

M/S. DHARAMPAL SATYAPAL LTD.

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v.

DEPUTY COMMISSIONER OF CENTRAL EXCISE,
GAUHATI & ORS.

(Civil Appeal Nos.4458-4459 of 2015)

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MAY 14, 2015

[A.K. SIKRI AND ROHINTON FALI NARIMAN, JJ.]

Central Excise Act, 1944 – s. 11A – Finance Act, 2003 – s. 154 – Initiation of recovery proceedings without show cause notice – Exemption of excise duty for certain tobacco products to new industrial units in North-Eastern region – Said exemption withdrawn – Withdrawal challenged by assessee – Subsequently, vide s. 154, withdrawal of benefit effected from retrospective effect – In R.C. Tobacco’s case this Court upheld the constitutional validity of s. 154 – Thereafter, recovery order passed by the Department against assessee for the benefit drawn by the assessee – Said order passed without issuing notice – Challenge to, on the ground of violation of principles of natural justice – Held: Every violation of a facet of natural justice may not lead to the conclusion that order passed is always null and void – Validity of the order has to be decided on the touchstone of ‘prejudice’ – Ultimate test is always the same, viz., the test of prejudice or the test of fair hearing – On facts, issuance of notice would be an empty formality and the case stands covered by ‘useless formality theory’ – Thus, non-issuance of notice before sending communication did not result in any prejudice to assessee and it may not be feasible to direct the Department to take fresh action after issuing notice as that would be a mere formality.

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Natural justice – Concept and doctrine of – Explained and discussed.

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A Dismissing the appeals, the Court

HELD: 1.1 The principles of natural justice have sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. The principles of natural justice are grounded in procedural fairness which ensures taking of correct decision and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable in both instrumental and non-instrumental terms. It is on the said jurisprudential premise that the fundamental principles of natural justice, including audi alteram partem, have developed. It is for this reason that the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory

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provision or not. [Para 22, 24, 25] [455-D-F; 457-H; 458- A
A-F]

1.2 It becomes clear that the opportunity to
provide hearing before making any decision was
considered to be a basic requirement in the Court B
proceeding. Later on, this principle was applied to other
quasi-judicial authorities and other tribunals and
ultimately it is now clearly laid down that even in the
administrative actions, where the decision of the C
authority may result in civil consequences, a hearing
before taking a decision is necessary. Therefore, there
was a requirement of issuance of show-cause notice by
the Deputy Commissioner before passing the order of
recovery, irrespective of the fact whether s. 11A of the D
Act is attracted in the instant case or not. [Paras 27, 29]
[462-B-C; 463-F]

1.3 Even if it is found by the Court that there is a
violation of principles of natural justice, the Courts have E
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 F
whom the action is taken. Therefore, every violation of a
facet of natural justice may not lead to the conclusion
that 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., G
the test of prejudice or the test of fair hearing. [Para 31]
[465-E-G]

1.4 As regards whether it is open to the authority,
which has to take a decision, to dispense with the H
requirement of the principles of natural justice on the

A ground that affording such an opportunity will not make any difference, to put it otherwise, can the administrative authority dispense with the requirement of issuing notice by itself deciding that no prejudice would be caused to the person against whom the action is contemplated, answer has to be in the negative. It is not permissible for the authority to jump over the compliance of the principles of natural justice on the ground that even if hearing had been provided it would have served no useful purpose. The opportunity of hearing will serve the purpose or not has to be considered at a later stage and such things cannot be presumed by the authority. [Para 33] [467-B-E]

D 1.5 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. Keeping in view the said principles in mind, even when it is found that there is an infraction of principles of natural justice, a further question is addressed as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the appellant. In the facts of the instant case, it is found that such an exercise would be totally futile having regard to the law laid down in *R.C. Tobacco's* case. [Para 34-36] [468-D-E; 469-D-E]

G 1.6 The legal consequence of s. 154 is that the amount with which the appellant was benefitted under the said Notification becomes refundable. Even after the notice is issued, the appellant cannot take any plea to retain the said amount on any ground whatsoever as it is bound by the dicta in *R.C. Tobacco's* case. Likewise,

even the officer who passed the order has no choice A
but to follow the dicta in *R.C. Tobacco's* case.
Quantification of the amount is not disputed at all. In
such a situation, issuance of notice would be an empty
formality and that the case stands covered by 'useless B
formality theory'. Therefore, non-issuance of notice
before sending communication did not result in any
prejudice to the appellant and it may not be feasible to
direct the respondents to take fresh action after issuing
notice as that would be a mere formality. [Paras 37,39] C
[469-G-H; 470-A; 471-A-B]

1.7 The judgment in *J.K. Cotton's* case was
specifically taken note of and discussed in *R.C.
Tobacco's* case. The judgment in *R.C. Tobacco's* case D
would reflect that the appellant therein had specifically
relied upon the judgment in *J.K. Cotton's* case in
support of the submission that retrospectivity was
harsh and excessive since there is, in fact, a
retrospective imposition of excise duty. Another E
submission, that the demand which was raised could
not be sustained as it was made without issuing any
show-cause notice and was in contravention of s.11A
of the Act. The Court, however, did not find any merit
in the submissions. When the Court was conscious of F
the principle laid down in *J.K. Cotton's* case and
explained the same in a particular manner while
deciding the appeal in *R.C. Tobacco's* case, it cannot
be argued that the judgment in *R.C. Tobacco* runs
contrary to *J.K. Cotton's* case.[Para 40A] [471-C-G] G

*R.C. Tobacco Private Ltd. & Anr. v. Union of India &
Anr.* 2005 (3) Suppl. SCR 342 : (2005) 7 SCC 725; *M/
s. J.K. Cotton Spinning and Weaving Mills Ltd. v. Union*

