IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME-TAX APPEAL NO. 302 OF 2002

Veena Estate Pvt. Ltd. … Appellant
Conwood House, Gen. A.K. Vaidya Marg,
Goregaon (East), Mumbai – 400 063.

Versus

Commissioner of Income-Tax, Mumbai City-IX, Mumbai …Respondent

Ms. Aarti Vissanji for the appellant.
Mr. Devvrat Singh with Ms. Sangeeta Yadav and Mr. Jagdish Chaudhary for the respondent.
Mr. Madhur Agrawal as amicus curiae.

CORAM: G. S. KULKARNI &
JITENDRA JAIN, JJ.
DATE: 11 January, 2024

JUDGMENT (Per G.S. Kulkarni, J.)

1. A short but interesting question has arisen in the present proceedings though not raised as a question of law, however, in the context of the appellant's contention that the proceedings would stand covered by a decision of this Court in the case of **Ventura Textile Ltd. vs. Commissioner of Income Tax, Mumbai City-II**[1]. The question is as to whether an alleged defect in the notice issued to the appellant under Section 271(1)(c) read with Section 274 of the Act, in regard to which the appellant had never raised an objection from

1 (2020) 117 taxmann.com 182 (Bom.)

the very inception, that is since last 30 years (from 19 August, 1993), can now be permitted to be raised, in the absence of any prejudice being caused to the appellant - assessee.

2. This appeal under section 260A of the Income-tax Act, 1961 (for short "**I.T. Act**") is filed by the appellant/assessee, being aggrieved by the judgment and order dated 30 October, 2001 passed by the Income-tax Appellate Tribunal (for short **"ITAT"**) whereby the respondent/Revenue's appeal against the order passed by the Commissioner of Income-tax (Appeals) (for short "**CIT(A)**") has been allowed. Earlier the CIT(A) by its order dated 05 February, 1996, as impugned before the Tribunal, had set aside the penalty of Rs.33,34,096/- imposed on the appellant/assessee under section 271(1)(c) of the I.T. Act.

3. At the outset, we may observe that by an order dated 14 September, 2004, the present appeal came to be admitted by a co-ordinate Bench of this Court on the following substantial question of law:

> "Whether the Tribunal erred on the facts and in the circumstances of the case and in law in reversing the order of the CIT(A) and confirming the penalty of Rs.33,34,096/- (Rupees Thirty three lacs Thirty four thousand Ninety six only) levied by the Assessing Officer under section 271(1)(c) of the Act?

4. The appeal was pending hearing, when before us, an oral application on behalf of the appellant was made contending that the appeal stands covered by the decision rendered by a co-ordinate Bench of this Court in **Ventura Textile Ltd.** (supra) and for such reason the appeal needs to be allowed. This Court at such stage considered the rival contentions of the parties including the submissions as advanced by learned amicus curiae, who was earlier appointed by a co-ordinate Bench of this Court vide order dated 17 December, 2021, recording questions which would be required to be considered if the plea as urged on behalf of the appellant was to be accepted. The Court, accordingly, passed the following order on 13 July, 2023:-

> "1. This appeal was circulated before us on behalf of the appellant contending that the issue in regard to the alleged defect in the notice issued under Section 271(1)(c) of the Income-tax Act, 1961 (for short, "the Act") would stand covered by the decision of a co-ordinate Bench of this Court in ***Ventura Textiles Ltd. vs.*** **Commissioner of Income Tax, Mumbai City-II**, [2020] 117 taxmann.com 182 (Bombay).
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> 2. We have perused the observations of the Court in such decision and more particularly in paragraphs 20.1 and 20.2, whereby the Division Bench has observed that even if a question was not raised before the tribunal, the same can be raised before the High Court in the proceedings under Section 260-A of the Act, when the issue is on jurisdiction. In our opinion, there cannot be any quarrel on such proposition.
>
> **3. The question, however, would be whether an assessee can be permitted to raise a technical plea of vagueness in the notice when the same was never the case of the assessee before the tribunal. The assessee never complained that the notice under Section 271(1)(c) of the Act was never understood by it or the same was in any manner vague or defective and had caused any prejudice to the assessee. In fact, now merely relying on the said decision, it is for the first time being contended that this Court should label the notice to be defective**

in the proceedings of this appeal under Section 260-A of the Act, in the absence of any such plea before the forums below. In our prima facie opinion, the appellant needs to satisfy the Court whether the appellant can at all urge such contention in the proceedings of a Section 260-A appeal when admittedly such question of law is not raised in the present appeal.

4. In our opinion, in the facts of the present case, if the appellant intends an additional question to be framed in this regard, the same cannot be done without the appellant crossing the barrier of the test of specific prejudice, if any caused to it in responding to such notice issued under Section 271(1)(c) of the Act, is satisfied.

5. The question therefore would be that when the assessee never raised a plea that the assessee did not understand such notice issued to him and/ or acquiesced and conceded in the adjudication of such notice, without any plea of prejudice being taken at any point of time, then in such circumstances, can the assessee take a plea before the High Court calling upon it to take a view that although no prejudice on such count was earlier felt and suffered, merely because it is now technically noticed that there was a defect in the notice by non striking of the applicable option, it should be deemed to be presumed that a prejudice was caused to the assessee and therefore, on such count, the penalty proceedings be declared illegal.

6. In our opinion, although *Ventura Textiles Ltd.* (supra) has though considered such issue being raised as a jurisdictional question in the proceedings of 260-A of the Income Tax Act, however, as to what would be the position as would be reflected from the settled principles of law that there cannot be a plea of breach of principles of natural justice, unless the threshold test of a "factual prejudice" being caused is satisfied, for the Court to accept such plea, is not what has been expressly considered.

7. It was contended that the decision in *Ventura Textiles Ltd.* (supra) was also considered by the Full Bench of this Court in ***Mohd. Farhan A. Shaikh v. Deputy Commissioner of Income Tax, Central Circle1, Belgaum***[2]. We have perused the judgment of the Full Bench and more particularly paragraphs 85 to 90 and paragraphs 181 to 186, however, the issue which we have raised appears to have not been answered by the Full Bench, is what we note.

8. We would accordingly hear the parties on these issues on the adjourned date of hearing.

9. Stand over to **27 July, 2023 at 02.30 p.m.**"

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2 (2021) 125 taxmann.com 253

(emphasis supplied)

5. It is on the backdrop of the above order that the Court was required to hear the parties on the issue as recorded by us in the above order, than to hear the appeal on the substantial question of law as framed vide order dated 14 September, 2004.

6. As stated above, the present proceedings arise from the penalty proceedings as initiated against the appellant/assessee under section 271(1)(c) of the I.T. Act, whereby a penalty of Rs.33,34,096/- was levied and confirmed against the appellant. In the levy of penalty, the procedure as mandated by Section 274 of the I.T. Act was set into motion, inasmuch as, a show cause notice was issued to the assessee as to why the penalty be not imposed on the assessee under the provisions of Section 271(1)(c) of the IT Act. The assessee replied to the said notice and after considering such reply, and after the assessee was heard, such penalty came to be imposed on the assessee. It was not the assessee's case that any ambiguity was found in the notice issued to the assessee under section 271(1)(c) read with 274 of the I.T. Act. It was also not its case that the assessee had not understood the contents of the notice and more particularity as to which of the two limbs of Section 271(1)(c) were pressed into service against the assessee in the facts and circumstances of the case. The

assessee / appellant replied to both the limbs falling under Section 271(1)(c) of the Act. Accordingly, the assessee whole heartedly participated in such penalty proceedings without raising any objection on the nature of the notice. Thus, when the facts are such that the test of prejudice itself was not satisfied by the assessee, would it be permissible for the assessee to contend that without satisfying the test of prejudice, the penalty proceedings ought to be held to be vitiated is the question which would arise for our consideration.

7. The relevant facts are required to be adverted, which are as follows:-

The assessee is a company registered under the Companies Act, 1956. It was dealing with real estate and construction. The assessment year in question is 1984-85. The assessee had purchased a plot of land in 1982 at Agripada in Mumbai for Rs.25,00,000/-. A sum of Rs. 26,61,283/- was incurred towards development and construction. The balance in the account stood at Rs.51,61,282/-. On 19 September, 1983, a partnership in the name of M/s. Nirmal Enterprises was formed between the assessee and six others. The assessee revalued the land at Rs.1,04,53,500/-, being the market value as on 19 September, 1983, and introduced the same into the firm as its capital.

8. In respect of assessment year 1984-85, the assessee filed its return of income on 29 September, 1984 declaring "Nil" income. The Assessing Officer

sought instructions from the Inspecting Assistant Commissioner (for short, "**IAC**") under the then Section 144A as to whether any income or capital gain was assessable in the assessee's hand, on the writing up of the value of the land, being the assessee's stock-in-trade, and on the introduction of the same as the capital of the assessee in the partnership firm Nirmal Enterprises. In prusuance thereto, in its order dated 1 April, 1985, the IAC opined that on the basis of the decision of the Supreme Court in **Hind Construction Ltd.**[3], no income could be said to have arisen to the assessee, either when it wrote up the value of the land or when the same was introduced into the firm as its capital. The Assessing Officer was accordingly instructed. Also, a note was made to the effect that the case has also been discussed with the concerned CIT, who was also of the same opinion.

9. On such instructions of the IAC, the Assessing Officer proceeded to complete the assessment. No profit or capital gain was assessed in respect of the capital contribution of the assessee into Nirmal Enterprises. The assessment was however made on an income of Rs.33,89,467/-, in respect of other transactions in the course of the assessee's business, which was adjusted fully against the losses brought forward. The assessment was completed on 20 April, 1985 under Section 143(3) of the I.T. Act. Thereafter, proceedings were

3 83 ITR 211

initiated under Section 263 of the I.T. Act by the CIT on the basis of the judgment of the Supreme Court in the case of **Sunil Siddharthbai vs. CIT**[4], in which it was held by the Court that although there was a "transfer" involved when a partner brought in his asset in to the firm as his capital contribution, there arose no capital gains, due to the peculiar nature of a partner's rights in the firm. The CIT, however, relied on certain observations made by the Supreme Court to the effect that if the formation of the partnership firm was a ruse or device to convert the personal asset of the partner into money, which would substantially remain available to him without any liability to tax on capital gains, it would be open to the taxing authorities to go behind the transaction. Also, the tax authorities were entitled to examine whether the formation of the partnership was genuine, and whether the conversion of the personal asset of the partner into partnership asset was a genuine contribution to the capital of the firm or a device to avoid tax liability. Even if the partnership is genuine, the tax authorities could examine whether there is a genuine attempt to contribute to the capital of the firm for the purpose of carrying on the partnership business or it is only a ruse or device to convert the personal asset into money substantially for the benefit of the assessee, while evading tax on capital gains. The CIT noted that if such circumstances existed, it would be open to the Department to disregard the apparent and tax the

4 156 ITR 509

profits or capital gains. The CIT also relied on the judgment of the Supreme Court in the case of **McDowell & Co. Ltd. vs. Commercial Tax Officer**[5] where the right of the income-tax authorities to pierce the veil or smokescreen created by dubious or colourable devices and tax the profits was upheld. The CIT noted that the Assessing Officer had not applied his mind to these aspects, when he completed the assessment. He had not attempted to verify whether the transfer of stock-in-trade worth more than Rs.50 lakhs, was an attempt to avoid tax through a colourable device nor did he verify whether there was a genuine intention to contribute to the capital of the firm. The CIT further noted from the deed of partnership, that although the assessee had contributed stock-in-trade worth more than Rs.1 crore, the other partners contributed nothing and that they had merely promised that they would bring in money as and when required. Despite this, the Assessing Officer did not evaluate whether the other partners were really capable of matching the contribution of the assessee. The Assessing Officer had also not gone into the question of genuineness of the firm. Under these circumstances, the CIT set aside the assessment and directed the Assessing Officer to make a fresh assessment in accordance with law after verification of the facts on the lines indicated above.

5 (1985) 154 ITR 148

10. Accordingly, a fresh assessment order came to be passed. In the fresh assessment order, the Assessing Officer recorded his findings *inter alia* that the assessee had not only transferred the stock-in-trade at the market value, but had also withdrawn the profits arising therefrom, which were not disclosed and that the events were so arranged that the assessee had the enjoyment and benefits of the monies though the tax due thereon was not paid. In such view of the matter, he brought the sum of Rs.52,92,218/- to tax as profit on transfer of stock-in-trade to Nirmal Enterprises. Apparently, such amount was worked out as under:

Amount for which the land was transferred to the firm	Rs. 1,04,53,500
Less: Cost of the land	Rs. 25,00,000
Expenses on development	Rs. 26,61,282
	Rs. 51,61,282
Balance being profit	**Rs. 52,92,218**

11. Aggrieved by the assessment order, the assessee preferred an appeal to the CIT(A), who was of the view that the amendment to Section 45 of the I.T. Act by the introduction of sub-section (3) to nullify the effect of **Sunil Siddharthbai** (supra) took effect only from the assessment year 1985-86 and hence, by mere revaluation of the stock-in-trade, one cannot earn income unless the same was sold or transferred, and that the assessee had merely transferred the land as its capital to the firm, that the Assessing Officer had not

established that the firm was bogus or that if it was specifically formed for avoiding tax liability. It was observed that hence, the conditions laid down in **Sunil Siddharthbai** (supra) to come to the conclusion that the transfer was a ruse or device have not been satisfied, inasmuch as, the firm was not established for avoiding tax. It was observed that the asset had not been converted into money and a mere revaluation of the asset did not result in any income. The CIT(A) accordingly deleted the addition of Rs.52,92,218/- and allowed the appeal filed by the assessee.

