to interest of revenue same must be discharged on basis of cogent material Notably in various cases consistently where revision u/s 263 was made by PCIT in cases where assessment was initiated and completed on limited scrutiny and PCIT made a feeble attempt to convert the case to complete scrutiny in garb of section 263 proceedings same has been jettisioned by various benhces of ITAT like Cuttack bench in Akash Ganga Promoters case in ITA 164/CTK/2019 (18.12.2019) & Suraj Diamond case ITA 3098/2019 order

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			dated 27.11.2019 & Sonali Hemant Bhavskar (ITA 742/MUM/2019 order dated 17.05.2019). Notably in various decision of ITAT benches in relation to validity of sec. 263 order it is held that assessee is entitled to challenge validity of assesment proceedings also to say revision is not maintainable. (Refer Kol Bench of ITAT in Rozelle Sales case ITA 2030/2018 Dated 30.08.2019)
Section 270A penalty for underreporting and misreporting & Other penalties in chapter XXI of the Act	Broad overview Penalties relating to income I) Sec 270A II) Sec 271AAB III) Sec 271AAC Other non income related penalties Which are generally levied by revenue	Sec. 274 deals with show cause notice to be given which as per Apex court verdict in case of Amrit Foods 13 SCC 419 (2005) that penalty provision containing multiple clauses , in notice of penalty charge of	To be levied generally and ordinarily on basis of satisfaction recorded in assessment order by AO concerned as per dictum of apex court in 379 ITR 521 (Jai Lakshmi Rice Mills)

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	I) Sec 269SS /271D II) Sec 269T/271E III) Sec 269ST/271DA IV) Sec 271A V) Sec 271B VI) Sec 271C Etc. *New penalty sec 271AAD separate paper written by author* Sec 271(1)(c) concealment penalty old provisions remained operative till AY 2016-2017 and from AY 2017-2018 sec. 270A is operative qua income based penalty (subject to reconciliation with sec 271AAB & 271AAC)	provision must be clear . To same effect is recent Apex court decision in case of Kalpataru Power transmission case order dated 7/01/2020 in civil appeal no 27 of 2020. Apart from this various high courts on this issue are ad idem on clear and correct charge in given notice of penalty. Sec. 275 discusses time limit for lvey of penalty For penalty most important and relevant concept is if facts are not proved but same are also not disproved (equal hypothesis angle) then penalty on income addition cant be levied refer 265 ITR 25 & 249 ITR 125) Leading apex court verdicts on	Sec. 273B reasonable cause applies to almost all non income related penalties putting primary burden on assessee to establish reasonable cause for default /contravention made Sec 270A(6) first clause states significantly as to what reply is expected from assesssee to get insulation from penal consequencies (like boanfide explanation with proper disclosure of material facts and same is subtantiated for meaning of bonafide refer Delhi high court in PCIT vs National housing bank order dated 28/08/2018) (also waiver provision in sec.270AA subject to fulfillment of relevant

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		penalty for income addition Reliance Petro case 322 ITR 158 Price waterhouse 348 ITR 306 etc (difference between false and incorrect claim)	conditions may be looked into) Delhi high court in decision of DCM 359 ITR 102 has analysed the scheme of income tax act to hold that that law of penalty cant become a gag or haunt to assessee for making claim which might be wrong or erroneous where scrutiny of same is imminent and natural. For discussion on sec. 273B refer above discussion on sec 271C

Power to drop the proceedings once initiated by notice is very well there in very same authority who has issued the said notice for which reference may be made to apex court citations in 41 ITR 539 & 63 ITR 278.

Mahindra and Mahindra (15 Taxman 1) Apex court Held:

By now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled and it would be redundant to recapitulate the whole catena of decisions of this Court commencing from Barium Chemicals Ltd. v. Company Law Board(1) case on the point. Indisputably, it is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to or has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters the Court would be justified in interfering with

the same. This Court in one of its later decisions in Smt. Shalini Soni etc. v. Union of India and Ors. etc.(2) has observed thus: "It is an unwritten rule of the law, constitutional and administrative, that whenever a decision-making function is entrusted to the subjective satisfaction of a statutory functionary, there is an implicit obligation to apply his mind to pertinent and proximate matters only, eschewing the irrelevant and the remote." Suffice it to say that the following passage appearing at pages 285-86 in Prof. de Smith's treatise 'Judicial Review of Administrative Action' (4th Edn.) succinctly summarises the several principles formulated by the Courts in that behalf thus:

"The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case; In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories; failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account; and where an authority hands over its discretion to another body it acts ultra vires. Nor, is it possible to differentiate with precision the grounds of invalidity contained within each category."