- A *of India* 1988 SCR 700 : (1987) Supp SCC 350; *Collector of Central Excise, Patna & Ors. v. I.T.C. Limited & Anr.* (1995) 2 SCC 38; *Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors.* 1978 (2) SCR 272: (1978) 1 SCC 405; *Cooper v. Sandworth Board of Works* (1863) 14 GB (NS); *Managing Director, ECIL, Hyderabad & Ors. v. B. Karunakar & Ors.* 1993 (2) Suppl. SCR 576: (1993) 4 SCC 727; *C.B. Gautam v. Union of India & Ors.* 1992 (3) Suppl. SCR 12: (1993) 1 SCC 78; *Maneka Gandhi v. Union of India & Anr.* 1978 (2) SCR 621: (1978) 1 SCC 248; *Maharashtra State Financial Corporation v. M/s. Suvarna Board Mills & Anr.* 1994 (2) Suppl. SCR 754: (1994) 5 SCC 566; *East India Commercial Company Ltd., Calcutta & Anr. v. The Collector of Customs, Calcutta* AIR 1962 SC 1893: 1963 SCR 338; *U.O.I. & Ors. v. Madhumilan Syntex Pvt. Ltd. & Anr.* 1988 (3) SCR 838: (1988) 3 SCC 348; *Morarji Goculdas B&W Co. Ltd. & Anr. v. U.O.I. & Ors.* (1995) Supp 3 SCC 588; *Metal Forgings & Anr. v. U.O.I. & Ors.* (2003) 2 SCC 36; *U.O.I. & Ors. v. Tata Yodogawa Ltd. & Anr.* 1988 (38) ELT 739 (SC); *Malloch v. Aberdeen Corporation* (1971) 1 WLR 1578 at 1595; *Cinnamond v. British Airports Authority* (1980) 1 WLR 582 at 593;
- F *General Medical Council v. Spackman* 1943 AC 627; *The Board of High School and Intermediate Education, U.P. & Ors. v. Kumari Chittra Srivastava & Ors.* AIR 1970 SC 1039: 1970 (3) SCR 266: 1970) 1 SCC 121; *Escorts Farms Ltd. (Previously known as M/s. Escorts Farms (Ramgarh) Ltd.) v. Commissioner, Kumaon Division, Nainital, U.P. & Ors.* 2004 (2) SCR 543: (2004) 4 SCC 281 – referred to.

Case Law Reference

- H 2005 (3) Suppl. SCR 342 Referred to. Para 5

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CENTRAL EXCISE, GAUHATI

1988 SCR 700	Referred to.	Para 9	A
(1995) 2 SCC 38	Referred to.	Para 16	
1978 (2) SCR 272	Referred to.	Para 20	
(1863) 14 GB (NS)	Referred to.	Para 25	
1993 (2) Suppl. SCR 576	Referred to.	Para 25	B
1992 (3) Suppl. SCR 12	Referred to.	Para 26	
1978 (2) SCR 621	Referred to.	Para 27	
1994 (2) Suppl. SCR 754	Referred to.	Para 27	
1963 SCR 338	Referred to.	Para 28	C
1988 (3) SCR 838	Referred to.	Para 28	
(1995) Supp 3 SCC 588	Referred to.	Para 28	
(2003) 2 SCC 36	Referred to.	Para 28	
1988 (38) ELT 739 (SC)	Referred to.	Para 28	
(1971) 1 WLR 1578	Referred to.	Para 31	D
(1980) 1 WLR 582	Referred to.	Para 31	
1943 AC 627	Referred to.	Para 33	
1970 (3) SCR 266	Referred to.	Para 33	
2004 (2) SCR 543	Referred to.	Para 38	E

CIVIL APPELLATE JURISDICTION: Civil Appeal
No. 4458 - 4459 of 2015.

From the Judgment and Order of the High Court of Gauhati dated 05.06.2012 and 01.12.2011 in Review Petition No. 176560 of 2012 in Central Excise Tax Reference No. 1 of 2008 and Central Excise Tax Reference No. 1 of 2008 respectively. F

Mukul Rohtagi, Rupesh Kumar, Ms. Madhvi Diwan, Charul Sarin, B. Krishna Prasad for the Appellant. G

Śoli J. Sorabjee, Preetesh Kapur, S. Kashyap, Abaya Kashyap, Raghav Narayan (For Mitter & Mitter Co.), Gopal Singh, Corporate Law Group for the Respondents. H

A The Judgment of the Court was delivered by

A.K. SIKRI, J. Leave granted.

B 2. Union of India, vide Memorandum dated December
24, 1997, unveiled a new industrial policy for the North-
Eastern region. In the said policy, in order to give stimulation
to the development of industrial infrastructure in the North-
Eastern region, the said region was made tax free zone for
C a period of ten years giving incentives to those who wanted
to establish industries in that region. Pursuant thereto, the
Notification dated July 08, 1999 was issued granting new
industrial units that had commercial production on or after
December 24, 1997 and certain types of industrial units that
increased their installed capacity after that date, exemption
D on goods cleared from units located in growth centres and
integrated infrastructure centres.

E 3. The aforesaid Notification was issued under the
provision of Central Excise Act, 1944 as well as Additional
Duties of Excise (Goods of Special Importance) Act, 1957
and Additional Duties of Excise (Textiles and Textile Articles)
Act, 1978. However, on December 31, 1999, another
Notification was issued whereby exemption of central excise
was withdrawn in respect of goods falling under Chapter
F 21.06 (*pan masala*) and Chapter 24 (tobacco and tobacco
substitutes, including cigarettes, chewing tobacco etc.).

G 4. This withdrawal Notification was challenged by the
appellant by filing the writ petition in the High Court of
Gauhati. The learned Single Judge dismissed the writ
petition. However, appeal preferred by the appellant was
allowed by the Division Bench vide judgment dated
December 03, 2012. In nutshell, the High Court held that
the principal of *Promissory Estoppel* shall apply and once a
H promise was given by the Union of India assuring that no

such duty would be charged for a period of ten years, it was A
not open for the Union of India to withdraw the same.
Challenging that judgment, Union of India filed petitions for
special leave. Leave was granted and the petitions were
registered as Civil Appeal Nos. 8841-8844 of 2003.

5. After the filing of the aforesaid appeals, certain B
subsequent events took place. It so happened that vide
Section 154 of the Finance Act, 2003 (hereinafter referred
to as the 'Act of 2003'), withdrawal of the benefit was effected
from retrospective effect. Effect thereof was to withdraw the C
benefit given under the Notification issued earlier. Validity
of Section 154 was questioned and the issue was considered
by this Court in *R.C. Tobacco Private Ltd. & Anr. v. Union
of India & Anr.*¹ This Court upheld the constitutional validity D
of the aforesaid provision and repelled the challenge so laid.
The effect was to disentitle the appellant and other similarly
situated from getting any such benefit by virtue of Section
154 of the Act of 2003 and knocking down the basis of the
judgment of the High Court, which lost its validity on the E
aforesaid ground.

