GAHC010130862017

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3333/2017

M/S. NEW TECH STEEL and ALLOYS PVT. LTD.
A PRIVATE LIMITED COMPANY WITHIN THE MEANING OF THE COMPANIES ACT, 1956, AND HAVING ITS REGISTERED OFFICE SITUATED AT N.H. 39, NEAR CRPF GROUP CENTER, KHATKHATI, ASSAM, IN THE DISTRICT OF KARBI ANGLONG, REP. BY SRI SURESH SHARMA, ONE OF THE DIRECTORS OF THE COMPANY.

VERSUS

THE STATE OF ASSAM and 2 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE DEPARTMENT OF FINANCE, GOVTOF ASSAM, DISPUR, GUWAHATI - 781006, DIST. KAMRUP M, ASSAM

2:THE COMMISSIONER OF TAXES

ASSAM
KAR BHAWAN
DISPUR
GUWAHATI - 781006
ASSAM

3:THE DEPUTY COMMISISONER OF TAXES

NAGAON ZONE
NAGAON
ASSA

Advocate for the Petitioner : MS.N BORDOLOI

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE SOUMITRA SAIKIA

JUDGMENT & ORDER(CAV)

Date : 26-02-2021

1. WP(C)/3056/2017 has been filed by the petitioner-company assailing the assessment order dated 20-07-2013 passed by the respondent no. 3 assessing that the petitioner to be liable to pay the taxes assessed and interest of Rs. 10,01,015/- (Rupees Ten Lakhs One Thousand Fifteen) only as Tax due, interest payable Rs. 4,43,719/- (Rupees Four Lakhs Forty Three Thousand Seven Hundred Nineteen), penalty of Rs. 5,00,000/- (Rupees Five Lakh) only under section 90 and Rs. 1,00,000/- (Rupees One Lakh) and only under section 62(3) of the AVAT Act 2003 for the assessment year 2010-11 and the Demand Notice dated 30.07.2013 issued seeking to recover the amounts assessed.

WP(C)/3333/2017 has also been filed by the petitioner-company assailing the assessment order dated 20-07-2013 passed by the respondent no. 3 under section 9(2) of the Central Sales Tax Act, 1956 read with section 37 of the Assam Value Added Tax Act, 2003 in respect of quarterly turn over/return filed by the petitioner showing an amount of Rs. 3,52,41,153/- (Rupees Three Crore Fifty Two Lakhs Forty One Thousand One Hundred Fifty Three only) whereby an amount of Rs. 6,31,016/- (Rupees Six Lahks Thirty One Thousand Sixteen only) was assessed as tax due and interest payable. The demand Notice dated 30-07-2013 raising a demand of Rs. Rs. 6,31,016/- (Rupees Six Lahks Thirty One Thousand Sixteen only) pursuant to the said assessment order passed by the respondent no. 3 has also been assailed by the petitioner.

Since both the writ petitions were filed by the same petitioner being aggrieved by the same respondent authority namely, respondent no. 3 and since the grounds of challenge in both the writ petitions are common namely, violation of Principles of Natural Justice because of non-issuance of proper Notice by the respondent Department prior to completion of assessments order, both the writ petitions were taken up for hearing together and are disposed of by a common order.

2. By notification dated 12-05-2009 the Government of Assam announced the Industrial and Investment Policy of Assam, 2008 (hereinafter referred to as the Policy of 2008) granting exemption from payment of sales tax to New Industrial Units set up on or after 01.10.2008 and also existing industrial units undertaking expansion, modernization and diversification. The exemption was granted for a period of 7(seven) years. The period of validity of the said Policy was for a period of 5(five) years w.e.f. 01.10.2008 to 30.09.2013. In order to give effect to the Policy of 2008, a Scheme, namely, the Assam Industries (Tax Remission) Scheme, 2009 (hereinafter referred to as the Scheme of 2009) was published vide Notification No. FTX.66/2009/2 dated 03.11.2009.

3. Being bolstered by the exemptions announced in the Industrial Policy of Assam, 2008 by the Government of Assam, the petitioner-company established its factory at N.H.39, near CRPF Group Centre, Khatkhati, Assam in the district of Karbi Anglong for manufacturing of MS Ingots and TMT Bars.

