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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 14528/2021 & CM APPL. 45702/2021

BHARAT ALUMINIUM COMPANY LTD. ..... Petitioner
Through: Mr. Arvind Datar, Senior Advocate with Mr. Gopal Mundhra, Advocate.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Gigi C. George, Advocate for UOI. Mr. Sanjay Kumar, Advocate for Revenue.

% Reserved On : 24th December, 2021
Date of Decision: 14th January, 2022

CORAM:
HON'BLE MR. JUSTICE MANMOHAN
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

MANMOHAN, J:

1. Present writ petition has been filed by the petitioner challenging the action of respondent No.3 in passing the impugned final assessment order dated 27th November, 2021 under Section 143(3) of the Income Tax Act, 1961 [for short '*the Act*'] and the impugned notice dated 27th November, 2021 under Section 156 of the Act for Assessment Year 2018-19.

ARGUMENTS ON BEHALF OF THE PETITIONER

2. Mr. Arvind Datar, learned senior counsel for the petitioner stated that the impugned orders have been passed arbitrarily, without following the

principles of natural justice and in gross violation of the scheme of faceless assessment under Section 144B of the Act, inasmuch as even after the 'Nil' or 'Null' variation proposed in the show cause notice, additions had been made to the assessed income in the draft assessment order as well as in the impugned final assessment order.

3. He contended that respondent No.3 in the draft assessment order as well as in the impugned final assessment order had proceeded to make additions to the assessed income on the false premise that the petitioner had not furnished relevant details / information in response to the statutory notice dated 19th August, 2021, issued under Section 142(1) of the Act. He stated that respondent No.3 had failed to appreciate that the petitioner was unable to upload the file due to technical glitches on the respondent's own portal. He emphasised that the petitioner had still filed reply to the notice that too within the due date vide email dated 3rd September, 2021 and, thus, there was no non-compliance on the part of the petitioner.

4. Mr. Arvind Datar submitted that while Section 144B(1)(xvi) provides an opportunity to the assessee by serving a Show Cause Notice in case any variation of assessment is proposed which is prejudicial to the interest of assessee, Section 144B(1)(xxv) provides for issuance of draft assessment order to the assessee after considering the reply to Show Cause Notice. He emphasized that in the present case, respondent No.3 issued a Show Cause Notice under Section 144B(1)(xvi) proposing 'Null' or 'Nil' variation and the petitioner duly confirmed the same vide letter dated 16th September, 2021. However, thereafter, respondent No.3 took a complete turnaround and issued the draft assessment order proposing variations for which no Show Cause Notice was ever issued to the petitioner.

5. He pointed out that this Court in multiple cases, including ***Rani Promoter Pvt. Ltd. vs. Additional Commissioner of Income Tax [2021 (7) TMI 919-Delhi High Court]*** and ***Toplight Corporate Management (P.) Ltd. vs. National Faceless Assessment Centre Delhi [(2021) 128 taxmann.com 221 (Delhi)],*** has unequivocally held that issuance of Show Cause Notice, mentioning the proposed additions under Section 144B(xvi), is a mandatory requirement and any assessment order passed without issuance of such Show Cause Notice is bad in law. He even stated that in the instant case, the Show Cause Notice, referred to in the final Assessment Order, was never served upon the petitioner.

6. He also stated that the petitioner had not been granted any opportunity of personal hearing, despite a specific request having been made under Section 144B(7) of the Act by the petitioner. He submitted that Section 144B(7)(vii), (viii) and (ix) provides opportunity of personal hearing through video conferencing where such option is exercised by the assessee. He stated that this Court in ***Sanjay Aggarwal vs. National Faceless Assessment Centre [2021 (6) TMI 336 - Delhi High Court] and Umkal Healthcare (P.) Ltd. vs. NFAC [(2021) 131 taxmann.com 325 (Delhi)]*** has held that it was incumbent upon the Department to accord a personal hearing to the assessee where such a request was made under Section 144B(7) and failure to do so would amount to violation of principles of natural justice as well as mandatory procedure prescribed in the Faceless Assessment Scheme under Section 144B of the Act.