6. So far so good. The grievance of the appellant
and other similarly situated industries for not extending the
benefit of Notification dated July 08, 1999 is buried down.
However, after notifying Section 154 of the Act of 2003, which F
had nullified the effect of Notification No. 32 of 1999
retrospectively thereby annulling the effect thereof altogether,
respondent No.1 herein passed recovery order dated June
03, 2003 for recovery of a sum of 2,93,43,244 (rupees two
crores ninety three lakhs forty three thousand two hundred G
and forty four only) from the appellant, which was the benefit
that had been drawn by the appellant for the period
November 1999 till February 2001 in terms of the Notification
No. 32 of 1999. By another order dated June 06, 2003 issued H

¹ (2005) 7 SCC 725

A by respondent No.1, the appellant was directed to pay the excise duty for the said period for which the benefit had been availed. He also rejected the pending claim of refund for the period from March 2001 till May 31, 2003. These recovery orders were challenged by the appellant by filing appeal

B before the Commissioner (Appeals). Along with the appeal, the appellant also filed an application for interim order seeking stay against the pre-deposit. On this application, orders dated March 31, 2004 were passed by the Commissioner (Appeals) directing the appellant to deposit

C entire duty amount within a period of thirty days. This order of pre-deposit was challenged by the appellant by filing four writ petitions in the High Court of Gauhati. The learned Single Judge of the High Court, however, dismissed these writ petitions vide orders dated May 18, 2004. The appellant

D carried this issue of pre-deposit to a higher forum in the form of writ appeals before the Division Bench of the said Court. Interim orders dated June 11, 2004 were passed in the writ appeals directing the Commissioner (Appeals) not to dismiss

E the appeals preferred by the appellant before him for non-deposit of the duty amount. In other words, interim stay against the pre-deposit was given. The Commissioner (Appeals) heard the appeals and passed the orders dated June 15, 2005 deciding the appeals in favour of the appellant.

F He held that issuance of show-cause notice was mandatory before a valid recovery of demand could be made from the appellant and, thus, remitted the matter to the adjudicating authority. After this final order was passed by the Commissioner (Appeals), writ appeals of the appellant before

G the Division Bench were disposed of as infructuous in view of the fact that the Commissioner (Appeals) had passed an order on merits and, therefore, no cause survived which required further adjudication in those appeals.

H 7. Insofar as the order of the Commissioner (Appeals)

is concerned, both the appellant as well as the Revenue felt A
aggrieved thereby. The appellant was not satisfied with the
order of remand and the nature of relief granted even after
accepting that issuance of show-cause notice was mandatory
before passing a valid recovery of demand. The respondents B
were aggrieved of the order passed on merit holding that
show-cause notice was mandatory. Therefore, both the
appellant as well as the Revenue filed appeals aggrieved
against the order dated June 15, 2005 passed by the
Commissioner (Appeals). The Customs Excise & Service C
Tax Appellate Tribunal (for short 'CESTAT') decided these
appeals vide common order dated My 28, 2007. It reversed
the orders of the Commissioner (Appeals), which resulted
in allowing the appeal filed by the Revenue and dismissing D
the appeal preferred by the appellant. A perusal of the
judgment of the CESTAT would reveal that it has primarily
referred to the judgment of this Court in **R.C. Tobacco** and
held that the matter stood concluded by the said judgment.
The appellant challenged the order of CESTAT by filing
Central Excise Tax Reference No. 1 of 2008 before the High E
Court of Gauhati. This Reference was dismissed by the
High Court on December 01, 2011 on the ground of *res*
judicata holding that orders dated May 18, 2004 passed by
the Single Judge dismissing the writ petitions of the appellant
had attained finality. The appellant preferred Review Petition F
seeking review of the said order, which has also been
dismissed by the High Court on June 05, 2012. In the present
appeals, the appellant has challenged both the orders dated
December 01, 2011 passed in the Tax Reference as well as
the order dated June 05, 2012 passed in the Review Petition. G

8. From the brief narration of the background facts H
mentioned above, it is apparent that the frontal attack of the
appellant against the recovery orders passed by the
respondents is premised on the plea that no such recovery

A proceedings could be initiated without a show-cause notice under Section 11-A of the Excise Act. The appellant has also taken a plea in these appeals that order of the Single Judge at pre-deposit stage could not operate as *res judicata* on merits and, therefore, dismissal of the Tax Reference by the
 B High Court, and consequently the Review Petition, is clearly erroneous and the High Court should have gone into the merits of the issue decided by CESTAT.

9. As noted above, CESTAT has decided the case
 C against the appellant on the ground that issue now raised is covered by the judgment of this Court in ***R.C. Tobacco*** (supra). As pointed out, in ***R.C. Tobacco*** (supra), this Court has already upheld the validity of Section 154 of the Act of 2003 thereby taking away the benefit of Notification No. 32
 D of 1999 retrospectively insofar as excisable goods falling under Chapter 24 are concerned. Conscious of the position that judgment in ***R.C. Tobacco*** (supra) stares at the face of the appellant, Mr. Soli Sorabjee, learned senior counsel who appeared for the appellant, has also made an endeavour to
 E show that the said judgment in ***R.C. Tobacco*** (supra) is in clear conflict with earlier three Judge Bench judgment of this Court in ***M/s. J.K. Cotton Spinning and Weaving Mills Ltd. v. Union of India***². Thus, following three issues have
 F arisen for consideration in these appeals:

- (a) Whether order of the Single Judge at pre-deposit stage can operate as *res judicata* on merits?
- (b) Whether recovery proceedings can be initiated without show-cause notice under Section 11A of the Excise Act, which is mandatory?
- (c) Whether there is a conflict between the three Judge Bench judgment in ***J.K. Cotton*** (supra) and ***R.C. Tobacco*** (supra)?