4. The petitioner-company being a new unit with State of Assam, applied for and was granted an Eligibility Certificate as well as a Certificate of Entitlement for claiming incentives and exemptions under the Policy of 2008 and the Scheme of 2009 respectively. The Eligibility Certificate and the Certificate of Entitlement was granted to the petitioner on 26.08.2013 and 25.10.2013 respectively.

5. For the assessment year 2010-11, the petitioner submitted its annual returns. It is contended that the returns filed were duly accompanied by the audited balance sheet for the assessment year 2010-11. It is contended that the petitioner's case was selected for Audit Assessments by the Department. Pursuant to the Notice received from the Department, the petitioner informed the Department that it was granted the Eligibility Certificate and the Certificate of Entitlement under the Policy of 2008 and the Scheme of 2009 respectively. However, since the same was not handed over to the petitioner-Company by the concerned Government Officials/Department the petitioner verbally sought for time to produce the same. According to the petitioner, without granting adequate opportunity to the petitioner to submit the necessary documents, namely, the Eligibility Certificate and the Certificate of Entitlement, the respondent No.

3 proceeded with the assessment and thereafter passed the impugned order dated 20.07.2013 and raised the demand of Rs. 10,01,015/- (Rupees Ten Lakhs One Thousand Fifteen) only as Tax due, interest payable Rs. 4,43,719/- (Rupees Four Lakhs Forty Three Thousand Seven Hundred Nineteen), penalty of Rs. 5,00,000/- (Rupees Five Lakh) only under section 90 and Rs. 1,00,000/- (Rupees One Lakh) and only under section 62(3) of the AVAT Act 2003 vide Demand Notice dated 30.07.2013. Being aggrieved the petitioner has assailed the order of the assessment and Demand Notice by way of WP(C)/3056/2017.

The petitioner also submitted quarterly returns under Central Sales Tax Act showing a turnover of Rs. 3,52,41,153/- (Rupees Three Crore Fifty Two Lakhs Forty One Thousand One Hundred Fifty Three only). However, the respondent no. 3 by the impugned assessment order dated 20-07-2013 summarily assessed tax due and interest payable without the benefit of concessional rates of taxes claimed by the petitioner. Being aggrieved the action of the Department has been assailed by WP(C)/3333/2017.

6. The learned counsel for the petitioner contends that the Department acted in an arbitrary manner, inasmuch as, the respondent finance and taxation Department was a constituent of the State Level Committee constituted by the Government to consider and grant of Eligibility Certificate and the Certificate Entitlement under the Policy of 2008 and the Scheme of 2009 respectively. It is the contention of the petitioner that the Finance and Taxation Department being a constituent of the State Level Committee was well aware that the petitioner-Company had been granted the Eligibility Certificate and the Certificate of Entitlement. As such, the impugned order dated 20.07.2013 and the consequential demand raised vide Demand Notice dated 30.07.2013 ought not to have been passed by the Department that too without affording adequate opportunity to the petitioner to present the copies of the Eligibility Certificate and the Certificate of Entitlement is arbitrary. Such high handedness of the respondent authority is illegal and contrary to the provisions of the AVAT Act, 2003, the Policy of 2008 and the Scheme of 2009 and, therefore, the same should be interfered with, set aside and quashed.

7. The further case of the petitioner is that although a Notice dated 21.04.2012 was issued under the provisions of Section 36 of the AVAT Act, however, the impugned order was passed under Section 37 of the AVAT Act, 2003. As no Notice as required under section 37 of the AVAT Act 2003 and/or under the provisions of Central Excise Act, was served upon the petitioner adequate opportunity was denied to the petitioner to represent its case before the departmental authority before impugned order was passed. As such the same being in violation of the Principles of Natural Justice, the impugned order and the consequently demands raised is bad in law and therefore the same should be set aside and quashed. In support of the contentions raised, the learned counsel for the petitioner has relied upon the following judgments:-

(i) 1995 (99) STC 501 *Gau - Superwhite Industries –Vs- State of Assam and Ors*.