12. Being aggrieved by the order passed by the CIT(A), the department approached the Tribunal. The assessee also preferred a cross appeal against the said order. Both the appeals were heard together and decided by the Tribunal. In the Department's appeal, the Tribunal held that it was apparent from the facts that the assessee, after joining the firm, withdrew substantial amounts of money (from the capital account). It was observed that the real purpose for which the partnership firm was established, was neither for the smooth running of the project nor for the financial requirements, as sought to be made out by the assessee. The Tribunal observed that had the assessee sold the land to outsiders, in such event, the sale proceeds would have been liable to tax. Further the retirement of the assessee from the firm on 28 February, 1989, even before the project was completed, revealed the true intention of the

assessee, as also there was no evidence to show that the other partners were taken into the partnership either to buttress the purpose of the business or to expedite the project. It was hence observed that in such circumstances, the judgment of the Supreme Court in **Sunil Sidharthbai's** case (supra) and in **ALA Firm vs. CIT**[6] was clearly applicable. The Tribunal accordingly allowed the department's appeal and restored the addition. The assessee's appeal against the order under section 263 was rejected.

13. In regard to the penalty proceedings for concealment of income and for furnishing inaccurate particulars of income as initiated by the Assessing Officer under section 271(1)(c) of the Act, a reply dated 6 September, 1993 was furnished by the assessee, in response to the said notice *inter alia* contending that the assessee's case was covered by the principles laid down in **Hind Construction** (supra), and that it did not fall within the ratio of either **Sunil Siddharthbai** (supra) or **ALA firm** (supra). It was contended that the partnership firm Nirmal Enterprises was genuinely constituted, that it did carry on business; that the transaction was at arm's length; that the other partners were men of business and not related to the assessee; that they actually carried out the firm's business and also contributed to the capital of the firm and brought in loans from relatives and friends; that the assessee withdrew monies

6 189 ITR 285

from its capital account only to pay off its liabilities as per the terms of the deed of partnership and that too only after receipt of advances from buyers of the units; that the withdrawal of the capital was to make the capital proportionate to the respective profit-sharing ratios; that all these facts were furnished to the Assessing Officer. Significantly, it was thus contended that under these circumstances, there was no concealment of income or furnishing of inaccurate particulars thereof, to warrant any levy of penalty. Thus, the notice was replied by the assessee without any grievance on the ground of any ambiguity or defect in the notice and more particularly on the applicability of both / any of the limbs of Section 271(1)(c) of the IT Act.

14. The Assessing officer, after considering the assessee's reply, held that the assessee had attempted to avoid tax by adopting a device and therefore, penalty was exigible. The assessee's claim that it had furnished all the material facts was rejected. It was held that the case was clearly covered by Section 271(1)(c). He also invoked Explanation 1 below the provision on the ground that the explanation of the assessee has been found to be false and that the assessee has not been able to substantiate the same. He accordingly imposed the minimum penalty of Rs.33,34,096/-.

15. Being aggrieved, the assessee preferred an appeal before the CIT (A) against the levy of penalty. The CIT(A) noted that the assessee had furnished

all the facts before the Assessing Officer and did not hold back anything. He further noted that in the assessment proceedings, the CIT(A) had earlier deleted the addition and although the Tribunal restored it, this showed that there was a bona fide difference of opinion amongst the two authorities as to whether the transaction resulted in taxable profits. It was held that in such a case, it could not be said that the assessee was guilty of concealment.

16. The revenue, being aggrieved by the order passed by the CIT(A), filed an appeal before the Tribunal, on which the impugned order has been passed, by which the Tribunal held that the penalty was rightly imposed and the CIT(A) was not justified in cancelling the same. On such backdrop the appeal in question was filed by the assessee.

17. Thus, at this stage of the proceedings, the moot question which has arisen before us, is whether we should accept the assessee's contention as urged by Ms. Vissanji, learned counsel for the appellant, that the proceedings would stand covered by the decision of a co-ordinate Bench of this Court in **Ventura Textiles Ltd.** (supra). That is as the Assessing Officer failed to tick mark in the show cause notice the relevant limb of Section 271(1)(c) whether in the facts of the case, the penalty proceedings would stand vitiated.

18. In appreciating such contention as urged on behalf of Ms. Vissanji, as noted by us in our order dated 13 July, 2023 (supra), we had observed that in view of the settled principles of law as laid down by the Supreme Court, we would be required to consider whether the assessee's contention of breach of principles of natural justice could at all be urged (that too at the third appellate stage), without the assessee crossing the threshold requirement, of the assessee not satisfying the test of "prejudice", suffered by the assessee. The question is also whether **Ventura Textiles Ltd.** (supra) in any manner decided the issue of prejudice so that the asesssee's contention of this case being covered by **Ventura Textiles Ltd.** could be accepted.

19. Ms. Vissanji, learned counsel for the assessee, however, submits that Section 274 is a mandatory procedural provision. She submits that once the nature of the provision is such, the test of prejudice is not required to be met, when there is a violation of procedural provision of a fundamental nature. This would also apply at any stage of the proceedings including at the third appellate stage like in the present proceedings, being an appeal on a pure substantial question of law as provided under section 260A of the I.T. Act. She submits that there is no need to prove prejudice when the notice itself was defective which, according to her, is a jurisdictional issue. It is submitted that this itself was a prejudice, inasmuch as, the notice in question issued to the assessee itself

would be rendered illegal. It is submitted that Section 271(1)(c) is attracted in two situations, namely, the assessee having concealed the particulars of income or having furnished inaccurate particulars of such income. Thus, an assessee having not been clearly informed of any of such two limbs, a prejudice being caused to the assessee has to be presumed. It is submitted that there cannot be any ambiguity in respect of a charge which the assessee is required to meet, as the penalty proceedings are penal in nature. It is submitted that once the notice itself was defective, such defect could not have been cured. In support of her contentions, Ms. Vissanji has placed reliance on the following decisions - i) **Ventura Textiles Ltd. vs. Commissioner of Income-tax**[7]; (ii) **Commissioner of Income-tax & Anr. vs. Manjunatha Cotton and Ginning factory**[8]; (iii) **Dilip N. Shroff vs. Joint Commissioner of Income-tax & Anr.**[9]; (iv) **Mohd. Farhan A. Shaikh vs. Deputy Commissioner of Income-tax, Central Circle-1, Belgaum**[10]; (v) **Principal Commissioner of Income-tax & Anr. vs. New Era Sova Mine**[11]; (vi) **Principal Commissioner of Income-tax, Panaji vs. Goa Dourado Promotions (P.) Ltd.**[12]; (vii) **Principal Commissioner of Income-tax (Central), Bengaluru vs. Goa Coastal Resorts and Recreation (P.) Ltd.**[13]; (viii)

7 426 ITR 478 (Bom.)
8 359 ITR 565 (Kar.)
9 (2007) 291 ITR 519 (SC)
10 (2021) 125 taxmann.com 253 (Bom.) (FB)
11 (2021) 433 ITR 249 (Bom.) (Panaji Bench)
12 (2020) 113 taxmann.com 630 (Bom.)
13 (2020) 113 taxmann.com 574 (Bom.)

Commissioner of Income-tax vs. Samson Perinchery[14]; (ix) **State of Uttar Pradesh vs. Sudhir Kumar Singh & Ors.**[15]; (x) **Commissioner of Income-tax vs. Smt. Kaushalya & Ors.**[16] and (xi) **Commissioner of Income-tax vs. Mastek Ltd.**[17].

20. On the other hand, Mr. Devvrat Singh, learned counsel for the revenue, would submit that the appellant's contention that the proceedings would stand covered by the decision of the Division Bench of this Court in ***Ventura Textiles Ltd. Vs. CIT, Mumbai City-11*** (supra), is not correct. It is his submission that the appellant had never raised any issue on breach of principles of natural justice, much less on the appellant's lack of understanding of the notice issued by the revenue under Section 271(1)(c) of the IT Act. He submits that merely for the reason that in the facts of the case in ***Ventura Textiles Ltd. Vs. CIT, Mumbai City-11*** (supra), a Division Bench of this Court having held that as the notice issued under Section 271(1)(c) of the IT Act did not tick the relevant limb as applicable under which penalty was proposed to be imposed, it cannot be that in the present facts, such decision would have application, *de hors* the settled principles of law as laid down by the Supreme Court, namely a person who complains of breach of principles of natural justice would be required to

14 (2017) 392 ITR 4 (Bom)
15 AIR 2020 SC 5215
16 216 ITR 660
17 (2013) 358 ITR 252 (SC)

show that a prejudice was caused to him. It is his submission that in this case, neither at any point of time, there was a complaint of breach of principles of natural justice, nor the test of prejudice is satisfied by the assessee. It is his submission that there cannot be a straight jacket application of the principles of natural justice, as it is settled principle of law in catena of judgments, that it would be the burden on the person complaining of any breach of principles of natural justice to prove the prejudice caused to him and such burden ought to be discharged.

21. It is next submitted that the Full Bench of this Court in **Mohd. Farhan A. Shaikh vs. The Deputy Commissioner of Income Tax** (supra) although had an occasion to consider as to whether the assessee would be required to satisfy that a prejudice was caused to the assessee for want of a proper notice under Section 271(1)(c) of the IT Act, it does not hold that the observations of the Division Bench in **Ventura Textiles Ltd. Vs. CIT, Mumbai City-11** (supra) in paragraph 26 to be bad. It is submitted that in fact, the decision in **Ventura Textiles Ltd. Vs. CIT, Mumbai City-11** (supra) would support the case of the revenue, rather than the assessee contending that it supports the assessee's case on an alleged defect in the show cause notice issued to the assessee under Section 271(1)(c) of the IT Act.

22. It is next submitted that in fact, the order admitting the present appeal itself is very clear that the case of the assessee was never of any defect in the notice issued by the Assessing Officer under Section 271(1)(c) of the IT Act or not even remotely, a complaint of breach of principles of natural justice on that count as urged by the assessee. It is, therefore, not permissible for the assessee that after a period of almost 20 years from the date of admission of this appeal by this Court, to raise an issue which was never raised, thought about or taken before any of the lower authorities or even in the appeal before this Court.

23. It is submitted that this is a case where no prejudice is suffered by the assessee and a mere technical plea is being raised to succeed in the present appeal. It would not be permissible for the assessee to raise such an issue after almost 20 years of the admission of the appeal. In support of his contention, Mr. Devvrat Singh has placed reliance on the decisions in **State Bank of Patiala & Ors. Vs. S. K. Sharma**[18] and **Natwar Singh vs. Director of Enforcement & Anr.**[19], **Union of India & Ors. Vs. Alok Kumar**[20].

24. Mr. Madhur Agrawal, learned *amicus* also assisted the Court. He would submit that in the event there is a violation of principles of natural justice which are of a fundamental character, in such event, the Court may hold that

18 (1996) 3 Supreme Court Cases 364
19 (2010) 13 Supreme Court Cases 255
20 (2010) 5 Supreme Court Cases 349

the proceedings would stand vitiated. He would submit that it would be necessary to consider whether the notice issued to the assessee under Section 271(1)(c) of the IT Act had deprived the assessee of a reasonable opportunity. It is, however, also submitted that whether the procedure as adopted was unfair and/or in breach of the principles of natural justice, would be required to be alleged by the party before the authorities and in the absence of such allegation, it would be required to be considered that the assessee has not suffered any prejudice. Mr. Agrawal has referred to the decisions in **Madhyamam Broadcasting Ltd. Vs. Union of India & Ors.**[21], **Union of India & Ors. vs. Tulsiram Patel &** Ors.[22], **Union of India & Ors. Vs. A.K. Pandey**[23] and **Sundaram Finance Ltd. Vs. Asst. Commissioner of Income Tax Circle VI(4), Chennai**[24].