² (1987) Supp SCC 350

First issue is the basis for the judgment of the High Court. A

10. For answering this issue, it would be necessary to take into account the complete implication thereof with reference to the nature of recovery orders passed by respondent No.1, challenge thereto before the Commissioner (Appeals) and interim order of pre-deposit passed by the Commissioner (Appeals) on March 31, 2004 as also the nature of challenge which was laid by the appellant against the said order of pre-deposit in the writ petitions filed in the High Court, which were dismissed by the learned Single Judge on May 18, 2004. B C

11. By virtue of Notification dated July 08, 1999, the appellant was granted refund of the duty deposited in cash up to February 2001. After the enactment of Section 154 of the Act of 2003, recovery order dated June 03, 2003 was passed for recovery of the aforesaid amount which had been refunded to the appellant. Simultaneously, another order dated June 06, 2003 was issued asking the appellant to pay duty on the ground that such goods were no more exempted from payment of duty. In the appeals which were filed by the appellants before the Commissioner (Appeals) challenging the aforesaid orders, the Commissioner passed interim orders dated March 31, 2004 directing the appellants to pay the amount demanded by the aforesaid orders. This order dated March 31, 2004 of the Commissioner (Appeals) reflects that the Commissioner went into various issues raised by the appellant on the basis of which it was pleaded by the appellant that it had a good case on merits and, therefore, condition of pre-deposit be waived. Apart from the contention that no show-cause notice was given before passing those orders, it was even argued that by making the retrospective amendment in the form of Section 154 of the Act of 2003, the only effect was to validate the earlier actions D E F G H

A but no demand of refund of any amount could be made and
no refund of the amount already paid could be claimed. It
was also argued that the matter of recovery of amounts was
pending consideration of Central Board of Excise and
Customs (CBEC) as well as in the Gauhati High Court. All
B these issues were considered by the Commissioner
(Appeals), who gave his *prima facie* view thereupon
observing that the appellants did not have strong *prima facie*
case on merits resulting into the direction to deposit the entire
amount within thirty days.
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12. The appellant had filed writ petitions against the
aforesaid order of the Commissioner (Appeals) with the
prayer that the direction of the Commissioner (Appeals) to
deposit the entire amount within thirty days be set aside and
D the prayer of pre-deposit of the appellant be accepted. No
doubt, while arguing for this relief, the appellant had raised
various contentions on the merits of the case in its endeavour
to demonstrate that it had a good case on merits. It is also
borne from the record that the learned Single Judge, while
E dismissing the writ petition, dealt with these issues, which
touched upon the merits of the main issue. That is the reason
that the order dated May 18, 2004 of the learned Single
Judge dismissing the writ petition of the appellant runs into
F 37 pages. Nevertheless, we find that the observations which
were made by the learned Single Judge on the issues raised
were only *prima facie* in nature and the prime focus of the
judgment rested on the core issue, namely, whether the
direction of the Commissioner (Appeals) directing the
G appellant to make deposit of the amount as a pre-condition
for hearing of the appeal was sustainable or not. The writ
petition was dismissed affirming the said order. Therefore,
any observations made by the learned Single Judge, which
were tentative in nature, could not be taken into consideration
H by the Division Bench in the impugned judgment, thereby

dismissing the Reference, invoking the principle of *res* A
judicata. The order of the learned Single Judge dismissing
the writ petition was challenged before the Division Bench
and the Division Bench passed interim orders in the writ
appeals not to dismiss the appeals preferred by the appellant
for non-deposit of the duty. In this backdrop, appeals were B
heard and appellant even partly succeeded. After the order
of the Commissioner (Appeals) dated June 15, 2005 deciding
the appeals partly in favour of the appellant, the writ appeals
which were pending before the Division Bench had become C
infructuous and disposed of as such without going into the
merit of the order passed by the learned Single Judge This
is yet another reason to hold that the order of the learned
Single Judge could not be treated as *res judicata*.

13. Having regard to the aforesaid position, we heard D
the instant appeal on merits, namely, on the issue as to
whether it was mandatory to issue show-cause notice making
an order of recovery. The Commissioner (Appeals) has held
it to be mandatory and this order of the Commissioner E
(Appeals) has been set aside by the CESTAT. The Reference
petition against the order of CESTAT, though wrongly is
dismissed on the ground of *res judicata*, the impugned order
shows that it has mentioned that such show-cause notice
was not mandatory as held by the learned Single Judge by F
order dated May 18, 2004.

14. Learned senior counsel appearing for the
appellant as well as learned Attorney General agreed that in
this situation this Court may decide the aforesaid issue finally.
It is for this reason that we have heard counsel for the parties G
at length on this aspect of the matter.

15. The neat submission made by Mr. Soli Sorabjee
on behalf of the appellant was that the impugned demand
of the Assistant Commissioner was in the nature of H

A adjudication whereby the amount demanded in the order dated June 06, 2003 was crystallized and, therefore, there could not have been demand for recovery of the stipulated amount without issuing notice to the appellant and giving the appellant herein right of hearing. He also submitted that

B merely because *vires* of Section 154 of the Act of 2003 were upheld by this Court in ***R.C. Tobacco*** (supra) could not be a ground to dispense with the aforesaid mandatory requirements of principles of natural justice. His further submission was that ‘*no prejudice*’ principle adopted by the

C CESTAT amounted to erroneous approach. He sought to draw a fine distinction in this behalf by contending that the Authority passing the order could not presume that prejudice would not be caused to a person against whom the action is contemplated and on that presumption dispense with the

D mandatory requirement of issuance of the notice. According to him, such a doctrine could be applied only by the courts while dealing with such issues where it is found that the action of the Authority was violative of principles of natural justice, the Court could still choose not to remit the case back to the

E concerned Authority if it finds that it will be a futile exercise.

16. As a pure principle of law, we find substance and force in the aforesaid submission of Mr. Sorabjee. No doubt, the Department was seeking to recover the amount paid by

F virtue of Section 154 of the Act of 2003 which was enacted retrospectively and the constitutional validity of the said Section had already been upheld by this Court in ***R.C. Tobacco*** (supra) at the time of issuance of notice for recovery. Further, no doubt, the effect of the said amendment

G retrospectively was to take away the benefit which was granted earlier. However, the question is whether before passing such an order of recovery, whether it was necessary to comply with the requirement of show-cause notice? The

H appellant wanted to contend that Section 11A of the Excise

Act was applicable, which requires this procedure to be A
followed. Even if that provision is not applicable, it is
fundamental that before taking any adverse action against
a person, requirement of principles of natural justice is to be
fulfilled. This Court in **Collector of Central Excise, Patna**
& Ors. v. I.T.C. Limited & Anr.³ has held that show-cause B
and personal hearing is necessary before saddling an
assessee with additional demand. It is also trite that when a
statute is silent, with no positive words in the Act or Rules
spelling out need to hear the party whose rights or interests C
are likely to be affected, requirement to follow fair procedure
before taking a decision must be read into statute, unless
the statute provides otherwise.