(ii) 1990 78 STC 393 Gau - *Dwijendra Kumar Bhattacharjee –vs- Superintendent of Taxes.*

(iii) MANU/JH/0352/2018 – *Shiva Stone Chips –Vs- State of Jharkhand and Ors*.

(iv) Manu/SC/0314/2017 – *Larsen & Toubro Ltd. –Vs- State of Jharkhand and Ors.*

8. The Department contested the case by filing an affidavit in WP(C) No. 3056/2017. The departmental counsel craved leave of this Court to rely upon the same for the purposes the connected writ petition being WP(C) No. 3333/2017 also. The Department in their affidavit submitted that in spite of notices being issued by the Department there was no compliance by the petitioner in respect of the statutory requirements. The Department contended that the Eligibility Certificate dated 26.08.2013 was issued only after the assessment order dated 20.07.2013 was passed. Therefore, in the absence of compliance of the notice to appear by the petitioner-Company and the fulfilment of the statutory requirements, there was no option left to the Department but to proceed with the assessments which were completed vide order dated 20.07.2013. The Department contended that there was complete non-

cooperation from the petitioner in spite of Notices being issued and opportunities being granted by the Department. According to the Department, the petitioner also did not exercise the option of offering the Bank Guarantee for exercising the Exemption/Remission before the issuance of the Eligibility Certificate and the Certificate of Entitlement which is the mandatory requirement as per the Scheme of 2009. The Department, accordingly, submits that there being an alternative and efficacious statutory remedy of appeal being available to the petitioner under the statute, Writ Court may not interfere with the Assessment Order passed in the facts of the present case.

9. The learned standing counsel representing the Department of Finance and Taxation in support of his contentions that the petitioner having been issued notices in respect of the assessments proposed to be made under section 36 of the AVAT Act, 2003 cannot complain of violation of Principle of Natural Justice and in support of his contentions relies upon the Judgment of the Supreme Court in the case of *Dharampal Satyapal Limited –Vs- Deputy Commissioner of Central Excise, Guwahati and Ors*. reported in *(2015) 8 SCC 519.*

10. I have heard the learned counsels for the parties and have also perused the pleadings available on record. The primary grievance of the petitioner is that the petitioner had applied for and was granted Eligibility Certificate dated 26-08-2013 by the Assam Industrial Development Corporation under which the petitioner was entitled for claiming incentives under the Industrial Policy of Assam 2008 and for claiming exemption of tax under the Assam Industries (Tax Exemption) Scheme 2009. The incentives approved are '*VAT Exemption'* with effect from 12-07-2010 to 11-07-2017 (07 years) subject to maximum of 100% of fixed capital investment i.e. Rs 9,89,04,734/- (Rupees Nine Crore Eighty Nine Lakhs four Thousand Seven Hundred Thirty Four) only and power subsidy with effect from 12-07-2010 to 11-07-2015 for five (five) years. The petitioner was also granted entitlement certificate dated 25-10-2013 by the Commissioner of Taxes whereby the petitioner was entitled for exemption of Rs 9,89,04,734/- (Rupees Nine Crore Eighty Nine Lakhs four Thousand Seven

Hundred Thirty Four) only from the period with effect from 12-07-2010 to 11-07-2017 in respect of the finished products namely, 'M/s Ingots and TMT Bars'. It is the pleaded case of the petitioner that annual returns dated 10-04-2012 for the Assessment year 2010-11 were duly filed before the authorities. In the said returns refund of taxes paid to the extent of Rs. 12,76,901/- (Rupees twelve lakh seventy six thousand nine hundred one) only was also claimed by the petitioner.