7. He lastly submitted that when power is given to do a certain thing in a certain way, the thing must be done in that way or not at all and other methods of performance are forbidden**.**

ARGUMENTS ON BEHALF OF THE RESPONDENTS

8. *Per contra*, learned counsel for the respondents/Revenue submitted that cases of violation of principle of natural justice can be summarized in two categories i.e. (i) denial of opportunity and (ii) insufficiency of opportunity. He stated that the cases falling under the first category, wherein no opportunity was provided to the person charged, cannot withstand the scrutiny of law and were required to be set aside. However, in cases where insufficiency of opportunity was complained of, the prejudice caused to the person deprived of sufficient opportunity had to be taken into account before any finding on legality of such proceedings was recorded.

9. He further stated that personal hearing in assessment proceedings under the Act is an added opportunity in addition to the written replies submitted by assessee and hence denial thereof would fall under the second category of "insufficiency of opportunity". According to him, Section 144B of the Act, made effective from 1st April, 2021, had brought about a new era of faceless assessment where Assessing Officers cannot be identified during the assessment proceedings. He submitted that grant of personal hearing in routine and mechanical manner or stereotyped manner would not only frustrate the entire concept of Faceless Assessment Scheme but would also defeat the very purpose for which this Scheme was brought about by the Legislature. He pointed out that the Legislature, in its own wisdom, had provided for a mechanism for grant of personal hearing in deserving cases falling in the category of Section l44B of the Act itself. The relevant portion of Section 144B of the Act, relied upon by learned counsel for respondents/Revenue, is reproduced hereinbelow:-

"144B. Faceless assessment:

(7)(vii) in a case where a variation is proposed in the draft assessment order or final draft assessment order or revised draft assessment order, and an opportunity is provided to the assessee by serving a notice calling upon him to show cause as to why the assessment should not be completed as per the such draft or final draft or revised draft assessment order, the assessee or his authorized representative, as the case may be, may request for personal hearing so as to make his oral submissions or present his case before the income-tax authority in any unit;

(viii) the Chief Commissioner or the Director General, in charge of the Regional Faceless Assessment Centre, under which the concerned unit is set up, may approve the request for personal hearing referred to in clause (vii) if he is of the opinion that the request is covered by the circumstances referred to in sub-clause (h) of clause (xii);

……
(xii):
*(a) to (g) *******
(h) circumstances in which personal hearing referred to clause (viii) shall be approved"

10. He further stated that this Court in ***Sanjay Aggarwal*** (supra) and other similar matters has held that as no standards, procedures and process in terms of sub-clause (h) of Section 144B(7)(xii) read with Section 144B(7)(viii) of the Act had been framed, it was incumbent upon Revenue to accord personal hearing to the petitioner. He emphasised that the aforesaid finding given by this Court was due to Revenue counsel not producing the standard procedure and process framed by the Revenue. He pointed out that the Standard Operating Procedure for personal hearing through video conference under the Faceless Assessment Scheme, 2019 was issued by CBDT vide Circular F.No.Pr.CCIT/NeAC/SOP/2020-21 dated 23rd November, 2020. He stated that CBDT vide order F.NO.187/3/2020-

ITA-I dated 31st March, 2021 extended the Circulars/notifications issued under Faceless Assessment Scheme to the Faceless Assessment under Section 144B of the Act and, therefore, the SOP contained in circular dated 23rd November, 2020 was equally applicable to the proceedings under Section 144B of the Act also. The circular dated 23rd November, 2020 is reproduced hereinbelow:-

> *"Where any modification is proposed in the draft assessment order (DAO) issued by any AU and the Assessee or the authorized representative* ***in his/her written response disputes the facts underlying the proposed modification*** *and makes a request for a personal hearing, the CCIT ReAC may allow personal hearing through Video Conference, after considering the facts & circumstances of the case, as below:-*
>
> > *1. The Assessee has submitted written submission in response to the DAO.*
> >
> > *2. The Video Conference will ordinarily be of 30 minutes duration. It may be extended on the request of the Assessee or authorised representative.*
> >
> > *3. The Assessee may furnish documents/evidence, to substantiate points raised in the Video Conference during the session or within a reasonable time allowed by the AU, after considering the facts and circumstances of the case."*
>
> *(emphasis supplied)*

11. Therefore, according to him, the personal hearing is discretionary. He emphasised that under faceless assessment under Section 144B of the Act, the assessee does not have a vested right to personal hearing and the same could be granted depending upon the individual facts of each case and fulfilling of the conditions laid down in SOP dated 23rd November, 2020.