17. What is the genesis behind this requirement?
Why it is necessary that before an adverse action is taken D
against a person he is to be given notice about the proposed
action and be heard in the matter? Why is it treated as
inseparable and inextricable part of the doctrine of principles
of natural justice?

18. Natural justice is an expression of English E
Common Law. Natural justice is not a single theory – it is a
family of views. In one sense administering justice itself is
treated as natural virtue and, therefore, a part of natural
justice. It is also called '*naturalist*' approach to the phrase F
'*natural justice*' and is related to '*moral naturalism*'. Moral
naturalism captures the essence of commonsense morality
– that good and evil, right and wrong, are the real features
of the natural world that human reason can comprehend. In G
this sense, it may comprehend virtue ethics and virtue
jurisprudence in relation to justice as all these are attributes
of natural justice. We are not addressing ourselves with this
connotation of natural justice here.

³ (1995) 2 SCC 38

A 19. In Common Law, the concept and doctrine of
natural justice, particularly which is made applicable in the
decision making by judicial and quasi-judicial bodies, has
assumed different connotation. It is developed with this
fundamental in mind that those whose duty is to decide, must
B act judicially. They must deal with the question referred both
without bias and they must given to each of the parties to
adequately present the case made. It is perceived that the
practice of aforesaid attributes in mind only would lead to
doing justice. Since these attributes are treated as natural
C or fundamental, it is known as '*natural justice*'. The principles
of natural justice developed over a period of time and which
is still in vogue and valid even today were: (i) rule against
bias, i.e. *nemo iudex in causa sua*; and (ii) opportunity of
being heard to the concerned party, i.e. *audi alteram partem*.
D These are known as principles of natural justice. To these
principles a third principle is added, which is of recent origin.
It is duty to give reasons in support of decision, namely,
passing of a '*reasoned order*'.

E 20. Though the aforesaid principles of natural justice
are known to have their origin in Common Law, even in India
the principle is prevalent from ancient times, which was even
invoked in Kautilya's '*Arthashastra*'. This Court in the case
of ***Mohinder Singh Gill & Anr. v. The Chief Election***
F ***Commissioner, New Delhi & Ors.***⁴ explained the Indian
origin of these principles in the following words:

G "Indeed, natural justice is a pervasive facet of secular
law where a spiritual touch enlivens legislation,
administration and adjudication, to make fairness a
creed of life. It has many colours and shades, many
forms and shapes and, save where valid law excludes,
it applies when people are affected by acts of authority.
H It is the bone of healthy government, recognised from

⁴ (1978) 1 SCC 405 : AIR 1978 SC 851

earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam – and of Kautilya's Arthashastra – the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system".

21. Aristotle, before the era of Christ, spoke of such principles calling it as universal law. Justinian in the fifth and sixth Centuries A.D. called it '*jura naturalia*', i.e. natural law.

22. The principles have sound jurisprudential basis. Since the function of the judicial and quasi-judicial authorities is to secure justice with fairness, these principles provide great humanising factor intended to invest law with fairness to secure justice and to prevent miscarriage of justice. The principles are extended even to those who have to take administrative decision and who are not necessarily discharging judicial or quasi-judicial functions. They are a kind of code of fair administrative procedure. In this context, procedure is not a matter of secondary importance as it is only by procedural fairness shown in the decision making that decision becomes acceptable. In its proper sense, thus, natural justice would mean the natural sense of what is right and wrong.

23. This aspect of procedural fairness, namely, right to a fair hearing, would mandate what is literally known as '*hearing the other side*'. Prof. D.J. Galligan⁵ attempts to

⁵ On '*Procedural Fairness*' in Birks (ed), the Frontiers of Liability (Volume One) (Oxford 1994)

- A provide what he calls '*a general theory of fair treatment*' by exploring what it is that legal rules requiring procedural fairness might seek to achieve. He underlines the importance of arriving at correct decisions, which is not possible without adopting the aforesaid procedural fairness, by emphasizing
- B that taking of correct decisions would demonstrate that the system is working well. On the other hand, if mistakes are committed leading to incorrect decisions, it would mean that the system is not working well and the social good is to that extent diminished. The rule of procedure is to see that the
- C law is applied accurately and, as a consequence, that the social good is realised. For taking this view, Galligan took support from Bentham⁶, who wrote at length about the need to follow such principles of natural justice in civil and criminal
- D trials and insisted that the said theory developed by Bentham can be transposed to other forms of decision making as well. This jurisprudence of advancing social good by adhering to the principles of natural justice and arriving at correct decisions is explained by Galligan in the following words:
- E "On this approach, the value of legal procedures is judged according to their contribution to general social goals. The object is to advance certain social goals, whether through administrative processes, or through
- F the civil or criminal trial. The law and its processes are simply instruments for achieving some social good as determined from time to time by the law makers of the society. Each case is an instance in achieving the
- G general goal, and a mistaken decision, whether to the benefit or the detriment of a particular person, is simply a failure to achieve the general good in that case. At this level of understanding, judgments of fairness have no place, for all that matters is whether the social good, as expressed through laws, is effectively achieved."

H ⁶ *A Treatise of Judicial Evidence* (London 1825)

Galligan also takes the idea of fair treatment to a second level of understanding, namely, pursuit of common good involves the distribution of benefits and burdens, advantages and disadvantages to individuals (or groups). According to him, principles of justice are the subject matter of fair treatment. However, that aspect need not be dilated.

24. Allan⁷, on the other hand, justifies the procedural fairness by following the aforesaid principles of natural justice as rooted in rule of law leading to good governance. He supports Galligan in this respect and goes to the extent by saying that it is same as ensuring dignity of individuals, in respect of whom or against whom the decision is taken, in the following words:

“The instrumental value of procedures should not be underestimated; the accurate application of authoritative standards is, as Galligan clearly explains, an important aspect of treating someone with respect. But procedures also have *intrinsic* value in acknowledging a person’s right to understand his treatment, and thereby to determine his response as a conscientious citizen, willing to make reasonable sacrifices for the public good. If obedience to law ideally entails a recognition of its morally obligatory character, there must be suitable opportunities to test its moral credentials. Procedures may also be thought to have *intrinsic* value in so far as they constitute a fair balance between the demands of accuracy and other social needs: where the moral harm entailed by erroneous decisions is reasonably assessed and fairly distributed, procedures express society’s commitment to equal concern and respect for all.”