11. The petitioner's case was selected for Audit Assessment under section 36 of the Assam Value Added Tax Act, 2003 and Notice dated 21-04-2012 was duly issued by the respondents department directing the petitioner to appear before the authorities and to produce books of accounts and other evidences in support of the return filed. Subsequently, on 16-11-2012 another notice was issued directing the petitioner to appear before the authorities. According to the petitioner its authorised representative duly appeared before the authority and verbally submitted that it had been granted exemption under the Industrial Policy and also under the Scheme of 2009, however, the necessary certificates have not yet been received from the issuing authority and therefore further time be granted to the petitioner to produce the exemption certificates. The department thereafter issued Notices for imposition of penalty as there was no compliance of the petitioner in respect of its statutory compliance and in respect of which earlier Notices were issued. Thereafter, vide order dated 20-07-2013 impugned in the present proceeding, the department summarily completed the assessments pending against the petitioner under section 37 of the AVAT Act, 2003. For the assessment year 2010-11, the department raised a demand of Rs. 10,01,015/- (Rupees Ten Lakhs One Thousand Fifteen) only as Tax due, interest payable Rs. 4,43,719/- (Rs. Four Lakhs Forty Three Thousand Seven Hundred Nineteen), penalty of Rs. 5,00,000/- (Rupees Five Lakh) only under section 90 and Rs. 1,00,000/- (Rupees One Lakh) and only under section 62(3) of the AVAT Act 2003 for the assessment year 2010-11. The demand of Taxes and Penalty was raised in terms of the assessments completed by the demand notice dated 30-07-2013. Accordingly the said assessment order dated 20-07-2013 and demand notice dated 30-07-2013 have been assailed in the present proceeding. Pursuant to the issuance of the impugned order dated 20-07-

2013, the petitioner by communication dated 28-01-2014 represented before the respected authority requesting for passing an order for reassessment of their tax liability, which however, had remained un-disposed.

The petitioner also filed returns under Central Sales Tax 1956. Both the cases were pending before the same authority and were taken up for hearing on the same dates. Although Notices dated 21-04-2012 and 16-11-2012 were issued by the Department in respect of the assessments under AVAT Act, since both the proceedings were taken up by the same authority and against the same petitioner, no separate Notice was issued in respect of Assessments under Central Sales Tax.

12. The short case projected by the petitioner is that the assessments completed by the department under section 37 of the AVAT Act, 2003 is hit by the Principle of violation of Natural Justice inasmuch as, the Notice contemplated under section 37 prior to completion of the Best Judgment' assessment by the Assessing Authority was not issued. The petitioner therefore submits that the impugned order dated 20-07-2013 along with the demand Notice dated 30-07-2013 be set aside and quashed. It is however seen from the pleadings that the only ground the petitioner has taken to assail the correctness of the impugned order and demand raised by the department is the violation of Principles of Natural Justice. It is also seen that the petitioner has not assailed audit assessment made under section 36 of the AVAT Act. It is also not denied by the writ petitioner notices as contemplated under section 36 had been issued by the department and duly received by them. The contention of the petitioner that they had appeared before the authority and verbally requested them to await for the Eligibility and Entitlement Certificates yet to be received by the petitioner at the relevant point of time and thereafter, proceed with the assessments, is disputed by the department.

13. Under the circumstances, in respect of the non-issuance of Notice by the department as required under section 37 of the before the proceeding 'Best Judgment Assessment', the petitioner has not been able to demonstrate as to how it has been prejudiced by the non-issuance of Notice under section 37 to render entire proceedings illegal, inasmuch as, the petitioner admitted to the receipt of Notice under section 36 as well as show causes prior to issuance of penalty. As such, it is not denied by the

petitioner that it was not aware of the Audit Assessments pending before the department. As it is seen from the pleadings that the petitioner has received Eligibility Certificate on 26-08-2013 and entitlement certificate on 25-10-2013, i.e. well after the impugned order being passed in any event the petitioner could not have submitted the said certificate prior to passing of the impugned order. As such, non issuance of Notice contemplated under section 37 of the AVAT Act, 2003 in the facts of the present case did not cause the petitioner any prejudice to render on that count alone, the impugned order declared to be illegal as the petitioner was served notice under section 36 at an earlier point of time.