Analysis :-

25. Before we advert to the submissions as advanced by the learned counsel for the parties, we may, at the outset, note the relevant extract of Section 271 and Section 274 of the I.T. Act as it stood at the relevant time:-

> **"Failure to furnish returns, comply with notices, concealment of income, etc.**

21 MANU SC 0333/2023
22 MANU SC 0373/1085
23 (2009) 14 (ADDL.) S.C.R. 528
24 (2018) 93 taxmann.com 258 (Madras)

Section 271.(1) If the Income-tax Officer or the Appellate Assistant Commissioner [or the Commissioner (Appeals] in the course of any proceedings under this Act, is satisfied that any person—

(*a*) has without reasonable cause failed to furnish the return of total income which he was required to furnish under sub-section (1) of section-139 or by notice given under sub-section (2) of section-139 or section-148 or has without reasonable cause failed to furnish it within the time allowed and in the manner required by sub-section (1) of section-139 or by such notice, as the case may be, or

(*b*) has without reasonable cause failed to comply with a notice under sub-section (1) of section-142 or sub-section (2) of section-143, or fails to comply with a direction issued under sub-section (2A) of Section 142, or

(*c*) has concealed the particulars of his income or furnished inaccurate particulars of such income,

he may direct that such person shall pay by way of penalty,—

(*i*) in the cases referred to in clause (*a*),, -

a) …..

b) ….

(*ii*) in the cases referred to in clause (*b*), in addition to any tax payable by him a sum which shall not be less then ten per cent but which shall not exceed fifty per cent of the amount of the tax, if any, which would have been avoided if the income returned by such person had been accepted as the correct income ;

(*iii*) in the cases referred to in clause (*c*), in addition to any tax payable by him, a sum which shall not be less than, but which shall not exceed twice, the amount of the tax sought to be evaded by reason of concealment of particulars of his income or the furnishing of inaccurate particulars of such income.

Provided that if in a case falling under clause (c), the amount of income (as determined by the Income-tax Officer on assessment) in respect of which the particulars have been concealed or inaccurate particulars have been furnished exceeds a sum of twenty-five thousand rupees, the Income-tax Officer shall not issue any direction for payment by way of penalty without the previous approval of the Inspecting Assistant Commissioner."

Procedure

Section 274. (1) **No order imposing a penalty under this Chapter shall be made unless the assessee has been heard, or has been given a reasonable opportunity of being heard.**

(2) ***

> (3) An Appellate Assistant Commissioner or a Commissioner (Appeals) on making an order under this Chapter imposing a penalty, shall forthwith send a copy of the same to the Income-tax Officer."
>
> (emphasis supplied)

26. It may be observed that on a plain reading of the provisions of Section 271 or the provisions of Section 274 *per se* these provisions do not expressly provide for a notice or a format or a form of a notice. Section 274 which is a procedural provision mandates that no order imposing a penalty under Chapter XXI of the IT Act shall be made unless the assessee has been given a reasonable opportunity of being heard. Such hearing would be on the proposed penalty. Thus, on a plain purport of Section 274, what can be said to be mandatory part of the provision is that the assessee is heard, before an order is passed imposing a penalty. Now, even assuming that issuance of a notice under Section 274 being mandatory and the same is issued to the assessee, it is for the assessee to raise a grievance, if the assessee feels that the same is defective. Any grievance on the nature of the notice is subjective depending on the facts and circumstances of the case. If in a given case the assessee participates in any hearing without any grievance on the notice, then certainly a situation is brought about that he has no quarrel on any defect on the notice. This also for the reason, that an opportunity to contest a plea of a defective notice was available to the assessee and if so raised, it calls for and merges into consideration of such plea, in the order to be passed by the Assessing Officer.

Conversely if such plea of a notice being defective is not raised, it brings about a situation that the assessee was not aggrieved with the notice, having fully participated at the hearing and that there was no question of any real prejudice being caused to the assessee. The real position on such issue would be required to be ascertained from the facts of each case. Thus, in so far as the provision of Section 274 is concerned, the bottom line is whether the assessee was heard on all his pleas before an order imposing penalty was passed against him, which may include several serious pleas as raised by him including a plea of a defective notice. In fact, there is something more fundamental namely in the course of adjudication, a party is entitled to take all the pleas, such pleas would fall for consideration of the adjudicating authority. All such pleas, which are raised by the parties would fall for consideration of the adjudicating officer. If a particular plea is not taken, then certainly there would be a presumption that party not raising such plea, did not have any grievance on such issue. Further, it would be only on the pleas which are raised by the parties, the adjudicating officer would proceed to adjudicate the proceedings. This necessarily reflects and/or brings about a situation that the adjudicating officer having adjudicated on all the pleas as raised by the party, there would be no defect of non consideration of any plea of the party, in the order passed by the adjudicating authority. Thus, in any further proceedings arising out of such order of

adjudication, it is certainly not open to the affected party to make a grievance that he is adversely affected by such order on the ground of a plea being not adjudicated and/or of breach of principles of natural justice, in any of its forms, and if at all such grievance is raised, what would be of foremost consideration, is even assuming such plea was not raised, as to what is the prejudice caused to the assessee or in other words whether the assessee meets the test of prejudice, which he would be required to satisfy. Such principles are applicable even in judicial adjudication. In this context, it would be appropriate to refer to the decision of the Supreme Court in **State of U.P. Vs. Harendra Arora & Anr.**[25] in which the Supreme Court in the context of Section 99-A of the Code of Civil Procedure which provides that no order under section 47 to be reversed or modified unless decision of the case is prejudicially affected, the Supreme Court observed thus:-

> "14. Even under general law i.e. the Code of Civil Procedure, there are various provisions viz. Sections 99-A and 115 besides Order 21 Rule 90 where merely because there is defect, error or irregularity in the order, the same would not be liable to be set aside unless it has prejudicially affected the decision. Likewise, in the Code of Criminal Procedure also, Section 465 lays down that no finding, sentence or order passed by a competent court shall be upset merely on account of any error, omission or irregularity unless in the opinion of the court a failure of justice has, in fact, been occasioned thereby. We do not find any reason why the principle underlying the aforesaid provisions would not apply in case of the statutory provisions like Rule 55-A of the Rules in relation to disciplinary proceeding. Rule 55-A referred

25 (2001) 6 Supreme Court Cases 392

> to above embodies in it nothing but the principles of reasonable opportunity and natural justice."

27. The assessee's case on whether any prejudice was caused to it can now be examined. It is not in dispute that the assessee had filed its return of income for the assessment year 1984-85 on 29 September, 1984 showing "Nil" total income. The assessee had computed its income for the year in question before deducting brought forward losses of earlier assessment years at Rs.47,32,428/-. From such amount, the assessee deducted an amount of Rs.33,89,467/- which it claimed to be "brought forward unabsorbed losses of earlier years". On this basis, a "Nil" income was written in the return by the assessee in the year 1984-85. Such assessment was made under Section 143(3) of the IT Act. The Assessing Officer computed the assessee's income before deducting total brought forward unabsorbed losses of earlier years at Rs. 33,89,467/-. From this, he deducted brought forward unabsorbed losses of earlier years aggregating to Rs. 33,89,467/- and arrived at a "Nil" total income on which the assessment was made.

28. The original assessment was set aside by the CIT(A), Mumbai by an order under Section 263 of the IT Act dated 30 March, 1988. Consequently, a fresh assessment was made and an order to that effect was passed by the Assessing Officer on 29 March, 1990. In such assessment order, the Assessing

Officer computed the total income, before allowing the deduction of amount of brought forward unabsorbed losses of earlier years at Rs.86,81,685/-. From such amount, he deducted an amount of Rs.58,69,877/- on account of brought forward unabsorbed losses of earlier years and unabsorbed depreciation of earlier years. On this basis, the total taxable income of the assessee was computed at Rs.28,11,808/- on which the assessment was made. The Assessing Officer, in such circumstances, initiated penalty under Section 271(1)(c) of the IT Act. During the course of the assessment proceedings, the Assessing Officer noted several illegalities as set out in paragraph 4 of the orders passed under Section 271(1)(c) of the IT Act. He *inter alia* observed that to avoid the tax liability, the assessee had claimed that it had transferred its stock-in-trade to the partnership firm, as its capital contribution as observed in the assessment order. It was also observed that the Assessing Officer was of the view that the real purpose of the transfer was only to convert assets of the assessee into money for its own benefit and at the same time avoiding liability to tax on its income. He also observed that the Assessing Officer had clearly noted that there was a transfer for consideration, making the surplus liable to charge of income tax. It was observed that the assessee had resorted to a colourable device to avoid tax and in such context, the decision of the Supreme Court in **McDowell & Co.** (supra) was squarely applicable. On such basis, the Assessing Officer made an

addition of Rs. 52,92,218/- to the assessee's undisclosed income on account of profit on transfer of stock-in-trade to the partnership firm M/s. Nirmal Enterprises as also initiated the penalty proceedings. It appears that the CIT (Appeals) deleted the said additions made by the Assessing Officer against which the Department has filed the second appeal before the tribunal. The Tribunal on such proceedings filed by the Department by an order dated 22 February, 1993 set aside the order of the CIT (Appeals) and restored the order of the Assessing Officer thereby allowing the department's appeal.

29. On such backdrop, it is significant to note that the original show cause notice issued under Section 271(1)(c) read with Section 274 of the IT Act was followed by another notice dated 19 August, 1993, which was served upon the assessee. In response to the said notice, the assessee's representative had appeared before the Assessing Officer. Also a written explanation vide letter dated 06 September, 1993 was filed. The assessee's representative reiterated the contentions as urged in the written reply as both the issues of concealment of the particulars of income as also inaccurate particulars of income were attracted. The assessee contended that the assessee neither concealed the particulars of income nor had given any inaccurate particulars of income and that a true and correct disclosure was made. The Assessing Officer in the order passed on the penalty proceedings observed that none of the contentions as

urged by the assessee had any substance and more particularly that the asssessee's contention that the assessee had disclosed all material facts for computation of total income and that it had neither concealed the particulars of its income nor furnished inaccurate particulars of the income. It was observed that from the examination and analysis made by the Assessing Officer in the assessment order and the material brought on record by the assessee, it was obvious that the whole transaction of transferring the stock-in-trade by the assessee to a so called partnership firm as its capital contribution can only be construed to be a device, which was adopted by the assessee with the sole intention of recouping the money of its stock-in-trade and at the same time, avoiding the tax liability on the profit arising out of it. It was also observed that the assessee adopted a colourable device to evade tax and at the same time convert its asset into money for its own benefit. The Assessing Officer accordingly observed that he was satisfied that the assessee had concealed the particulars of its income and also furnished inaccurate particulars of the income. The following operative portion of the order passed by the Assessing Officer imposing penalty is required to be noted which read thus:-

> "…..
>
> 9. On a careful consideration of the facts and circumstances of the case, I am satisfied that the assessee has concealed the particulars of its income and has also furnished inaccurate particulars of such income. It is significant to mention in this connection that this case clearly falls within the ambit of the provisions of section 271(1)(c) of the Income-

Tax Act 1961. Also, the Explanation 1 to section 271(1)(c) of the Act is attracted in this case. This is so as the explanation offered by the assessee in respect of the facts materials to the computation of its total income have been found to be false. The assessee has not been able to substantiate that the assessee has not been able to substantiate that the explanation offered by it was bonafide. I, therefore, hold that a penalty u/s. 271(1)(c) of the I.T. Act, 1961 is imposable on the assessee. The minimum and the maximum amounts of penalty imposable u/s. 271(1)(c) of the Act work out to Rs.33,34,096/- and Rs.66,68,192/- respectively as computed below:

i) Amount of income in respect of which particulars have been concealed or inaccurate particulars have been furnished – Rs.52,92,218/-.

ii) Tax that would have been chargeable on the income in respect of which particulars have been concealed or inaccurate particulars have been furnished had such income been the total income – Rs.33,34,096/-.

iii) Minimum amount of penalty imposable u/s.271(1)(c) of the I.T. Act 1961 -

- Rs. 33,34,096/-.

iv Maximum amount of penalty imposable u/s. 271(1)(c) of the Act – Rs. 66,68,192/-.

10. Having regard to facts and the circumstances of the case I impose a penalty of Rs. 33,34,096/- (Rupees Thirty-three lakhs, thirty-four thousand, ninety-six only) u/s.271(1)(c) of the I.T. Act, 1961 on the assessee and direct that the assessee shall pay by way of penalty u/s.271(1)(c) of the I.T. Act a sum of Rs. 33,34,096/- (Rupees Thirty-three lakhs, Thirty-four thousand, ninety-six only). Issue notice of demand and chalan."

(emphasis supplied)

30. The order passed by the Assessing Officer was challenged by the assessee before the Commissioner of Income-Tax (Appeals), who by an order dated 05 February, 1996 allowed the assessee's appeal, *inter alia* on the ground that the assessee did not conceal the particulars of income or furnish inaccurate

particulars of income, thus, the assessee's case was covered under Explanation-1 to Section 271(1)(c) which made it clear that the presumption of concealment would arise only if the Explanation offered was found to be false. It was observed that neither the CIT (Appeals) in the present case nor the ITAT had given any finding that the explanation furnished was false.