It, thus, cannot be denied that principles of natural

⁷ 'Procedural Fairness and the Duty of Respect', (198) 18 OJLS 497

- A justice are grounded in procedural fairness which ensures taking of correct decision and procedural fairness is fundamentally an instrumental good, in the sense that procedure should be designed to ensure accurate or appropriate outcomes. In fact, procedural fairness is valuable
- B in both instrumental and non-instrumental terms.

25. It is on the aforesaid jurisprudential premise that the fundamental principles of natural justice, including *audi alteram partem*, have developed. It is for this reason that
- C the courts have consistently insisted that such procedural fairness has to be adhered to before a decision is made and infraction thereof has led to the quashing of decisions taken. In many statutes, provisions are made ensuring that a notice is given to a person against whom an order is likely to be
- D passed before a decision is made, but there may be instances where though an authority is vested with the powers to pass such orders, which affect the liberty or property of an individual but the statute may not contain a provision for prior hearing. But what is important to be noted is that the
- E applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

- F De Smith⁸ captures the essence thus - "*Where a statute authorises interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on plainest principles of natural justice*".
- G

Wade⁹ also emphasizes that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power. In

H ⁸ *Judicial Review of Administrative Action* (1980), at page 161

⁹ *Administrative Law* (1977), at page 395

Cooper v. Sandworth Board of Works¹⁰ the Court laid down that: ‘...although there is no positive word in the statute requiring that the party shall be heard, yet justice of common law would supply the omission of Legislature’. Exhaustive commentary explaining the varied contours of this principle can be traced to the judgment of this Court in **Managing Director, ECIL, Hyderabad & Ors. v. B. Karunakar & Ors.**¹¹, wherein the Court discussed plenty of previous case law in restating the aforesaid principle, a glimpse whereof can be found in the following passages:

“20. The origins of the law can also be traced to the principles of natural justice, as developed in the following cases: In A. K. Kraipak v. Union of India, (1969) 2 SCC 262 : (1970) 1 SCR 457, it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose, there is no reason why they should not be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry. It was further observed that the concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the inquiry is held and the constitution of the tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a Court

¹⁰ (1863) 14 GB (NS)

¹¹ (1993) 4 SCC 727

A that some principle of natural justice has been
contravened, the Court has to decide whether the
observance of that rule was necessary for a just
decision on the facts of that case. The rule that inquiry
must be held in good faith and without bias and not
B arbitrarily or unreasonably is now included among the
principles of natural justice.

21. In Chairman, Board of Mining Examination v. Ramjee, (1977) 2 SCC 256, the Court has observed
C that natural justice is not an unruly horse, no lurking
landmine, nor a judicial cure-all. If fairness is shown by
the decision-maker to the man proceeded against, the
form, features and the fundamentals of such essential
processual propriety being conditioned by the facts and
D circumstances of each situation, no breach of natural
justice can be complained of. Unnatural expansion of
natural justice, without reference to the administrative
realities and other factors of a given case, can be
E exasperating. The Courts cannot look at law in the
abstract or natural justice as mere artifact. Nor can they
fit into a rigid mould the concept of reasonable
opportunity. If the totality of circumstances satisfies the
Court that the party visited with adverse order has not
F suffered from denial of reasonable opportunity, the
Court will decline to be punctilious or fanatical as if the
rules of natural justice were sacred scriptures.

22. In Institute of Chartered Accountants of India v. L. K. Ratna, (1986) 4 SCC 537, Charan Lal Sahu v. Union of India, (1990) 1 SCC 613 (Bhopal Gas Leak Disaster Case) and C. B. Gautam v. Union of India, (1993) 1
G SCC 78, the doctrine that the principles of natural justice
must be applied in the unoccupied interstices of the
statute unless there is a clear mandate to the contrary,
H is reiterated.”

In his separate opinion, concurring on this A
fundamental issue, Justice K. Ramaswamy echoed the
aforesaid sentiments in the following words:

“61. It is now settled law that the proceedings must be B
just, fair and reasonable and negation thereof offends
Articles 14 and 21. It is well settled law that principles
of natural justice are integral part of Article 14. No
decision prejudicial to a party should be taken without
affording an opportunity or supplying the material which C
is the basis for the decision. The enquiry report
constitutes fresh material which has great persuasive
force or effect on the mind of the disciplinary authority.
The supply of the report along with the final order is
like a post mortem certificate with putrefying odour. The D
failure to supply copy thereof to the delinquent would
be unfair procedure offending not only Arts. 14, 21 and
311(2) of the Constitution, but also, the principles of
natural justice.”

26. Likewise, in **C.B. Gautam v. Union of India & E
Ors.**¹², this Court once again held that principle of natural
justice was applicable even though it was not statutorily
required. The Court took the view that even in the absence
of statutory provision to this effect, the authority was liable F
to give notice to the affected parties while purchasing their
properties under Section 269-UD of the Income Tax Act,
1961. It was further observed that the very fact that an
imputation of tax evasion arises where an order for
compulsory purchase is made and such an imputation casts G
a slur on the parties to the agreement to sell leads to the
conclusion that before such an imputation can be made
against the parties concerned they must be given an
opportunity to show-cause that the under valuation in the
agreement for sale was not with a view to evade tax. It is, H

¹² (1993) 1 SCC 78

A therefore, all the more necessary that an opportunity of hearing is provided.