14. It is also seen from the pleadings that there is no challenge to the impugned order on any other grounds other than violation of Principle of Natural Justice. While there is no quarrel with the proposition that the Principle of Natural Justice is required to adhered to, however, the party claiming to be affected by any violation of such principle must necessarily demonstrate the prejudice caused to it by non-issuance of any such notice. In the facts of the present case, the petitioner was well aware that audit assessment for the relevant assessment year is being proceeded with by the department however, in view of the alleged non-cooperation from the petitioner in respect of furnishing of necessary books of accounts/evidences, which is reflected in the recital of the impugned order, the department closed the assessments by resorting to "Best Judgment" assessment under section 37 of the AVAT Act. It is also seen from the provisions of the AVAT Act, 2003 that there is a limitation statutorily provided under section 39 of the Act in respect of Assessments required to be made. Under section 39 of the Act, it is provided that no assessments under the forgoing provisions of the Act shall be made after expiry of five (5) years from the end of which the assessment relates. The Taxation Authorities designated under the provisions of the AVAT Act, are required to statutorily perform their duties prescribed. When the Officer of the department undertakes assessment proceedings, the assessment will have to be completed within the time limit specified. When the petitioner's case was selected for audit assessment and Notices for the same were duly served upon the petitioner, if the petitioner fails to appear and cooperate with the department or resiles from the

commitment earlier made to appear before the authorities and support its returns filed by proper evidence/books of account etc., the Departmental Authorities are required to proceed in terms of the mandate of the Act. From the pleadings it is seen that for the non-cooperation of the petitioner and/or failure of the petitioner as per its commitment to appear before the authority and furnish necessary evidences/books of accounts, the department proceeded to complete the assessment as per '*Best Judgment'* of the assessing officer, in terms of section 37. Under such circumstances, as discussed above, the non issuance of prior Notice before completing the assessment under section 37 cannot be treated to be sufficient alone to interfere with the orders and demands Notices impugned in the absence of manifest prejudice shown to have been suffered by the petitioner more particularly, when it is the petitioner's pleaded case that the concerned exemption certificate and the certificate of entitlement was received by the petitioner well after the assessment orders passed.

15. It is also seen that there are adequate efficacious remedy available under AVAT Act, 2003 to address the grievances of the petitioner-Company without taking recourse to the remedies provided under Article 226. Although, alternative remedy is not an absolute bar, keeping in view that the petitioner had failed to respond the statutory notices and also as the writ petition seeking quashment of the impugned orders was filed after 3(three) years without justifying the delay, this Court is not persuaded to entertain the prayers made and the reliefs sought for by the writ petitioner under present circumstances.

16. At this stage the judgments relied upon by the learned counsel for the petitioner need to be referred to. The learned counsel for the petitioner referred to the judgment of *Superwhite Industries (Supra*) to support the contention that question of exemption which required to be decided first before taking up assessment. There is no quarrel with the proposition, however in the facts of the present case it is seen from the pleadings that prior to the order of assessment being passed which is impugned in the writ petition i.e. WP(C)/2007/2013, the exemption certificates were admittedly not received by the writ petitioner. Therefore, it cannot be said that the question of exemption could have been decided prior to assessment order being passed inasmuch

as, it was the duty of the petitioner to respond to the Notice issued by the Department and adequately address upon the question of exemptions granted to it before the Departmental Authorities. From the facts pleaded as it is seen that as the petitioner did respond to the Notice received, the Audit Assessment were completed by the Department by taking recourse to 'Best Judgment Assessment' under section 37 of the Act.

17. In the case of *Dwijendra Kumar Bhattacharjee vs- Superintendent of Taxes*, this Court held that opportunity given to the assessing to be heard must be real and reasonable. This Court in the said case held that when the assessee seeks sometime stating difficulties, his prayer should be considered judiciously. As it might not be possible for assessee to submit such evidences instantaneously or at short notice. This Court held that such prayer cannot be summarily rejected without considering the ground given by the assessee because the Assessing Officer is hard pressed for time and has to complete the assessment by a specific date or for administrative exgigencics.

18. In the present proceedings, time as prayed for was duly granted by the petitioner, and which is not disputed by the petitioner. The petitioner also does not dispute the receipt of Notices issued by the Department, in the process of the assessment conducted. However, the petitioner was not able to furnish any such petition or application preferred before the Department Authorities which had been rejected summarily without considering the prayer of the petitioner. Accordingly, although I respectfully concur with the ratio laid down, however in the facts of the present case, this Judgment will not be applicable.