COURT'S REASONING

THIS COURT IS UNABLE TO COMPREHEND AS TO HOW DESPITE 'NIL' OR 'NULL' VARIATION PROPOSED IN THE SHOW CAUSE NOTICE, THE IMPUGNED FINAL ASSESSMENT ORDER AND NOTICE MAKES A DEMAND OF Rs.1,69,77,44,240/-.

12. Having heard learned counsel for the parties, this Court is unable to comprehend as to how despite 'Nil' or 'Null' variation proposed in the show cause notice, additions had been made to the assessed income in the draft Assessment Order and the final Assessment Order. Infact, while the show cause notice assessed a total loss of Rs.1,76,94,91,428/-, the impugned final assessment order and notice makes a demand of Rs.1,69,77,44,240/- as if the petitioner made a super profit!

13. Further, no Show Cause Notice, as mandatorily required by Section 144B(1)(xvi) of the Act, had been served upon the petitioner with respect to the variations made. The draft Assessment Order had also been issued without considering the reply which was submitted by the petitioner well in time in response to notice issued under Section 142(1) of the Act through email, given the technical glitch in the online facility.

FACELESS ASSESSMENT SCHEME DOES NOT MEAN NO PERSONAL HEARING. NOT UNDERSTOOD AS TO HOW GRANT OF PERSONAL HEARING WOULD EITHER FRUSTRATE THE CONCEPT OR DEFEAT THE VERY PURPOSE OF FACELESS ASSESSMENT SCHEME.

14. Last but not the least, this Court finds that no opportunity of personal hearing was given despite a specific request made by the petitioner.

15. This Court is of the opinion that a faceless assessment scheme does not mean no personal hearing. It is not understood as to how grant of

personal hearing would either frustrate the concept or defeat the very purpose of Faceless Assessment Scheme.

16. In ***Piramal Enterprises Limited vs. Additional/Joint/Deputy Assistant Commissioner of Income-tax/Income-tax Officer & Ors., 2021 SCC OnLine Bom 1534***, while interpreting Section 144B of the Act, the Bombay High Court has held as under:-

> *"65. Principles of natural justice firmly run through fabric of section 144B(1) of the Income Tax Act, 1961. Whenever DAO, FDAO is prejudicial to the interest of assessee or RDAO is prejudicial to the interest of assessee in comparison to DAO or FDAO, upon a response to show-cause notice, personal hearing for oral submissions or to present its case before income tax authority is strongly entwined in the provisions on a request from an assessee unless it is absurd, strategised and/or intended to protract assessment etc. It would also emerge from various decisions, referred to above, ordinarily, such a request would not be declined. Judgments cited on behalf of petitioner referred to hereinbefore give exposition on significance and importance of principles of natural justice.*
>
> *66. Section 144-B of the Income Tax Act, 1961 captioned 'Faceless Assessment' commences vide its sub-section (1) with a non-obstante clause and compulsively requires assessment u/ss 143(3) and 144 shall be by prescribed procedure contained in sub-section (1) of section 144-B in the cases referred to in sub-section (2) thereof.*
>
> *67. Sub-section (9) of section 144B declares that assessment made under section 143(3) or under section 144(4) referable to subsection (2) other than sub-section (8) on or after 1st day of April, 2021 shall be non est if such assessment is not made in accordance with the procedure laid down under section 144B. There is a telling/pronounced rigour, to follow the procedure under section 144B, lest the assessment would be non est.*
>
> *68. Going by the provisions under section 144B, when hearing has been envisioned and incorporated, it is imperative to observe principles of natural justice as stipulated.*

xxx *xxx* *xxx*

> *70. In the circumstances, when an assessee approaches with response to show cause notice, the request made by an assessee, as referred to in clause (vii) of sub section 7 of section 144B, would have to be taken into account and it would not be proper, looking at the prescribed procedure with strong undercurrent to have hearing on a request after notice, to say that petitioner would have opportunity pursuant to section 144C in the present matter, would intercept operation of the scheme contained under section 144B.*