31. The department assailed the said order passed by the Commissioner of Income-tax (Appeals), before the Tribunal. By the impugned order, the department's appeal has been allowed. The judgment of the tribunal is a detailed judgment wherein the Tribunal has opined that the assessee was held guilty for the mischief of the main provision of Section 271(1)(c) of the IT Act and was liable for penalty. It is observed by the Tribunal that there was patent lack of disclosure by the assessee. The relevant observations of the tribunal are required to be noted which read thus:-

> "30. This aspect of the matter has already been considered by us at some length. To briefly recapitulate at the cost of repetition, the fact that the assesse was in receipt of substantial amounts from Nirmal Enterprises through its capital account and that such receipts almost equalled the written-up value of the plot of land introduced as its capital in Nirmal Enterprises is, in our opinion, material to the computation of its income. The assesse did not disclose this fact in the manner required of it, having regard to the nature of the case, the issue and the stakes involved. The "disclosure" through the filing of the capital account copy is not proper disclosure, it cannot be considered to be an overt disclosure of a material fact; it did not relieve the assesse of the burden to come out with the full and true facts pointedly and in a focussed manner, drawing the attention of the income-tax authorities specifically to the fact. The very conduct of the assesse in trying to take advantage of the copy of the

capital account filed in an inconspicuous or unobtrusive manner as if a material fact has been disclosed in the manner required of it smacks of mala fide. At no stage did the assesse volunteer the information it had to be called out from the record after investigation pursuant to the CIT's order u/s. 263. There has been no explanation worth the while with regard to the withdrawal of monies from Nirmal Enterprises through the capital account. The explanation given in the reply to the penalty notice to the effect that the monies were drawn as per the partnership deed to pay off the liabilities of the assesse and to bring the capital of the partners in proportion to their profit-sharing ratio has already been found by us and not substantiated by any evidence. The explanation is inherently false because if the capital is to be reduced to levels proportionate to the profit-sharing ratios of the partners within 6 months of the capital contribution then what is the purpose of bringing in disproportionate capital in the first place? There is also an admission in the same explanation that the monies were drawn out of advances received by Nirmal Enterprises from the buyers of units. This disproves the other part of the explanation as to why the monies were withdrawn. Thus the explanation is inherently false. Therefore, even on merits. Explanation 1 to s. 271(1)(c) is fully attracted.

31. For the above reasons, we set aside the order of the CIT(A) cancelling the penalty and restore that of the AO. The Departmental will have its costs from the assessee which we assess at Rs. 5,000/- (Rupees five thousand only). The same shall be deposited by the assesse with the Registry of the Tribunal within 2 months from the receipt of this order. The Department may withdraw the same by filing an application to the Registry."

(emphasis supplied)

32. On perusal of the memo of appeal as filed before this Court, it is clear that no ground has been taken in the memo of appeal, nor any question of law was raised that the notice issued by the department under Section 271(1)(c) was in any manner defective, in regard to which limb of the said provision namely in regard to concealment by the assessee of the particulars of its income or furnishing inaccurate particulars of such income stood attracted, as it is seen

from the findings as recorded by the Assessing Officer that both the limbs were attracted.

33. As fairly stated on behalf of the appellant/assessee, such contention was not raised at any point of time before the Assessing Officer who adjudicated on the penalty proceedings. Such contention was also not raised before the Commissioner of Income Tax (Appeals) and there was no question of such contention being raised before the Tribunal as it was the revenue's appeal which was the subject matter of consideration before the Tribunal and in the present appeal also, such issue was not raised and the appeal was admitted on the question of law which we have noted hereinabove, as framed by this Court by its order dated 14 September, 2004.

34. If this be the case, should the Court now after more than 20 years of the order being passed by the Tribunal accept the contention as urged on behalf of the assessee that in these circumstances, the Court should accept that the notice as issued to the assessee under Section 274 of I.T. Act was defective, and hence the proceedings would stand covered by the decision of the co-ordinate Bench of this Court in **Ventura Textiles Ltd.** (supra).

35. In our opinion, the decision in **Ventura Textiles Ltd.** (supra) would not support the assessee. **Ventura Textiles Ltd.** (supra) was a case wherein the

Court was considering an appeal under Section 260-A of the IT Act which assailed an order passed by the Tribunal, whereby for the first time, an issue was raised as to whether the order passed under Section 271(1)(c) of the IT Act was bad in view of the fact that both at the time of initiation as well as at the time of imposition of the penalty, the Assessing Officer was not clear as to which limb of Section 271(1)(c) was attracted. It is in such context, the Division Bench of this Court was *inter alia* considering the decisions in regard to the two ingredients of Section 271(1)(c) of the IT Act namely "concealment of particulars of income" and "furnishing inaccurate particulars of such income" being attracted in a notice to be issued invoking such provision for levy of a penalty. It was observed that these two expressions comprise of the two limbs for imposition of penalty under the said provision. The Division Bench, *inter alia* referring to the decision of the Gujarat High Court in **Manu Engineering Vs. CIT**[26] and Delhi High Court in **Virgo Marketing P. Ltd. Vs. CIT**[27], held that a notice for levy of penalty has to be clear as to qua which limb of the said provision the penalty was attracted. It was observed that if the Assessing Officer proposes to invoke the first limb or the second limb, then the notice has to be appropriately marked to that effect. If there was no striking off of the inapplicable portion in the notice which is in the printed format, it would lead

26 (1980) 122 ITR 306 (Guj)
27 (2008) 171 Taxmann 156 (Del)

to an inference of non- application of mind. In such a case, penalty would not be sustainable for the reason that both the limbs, as held by the Supreme Court in **Ashok Pai Vs. CIT**[28], carry different connotations. It is in such context, the Court observed that in the said case, in the show cause notice issued to the assessee therein, the inapplicable portion was not struck off. In such context, the Court considering the decisions as rendered by this Court as also by the High Courts and more particularly in **Commissioner of Income-tax & Anr. vs. Manjunatha Cotton and Ginning factory** (supra), CIT Vs. SSA's Emerald Meadows[29], **Principal Commissioner of Income-tax (Central), Bengaluru vs. Goa Coastal Resorts and Recreation (P.) Ltd.** (supra), held that as a consequence of such ambiguity, the penalty order passed would stand vitiated. However, in so far as the facts of the case were concerned, namely the assessment order and the show cause notice, both issued on the same date (issued on 28 February, 2006) if read in conjunction, it was observed that a view can reasonably be taken that notwithstanding the defective notice, the assessee was fully aware of the reason as to why the Assessing Officer sought to impose penalty. It was observed that it would be too technical and pedantic to take the view that because in the printed notice the inapplicable portion was not struck off, the order of penalty should be set aside even though in the

28 (2007) 292 ITR 11 (SC)

29 (2016) 73 Taxmann.com 248 (SC)

assessment order it was clearly mentioned that the penalty proceedings under Section 271(1)(c) of the IT Act, had been initiated separately for furnishing inaccurate particulars of income. It was observed that therefore, such contention as urged on behalf of the appellant / assessee did not appeal to the Court and on such ground, the Court was not inclined to interfere with the imposition of penalty. The Court accordingly proceeded to examine whether in the return of income the assessee had furnished inaccurate particulars of income. The Court observed that there was some peculiarity namely in the statutory show cause notice, the Assessing Officer did not indicate as to whether penalty was sought to be imposed for concealment of income or for furnishing inaccurate particulars of income, though in the assessment order it was mentioned that penalty proceedings were initiated for furnishing inaccurate particulars of income. However, in the order of penalty, the Assessing Officer had held that the assessee had concealed its income as well as furnished inaccurate particulars of income. The Court observed that concealment of particulars of income was not the charge against the appellant and the charge was of furnishing inaccurate particulars of income. It was hence observed that it was trite that penalty cannot be imposed for alleged breach of one limb of Section 271(1)(c) of the IT Act, while penalty proceedings were initiated for breach of the other limb of Section 271(1)(c) and for such reason,

it was observed that the order of penalty stood vitiated. Thus, the facts before the Court in such case were quite peculiar.

36. Reverting to the facts of the present case, certainly, the facts are distinct from what had fallen for consideration of the Division Bench in **Ventura Textiles Ltd. Vs. CIT, Mumbai City-11** (supra). It is clear that the Assessing Officer in the present case had taken into consideration both the limbs of Section 271(1)(c) as both the limbs were attracted and they were so understood by the assessee. It is on such backdrop, the penalty proceedings which were initiated against the assessee, were also responded/contested. Thus, in our opinion, what has been held in **Ventura Textiles Ltd. Vs. CIT, Mumbai City-11** (supra) in the first part would become applicable, on which the Division Bench turned down the case of the assessee on the question of law no.D. It would be appropriate to note the said question of law and the reasons as set out in Ventura's decision, to turn down the said question of law which read thus:-

> "D. Whether on the facts and in the circumstances of the case the Tribunal ought to have held that the order passed under section 271(1)(c) is bad in view of the fact that both at the time of initiation as well as at the time of imposition of the penalty the Assessing Officer was not clear as to which limb of Section 271(1)(c) was attracted?"
>
> Reverting back to the facts of the present case, if the assessment order and the show cause notice, both issued on the same date i.e., on February 28, 2006, are read in conjunction, a view can reasonably be taken that notwithstanding the defective notice, the assessee was fully aware of the reason as to why the Assessing Officer sought to

> impose penalty. It was quite clear that for breach of the second limb of Section 271(1)(c) of the Act i.e., for furnishing inaccurate particulars of income that the penalty proceedings were initiated. The purpose of a notice is to make the noticee aware of the ground(s) of notice. In the present case, it would be too technical and pedantic to take the view that because in the printed notice the inapplicable portion was not struck off, the order of penalty should be set aside even though in the assessment order it was clearly mentioned that the penalty proceedings under Section 271(1)(c) of the Act had been initiated separately for furnishing inaccurate particulars of income. Therefore, this contention urged by the appellant / assessee does not appeal to us and on this ground we are not inclined to interfere with the imposition of penalty.
>
> 36. Thus, on a careful examination of the entire matter, while we answer question number D against the appellant / assessee, question numbers A, B and C are answered in favour of the appellant / assessee. Therefore, on an overall consideration, the appeal would stand allowed and the order of penalty as affirmed by the two lower appellate authorities would consequently stand interfered with."

It needs to be observed that the questions A, B and C as decided in **Ventura Textiles Ltd. Vs. CIT, Mumbai City-11** (supra) were on merits. It is thus difficult to accept Ms. Vissanji's contention that the assessee's case would stand covered by the decision in **Ventura Textiles**'s case.

37. At this stage, for more clarity, we may observe some of the significant features of the case in hand, which are as under:-

(i) that the penalty proceedings were initiated during the assessment proceedings. The Assessing Officer had although issued a notice without a tick mark, it appears that both the

limbs under Section 271(1)(c) namely "concealment of particulars of income" and "furnishing inaccurate particulars of such income" were attracted in the facts of the case.

(ii) At no point of time, the assessee had a grievance in regard to the Section 271(1)(c) notice being in any manner vague, ambiguous and not being understood by the assessee in regard to the limbs under Section 271(1)(c) being attracted. The corollary to this, was that neither before the Assessing Officer, nor before the appellate authority, the assessee raised such a plea, that the notice proposing to impose penalty on the assessee, was in any manner defective.

(iii) The notice was in fact, responded by the assessee on both the counts as falling under Section 271(1)(c) of the IT Act.

(iv) The assessee on the above backdrop had wholeheartedly participated at the hearing before the Assessing Officer.

38. Hence, there was no question of any issue of breach of the principles of natural justice, for want of a proper notice being raised before the tribunal by the assessee. The tribunal having allowed the revenue's appeal by the impugned order dated 30 October, 2001, the present appeal was filed on 17

April, 2002 and the appeal came to be admitted vide an order dated 14 September, 2004 on the substantial question of law as framed which also does not admit the appeal on any issue on the notice under Section 271(1)(c) being defective.

39. It is after about 20 years of admission of the appeal, the issue has been raised merely because in the meantime, there were certain decisions rendered by the Courts to hold that the Assessing Officer would be required to tick mark the relevant ground as falling under Section 271(1)(c) of the IT Act being attracted for levy of penalty, namely either the first limb of "concealment of particulars of income" or the second limb of "furnishing inaccurate particulars of such income". It is for such reason, on a technical plea, it was contended that the case would stand covered by **Ventura Textiles Ltd. Vs. CIT, Mumbai City-11** (supra).

40. In the facts of the case, we do not find ourselves in agreement with Ms. Vissanji for reasons, which we discuss hereunder.