19. The judgment of the Hon'ble High Court of Jharkhand in the case of *Shiva Stone Chips vs- The State of Jarkhand and Ors.* is relied upon by the petitioner to support the contention that quasi judicial authorities are also required to follow the settled Principle of Natural Justice. The Hon'ble High Court of Jharkhand in the said case of *Shiva Stone Chips vs- The State of Jarkhand and Ors.* referred to by the petitioner, also holds that quasi judicial authorities are required to record reasons and to provide opportunity of hearing, the principle of which although not disputed, the

same however, is not applicable in the facts of the present case.

20. The petitioner has also relied upon the judgment of the Apex Court in the case of *Larsen & Toubro Ltd. Vs State of Jharkhand and Ors*. reported in *(2017) 13 SCC 780* in support of his contention raised in the writ petition. In the said judgment, the issue involved is the meaning that can be ascribed to the term 'information' in respect of the powers granted under statutes to Department authorities to reopening of assessment. The Apex Court held as under-

> '***27.*** *There are a catena of judgments of this Court holding that assessment proceedings can be reopened if the audit objection points out the factual information already available in the records and that it was overlooked or not taken into consideration. Similarly, if audit points out some information or facts available outside the record or any arithmetical mistake, assessment can be reopened*.'

However, in the facts of the present proceedings this judgment will not come to the aid of the petitioner. As discussed above, the entire challenge in the present proceeding is to the impugned order dated 20-07-2013 passed by the Assessing Officer under section 37 of the AVAT Act, 2003 solely on the ground of violation of the Principles of Natural Justice. No other grounds have been urged to assail the correctness of the impugned order passed. Nor is the Audit Assessment Proceedings initiated by the Department under challenge. The case projected by the petitioner is not where assessments completed were sought to be responded, rather the Audit Assessments initiated were completed by resorting to "Best Judgment" assessment. The assessment order has been assailed on the ground of the same being violative of the Principles of Natural Justice as the "Best Judgement" assessment were completed by non-issuance of prior Notice to the petitioner.

21. The learned state counsel has pressed into service the judgment of the Apex Court rendered in the case of *Dharampal Satyapal Limited –vs- Deputy Commissioner of Central Excise, Gauahti and Ors*. reported in *(2015) 8 SCC 519.* The Apex Court in the said judgment examined the applicability of the Principle of Natural Justice as well as requirement of procedural fairness in respect of opportunity of being heard to be

given by the decision making authority. The Apex Court examined the various judgements enunciating the Principles of Natural Justice and while upholding the requirement of following the Principles of Natural Justice/audi alteram partem to be adhered to by judicial as well as quasi-judicial authorities, the Apex Court however, held that there are instances and cases were non-grant of hearing or violation of a Facet of Natural Justice would not *ipso-facto* lead to the conclusion always that the order complained of is null and void. The Apex Court held that the validity of such order will have to be decided on the touchtone of 'prejudice' caused to the complainant therein. The Apex Court however held that it is only the Courts who are empowered to consider whether any purpose would be served in remanding the case keeping in mind whether any prejudiced is caused to the person against whom the action to be taken. The relevant paragraphs are extracted below:

> "***38.*** *But that is not the end of the matter. While the law on the principle of audi alteram partem has progressed in the manner mentioned above, at the same time, the courts have also repeatedly remarked that the principles of natural justice are very flexible principles. They cannot be applied in any straitjacket formula. It all depends upon the kind of functions performed and to the extent to which a person is likely to be affected. For this reason, certain exceptions to the aforesaid principles have been invoked under certain circumstances. For example, the courts have held that it would be sufficient to allow a person to make a representation and oral hearing may not be necessary in all cases, though in some matters, depending upon the nature of the case, not only full-fledged oral hearing but even cross-examination of witnesses is treated as a necessary concomitant of the principles of natural justice. Likewise, in service matters relating to major punishment by way of disciplinary action, the requirement is very strict and full-fledged opportunity is envisaged under the statutory rules as well. On the other hand, in those cases where there is an admission of charge, even when no such formal inquiry is held, the punishment based on such admission is upheld. It is for this reason, in certain circumstances, even post-decisional hearing is held to be permissible. Further, the courts have held that under certain circumstances principles of natural justice may even be excluded by reason of diverse factors like time, place, the apprehended danger and so on.*