IT IS SETTLED LAW THAT WHERE EXERCISE OF A POWER RESULTS IN CIVIL CONSEQUENCES TO CITIZENS, UNLESS THE STATUTE SPECIFICALLY RULES OUT THE APPLICATION OF NATURAL JUSTICE, THE RULES OF NATURAL JUSTICE WOULD APPLY.

17. This Court is further of the view that where an action entails civil consequences, like in the present matter, observance of natural justice would be warranted and unless the law specifically excludes the application of natural justice, it should be taken as implanted into the scheme. The settled position in law is that where exercise of a power results in civil consequences to citizens, unless the statute specifically rules out the application of natural justice, the rules of natural justice would apply, including the right to personal hearing. Denial of such opportunity is not in consonance with the scheme of the Rule of Law governing our society. [See: ***Raghunath Thakur vs. State of Bihar & Ors., (1989) 1 SCC 229***]. In fact, the opportunity to provide hearing before making any decision is considered to be a basic requirement in Court proceedings.

18. In ***C.B. Gautam vs. Union of India & Ors., (1993) 1 SCC 78***, the Supreme Court invoked the same principle and held that even though it was not statutorily required, yet the authority was liable to give notice to the

affected parties while purchasing their properties under Section 269-UD of the Act, namely, the compulsory purchase of the property. It was observed that though the time frame within which an order for compulsory purchase has to be made is fairly tight, yet urgency is not such that it would preclude a reasonable opportunity of being heard. A presumption of an attempt to evade tax may be raised in case of significant under valuation of the property but it would be rebuttable presumption, which necessarily implies that a party must have an opportunity to show cause and rebut the presumption. 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 a slur on the parties to the agreement to sell lead 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, therefore, all the more necessary that an opportunity of hearing is provided.

19. Subsequently, in ***Sahara India (Firm) vs. Commissioner of Income-tax, Central-I,*** reported in ***[2008] 169 Taxman 328 (SC),*** the Apex Court highlighted the necessity and importance of opportunity of pre-decisional hearing to an assesee and that too in the absence of any express provision. Infact, the requirement of following principles of natural justice was read into Section 142(2A) of the Income Tax Act following the earlier decisions of the Supreme Court in ***Swadeshi Cotton Mills vs. Union of India (1981) 1 SCC 664*** and ***C.B. Gautam vs. Union of India & Ors. (1993) 1 SCC 78***. Later on this principle was applied to other quasi-judicial and other tribunals and it is now clearly laid down that even in these actions, where the decision

of the authority may result in civil consequences, a hearing before taking a decision is necessary.

USE OF THE EXPRESSION "MAY" IN SECTION 144B (7)(VIII) IS NOT DECISIVE. WHERE A DISCRETION IS CONFERRED UPON A QUASI-JUDICIAL AUTHORITY WHOSE DECISION HAS CIVIL CONSEQUENCES, THE WORD "MAY" WHICH DENOTES DISCRETION SHOULD BE CONSTRUED TO MEAN A COMMAND. CONSEQUENTLY, THIS COURT IS OF THE VIEW THAT REQUIREMENT OF GIVING AN ASSESSEE A REASONABLE OPPORTUNITY OF PERSONAL HEARING IS MANDATORY.