41. It is a settled principle of law that any breach of the principles of natural justice cannot be addressed by a straight jacket formula. Any complaint of breach of principles of natural justice would be required to be considered in the facts of the case. When the facts of the case would demonstrate it, to be an

undisputed position, that no real prejudice was caused to a party aggrieved by an order, being alleged to be breach of the principles of natural justice, the Court would certainly not interfere. Such complaint and/or a genuine grievance of the breach of principles of natural justice accompanied with the prejudice it would cause, is required to be made with utmost promptness. Any delay in making such complaint or raising a grievance would give rise to a position that such grievance is either not genuine or is belated and/or a technical plea being agitated. In **Natwar Singh vs. Director of Enforcement & Anr.** (supra), the Supreme Court while observing on the test of real prejudice, observed that there is no such thing as "technical infringement of natural justice", as what is necessarily to be seen is that there must have been caused some real prejudice to the complainant. It was observed that the requirements of natural justice must depend *inter alia* as involved in the facts and circumstances of the case and the nature of the inquiry, etc. The relevant observations of the Supreme Court are required to be noted which read thus:-

> "26. Even in the application of the doctrine of fair play there must be real flexibility. There must also have been caused some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. 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 to be dealt with and so forth. Can the Courts supplement the statutory procedures with requirements over and above those specified? In order to ensure a fair hearing, Courts can insist and require additional steps as long a such steps would not frustrate the apparent purpose of the legislation."

(emphasis supplied)

42. In the present case, applying such principles of natural justice, the assessee at no point of time, had discharged the basic burden of prejudice being caused to it. In **State Bank of Patiala & Ors. Vs. S. K. Sharma** (supra), the Court observed that the respondent in such case, neither before the enquiry officer nor before the trial Court, or the appellate Court, had protested that he was denied of an adequate opportunity to cross-examine the witnesses effectively or to defend himself properly on account of non-supply of the statements of witnesses. In such circumstances, the Court observed that it was possible to say that there has been a substantial compliance of the enquiry procedure. The Court also observed that the question would be whether each and every violation of rules or regulations governing the enquiry automatically vitiated the enquiry and the punishment awarded or whether the test of substantial compliance can be invoked in cases of such violation and whether the issue has to be examined from the point of view of prejudice. Answering such issue, the Court observed that the test in such cases should be one of prejudice. The Court also observed that there may be some procedural provisions, as also there may be provisions, which are fundamental in nature, in which case the theory of substantial compliance may not be applicable as discussed in paragraph 11 of the said decision. In the context of prejudice, the

Court, referring to the decision in **Janakinath Sarangi v. State of Orissa**[30], and in the case of **K. L. Tripathi vs. State Bank of India & Ors.**[31], as also in the case of **Managing Director, E.C.I.L. V. B Karunkar**[32], held that principles of natural justice cannot be reduced to any hard and fast formulae. The relevant observations in that regard are required to be noted which read thus:-

> "28. The decisions cited above make one thing clear, viz., principles of natural justice cannot be to reduced to any hard and fast formulae. As said in Russell c. Duke of Norfolk [1949 (1) All.E.R.109] way back in 1949, these principle cannot be put in a straight-jacket. Their applicability depends upon the context and the facts and circumstances of each case. [See Mahender Singh Gill v. Chief Election commissioner (1978 (2) S.C.R.272)]. The objective is to ensure a fair hearing, a fair deal, to the person whose rights are going to be affected. [See A.K.Roy v. Union of India 1982 (1) S.C.C.271) and Swadeshi Cotton Mills v. Union (1981 (1) S.C.C.664)]. As pointed out by this Court in A.K.Kraipak L Ors. v. Union of India & Ors. (1969 (2) S.C.C.262), the dividing line between quasi-judicial function and administrative function [affecting the rights of a party] has become quite thin and almost indistinguishable a fact also emphasized by House of Lords in C.C.C.U. v. Civil Service Union [supra] where the principles of natural justice and a fair hearing were treated as synonymous. **Whichever the Cases it is from the standpoint of fair hearing - applying the test of prejudice, as it may be called - that any and every complaint of violation of the rule of audi alteram partem should be examined. Indeed, there may be situations where observance of the requirement of prior notice/no hearing may defeat the very proceeding - which may result in grave prejudice to public interest**. It is for this reason that the rule of post-decisional hearing as a sufficient compliance with natural justice was evolved in some of the cases, e.g., Liberty Oil Mills v. Union of India (1984 (3) S.C.C.465). There may also be cases where the public interest or the interests of the security of State or other similar considerations may make it inadvisable to observe the rule of audi alteram partem

30 1969 (3) S.C.C.392
31 1984 (1) S.C.C.43
32 1993 (4) S.C.C.727

altogether [as in the case of situations contemplated by clauses (b) and (c) of the proviso to Article 311(2)] or to disclose the material on which a particular action is being taken. **There may indeed be any number of varying situations which it is not possible for anyone to foresee. In our respectful opinion, the principles emerging from the decided cases can be stated in the following terms in relation to the disciplinary orders** and enquiries: a distinction ought to be made between violation of the principle of natural justice, audi alteram partem, as such and violation of a facet of the said principle. In other words, distinction is between "no notice"/"no hearing" and "no adequate hearing" or to put it in different words, "no opportunity" and "no adequate opportunity". To illustrate - take a case where the person is dismissed from service without hearing him altogether [as in Ridge v. Baldwin]. It would be a case falling under the first category and the order of dismissal would be invalid or void, if one chooses to use that expression [Calvin v.Carr]. But where the person is dismissed from service, say, without supplying him a copy of the enquiry officer's report [Managing Director, E.C.I.L. v.B.Karunkar] or without affording him a due opportunity of cross-examining a witness [K.L.Tripathi] it would be a case falling in the latter category - violation of a facet of the said rule of natural justice - in which case, the validity of the order has to be tested on the touch-stone of prejudice, i.e., whether, all in all, the person concerned did nor did not have a fair hearing. It would not be correct - in the light of The above decisions to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further enquiry. In our opinion, the approach and test adopted in B.Karunkar should govern all cases where the complaint is not that there was no hearing [no notice, no opportunity and no hearing] but one of not affording a proper hearing [i.e., adequate or a full hearing] or of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touch-stone of prejudice as aforesaid.

29. The matter can be looked at from the angle of justice or of natural justice also. The object of the principles of natural justice - which are now understood as synonymous with the obligation to provide a fair hearing - is to ensure that justice is done, that there is no failure of justice and that every person whose rights are going to be affected by the proposed action gets a fair hearing. The said objective can be tested with reference to sub-clause (iii) concerned herein. It says that copies of statements of witnesses should be furnished to the

> delinquent officer "not later than three days before the commencement of the examination of the witnesses by the Inquiring Authority". **Now take a case - not the one before us where the copies of statements are supplied only two days before the commencement of examination of witnesses instead of three days. The delinquent officer does not object; he does not say that two days are not sufficient for him to prepare himself for cross-examining the witnesesses. The eqnuiry is concluded and he is punished. Is the entire enquiry and the punishment awarded to be set aside on the only ground that instead of three days before, the statements were supplied only two days before the commencement of the examination of witnesses? It is suggested by the Appellate Court that sub-clause (iii) is mandatory since it uses the expression "shall". Merely because, word "shall" is used, it is not possible to agree that it is mandatory. We shall, however, assume it to be so for the purpose of this discussion. But then even a mandatory requirement can be waived by the person concerned if such mandatory provision is his interest and not in public interest**, ……."
>
> (emphasis supplied)

43. In **Union of India & Ors. Vs. Alok Kumar** (supra), the Court considered the doctrine of *de facto* prejudice and considered a contention as urged on behalf of the appellant therein, that the prejudice is a *sine qua non* for vitiation of any disciplinary order. In such context, the Court observed as under:-

> "83. Earlier, in some of the cases, this Court had taken the view that breach of principle of natural justice was in itself a prejudice and no other `de facto' prejudice needs to be proved. In regard to statutory rules, the prominent view was that the violation of mandatory statutory rules would tantamount to prejudice but where the Rule is merely dictatory the element of de facto prejudice needs to be pleaded and shown. With the development of law, rigidity in these Rules is somewhat relaxed. **The instance of de facto prejudice has been accepted as an essential feature where there is violation of non-mandatory rules or violation of natural justice as it is understood in its common parlance. Taking an instance, in a departmental inquiry where the Department relies upon a large number of documents majority of which are furnished**

and an opportunity is granted to the delinquent officer to defend himself except that some copies of formal documents had not been furnished to the delinquent. In that event the onus is upon the employee to show that non-furnishing of these formal documents have resulted in de facto prejudice and he has been put to a disadvantage as a result thereof.

85. The Doctrine of de facto prejudice has been applied both in English as well as in Indian Law. To frustrate the departmental inquiries on a hyper technical approach have not found favour with the Courts in the recent times. In the case of S.L. Kapoor v. Jagmohan [1980 (4) SCC 379], a three Judge Bench of this Court while following the principle in Ridge v. Baldwin stated that if upon admitted or indisputable facts only one conclusion was possible, then in such a case that principle of natural justice was in its self prejudice would not apply. Thus, every case would have to be examined on its own merits and keeping in view the statutory rules applying to such departmental proceedings. The Court in S.L. Kapoor (supra) held as under:

> "18. In Ridge v. Baldwin [1964 AC 40, 68 : 1963 2 All ER 66, 73] One of the arguments was that even if the appellant have been heard by the Watch Committee nothing that he could have said could have made any difference. The House of Lords observed at (p. 68):
>
> "It may be convenient at this point to deal with an argument that, even if as a general rule a watch committee must hear a constable in its own defence before dismissing him this case was so clear that nothing that the appellant could have said could have made any difference. It is at least very doubtful whether that could be accepted as an excuse. But, even if it could, the watch committee would, in my view, fail on the facts. It may well be that no reasonably body of men could have reinstated the appellant. But at between the other two courses open to the watch committee the case is not so clear. Certainly, on the facts, as we know them the watch committee could reasonably have decided to forfeit the appellant's pension rights, but I could not hold that they would have acted wrongly or wholly unreasonably if they have in the exercise of their discretion decided to take a more lenient course."

> 86. Expanding this principle further, this Court in the case of K.L. Tripathi v. State Bank of India [(1984) 1 SCC 43] held as under:
>
> > "…. It is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth."
>
> 87. In the case of ECIL v. B. Karunakar [(1993) 4 SCC 727], this Court noticed the existing law and said that the theory of reasonable opportunity and the principles of natural justice have been evolved to uphold the rule of law and to assist the individual to vindicate his just rights. They are neither incantations to be invoked nor rites to be performed on all and sundry occasions. **Whether, in fact, prejudice has been caused to the employee or not on account of denial of report to him, has to be considered on the facts and circumstances of each case**. The Court has clarified even the stage to which the departmental proceedings ought to be reverted in the event the order of punishment is set aside for these reasons.
>
> 89. The well established canons controlling the field of bias in service jurisprudence can reasonably extended to the element of prejudice as well in such matters. **Prejudice de facto should not be based on a mere apprehension or even on a reasonable suspicion. It is important that the element of prejudice should exist as a matter of fact or there should be such definite inference of likelihood of prejudice flowing from such default, which relates statutory violations. It will not be permissible to set aside the departmental inquiries** in any of these classes merely on the basis of apprehended prejudice."
>
> (emphasis supplied)

44. It is well settled that in judging the validity of an adjudicatory order, when the complaint is of non compliance of the principles of natural justice or

in cases where the attack is not on the ground of bias, a distinction is required to be drawn between cases of no notice or no hearing, and cases of no fair hearing or no adequate hearing. If the defect is of the former category, it will automatically make the order invalid but if the defect is of a latter category, it will have to be further examined whether the defect has resulted in prejudice and failure of justice and it is only when such a conclusion is reached that the order may be declared invalid. (See. **Municipal Corporation, Ludhiana vs. Inderjit Singh & Anr.**[33]; **P.D. Agrawal vs State Bank Of India & Ors.**[34]; **Haryana Financial Corporation & Anr. Vs. Kailash Chandra Ahuja**[35];**Union of India & Anr. v. M/s. Mustafa & Najibai Trading Co. & Ors.**[36]. Some of these decisions can be discussed.