27. From the aforesaid discussion, it becomes clear that the opportunity to provide hearing before making any decision was considered to be a basic requirement in the Court proceeding. Later on, this principle was applied to other quasi-judicial authorities and other tribunals and ultimately it is now clearly laid down that even in the administrative actions, where the decision of the authority may result in civil consequences, a hearing before taking a decision is necessary. It was, thus, observed in **A.K. Kraipak's** case (supra) that if the purpose of rules of natural justice is to prevent miscarriage of justice, one fails to see how these rules should not be made available to administrative inquiries. In the case of **Maneka Gandhi v. Union of India & Anr.**¹³ also the application of principle of natural justice was extended to the administrative action of the State and its authorities. It is, thus, clear that before taking an action, service of notice and giving of hearing to the noticee is required. In **Maharashtra State Financial Corporation v. M/s. Suvarna Board Mills & Anr.**¹⁴, this aspect was explained in the following manner:

F "3. It has been contended before us by the learned counsel for the appellant that principles of natural justice were satisfied before taking action under Section 29, assuming that it was necessary to do so. Let it be seen whether it was so. It is well settled that natural justice cannot be placed in a straight-jacket; its rules are not embodied and they do vary from case to case and from one fact-situation to another. All that has to be seen is that no adverse civil consequences are allowed to ensue before one is put on notice that the

H ¹³ (1978) 1 SCC 248

¹⁴ (1994) 5 SCC 566

consequence would follow if he would not take care of the lapse, because of which the action as made known is contemplated. No particular form of notice is the demand of law: All will depend on facts and circumstances of the case.”

28. In the case of *East India Commercial Company Ltd., Calcutta & Anr. v. The Collector of Customs, Calcutta*¹⁵, this Court held that whether the statute provides for notice or not, it is incumbent upon the quasi-judicial authority to issue a notice to the concerned persons disclosing the circumstances under which proceedings are sought to be initiated against them, failing which the conclusion would be that principle of natural justice are violated. To the same effect are the following judgments:

- a) *U.O.I. & Ors. v. Madhumilan Syntex Pvt. Ltd. & Anr.*¹⁶
- b) *Morarji Goculdas B&W Co. Ltd. & Anr. v. U.O.I. & Ors.*¹⁷
- c) *Metal Forgings & Anr. v. U.O.I. & Ors.*¹⁸
- d) *U.O.I. & Ors. v. Tata Yodogawa Ltd. & Anr.*¹⁹

29. Therefore, we are inclined to hold that there was a requirement of issuance of show-cause notice by the Deputy Commissioner before passing the order of recovery, irrespective of the fact whether Section 11A of the Act is attracted in the instant case or not.

30. But that is not the end of the matter. While the law on the principle of *audi alteram partem* has progressed

¹⁵ AIR 1962 SC 1893

¹⁶ (1988) 3 SCC 348

¹⁷ (1995) Supp 3 SCC 588

¹⁸ (2003) 2 SCC 36

¹⁹ 1988 (38) ELT 739 (SC) :: 1988 (19) ECR 569 (SC)

A 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 straight-jacket formula. It all depends upon the kind
of functions performed and to the extent to which a person
B 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
C 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 necessary concomitant of the
principles of natural justice. Likewise, in service matters
D 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
E 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,
F the apprehended danger and so on.

31. We are not concerned with these aspects in the
present case as the issue relates to giving of notice before
taking action. While emphasizing that the principles of natural
G justice cannot be applied in straight-jacket 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,
H 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 Corporation***²⁰, who said that 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 LJ opined in ***Cinnamond v. British Airports Authority***²¹ that ‘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 ‘*right*’ result can be secured without according such treatment to the individual. 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 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.

32. In ***Managing Director, ECIL*** (supra), the majority opinion, penned down by Sawant, J., while summing up the

²⁰ (1971) 1 WLR 1578 at 1595

²¹ (1980) 1 WLR 582 at 593

A discussion and answering the various questions posed, had to say as under *qua* the prejudice principle:

“30. Hence the incidental questions raised above may be answered as follows:

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(v) The next question to be answered is what is the effect on the order of punishment when the report of the enquiry officer is not furnished to the employee and what relief should be granted to him in such cases. The answer to this question has to be relative to the punishment awarded. When the employee is dismissed or removed from service and the inquiry is set aside because the report is not furnished to him, in some cases the non-furnishing of the report may have prejudiced him gravely while in other cases it may have made no difference to the ultimate punishment awarded to him. Hence to direct reinstatement of the employee with back-wages in all cases is to reduce the rules of justice to a mechanical ritual. 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 not 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 the denial to him of the report, has to be considered on the facts and circumstances of each case. Where, therefore, even after the furnishing of the report, no different consequence would have followed, it would be a perversion of justice to permit the employee to resume duty and to get all the consequential benefits. It amounts to rewarding the dishonest and the guilty and thus to stretching the concept of justice to illogical

and exasperating limits. It amounts to an “unnatural expansion of natural justice” which in itself is antithetical to justice.” A

33. So far so good. However, an important question posed by Mr. Sorabjee is as to whether it is open to the authority, which has to take a decision, to dispense with the requirement of the principles of natural justice on the ground that affording such an opportunity will not make any difference? To put it otherwise, can the administrative authority dispense with the requirement of issuing notice by itself deciding that no prejudice will be caused to the person against whom the action is contemplated? Answer has to be in the negative. It is not permissible for the authority to jump over the compliance of the principles of natural justice on the ground that even if hearing had been provided it would have served no useful purpose. The opportunity of hearing will serve the purpose or not has to be considered at a later stage and such things cannot be presumed by the authority. This was so held by the English Court way back in the year 1943 in the case of *General Medical Council v. Spackman*²². This Court also spoke in the same language in the case of *The Board of High School and Intermediate Education, U.P. & Ors. v. Kumari Chittra Srivastava & Ors.*²³, as is apparent from the following words: B
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D
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“8. The learned counsel for the appellant, Mr. C.B. Aggarwal, contends that the facts are not in dispute and it is further clear that no useful purpose would have been served if the Board had served a show cause notice on the petitioner. He says that in view of these circumstances it was not necessary for the Board to have issued a show cause notice. We are unable to accept this contention. Whether a duty arises in a F
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²² 1943 AC 627

²³ (1970) 1SCC 121 : AIR 1970 SC 1039

A particular case to issue a show cause notice before inflicting a penalty does not depend on the authority's satisfaction that the person to be penalised has no defence but on the nature of the order proposed to be passed."

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34. In view of the aforesaid enunciation of law, Mr. Sorabjee may also be right in his submission that it was not open for the authority to dispense with the requirement of principles of natural justice on the presumption that no prejudice is going to be caused to the appellant since judgment in *R.C. Tobacco* (supra) had closed all the windows for the appellant.

D 35. 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 the case of *Managing Director, ECIL* (supra) itself in the following words:

F "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.