20. The non-obstante clause and the use of expression 'shall be made' in Section 144B(1) creates a mandatory obligation upon the respondent/Revenue to follow the prescribed procedure. This Court is also of the view that the use of the expression "may" in Section 144B (7)(viii) is not decisive. It is settled law that having regard to the context, the expression "may" used in a statute has varying significance. In some contexts, it is purely permissive, whereas in others, it may make it obligatory upon the person invested with the power to exercise it. The word "may" is capable of meaning "must" or "shall" in the light of the context. In fact, where a discretion is conferred upon a quasi judicial authority whose decision has civil consequences, the word "may" which denotes discretion should be construed to mean a command. In ***State (Delhi Admn.) vs. I.K. Nangia & Anr., (1980) 1 SCC 258***, the Supreme Court has held as under:-

> *"15. …There can be no doubt that this implies the performance of a public duty, as otherwise, the scheme underlying the section would be unworkable. The case, in our opinion, comes within the dictum of Lord Cairns in Julius v. Lord Bishop of Oxford:*
>
> *There may be something in the nature of the thing empowered to be done, something in the object for which it is*

to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so.

The Explanation lays down the mode in which the requirements of Section 17(2) should be complied with. Normally, the word 'may' implies what is optional, but for the reasons stated, it should in the context in which it appears, mean 'must'. There is an element of compulsion. It is a power coupled with a duty. In Maxwell on Interpretation of Statutes, 11th Edn. at p. 231, the principle is stated thus:

> *Statutes which authorise persons to do acts for the benefit of others or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall, if they think fit', or, 'shall have power', or that 'it shall be lawful" for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have—to say the least—a compulsory force, and so would seem to be modified by judicial exposition.*

Though the company is not a body or authority, there is no reason why the same principle should not apply. It is thus wrong to suggest that the Explanation is only an enabling provision, when its breach entails in the consequences indicated above. It is not left to one's choice, but the law makes it imperative. Admittedly, M/s Ahmed Oomer Bhoy had not at the material time nominated any person, in relation to their Delhi branch. The matter is, therefore, squarely covered by Section 17(1)(a)(ii).

21. This Court is further of the view that a quasi judicial body must normally grant a personal hearing as no assessee or litigant should get a

feeling that he never got an opportunity or was deprived of an opportunity to clarify the doubts of the assessing officer/decision maker. After all confidence and faith of the public in the justness of the decision making process which has serious civil consequences is very important and that too in an authority/forum that is the first point of contact between the assessee and the Income Tax Department. The identity of the assessing officer can be hidden/protected while granting personal hearing by either creating a blank screen or by decreasing the pixel/density/resolution.

22. Consequently, this Court is of the view that the word "may" in Section 144B(viii) should be read as "must" or "shall" and requirement of giving an assessee a reasonable opportunity of personal hearing is mandatory.

THE CLASSIFICATION MADE BY THE RESPONDENTS/REVENUE BY WAY OF A CIRCULAR DATED 23RD NOVEMBER, 2020 IS NOT LEGALLY SUSTAINABLE. AN ASSESSEE HAS A VESTED RIGHT TO PERSONAL HEARING AND THE SAME HAS TO BE GIVEN, IF AN ASSESSEE ASKS FOR IT.

23. The argument of the respondent/Revenue that personal hearing would be allowed only in such cases which involve disputed questions of fact is untenable as cases involving issues of law would also require a personal hearing. This Court is of the view that the classification made by the respondents/Revenue by way of the Circular dated 23rd November, 2020 is not legally sustainable as the classification between fact and law is not founded on intelligible differentia and the said differentia has no rational relation to the object sought to be achieved by Section 144B of the Act.

24. Also, if the argument of the respondent/Revenue is accepted, then this Court while hearing an appeal under Section 260A (which only involves a

substantial question of law) would not be obliged in law to grant a personal hearing to the counsel for the Revenue!

25. Consequently, this Court is of the opinion that an assessee has a vested right to personal hearing and the same has to be given, if an assessee asks for it. The right to personal hearing cannot depend upon the facts of each case.

CONCLUSION

26. For the aforesaid reason, the impugned final assessment order and impugned notice (both dated 27th November, 2021) issued by respondent No.3 to the petitioner are set aside and the matter is remanded back to the Assessing Officer who shall issue a Show Cause Notice and a draft assessment order and thereafter pass a reasoned order in accordance with law. With the aforesaid direction, the present writ petition along with pending application stands disposed of.

MANMOHAN, J

NAVIN CHAWLA, J

JANUARY 14, 2022
AS/js