[2024] 464 ITR 578 (All)

[IN THE ALLAHABAD HIGH COURT]
SATISH KUMAR BANSAL HUF

v.

NATIONAL FACELESS ASSESSMENT CENTRE AND ANOTHER

SAUMITRA DAYAL SINGH and DONADI RAMESH *JJ.*

April 26, 2024.

Section(s): Income-tax Act, 1961, ss. 143(3), 144B(6)(vii), 144B(6)(viii) ; Constitution of India, s. 226
Assessment Year: 2022-23
Favouring: Assessee, person /Direction/Observation, Condition, Qualification, Clarification, Declaration

ASSESSMENT — FACELESS ASSESSMENT — CONDITIONS PRECEDENT — PROVIDING OPPORTUNITY OF PERSONAL HEARING EVEN IF NOT REQUESTED IN WRITING BY ASSESSEE — NO DISCRETION WITH ASSESSING OFFICER — FAILURE TO COMPLY WITH CONDITION — VIOLATION OF PRINCIPLES OF NATURAL JUSTICE — ASSESSMENT ORDER SET ASIDE — ORDER TO BE TREATED AS SHOW-CAUSE NOTICE AND PROCEEDINGS TO FOLLOW IN ACCORDANCE WITH LAW — INCOME-TAX ACT, 1961, ss. 143(3) , 144B(6)(vii) , (viii) — CONSTITUTION OF INDIA, ART. 226

Section 144B(6)(vii) of the Income-tax Act, 1961 mandates that the assessee be given an opportunity of hearing regarding the variation proposed to the income of the assessee. At the time of submission of his reply to the show-cause notice, the assessee "requests" for an opportunity of personal hearing, which is necessary to be provided in terms of section 144B(6)(viii) . Grant of opportunity of personal hearing is not optional at the discretion of the Assessing Officer. On the contrary under the scheme of the Act, providing for opportunity of personal hearing is a mandatory rule and its waiver an exception to be exercised by the assessee. Wherever the assessee makes a specific request in terms of section 144B(6)(vii) , that would be enforced on the assessing authority through the National Faceless Assessment Centre in accordance with section 144B(6)(viii) . The provision cannot be read to mean that an opportunity of personal hearing may be granted only where the assessee specifically requests. That would be to give meaning to the word "request" used under section 144B(6)(vii) and (viii) , larger and much wider than intended by the Legislature. The word "request" used under section 144B(6)(vii) and (viii) only implies that where an assessee may furnish his written reply to the show-cause notice but not opt to avail of the opportunity of personal hearing, it may not be mandatory for the Assessing Officer to grant such opportunity of personal hearing if he intends to accept

the explanation furnished. He may pass an appropriate ex parte order accepting the explanation furnished by the assessee. If however, on reading the explanation furnished, the Assessing Officer maintains his tentative opinion to pass the assessment order as proposed, that may be adverse to the assessee, he would necessarily fix a date for personal hearing and communicate it to the assessee, through electronic mode as provided under the Act.

The assessment proceedings involve disputed questions of facts and law. What may be intended to be communicated by an assessee by submitting his written reply, may be received differently by the Assessing Officer on a simple ex parte reading thereof.Therefore, for the purpose of an effective discussion to arise and a reasoned conclusion to be drawn thereafter by the Assessing Officer, oral hearing remains an important and near about mandatory requirement to be fulfilled to ensure both, the requirement to pass a just and proper judicial or quasi-judicial order and also to preserve the faith in the adjudicatory authorities. If the assessee is to be taxed at a rate or at an income higher than he has returned, he deserves to know the reasons. Such reasons cannot be drawn ex parte, i. e., on the strength of an ex parte opinion of the Assessing Officer. Rather, there must be recorded reasons to deal with the explanation that the assessee may have furnished to the tentative opinion of the Assessing Officer. The assessee can then make an informed decision to either accept the reasoning and pay the tax or approach the appellate forum.

By way of the amendment made to section 251 the first appellate authority has no power to "set aside" a defective assessment order and to remit the matter to the Assessing Officer. He can either "confirm" or "reduce" or "enhance" or "annul" an assessment order. In the absence of power to remit the matter to the assessing authority to make a fresh assessment, in the case of an ex parte order wrongly drawn on ex parte basis, the appellate power would remain restricted and he would be forced to entertain the appeal on the merits and exercise the powers of the Assessing Officer which is not the scheme of the Act. If the opportunity of personal hearing is to be declined by the Assessing Officer as a normal practice, the assessee would have lost one opportunity and tier of appeal, for no fault on his part.