45. In the above context the Supreme Court in **Municipal Corporation, Ludhiana vs. Inderjit Singh & Anr.**(supra) observed thus:-

> 17. In *Alighar Muslim University* itself, the Court noticed the decision of the Court in *S.L. Kapoor v. Jagmohan* wherein it was held that non-compliance with the principles of natural justice by itself causes prejudice. No doubt, the development of law in the field would have also to be kept in mind. The said decision, however, was rendered in the facts of the said case as it was a case of overstay of leave by an employee. It was found that no prejudice had been caused to the petitioner therein. Mr. Patwalia places strong reliance upon para 21 of the said decision which reads as under: (*Alighar Muslim University case, SCC p. 539, para 21)*

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33 AIR 2009 SC 195

34 AIR 2006 SC 2064.

35 (2008) 9 SCC 31

36 AIR 1998 SC 2526

> "*21.* As pointed recently in *M. C. Mehta v. Union of India* there can be certain situations in which an order passed in violation of natural justice need not be set aside under Article 226 of the Constitution of India. For example where no prejudice is caused to the person concerned, interference under Article 226 is not necessary. Similarly, if the quashing of the order which is in breach of natural justice is likely to result in revival of another order which is in itself illegal as in *Gadde Venkateshwara Rao v. Govt. of A.P.* it is not necessary to quash the order merely because of violation of principles of natural justice…… "

46. In **Union of India & Anr. Vs. M/s. Mustafa & Najibai Trading Co. and Ors.** (supra) the Supreme Court in the context of Section 124 of the Customs Act which provides for issuance of a show cause notice, before confiscation of goods observed that in making a complaint of breach of *audi alteram partem*, the test of prejudice is required to be made out by the owner whose goods are to be confiscated. In such context, the Court observed thus:

> "35. Section 124 of the Act, which incorporates the rule of audi alteram partem, one of the two basic tenets of the principles of natural justice, does not have the effect of making any alteration in the nature of these penalties. There may be situations where the goods are found to be smuggled goods and are seized but the identity of the owner of the goods is not known. Can it be said that since notice cannot be issued to the owner of the goods under Section 124 of the Act, the goods which are found to be smuggled goods cannot be confiscated under Section 111 of the Act? In our view, this question must be answered in the negative because confiscation of goods under Section 111 of the Act is a penalty in rem which attaches to the goods which are the subject matter of the proceedings for confiscation and if it is found that the goods are liable to be confiscated under Section 111 of the Act, they can be confiscated without ascertaining their real owner. Moreover, in so far as the

> rule of audi alteram partem is concerned, the position is well settled that an order passed in disregard of the said principle would not be invalidated if it can be shown that as a result of denial of the opportunity contemplated by the said rule the person seeking to challenge the order has not suffered any prejudice. Since Section 124 of the Act incorporates the said principle of natural justice, failure to give the notice to the owner of goods would not, by itself, invalidate an order of confiscation. What has to be seen is whether the owner of the goods has suffered prejudice on account of the failure on the part of the officer passing the order for confiscation of goods. The owner of goods ordered to be confiscated cannot be said to have suffered any prejudice in a case where notice has been given to the person responsible for the alleged contravention on which the order for confiscation of goods is founded and who alone is in a position to offer an requirement regarding issuing of notice to the owner of the goods under Section 124 cannot therefore, be construed as a mandatory requirement so as to have the effect of invalidating an order. An order of confiscation would not be rendered invalid if there is substantial compliance with the requirements of Section 124 in the sense hat before passing an order of confiscation a notice has been given either to the owner of the goods or a person who is responsible for the contravention on which the order for confiscation of goods is founded and who alone is in a position to offer an explanation for such contravention."

47. In **P. D. Agrawal vs State Bank Of India & Ors.** (supra) the Supreme Court again had an occasion to consider the doctrine of prejudice as applicable in considering the grievance of breach of principles of natural justice. The Supreme Court observed that non observance of the principle of natural justice, itself causes prejudice or the same should not be read "as it causes difficulty of prejudice", cannot be said to be applicable in the facts of the case. In so observing, it was held that the principles of natural justice have undergone a sea change. Referring to the earlier decisions of the Supreme Court in **State Bank of Patiala v. S.K. Sharma** (supra) and

Rajendra Singh v. State of M.P. [(1996) 5 SCC 460], it was observed that the principle of law, is that some real prejudice must have been caused to the complainant. It was observed that the Court has shifted from its earlier concept that even a small violation shall result in the order being rendered a nullity. It was observed that to the principle/doctrine of *audi alteram partem*, a clear distinction has been laid down between the cases where there was no hearing at all and the cases where there was mere "technical infringement of the principle." The observations of the Supreme Court are required to be noted which read thus:-

> "**39.** Decision of this Court in *S.L. Kapoor* v. *Jagmohan* [(1980) 4 SCC 379] whereupon Mr Rao placed strong reliance to contend that non-observance of principle of natural justice itself causes prejudice or the same should not be read "as it causes difficulty of prejudice", cannot be said to be applicable in the instant case. The principles of natural justice, as noticed hereinbefore, have undergone a sea change. In view of the decisions of this Court in *State Bank of Patiala* v. *S.K. Sharma* [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] and *Rajendra Singh* v. *State of M.P.* [(1996) 5 SCC 460] the principle of law is that some real prejudice must have been caused to the complainant. The Court has shifted from its earlier concept that even a small violation shall result in the order being rendered a nullity. To the principle/doctrine of *audi alteram partem*, a clear distinction has been laid down between the cases where there was no hearing at all and the cases where there was mere technical infringement of the principle. The Court applies the principles of natural justice having regard to the fact situation obtaining in each case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straitjacket formula. (See *Viveka Nand Sethi* v. *Chairman, J&K Bank Ltd.* [(2005) 5 SCC 337 : 2005 SCC (L&S) 689] and *State of U.P.* v. *Neeraj Awasthi* [(2006) 1 SCC 667 : 2006 SCC (L&S) 190 : JT (2006) 1 SC 19] . See also *Mohd. Sartaj* v. *State of U.P.*[(2006) 2 SCC 315 : 2006 SCC (L&S) 295 : (2006) 1 Scale 265])

48. In **Haryana Financial Corpn. v. Kailash Chandra Ahuja** (supra), in the context of prejudice, the Supreme Court taking a review of principles of law under the Indian jurisprudence as also under the English Law, reiterated the principles that the recent trend, however, is of the test of prejudice. The following observations of the Court are required to be noted:-

> "31. **At the same time, however, effect of violation of the rule of audi alteram partem has to be considered. Even if hearing is not afforded to the person who is sought to be affected or penalised, can it not be argued that "notice would have served no purpose" or "hearing could not have made difference" or "the person could not have offered any defence whatsoever". In this connection, it is interesting to note that under the English law, it was held few years before that non-compliance with principles of natural justice would make the order null and void and no further inquiry was necessary.**
>
> 32. In the celebrated decision of Ridge v. Baldwin [1964 AC 40 : (1963) 2 WLR 935 : (1963) 2 All ER 66 (HL)] it was contended that an opportunity of hearing to the delinquent would have served no purpose. Negativing the contention, however, Lord Reid stated: (All ER p. 73 F-G)
>
> > "It may be convenient at this point to deal with an argument that, even if as a general rule a watch committee must hear a constable in his own defence before dismissing him, this case was so clear that nothing that the appellant could have said could have made any difference. *It is at least very doubtful whether that could be accepted as an excuse.*"
> >
> > (emphasis supplied)
>
> 33. Wade and Forsyth in their classic work, Administrative Law, (9th Edn.) pp. 506-09 also stated that if such argument is upheld, the Judges may be tempted to refuse relief on the ground that a fair hearing could have made no difference to the result. "But in principle it is vital that the procedure and the merits should be kept strictly apart, since otherwise *the merits may be prejudiced unfairly.*"
>
> (emphasis supplied)
>
> 34. This Court expressed the same opinion. In Board of High School & Intermediate Education v. Chitra Srivastava [(1970) 1 SCC 121] , the Board cancelled the examination of the petitioner who had actually appeared at the examination on the ground that there was shortage in

attendance at lectures. Admittedly, no notice was given to her before taking the action. On behalf of the Board it was contended that the facts were not in dispute and therefore, "*no useful purpose would have been served*" by giving a show-cause notice to the petitioner. This Court, however, set aside the decision of the Board, holding that the Board was acting in a quasi-judicial capacity and, therefore, it ought to have observed the principles of natural justice.

35. In S.L. Kapoor v. Jagmohan [(1980) 4 SCC 379] , rejecting the argument that observance of natural justice would have made no difference, this Court said:(SCC p. 395, para 24)

> "24. … The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. *It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced.*"
>
> (emphasis supplied)

36. The recent trend, however, is of "prejudice". Even in those cases where procedural requirements have not been complied with, the action has not been held *ipso facto* illegal, unlawful or void unless it is shown that non-observance had prejudicially affected the applicant.

37. In Malloch v. Aberdeen Corpn. [(1971) 1 WLR 1578 : (1971) 2 All ER 1278 (HL)] , Lord Reid said: (All ER p. 1283a-b)

> "… it was argued that to have afforded a hearing to the appellant before dismissing him would have been a useless formality because whatever he might have said could have made no difference. *If that could be clearly demonstrated it might be a good answer.*"
>
> (emphasis supplied)

Lord Guest agreed with the above statement, went further and stated: (All ER p.1291b-c)

> "… A great many arguments might have been put forward *but if none of them had any chance of success then I can see no good reason why the respondents should have given the appellant a hearing, nor can I see that he was prejudiced in any way.*"
>
> (emphasis supplied)

38. In Jankinath Sarangi v. State of Orissa [(1969) 3 SCC 392] it was contended that natural justice was violated inasmuch as the petitioner was not allowed to lead evidence and the material gathered behind his back was used in determining his guilt. Dealing with the contention, the Court stated: (SCC p. 394, para 5)

> "5. … We have to look to *what actual prejudice has been caused* to a person by the supposed denial to him of a particular right."
> (emphasis supplied)

39. In B. Karunakar [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] this Court considered several cases and held that it was only if the court/tribunal finds that the furnishing of the report "would have made a difference" to the result in the case that it should set aside the order of punishment. The law laid down in B. Karunakar [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] was reiterated and followed in subsequent cases also (vide State Bank of Patiala v. S.K. Sharma [(1996) 3 SCC 364 : 1996 SCC (L&S) 717] , M.C. Mehta v. Union of India [(1999) 6 SCC 237]).

40. In Aligarh Muslim University v. Mansoor Ali Khan [(2000) 7 SCC 529 : 2000 SCC (L&S) 965] the relevant rule provided automatic termination of service of an employee on unauthorised absence for certain period. M remained absent for more than five years and, hence, the post was deemed to have been vacated by him. M challenged the order being violative of natural justice as no opportunity of hearing was afforded before taking the action. Though the Court held that the rules of natural justice were violated, it refused to set aside the order on the ground that no prejudice was caused to M. Referring to several cases, considering the theory of "useless" or "empty" formality and noting "admitted or undisputed" facts, the Court held that the only conclusion which could be drawn was that had M been given a notice, it "would not have made any difference" and, hence, no prejudice had been caused to M.

41. In Ajit Kumar Nag v. Indian Oil Corpn. Ltd. [(2005) 7 SCC 764 : 2005 SCC (L&S) 1020] , speaking for a three-Judge Bench, one of us (C.K. Thakker, J.) stated: (SCC pp. 785-86, para 44)

> "44. We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing. We are further aware that it has been stated that apart from Laws of Men, Laws of God also observe the rule of audi alteram partem. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an opportunity to show cause as to why they had eaten the forbidden fruit.
> (See R. v. University of Cambridge [(1723) 1 Str 557 : 93 ER 698] .) But we are also aware that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned

> in a straitjacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. It has been stated: ' "To do a great right" after all, it is permissible sometimes "to do a little wrong".' [Per Mukharji, C.J. in Charan Lal Sahu v. Union of India [(1990) 1 SCC 613] (Bhopal Gas Disaster), SCC p. 705, para 124.] *While interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life. In our opinion, the approach of the Court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than 'precedential'.*"
>
> (emphasis supplied)
>
> 42. Recently, in P.D. Agrawal v. SBI [(2006) 8 SCC 776 : (2007) 1 SCC (L&S) 43] this Court restated the principles of natural justice and indicated that they are flexible and in the recent times, they had undergone a "sea change". If there is no prejudice to the employee, an action cannot be set aside merely on the ground that no hearing was afforded before taking a decision by the authority.
> .. … … .. …
>
> 45. In the instant case, no finding has been recorded by the High Court that prejudice had been caused to the delinquent employee, the writ petitioner. According to the High Court, such prejudice is "writ large". In our view, the above observation and conclusion is not in consonance with the decisions referred to above, including a decision of the Constitution Bench in B. Karunakar [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] . The view of the High Court, hence, cannot be upheld. The impugned order, therefore, deserves to be set aside and is accordingly set aside.
>
> 46. Since the High Court has not considered the second question, namely, whether failure to supply the report of the inquiry officer had or had not resulted in prejudice to the delinquent employee, ends of justice would be met with if we remit the matter to the High Court to decide the said question."
>
> (emphasis supplied)

49. In a recent decision of the Supreme Court in **Madhyamam Broadcasting Limited vs Union Of India**[37] the law in regard to the compliance of principles of natural justice and the test of prejudice which is required to be met by a

37 2023(3) BCR 685

party, complaining of the breach of principle of natural justice have been reiterated. In paragraph 42 of the said decision, the Court has observed that the party alleging violation of the principles of natural justice is required to prove that the administrative action has violated the principles of natural justice and such non-compliance of the requirement of natural justice has prejudiced a party. It was observed that the Courts, while assessing prejudice, need to determine if compliance of the principles of natural justice, could have benefited the party in securing a just outcome. The Court further observed that non-compliance of every facet and component of natural justice does not render the procedure unreasonable and the claimant must prove that the effect of non-compliance of a component of natural justice is so grave that the core of the right to a fair trial is infringed while making an argument from a component-facet perspective.

50. Such principles of law are enunciated, recognised and followed in cases which may directly affect the livelihood of a person, who would face a termination from service. In our case, we are concerned with a penalty under the IT Act which is a civil penalty in regard to which the above principles which are salutary would apply with full force as they concern statutory adjudication.