39. *We are not concerned with these aspects in the present case as the issue relates to giving of notice before taking action. While emphasising that the principles of natural justice cannot be applied in straitjacket formula, the aforesaid instances are given. We have highlighted the jurisprudential basis of adhering to the principles of natural justice which are grounded on the doctrine of procedural fairness, accuracy of outcome leading to general social goals, etc. Nevertheless, there may be situations wherein for some reason—perhaps because the evidence against the individual is thought to be utterly compelling—it is felt that a fair hearing "would make no difference"—meaning that a hearing would not change the ultimate conclusion reached by the decision-maker—then no legal duty to supply a hearing arises. Such an approach was endorsed by Lord Wilberforce in Malloch v. Aberdeen Corpn. [(1971) 1 WLR 1578 : (1971) 2 All ER 1278 (HL)] , who said that: (WLR p. 1595 : All ER p. 1294)*

"*… A breach of procedure … cannot give [rise to] a remedy in the courts, unless behind it there is something of substance which has been lost by the failure. The court does not act in vain."*

Relying on these comments, Brandon L.J. opined in Cinnamond v. British Airports Authority [(1980) 1 WLR 582 : (1980) 2 All ER 368 (CA)] that: (WLR p. 593 : All ER p. 377)

"*… no one can complain of not being given an opportunity to make representations if such an opportunity would have availed him nothing."*

In such situations, fair procedures appear to serve no purpose since the "right" result can be secured without according such treatment to the individual.

40. *In this behalf, we need to notice one other exception which has been carved out to the aforesaid principle by the courts. Even if it is found by the court that there is a violation of principles of natural justice, the courts have held that it may not be necessary to strike down the action and refer the matter back to the authorities to take fresh decision after complying with the procedural requirement in those cases where non-grant of hearing has not caused any prejudice to the person against whom the action is taken. Therefore, every violation of a facet of natural justice may not lead to the conclusion that the order passed is always null and void. The validity of the order has to be decided on the touchstone of "prejudice". The ultimate test*

is always the same viz. the test of prejudice or the test of fair hearing.

44. *At the same time, it cannot be denied that as far as courts are concerned, they are empowered to consider as to whether any purpose would be served in remanding the case keeping in mind whether any prejudice is caused to the person against whom the action is taken. This was so clarified in ECIL [(1993) 4 SCC 727 : 1993 SCC (L&S) 1184 : (1993) 25 ATC 704] itself in the following words: (SCC p. 758, para 31)*

"*31. Hence, in all cases where the enquiry officer's report is not furnished to the delinquent employee in the disciplinary proceedings, the courts and tribunals should cause the copy of the report to be furnished to the aggrieved employee if he has not already secured it before coming to the court/tribunal and given the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report. If after hearing the parties, the court/tribunal comes to the conclusion that the non-supply of the report would have made no difference to the ultimate findings and the punishment given, the court/tribunal should not interfere with the order of punishment. The court/tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished as is regrettably being done at present. The courts should avoid resorting to short cuts. Since it is the courts/tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is 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."*

22. The issue regarding the invalidation of an order solely on the ground of non adherence to the Principles of Natural Justice has again recently come up for consideration before the Apex Court in the case of *State of U.P -vs- Sudhir Kr Singh and Ors* reported in *(2020) SCC Online SC 847*. The Apex Court while considering various judgments has summarised the Principles regarding adherence to the doctrine of Natural Justice as under:

"*39. An analysis of the aforesaid judgments thus reveals:*

(1) Natural justice is a flexible tool in the hands of the judiciary to reach out in fit cases to remedy injustice. The breach of the audi alteram partem rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused.

(2) 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 a mandatory provision of law which is conceived not only in individual interest, but also in public interest.

(3) No prejudice is caused to the person complaining of the breach of natural justice where such person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts, in cases in which the Court finds on facts that no real prejudice can therefore be said to have been caused to the person complaining of the breach of natural justice.

(4) In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. This conclusion must be drawn by the Court on an appraisal of the facts of a case, and not by the authority who denies natural justice to a person.