Supreme Court of India

63 Moons Technologies Ltd ... vs Union Of India on 30 April, 2019

Held: 42. Thus, at the very least, it is clear that the Central Government's satisfaction must be as to the conditions precedent mentioned in the Section as correctly understood in law, and must be based on facts that have been gathered by the Central Government to show that the conditions precedent exist when the order of the Central Government is made. There must be facts on which a reasonable body of persons properly instructed in law may hold that it is essential in public interest to amalgamate two or more companies. The formation of satisfaction cannot be on irrelevant or imaginary grounds, as that would vitiate

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the exercise of power. (entire law on word satisfied and recording of satisfaction and opinion of an authority analysed from 360 degree perspective)

Supreme court in Kathiroor Service reported at 360 ITR 243 Held

17. Since the language of the Section 133(6) is wholly unambiguous and clear, reliance on interpretation of statutes would not be necessary. Before the introduction of amendment to Section 133(6) in 1995, the Act only provided for issuance of notice in case of pending proceedings. As a consequence of the said amendment, the scope of Section 133(6) was expanded to include issuance of notice for the purposes of enquiry. The object of the amendment of section 133(6) by the Finance Act, 1995 (Act 22 of 1995) as explained by the CBDT in its circular shows that the legislative intention was to give wide powers to the officers, of course with the permission of the CIT or the Director of Investigation to gather general particulars in the nature of survey and store those details in the computer so that the data so collected can be made use of for checking evasion of tax effectively. The assessing authorities are now empowered to issue such notice calling for general information for the purposes of any enquiry in both cases: (a) where a proceeding is pending and (b) where proceeding is not pending against the assessee. However in the latter case, the assessing authority must obtain the prior approval of the Director or Commissioner, as the case maybe before issuance of such notice. The word "enquiry" would thus connote a request for information or questions to gather information either before the initiation of proceedings or during the pendency of proceedings; such information being useful for or relevant to the proceeding under the Act.

Delhi high court in Sahara case 399 ITR 81

HELD:

36. Thus, what emerges from the Sahara (supra) decision of the Supreme Court in relation to Section 142(2A), can be summarized as under:

(i) The Assessing Officer must make a genuine and honest attempt to understand the accounts maintained by the assessee.

(ii) The opinion required to be formed by the Assessing Officer under Section 142(2A) must be based on objective criteria and not merely subjective satisfaction. The powers under the provision cannot be used by the Assessing Officer merely to shift his responsibility of scrutinizing the accounts to the special auditor.

(iii) The requirement of previous approval of the Chief Commissioner or Commissioner, casts a heavy duty on these authorities to ensure that this requirement is not reduced to an

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empty formality. Before granting the approval, the Commissioner or the Chief Commissioner, must have before him the materials on the basis of which the opinion has been formed by the Assessing Officer. The approval granted by the Commissioner or the Chief Commissioner must reflect application of mind to the facts of the case. This requirement was elaborated by the Calcutta High Court in West Bengal State Co-operative Bank Ltd. v. Joint Commissioner of Income Tax, [2004] 267 ITR 345 (Cal), where it noted that-

"The Commissioner of Income Tax should not give any approval mechanically and if he finds that there is no examination of the books of account by the Assessing Officer before sending the proposal, he will not certainly give any approval. Under this section, the Commissioner of Income Tax does not exercise the jurisdiction of the appellate authority rather the approving authority. Approval means and connotes supporting and accepting of an act and conduct done by another person. Therefore, it would be his duty to examine on receipt of his proposal, whether the Assessing Officer has correctly done it or not, if he finds that this requirement has not been fulfilled then he must not approve of the same."

(iv) In accordance with the principles of natural justice, the assessee must be given the opportunity of a pre-decisional hearing before action is taken under Section 142(2A).

Apex court in C.Velukutty 60 ITR 239

Held

12. Under section 12(2)(b) of the Act, power is conferred on the assessing authority in the circumstances mentioned thereunder to assess the dealer to the best of his judgment. The limits of the power are implicit in the expression "best of his judgment". Judgment is a faculty to decide matters with wisdom truly and legally. Judgment does not depend upon the arbitrary caprice of a judge, but on settled and invariable principles of justice. Though there is an element of guess- work in a "best judgment assessment", it shall not be a wild one, but shall have a reasonable nexus to the available material and the circumstances of each case. Though sub-section (2) of section 12 of the Act provides for a summary method because of the default of the assessee, it does not enable the assessing authority to function capriciously without regard for the available material.