51. Thus, the principles of law as laid down by the Supreme Court are clear, that mere breach of principles of natural justice is not in itself a prejudice and in fact it is *de facto* prejudice which is required to be proved. Applying such principles to the facts of the present case, it is clear that the notice issued to the assessee by the Assessing Officer under Section 271(1)(c) itself not being disputed by the assessee, to be in any manner in breach of the principles of natural justice, much less on the ground that it does not clarify as to which limb of the provisions was attracted, no fault could be found in the Assessing Officer proceeding to pass an order on such notice. In our opinion, accepting such a plea as urged on behalf of the assessee would amount to accepting a place of technical infringement of natural justice, as even remotely it was not the case of the assessee before any of the forums below that the notice in question was defective. This even assuming and as seen from the aforesaid decisions, that the law is well settled in a series of decisions, that even a mandatory provision can be waived. Thus, to accept such belated plea of a defective notice, would not be a permissible course of action for the Court, considering the well settled principles of law, as laid down by the Supreme Court as noted above.

52. We may also observe that arguments are advanced by both the sides on the view taken by the Full Bench of this Court in the case of **Mohd. Farhan A. Shaik Vs. The Deputy Commissioner of Income Tax** (supra). We discuss the

judgment of the Full Bench. In such case, the Full Bench was considering a precedential cleavage in view of the two decisions of this Court namely in **Commissioner of Income-tax vs. Smt. Kaushalya & Ors.** (Supra) and in case of **Principal Commissioner of Income-tax (Central), Bengaluru vs. Goa Coastal Resorts and Recreation (P.) Ltd.** (supra). The order passed by the Division Bench referring the issue to the Full Bench is required to be noted which reads thus:-

> " Heard Mr. S. R. Rivankar, learned Senior Advocate with Mr. Rama Rivankar for the Appellant in both these Appeals and Ms. Amira Razaq, learned Standing Counsel for the Respondent-Income
> Tax Department in both these Appeals.
>
> 2. The issue involved in both these Appeals is, whether mere failure to tick mark the applicable grounds in the printed form in which the notice is issued under Section 271 of the Income Tax Act, 1961 (IT Act), vitiates the entire penalty proceedings ?
>
> 3. The following decisions rendered by the Division Benches of this Court, relied upon by Mr. Rivankar, the learned Senior Advocate for the Appellant, supports the view that it does :-
>
> (1) The Commissioner of Income-Tax-11 vs. Shri Samson Perinchery1;
>
> (2) The Principal Commissioner of Income-Tax (Central) Bengaluru vs. Goa Coastal Resorts and Recreation Pvt. Ltd.2;
>
> (3) The Principal Commissioner of Income-Tax, Panaji vs. New Era Sova Mine and
>
> (4) The Principal Commissioner of Income-Tax, Panaji vs. Goa Dourado Promotions Pvt. Ltd.4 .
>
> 4. However, Ms. Razaq, the learned Standing Counsel for the Respondents-Income Tax Department relied upon a prior

decision of the Division Bench of this Court in Commissioner of Income-tax vs. Smt. Kaushalya, in which, the Division Bench has held that mere failure to tick mark the applicable ground or to cancel the inapplicable ground in the notice under Section 271 of the IT Act, does not vitiate the penalty proceedings, where the satisfaction for initiation of penalty proceedings is correctly recorded and reflected in the assessment order made by the Assessing Officer (AO) and duly communicated to the Assessee.

5. On perusal of both the sets of decisions, we find that there is a conflict between the view taken by us in Goa Dourado Promotions (supra) and Kaushalya (supra). In Goa Dourado Promotions (supra), the substantial question of law as to whether the ITAT erred in holding the penalty proceedings fatal for mere failure of the AO to tick the relevant box in the show cause notice, was answered against the Appellant-Revenue and in favour of the Respondent-Assessee relying upon the Samson Perinchery (supra) and New Era Sova Mine (supra). As noticed above, the Division Bench in Kaushalya (supra) has held that such failure to strike off the relevant portion of the printed notice or to tick mark the applicable portion in the printed notice, is not fatal, particularly where no prejudice has been demonstrated by the Assessee. Thus, there appears to be a conflict between the two sets of decisions of the Coordinate Benches. In particular, there appears to be a conflict between the view in Goa Dourado Promotions (supra) and Kaushalya (supra).

6. Though the said decisions relied upon by Mr. Rivankar were rendered subsequent to the decision of the Division Bench in Kaushalya (supra), it appears that the decision in Kaushalya (supra) was not brought to the notice of the subsequent Division Benches.

7. Though attempts were made by the learned Counsel for the parties to distinguish the two sets of decisions based upon the fact situations in the present matters, the conflict, according to us, will still persist. Since such issues recur, we feel that these Appeals can be more advantageously heard by a Bench of more than two Judges, so that, this conflict between the two sets of decisions, is resolved by authoritative pronouncement of the Full Bench.

8. Besides, we find that in the first set of decisions, relied upon by Mr. Rivankar while the entire emphasis is upon the proper form of the notice and inference of non-application of mind and failure to observe natural justice, there is no discussion on the aspect of 'prejudice' which a party is expected to

demonstrate in a case where the complaint is of 'inadequate notice', as opposed to a case of 'no notice'.

9. In State Bank of Patiala and others vs. S.K. Sharma, the Hon'ble Supreme Court has held that it would not be correct to say that for any and every violation of a facet of natural justice or of a rule incorporating such facet, the order passed is altogether void and ought to be set aside without further inquiry. The approach and test adopted in Managing Director, ECIL vs. B. Karunakar7 should govern all cases where the complaint is not that there was no hearing (no notice, no opportunity and no hearing), but one of not affording a proper hearing (i.e. adequate or full hearing) or of violation of a procedural rule or requirement governing the enquiry; the complaint should be examined on the touchstone of prejudice. The test is: 'all things taken together whether the delinquent officer/employee had or did not have a fair hearing'.

10. The aforesaid is relevant because, Ms Razaq has pointed out that in the present matters the assessment order under Section 143(3) of the IT Act or the order under Section 153C of the IT Act had recorded satisfaction for initiation of penalty proceedings on the relevant grounds and there was no ambiguity as such involved. She pointed out that at no stage until the additional question of law was framed in these matters, the Assessee had even pleaded or demonstrated any prejudice. She pointed out that in fact, the Assessee having understood clearly that the penalty proceedings were initiated on the grounds reflected in the assessment order under Section 143(3) or the order made under Section 153C of the IT Act, had submitted their necessary responses in the matter. One of the Assessees had also urged 'lenient treatment'. All these aspects have not been considered in the first set of decisions relied upon by Mr. Rivankar. There is, however, reference to these aspects in Kaushalya (supra), relied upon by Ms Razaq.

11. According to us, the issue which arises can be more advantageously decided by the Full Bench, now that we notice the conflict between the decisions relied upon Mr. Rivankar and the decision in Kaushalya (supra), not to mention the absence of discussion on the aspect of 'prejudice' in the decision relied upon by Mr. Rivankar.

12. Chapter I, Rule 8 of the Bombay High Court Appellate Side Rules, 1960 provides that if it shall appear to any Judge, either on the application of a party or otherwise, that an appeal or matter can be more advantageously heard by a Bench of two

> or more Judges, he may report to that effect to the Chief Justice who shall make such order thereon as he shall think fit.
>
> 13. According to us, the following question can be more advantageously considered by a Bench of more than two Judges, taking into consideration the conflicting decisions as aforesaid, as well as absence of any discussion on the aspect of 'prejudice' in the set of decisions relied up by Mr. Rivonkar :-
>
> **When in the assessment order or the order made under Sections 143(3) and 153C of the IT Act, the Assessing Officer has clearly recorded satisfaction for imposition of penalty on one or the other, or both grounds mentioned in Section 271(1)(c), whether a mere defect in the notice of not striking out the relevant words, would vitiate the penalty proceedings** ?
>
> 14. **The Full Bench, in the context of the aforesaid question can then, perhaps examine the conflict between the decisions in Goa Dourado Promotions (supra) and Kaushalya (supra). The Full Bench can as well consider the impact of non-discussion on the aspect of 'prejudice' in the decisions relied upon by Mr. Rivonkar, which includes the decision in Goa Dourado Promotions (supra), in the light of the decision of the Hon'ble Supreme Court in State Bank of Patiala (supra). The Full Bench can also consider the effect of the decision of the Hon'ble Supreme Court in case of Dilip N. Shroff vs. Joint Commissioner of Income-Tax and another on the issue of non-application of mind where the relevant portions of the printed notices are not struck off.**
>
> 15. The Registry is, therefore, directed to place these matters before the Hon'ble Chief Justice in order to obtain orders in terms of Chapter I, Rule 8 of the Bombay High Court Appellate Side Rules, 1960."

53. Having noted the referral order, the decision of the Full Bench would be required to be considered as to the view, which was taken by the Full Bench.

54. The Full Bench framed an issue as to whether the assessment order clearly recorded satisfaction for imposition of penalty on one or the other, or both limbs mentioned in Section 271(1)(c) and whether a mere defect in the

notice not striking off the relevant matter would vitiate the penalty proceedings.

55. The question before the Full Bench had arisen in view of the prior decision of the Division Bench in *Kaushalya* (supra), wherein the Division Bench of this Court was considering the challenge to an order imposing penalty. The Division Bench in *Kaushalya* (supra) in considering the plea that the notice issued to the assessee was defective, also considered the issue as to whether for accepting such a plea, the assessee was required to satisfy the test of any prejudice caused to the assesse, as in the absence of any prejudice, curing the defect of natural justice would not bring about any solution. In such context, the Division Bench in *Kaushalya* (supra) observed thus:-

> **56.** "… The assessment orders were already made and the reasons for issuing the notice under section 274 read with section 271(1)(c) were recorded by the Income-tax Officer. The assessee fully knew in detail the exact charge of the Department against him. In this background, it could not be said that ether there was non-application of mind by the Income-tax Officer or the so called ambiguous wording in the notice impaired or prejudiced the right of the assessee to reasonable opportunity of being heard. After all, section 274 or any other provision in the Act or the Rules, does not either mandate the giving of notice or its issuance in a particular form. Penalty proceedings are quasi-criminal in nature. Section 274 contains the principle of natural justice of the assessee being heard before levying penalty. Rules of natural justice cannot be imprisoned in any straight-jacket formula. For sustaining a complaint of failure of the principles of natural justice on the ground of absence of opportunity, it has to be established that prejudice is caused to the concerned person by the procedure followed. The issuance of notice is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done. Mere mistake in the language used or mere non-striking of the

> inaccurate portion cannot by itself invalidate the notice. The entire factual background would fall for consideration in the matter and no one aspect would be decisive. In this context, useful reference may be made to the following observation in the case of *CIT v. Mithila Motors (P.) Ltd. [1984] 149* ITR 751.
>
> **57.** … … ..
>
> **58.** No doubt, there an exist a case where vagueness and ambiguity in the notice can demonstrate non-application of mind by the authority and or ultimate prejudice to the right of opportunity of hearing contemplated under section 274. Take for example, the notice dated March 29, 1972, for the assessment year 1967-68. This show-cause notice was issued even before the assessment order was made. The assessee had no knowledge of exact charge of the Department against him. In the notice, not only there is use of the word "or" between the two groups of charges but there is use of the word "deliberately". The word "deliberately" did not exist in section 271(1)(c) when the notice was issued. It is worthwhile recalling that the said word was omitted by the Finance Act,1964, with effect from April 1, 1964, and the Explanation was added. The notice clearly demonstrated non-application of mind on the part of the Inspecting Assistant Commissioner. The vagueness and ambiguity in the notice had also prejudiced the right of reasonable opportunity of the assessee since he did not know what exact charges he had to face. In this background, quashing of the penalty proceedings for the assessment year 1967-68 seems to be fully justified."

59. The decisions rendered in **Principal Commissioner of Income-tax (Central), Bengaluru vs. Goa Coastal Resorts and Recreation (P.) Ltd.** (supra) and **Principal Commissioner of Income-tax, Panaji vs. Goa Dourado Promotions (P.) Ltd.** and some of the other decision as relied by Ms. Vissanji, did not consider the issue of prejudice, which was the subject matter of consideration in *Kaushalya* (supra). The Court in such cases had simplicitor considered an issue in regard to the defect in the notice to hold that once the

nature of notice itself is defective, then the situation is required to be remedied and penalty order on such defective notice cannot stand. However, in all the said decisions an issue in regard to prejudice was not placed for consideration of the Court, on the touchstone of the well settled principles of prejudice which would be applicable in given circumstances and as applied in the case of Kaushalya. It is this cleavage of opinion led the Division Bench of this Court at Goa in *Mohd. Farhan A. Shaik* to record such dichotomy and refer the question to be considered by the Full Bench, as noted by us in the referral order (supra).