G 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/

H Tribunal should not mechanically set aside the order

of punishment on the ground that the report was not furnished as it 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.”

36. Keeping in view the aforesaid principles in mind, even when we find that there is an infraction of principles of natural justice, we have to address a further question as to whether any purpose would be served in remitting the case to the authority to make fresh demand of amount recoverable, only after issuing notice to show cause to the appellant. In the facts of the present case, we find that such an exercise would be totally futile having regard to the law laid down by this Court in *R.C. Tobacco* (supra).

37. To recapitulate the events, the appellant was accorded certain benefits under Notification dated July 08, 1999. This Notification stands nullified by Section 154 of the Act of 2003, which has been given retrospective effect. The legal consequence of the aforesaid statutory provision is that the amount with which the appellant was benefitted under the aforesaid Notification becomes refundable. Even after the notice is issued, the appellant cannot take any plea to retain the said amount on any ground whatsoever as it is bound by the dicta in *R.C. Tobacco* (supra). Likewise, even the officer who passed the order has no choice but to follow the dicta in *R.C. Tobacco* (supra). It is important to note

A that as far as quantification of the amount is concerned, it is not disputed at all. In such a situation, issuance of notice would be an empty formality and we are of the firm opinion that the case stands covered by '*useless formality theory*'.

B 38. In ***Escorts Farms Ltd. (Previously known as M/s. Escorts Farms (Ramgarh) Ltd.) v. Commissioner, Kumaon Division, Nainital, U.P. & Ors.***²⁴, this Court, while reiterating the position that rules of natural justice are to be followed for doing substantial justice, held that, at the same
C time, it would be of no use if it amounts to completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. It was so explained in the following terms:

D "64. Right of hearing to a necessary party is a valuable right. Denial of such right is serious breach of statutory
E procedure prescribed and violation of rules of natural justice. In these appeals preferred by the holder of lands and some other transferees, we have found that
F the terms of government grant did not permit transfers of land without permission of the State as grantor. Remand of cases of a group of transferees who were not heard, would, therefore, be of no legal
G consequence, more so, when on this legal question all affected parties have got full opportunity of hearing before the High Court and in this appeal before this Court. Rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits. In view of the legal position explained by us above, we, therefore, refrain from remanding these cases in exercise of our discretionary powers under Article 136 of the
H Constitution of India."

²⁴ (2004) 4 SCC 281

39. Therefore, on the facts of this case, we are of the opinion that non-issuance of notice before sending communication dated June 23, 2003 has not resulted in any prejudice to the appellant and it may not be feasible to direct the respondents to take fresh action after issuing notice as that would be a mere formality.

40. With this we advert to the last submission of Mr. Sorabjee that the judgment in *R.C. Tobacco* (supra) (which is a two Judge Bench decision) is in conflict with the three Judge Bench judgment in *J.K. Cotton* (supra). This argument is not even open to the appellant for the simple reason that the judgment in *J.K. Cotton* (supra) was specifically taken note of and discussed in *R.C. Tobacco* (supra). Paragraph 13 of the judgment in *R.C. Tobacco* (supra) would reflect that the appellant therein had specifically relied upon the judgment in *J.K. Cotton* (supra) in support of the submission that retrospectivity was harsh and excessive since there is, in fact, a retrospective imposition of excise duty. It was also argued that justification of such retrospective imposition of tax must be overwhelming and no such overriding consideration had been disclosed. The submission went to the extent of pleading that if the appellant is called upon to pay the excise duty now it will cripple its unit. More pertinent was another submission, which is relevant for our purpose, that the demand which was raised could not be sustained as it was made without issuing any show-cause notice and was in contravention of Section 11A of the Act. In support of this view, few judgments, including *J.K. Cotton* (supra), were relied upon. The Court, however, did not find any merit in the aforesaid submissions and dealt with the issue as under, duly taking note of the judgment in *J.K. Cotton* (supra):

"40. In *J.K. Cotton Spg. & Wvg. Mills Ltd. v. Union of India*, (1987) Supp. SCC 350, relied upon by the

- A petitioners, by virtue of the retrospective amendment of Rules 9 and 49 of the Central Excise Rules in 1982, commodities obtained at an intermediate stage of manufacture in a continuous process were deemed to have been 'removed' within the meaning of Rule 9(1)
- B thereby making such intermediate products dutiable under the Act with effect from the commencement of the Act i.e. 1944. In this context the Court held that the amended Rules 9 and 49 would take effect subject to Section 11-A. The decision is distinguishable. The
- C circumstances in which the Court held that the demands for duty could only be limited to six months prior to the amendment was unquestionably different from those present in the case before us. What we have to consider
- D here is whether the benefit granted in 1999 could be withdrawn in 2003. Besides, the Court in *J.K. Cotton Spg. & Wvg. Mills Ltd.* case rejected the contention of the Union of India that Section 51 of the 1982 Finance Act by which the amendments were made to Rules 9
- E and 49 overrode the provisions of Section 11-A saying: (SCC p. 363, para 32) "if the intention of the legislature was to nullify the effect of Section 11-A,.. the legislature would have specifically provided for the same." Similarly
- F our decision in *National Agricultural Coop. Marketing Federation of India Ltd. v. Union of India*, (2003) 5 SCC 23 which dealt with an amendment to Section 80-P(2)(a)(iii) of the Income Tax Act, 1961 noted that: (SCC p.35, para 29)
- G "The amendment does not seek to touch on the periods of limitation provided in the Act, and *in the absence of such express provision or clear implication*, the legislature clearly could not be
- H taken to intend that the amending provisions authorizes the Income Tax Officer to commence

proceedings which before the new Act came into force, had, by the expiry of the period provided become barred". A

In the present case Section 154(4) specifically and expressly allows amounts to be recovered within a period of thirty days from the day Finance Bill, 2003 received the assent of the President. It cannot but be held therefore that the period of six months provided under Section 11-A would not apply." B

40 A. In the aforesaid scenario, when the Court was conscious of the principle laid down in *J.K. Cotton* (supra) and explained the same in a particular manner while deciding the appeal in *R.C. Tobacco* (supra), it cannot be argued that the judgment in *R.C. Tobacco* (supra) runs contrary to *J.K. Cotton* (supra). C D

41. For all these reasons, the appeals are dismissed.

Nidhi Jain

Appeals dismissed.

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