(5) The "prejudice" exception must be more than a mere apprehension or even a reasonable suspicion of a litigant. It should exist as a matter of fact, or be based upon a definite inference of likelihood of prejudice flowing from the non-observance of natural justice."

23. From the above discussion, what can be summarised is that where procedural

or substantive provision of law provide for issuance of prior Notice, their infraction *ipso-facto* does not always lead to the invalidity of the order passed unless prejudice caused to the litigant is shown except in cases where public interest is involved. The prejudice caused to the litigant should not be a mere apprehension or even a reasonable suspicion apprehend. It should exist as a matter of fact and/or based upon a definite inference of likelihood of prejudice flowing from the non-observance of Natural Justice. When this principle laid down by the Apex Court are applied to the facts of the present proceedings, it is seen that the petitioner does not dispute the issuance of and receipt of Notices by the Department in respect of Audit Assessments which had commenced.

24. There is also no dispute that under the scheme of AVAT Act 2003, under any of the conditions mentioned under section 37, the Departmental Authority may proceed for completing the assessment as per its 'Best Judgement'. The Certificate of Exemption dated 26-08-2013 and Certificate of Entitlement dated 25.10.2013 were not available with the petitioner during the continuance of assessment proceeding. This fact is also not disputed by the petitioner. It is also not disputed that the petitioner did not file any petition/application citing appropriate reasons for deferring the assessment proceeding. Consequently, the Certificate of Exemption and Certificate of Entitlement were not available before the assessing authority during the said proceedings. Therefore, although the Notice contemplated under section 37 was not served upon the petitioner as contended, in the facts of the present case, no prejudice is seen to have been caused to the petitioner inspite of prior Notice not being issued requiring interference of the impugned assessment order dated 20-07-2013 passed by the Assessing Officer only on the ground of violating/non-adherence of the Principles of Natural Justice.

25. Be that as it may, it is seen that pursuant to the impugned order dated 20.07.2003 and Demand Notice dated 30.07.2003 raised was passed, the petitioner filed a representation before the respondent Department dated 28.01.2014 requesting for re-assessment of their tax liability for the assessment year 2010-11. In the said representation, the petitioner stated that the Eligibility Certificate and the Certificate of

Entitlement were not issued from the respective department prior to passing of the impugned assessment order and consequently the same could not be produced before the respondent Department prior to the impugned order of assessment being passed. The petitioner-Company represented that the said certificates have since been received and, therefore, the prayer for re-assessment has been made.

26. Upon perusal of the provisions of the AVAT Act, 2003, it is seen that under Section 83, there is a power of rectification under section 83 of the AVAT Act 2003, any authority including Appellate /Revisional Authority or the Appellate Tribunal may on an application or otherwise at any time within three (3) years from the date of any order passed by it, rectify any error apparent on the face of the record. It is also seen from the record that this Court by order dated 24-05-2017 while directing the respondent Department to obtain required instruction, by way of an interim order directed that no coercive against shall be taken against the petitioner on the basis of the order dated 20-07-2003 (Annexure-X) of the writ petition passed by the respondent no. 3. Consequently, by virtue of the interim order, Tax & Penalty demanded by the Department has not been realised from the petitioner. Keeping in view the fact that there is no dispute at the Bar that the petitioner for the relevant period of time was issued Eligibility Certificate and Certificate of Entitlement, and the same, if produced before the Department, could have been adequately taken note of during the audit assessment proceedings, this Court is of the view that ends of justice will be met, if the matter is remanded back to the department. The department will adequately address the grievances of the petitioner in terms of the representation dated 28-01-2014 filed before the Department and which is presently pending before the Department as fairly submitted by the department counsel. The Department will pass appropriate orders theeon as may be permitted under the provisions of AVAT Act including section 83, read with the Rules as well as per the provisions of the Policy of 2008 and the Scheme of 2009.

27. The entire exercise will be completed within a period of 4(four) weeks from today. Till such orders are passed by the Department as indicated above and duly communicated to the petitioner, the interim order passed on 24.05.2017 directing no

coercive action to be taken in terms of the impugned order dated 20.07.2013 will be continued.

28. The writ petition stands disposed of in the above terms. No cost.

JUDGE

Comparing Assistant