60. It is in such context, the Full Bench considered the issues in this regard namely the issues falling on the line of reasoning in *Principal Commissioner of Income-tax (Central), Bengaluru vs. Goa Coastal Resorts and Recreation (P.) Ltd.* (supra), which did not consider the issue of prejudice and on the other hand, the decision rendered in *Kaushalya*. The Full Bench framed two questions which *inter alia* are **(i)** If the assessment order clearly records satisfaction for imposing penalty on one or other, or both grounds mentioned in Section 271(1)(c), will a mere defect in notice not striking off the irrelevant matter vitiated penalty proceedings; and **(ii)** Has Kaushalya failed to discuss the aspect of 'prejudice'? The Full Bench answered these questions *inter alia* observing that in so far as the view taken in *Principal Commissioner of*

Income-tax (Central), Bengaluru vs. Goa Coastal Resorts and Recreation (P.) Ltd. (supra) and other similar orders were concerned, the same is required to be considered to be more acceptable, as it is beneficial to the assessee. We may observe that *per se* the test of prejudice ought not to be applied in the manner as may be applicable in the facts of the present case, is not what has been disapproved by the Full Bench. The Full Bench cannot be read so as to construe that the test of prejudice in the given facts or a waiver as acquiescence would not be applicable, in considering any challenge to the orders imposing penalty. In other words, the Full Bench does not hold that the principles of law as laid down by the Supreme Court on prejudice are *per se* not applicable, when a complaint of breach of principles of natural justice is made in assailing an order imposing penalty. It also does not consider as to what can the fate of such plea if it is belatedly raised for the first time after a prolonged delay like in the present case. As to what has been observed by the Full Bench in this context can be noted which read thus:-

> "Answers:
>
> > Question No. 1 : If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice—not striking off the irrelevant matter—vitiate the penalty proceedings?
> >
> > 181. It does. The primary burden lies on the Revenue. In the assessment proceedings, it forms an opinion, *prima facie* or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice

under section 271(1)(c), read with section 274 of IT Act. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness.

182. More particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour.

183. Therefore, we answer the first question to the effect that Goa Dourado Promotions and other cases have adopted an approach more in consonance with the statutory scheme. That means we must hold that Kaushalya does not lay down the correct proposition of law.

Question No. 2: Has Kaushalya failed to discuss the aspect of 'prejudice'?

184. Indeed, *Smt. Kaushalya* case (supra) did discuss the aspect of prejudice. As we have already noted, Kaushalya noted that the assessment orders already contained the reasons why penalty should be initiated. So, the assessee, stresses Kaushalya, "fully knew in detail the exact charge of the Revenue against him". For Kaushalya, the statutory notice suffered from neither non-application of mind nor any prejudice. According to it, "the so called ambiguous wording in the notice [has not] impaired or prejudiced the right of the assessee to a reasonable opportunity of being heard". It went onto observe that for sustaining the plea of natural justice on the ground of absence of opportunity, "it has to be established that prejudice is caused to the concerned person by the procedure followed". *Smt. Kaushalya* case (supra) closes the discussion by observing that the notice issuing "is an administrative device for informing the assessee about the proposal to levy penalty in order to enable him to explain as to why it should not be done".

185. No doubt, there can exist a case where vagueness and ambiguity in the notice can demonstrate non-application of mind by the authority and/or ultimate prejudice to the right of opportunity of hearing contemplated under section 274. So asserts *Smt. Kaushalya* case (supra). …..

> 189. In Sudhir Kumar Singh, the Supreme Court has encapsulated the principles of prejudice. One of the principles is that "where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, "except in the case of mandatory provision of law which is conceived not only in individual interest but also in the public interest"."

61. In view of the above discussion, we are not persuaded to accept the contentions as urged by Ms. Vissanji that in the facts of the present case, merely because **Ventura Textiles Ltd.** (supra) and the other decisions as referred by her, would observe that in the facts of such cases, the Assessing Officer did not put the tick mark on the order issued under Section 271(1)(c) of the IT Act, indicating as to which limb of the provisions was attracted, the penalty proceedings would not stand vitiated in the present case.

62. On the contrary, we find much substance in the contention as urged by Mr. Devvrat Singh that it was imperative for the assessee to make out a case of prejudice which neither at the threshold before the authorities below nor in the present proceedings, was ever canvassed. It is difficult to accept the assessee's contention of the penalty proceedings being rendered invalid for want of a defective notice in the absence of the basic and fundamental supporting facts of such case, either being urged by the assessee or if not so urged, by satisfying the Court in regard to the prejudice. In fact, there is no

case on prejudice which is sought to be urged before us. Even considering the arguments as advanced by Mr. Agrawal, the learned amicus, even assuming that the provisions are fundamental in nature and mandatory, it is not the case that no notice was served on the assessee. Moreover, this is a case where notice was served on the assessee which was understood by the assessee in the perspective it was issued, that both the limbs had stood attracted; and it was accordingly contested/ responded by the assessee. If this be the case, any artificial and/or superfluous introduction of a plea of natural justice or a defective notice, certainly would not be an acceptable plea. In the facts of the case, it can certainly be said that it is not a case of any real prejudice or a case of the breach of principles of natural justice, but a borrowed plea of natural justice. The decision of the Full Bench in **Mohd. Farhan A. Shaik** cannot be read to mean that it does not recognize the principles of law as laid down by the Supreme Court that in accepting any plea of breach of principles of natural justice, such plea would be required to be tested on the aspect of prejudice. The law as laid down by the Supreme Court is law of the land and it is binding on all Courts. In this view of the matter, it would be unfounded for the assessee in the facts of the present case to contend that the test of prejudice was not attracted.

63. Even to consider such a plea as raised by the assessee, as a plea of jurisdiction, an anomalous situation is created, in as much as the assessee in a

quasi judicial adjudication without raising any grievance in regard to any defect in the notice acquiesced in the jurisdiction of the Assessing Officer in responding to the notice on on all his pleas, in regard to penalty proposed to be imposed on him under Section 271 (1)(c) of the Income Tax Act. Once having accepted the notice and having participated in the proceedings thereby submitting to the jurisdiction of the Assessing Officer, considering the settled principles of law, the assessee cannot take a position that there is a jurisdictional defect in the Assessing Officer proceeding to adjudicate the penalty-notice, by alleging defect in the notice. Even assuming that defect in the notice has adversely affected the interest of the noticee, the manner in which the interest is adversely affected and/or the nature of the prejudice caused to him, is required to be raised / set out with utmost promptness and/or at the first available opportunity. Certainly such grievance cannot be raised after long years that is after 23 years, to be a new invention, after the Assessing Officer had decided the issue. The plea of defect in the notice, cannot be an empty plea. Such plea can be accepted only when a demonstrable prejudice, was to be set out by the assessee, which would go to the root of the adjudication. If there is nothing on prejudice being pointed out to the Court except for bald plea of defect in the notice, in our opinion, such plea as made by the assessee cannot be accepted, so as to derail and/or render nugatory, the adjudication proceeding

before the Assessing Officer and further adjudication proceeding before the (CIT) and the Tribunal, where the assessee had not even imagined that a plea on the defect in the notice was required to be taken. It is an elementary rule that a litigant cannot be permitted to assume inconsistent positions and to the detriment of the opposite party. If the party has taken up a particular position not only at the early stage of the proceedings but even before the appellate forums, it is not open to a party to appropriate and reprobate and resile from such position. When a question of fact namely whether a prejudice was at all caused, was not raised before the forums below, the parties were estopped from urging it before the appellate forum. Even otherwise and considering the well settled position in law, even a legal right which may accrue to a party can be waived. Such party would be later on estopped / precluded from raising any question on a breach of a right which stood waived.

64. We are of the opinion that the Full Bench in answering the above questions, however, would not assist the assessee to contend that the settled principles of law as laid down by the Supreme Court in regard to the test of prejudice being made applicable, is inapplicable in the facts of the present case.

65. It is abundantly clear from the principles of law as laid down by the Supreme Court as noted above, that a technical plea of breach of principles of natural justice cannot be taken, unless a case of prejudice has been made out,

and if no case of prejudice is made out, certainly a plea of breach of principles of natural justice would be a hollow plea or a plea in futility. This for the reason, that a person complaining of breach of principles of natural justice needs to show that curing such breach, would culminate the proceedings with a different consequence favourable to the assessee. It is only after considering such pleas, it would be a fair decision, rendering justice to the complainant. In our opinion, this would be the logical conclusion of a plea on breach of principles of natural justice and the test of prejudice which is being sought to be applied in dealing with such complaints. The Full Bench does not lay down that the test of prejudice is not attracted when it comes to any complaint of breach of principles of natural justice on issues arising under Section 271(1)(c) of the IT Act. The Full Bench also does not consider as to whether at such a belated stage as in the present case, that is after 23 years of after the Assessing Officer had decided the issue, a plea of defect in the notice can be permitted to be raised. The Full Bench only questions the correctness of Kaushalya when it says that the assessment orders would provide sufficient reasons so as to substitute the defective notice. This is not the same as saying that, in the event a notice issued by the Assessing Officer within his jurisdiction having been accepted by the assessee, and/or never complained of, by applying the principles of law as laid down by the Supreme Court, the assessee can get away

on technical infringement of natural justice. This would be opposed to the principles of law as laid down by the Supreme Court in **Natwar Singh vs. Director of Enforcement & Anr.** (supra), wherein the Supreme Court has observed that there can never be a technical plea of breach of principles of natural justice and plea would be a realistic plea which can be proved on the principle of prejudice.

66. In the decisions of the Division Bench as referred by the Full Bench, in the facts of each of these cases, it was held that the Assessing Officer failing to tick mark the limb of Section 271(1)(c) of the IT Act being attracted, the penalty proceedings stood vitiated however, as observed by the Division Bench in its referral order dated 28 February, 2020 in **Mohd. Farhan A. Shaik** (supra) in none of these decisions, except in Kaushalya, the test of prejudice was applied.

67. We may also refer to the decision of the Division Bench of the Madras High Court in **Sundaram Finance Ltd. vs. Assistant Commissioner of Income-tax, Co. Circle VI(4), Chennai**[38] in which interpreting the provisions of Section 271(1)(c) read with provisions of Section 274, the Court observed that in the facts of the case, the assessee's objection in regard to any defect in the notice could not be entertained in the appeal, as such an objection, can never be a

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question of law in the assessee's case, as it was purely a question of fact. It was observed that the assessee at no earlier point of time had raised a plea that on account of a defect in the notice, that the assessee was put to any prejudice. The Court observed that such violation will not result in nullifying the orders passed by statutory authorities. It was observed that if the case of the assessee is that the assessee was put to a prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. It was observed that on facts, the Court could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee "clearly understood" what was the purport and import of notice issued under section 274 read with Section 271 of the Act. The principles of natural justice cannot be read in abstract. The relevant observations of the Court are required to be noted, which reads thus:

> "16. We have perused the notices and we find that the relevant columns have been marked, more particularly, when the case against the assessee is that they have concealed particulars of income and furnished inaccurate particulars of income. Therefore, the contention raised by the assessee is liable to be rejected on facts. That apart, this issue can never be a question of law in the assessee's case, as it is purely a question of fact. Apart from that, the assessee had at no earlier point of time raised a plea that on account of a defect in the notice, they were put to prejudice. All violations will not result in nullifying the orders passed by statutory authorities. If the case of the assessee is that they have been put to prejudice and principles of natural justice were violated on account of not being able to submit an effective reply, it would be a different matter. This was never the plea of the assessee either before the Assessing Officer or before the First Appellate Authority or before the Tribunal or

> before this Court when the Tax Case Appeals were filed and it was only after 10 years when the appeals were listed for final hearing, this issue is sought to be raised. Thus on facts, we could safely conclude that even assuming that there was defect in the notice, it had caused no prejudice to the assessee and the assessee clearly understood what was the purport and import of notice issued under section 274 read with Section 271 of the Act. Therefore, principles of natural justice cannot be read in abstract and the assessee, being a limited company, having wide network in various financial services, should definitely be precluded from raising such a plea at this belated stage."

68. We may observe that although there are other decisions which are cited on behalf of the parties, we do not intend to burden this judgment as the principles of law as discussed in the said judgments are well settled. However, considering the view which we have taken and more particularly the principles of prejudice to be satisfied in making a grievance on breach of principles of natural justice even in the context of a defective notice being well settled, as laid down in the decisions of the Supreme Court as noted by us above, we do not discuss these decisions to avoid prolix.

69. In the light of the above discussion, we reject the contention as urged on behalf of the assessee that the proceedings would stand covered by the decision of this Court in **Ventura Textiles Ltd. vs. Commissioner of Income-tax** (supra). To answer the question of law as initially framed, the proceedings would be required to be heard by the regular Court.

70. At the parting, we may observe that the observations as made by us in the present order are in the context of deciding the issue as discussed by us. All contentions of the parties on the appeal are expressly kept open.

(JITENDRA JAIN, J.) (G. S. KULKARNI , J.)