13. Can it be said that in the instant case the impugned assessment satisfied the said tests ? From the discovery of secret accounts in the head office, it does not necessarily follow that a corresponding set of secret accounts were maintained in the branch office, though it is probable that such accounts were maintained. But, as the accounts were secret, it is also not improbable that the branch office might not have kept parallel accounts, as duplication of false accounts would facilitate discovery of fraud and it would have been thought advisable to maintain only one set of false accounts in the head office. Be that as it may, the maintenance of secret accounts in the branch office cannot be assumed in the circumstances of the case. That apart, the maintenance of secret accounts in the branch office might lead

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to an inference that the accounts disclosed did not comprehend all the transactions of the branch office. But that does not establish or even probabilise the finding that 135% or 200% or 500% of the disclosed turnover was suppressed. That could have been ascertained from other materials. The branch office had dealings with other customers. Their names were disclosed in the accounts. The accounts of those customers or their statements could have afforded a basis for the best judgment assesment. There must also been other surrounding circumstances, such as those mentioned in the Privy Councils decision cited supra. But in this case there was no material before the assessing authority relevant to the assessment and the impugned assessments were arbitrarily made by applying a ratio between disclosed and concealed turnover in one shop to another shop of the assessee. It was only a capricious surmise unsupported by any relevant material. The High Court, therefore, rightly set aside the orders of the Tribunal.

14. Nor can we accede to the request of the learned counsel for the State to remand the matter to the Tribunal for fresh disposal. The sales tax authority had every opportunity to base its judgment on relevant material; but it did no do so. The department persisted all through the hierarchy of tribunals to sustain the impugned assessments. The High Court, having regard to the circumstances of the case, refused to give the department another opportunity. We do not think we are justified to take a different view.

5. On basis of above discussion , one may draw broad and indicative checklist as below which may help to craft better retort/response to notice issued to assessee:

A) Whether notice issued to dead person/non living person without bringing on record representative assessee as per law ? (refer 416 ITR 613 & 420 ITR 339)

B) Relevant & applicable provision mentioned (subject to sec. 292B curable error which cant cover jurisdictional error) so that assessee may defend his case lawfully ? Clear charge?

C) authority issuing the notice is competent authority in the provision referred having valid jurisdiction over the case/subject matter?

D) whether independent application of mind there ? Whether basis of notice and its connection with subject assessee pointed out adequately?

E) Underlying satisfaction recorded in writing in form of reasons/opinion etc whether provided to assessee for objections on the same? Whether it is provided with corresponding prior requisite sanction/approval (if any) and relevant back material as referred in satisfaction note?

F) Jurisdictional fact if any mentioned in the subject provision is pointed out in the stated notice issued to assessee and/or whether satisfaction recorded is complete on requisite jurisdictional facts as mentioned in the subject provision?

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G) Preliminary objection on notice validity etc whether to be submitted to plead aspects of ultra vires/coram non judice / absence of legal authority/warrant etc in notice issued?

H) Whether adequate & reasonable opportunity given in notice in terms of proper show cause notice etc?

I) Whether confrontation and cross examination request if required are mentioned in importunity ?

J) Whether information called for comes within scope of stated provision ?

K) Whether writ remedy before high court can be explored if yes its stage , advisably after first filing the jurisdictional objection with concerned authority and after its non acceptance then possibility of writ remedy (vis a vis alternate remedy) may be explored.

6. Conclusion

After discussing hermeneutics of notices in detail, it may be apt to close by recalling following chaste and sagacious observations of Apex court in two cases of Dabur India vs State of UP (.....Government, of course, is entitled to enforce payment and for that purpose to take all legal steps but the Government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take steps but not take extra legal steps or manoeuvre.) and second, Hindustan Poles corporation case cited as 2006 4 SCC 85 (Before we part with this case we would like to impress upon the respondent authorities that before issuance of show cause notices the Revenue must carefully take into consideration the settled law which has been crystallized by a series of judgments of this Court. The Revenue must make serious endeavour to ensure that all those who ought to pay excise duty must pay but in the process the Revenue must refrain from sending of indiscriminate show cause notices without proper application of mind. This is absolutely imperative to curb unnecessary and avoidable litigation in Courts leading to unnecessary harassment and waste of time of all concerns including Tribunals and Courts.) which must objectively and dispassionately goad and prick revenue authorities attention in issuance of various statutory notices.

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