Held, allowing the appeal, that in the first notice issued proposing a variation in income of the assessee only three days' time was granted to the assessee to reply. No assessment order was passed on the date fixed, i. e., March 15, 2024. The Assessing Officer had considered the adjournment application filed by the assessee on March 16, 2024 and had fixed another date for the very next day, i. e., March 17, 2024 which was a Sunday. Therefore, it was obligatory for the Assessing Officer to have fixed another date before passing the final order under section 143(3) read with section 144B for the assessment year 2022-23. Where the principles of natural justice had been violated, such an order was unsustainable and therefore, set aside. The assessee could treat the order as final show-cause notice and submit his reply. If the Assessing Officer did not accept the written explanation he would afford an opportunity of personal hearing to the assessee and then proceed in accordance with law.

Writ Tax No. 627 of 2024.

Shubham Agrawal for the petitioner.

Gaurav Mahajan and *Manu Ghildyal* for the respondents.

JUDGMENT

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Heard Sri Shubham Agarwal, learned counsel for the petitioner and Sri Manu Ghildyal, learned counsel for the Revenue.

2. The present petition has been filed to challenge the ex parte assess ment order dated March 23, 2024 passed in the case of the petitioner under section 143(3) read with section 144B of the Income-tax Act, 1961 (here-inafter referred to as the "Act") for the assessment year 2022-23.

3. At the outset, an objection has been raised as to the existence of sta tutory alternative remedy of appeal. That has been met by learned counsel for the petitioner on the strength of his submission that ex parte assess-ment order has been passed practically without allowing for any oppor-tunity of hearing to the petitioner less so reasonable opportunity of hearing. Neither the petitioner was given enough time to furnish its writ-ten reply to the show-cause notice dated March 11, 2024 nor it was granted any real opportunity to be heard during the assessment proceedings. The first notice for assessment was issued to the petitioner through e-mail mode on March 11, 2024 fixing the date as March 15, 2024. In view of short time granted, the petitioner could not appear on the date fixed. However, he moved an adjournment application on the next date, i. e., March 16, 2024. On that application, the Assessing Officer fixed the next/second and the final date of hearing on March 17, 2024. That was a Sunday. It is in such circumstances that the Assessing Officer passed the impugned assess-ment order on March 23, 2024 without allowing for any real opportunity of hearing to the petitioner to participate in the assessment proceedings.

4. Learned counsel for the Revenue submits, the assessment proceed ings had been initiated earlier. The petitioner was participating in the same. At the fag end of the proceedings, the petitioner did not co-operate. Accordingly, the assessment order has been finalised. Statutory remedies

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are available to the petitioner against the assessment order, therefore, the petition may not be entertained.

5. Having heard learned counsel for the parties and having perused the record, section 144B of the Act (by virtue of sub-section (6)(vii) and (viii)) mandates opportunity of hearing to be given to the petitioner upon show-cause notice issued to show cause why assessment may not be completed as proposed. Further, if at the time of submission of his reply to the show-cause notice, the assessee "requests" for opportunity of personal hearing, the same is necessary to be provided in terms of section 144B(6)(viii). Reading of the two provisions does not suggest that grant of opportunity of personal hearing is optional at the discretion of the Assessing Officer. On the contrary in the context of rights in dispute before the Assessing Officer and under the Scheme of the Act, providing for opportunity of personal hearing appears to be the rule and its waiver an exception to be exercised by the assessee. Wherever the assessee makes a specific request in terms of section 144B(6)(vii), that would be enforced on the assessing authority through the National Faceless Assessment Centre in accordance with section 144B(6)(viii). However, the provision cannot be read to mean that opportunity of personal hearing may be granted only where the assessee specifically requests for the same.

6. There is no warrant to interpret that the processual law prescribes that opportunity of personal hearing may not be granted by the assessing authority unless specifically requested for by the petitioner, in writing. To do that would be to give meaning to the word "request" used under section 144B(6)(vii) and (viii), larger and much wider than intended by the Legislature. Under the general Scheme of the Act, assessment orders are to be passed after giving opportunity to the assessee to present his case. To that extent, the Revenue does not dispute the contention of the assessee and it does not claim a right to frame ex parte assessment orders. It contends, the opportunity for personal hearing is not inherent in the right to participate in the assessment proceedings. The assessee may participate in the assessment proceedings by furnishing his written reply. If however, he seeks to avail of the opportunity of personal hearing, he may necessarily make a specific request, in that regard.

7. That may never be accepted. The assessment proceedings by very nature, often involve disputed question of facts and law. By merely submitting the written explanations, the facts and law may not become clear, on their own. Both with respect to computation of taxable receipts as also with respect to expenditure incurred and allowances and exemptions claimed, the facts and explanations thereto are not only required to be

pleaded and noted but are necessary to be discussed. It is not uncommon that in the course of a judicial or quasi-judicial proceeding the written document may be read in more than one way. That is also true of all explanations and replies. Also, language and writing are a mode of communication. They vary from person to person. Often same or similar thoughts are expressed differently by different persons depending upon their own skill and preferred use of expressions and method of writing. Therefore, what may be intended to be communicated by an assessee by submitting his written reply, may be received differently by the Assessing Officer on a simple ex parte reading of the same.

8. Therefore, for the purpose of an effective discussion to arise and a reasoned conclusion to be drawn thereafter by the Assessing Officer, oral hearing remains an important and near about mandatory requirement to be fulfilled to ensure both, the requirement to pass a just and proper judicial or quasi-judicial order and also to preserve the faith in the adjudicatory authorities.

9. Seen from another perspective, if the assessee is to be taxed at a rate or at income higher than he has returned, he deserves to know the reasons for the same. The reasons may not be drawn ex parte, i. e., on the strength of an ex parte opinion of the Assessing Officer. Rather, there must be recorded reasons to deal with the explanation that the assessee may have furnished to the tentative opinion of the Assessing Officer. Only after such reasons are drawn and recorded in the assessment order, the assessee may have opportunity to know the mind of the Assessing Officer. He may then make an informed decision to either accept the reasoning and pay up the tax or approach the appeal forum.

10. Here, we may also take note of an earlier amendment made to sec tion 251 of the Act whereby the power of the first appellate authority to "set aside" a defective assessment order and to remit the matter to the Assessing Officer, has been done away. At present, the first appellate authorities may either "confirm" or "reduce" or "enhance" or "annul" an assessment order. In the absence of power to remit the matter to the assessing authority to make a fresh assessment, in the case of an ex parte order wrongly drawn on ex parte basis, the appellate power would remain seriously restricted. The appellate authority would be forced to entertain the appeal on all merit issues and exercise the powers of the Assessing Officer. While it is not in doubt that the appellate authority has all the powers of an Assessing Officer, at the same time, it is not the Scheme of the Act to require the job of the assessing authority to be routinely performed by the first appellate authority. If the opportunity of personal

hearing is to be declined by the Assessing Officer by way of a normal prac tice, we foresee such situations are bound to arise in the normal course of things. In any case, the assessee would have lost one opportunity and tier of appeal, for no fault on its part.

11. Therefore, the word "request" used under section 144B(6)(vii) and (viii) only implies, where an assessee may furnish his written reply to the show-cause notice but not opt to avail of the opportunity of personal hearing, it may not be mandatory for the Assessing Officer to grant such opportunity of personal hearing if he intends to accept the explanation furnished. He may pass appropriate ex parte order accepting the explanation furnished by the assessee. If however, on reading the explanation furnished, the Assessing Officer maintains his tentative opinion to pass the assessment order as proposed, that may be adverse to the assessee, he would necessarily fix a date for personal hearing and communicate the same to the assessee, through electronic mode (as provided under the Act). Thereafter, it would be for the assessee to avail of that opportunity. If the assessee fails to avail of that opportunity, the Assessing Officer may proceed in accordance with law.

12. Seen in that light, the facts of the present case are glaring. The first notice proposing to make the variation was issued on March 11, 2024 and not earlier. Only three days' time was granted to the petitioner to respond to the same. At the same time, no assessment order came to be passed on the date fixed, i. e., March 15, 2024. Rather, the Assessing Officer entertained the adjournment application moved by the petitioner on March 16, 2024 and fixed another date. However, for reasons not known to the court and reasons that may never be speculated but in the circumstance that do not admit of any valid reasons to exist, the Assessing Officer fixed the proceedings for the very next date, i. e., March 17, 2024. That was a Sunday. Therefore, it was obligatory without fail for the Assessing Officer to have fixed another date before he may have proceeded to pass the final order. Seen in that light, the written instructions received by Sri Ghildyal in compliance of the last order do not bring out any just fact explanation to the course adopted by the assessing authority. Copy of the written instructions have been marked as "X" and retained on record. In the light of the above, no useful purpose may be served in keeping the present petition pending or calling for a counter-affidavit or to relegate the petitioner to the forum of appeal. As discussed above, that appeal if filed will only require the appellate authority to function as the assessing authority in the light of the amendment made in section 251 of the Act. That a part on first principle-

where rules of natural justice have been completely violated, we may never allow such an order to stand.

13. Accordingly, the order dated March 23, 2024 is set aside. The peti tioner may treat that order as final show-cause notice and submit its reply thereto within a period of one week and not later. Thus, the written reply, if any, may be filed by the petitioner by May 4, 2024. If the Assessing Officer is inclined to accept the explanation furnished by the assessee, in entirety, he may pass the consequential order without fixing any further date for hearing as the petitioner has not "requested" for the same. If how-ever, he proposes to reject the explanation furnished by the petitioner, he would necessarily fix a date for hearing with at least 15 days prior notice. It may be communicated through a prescribed mode. The petitioner under-takes to appear before the assessing authority in the manner prescribed on that date. Thereafter, the assessment proceeding may be carried on and be completed in accordance with law.

14. With the aforesaid observation, the present petition is allowed. No order as to cost.

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