IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 16260 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE BIREN VAISHNAV

and

HONOURABLE MR. JUSTICE DEVAN M. DESAI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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SHREE GANESH INTERMEDIARY PRIVATE LIMITED

Versus

NATIONAL FACELESS ASSESSMENT CENTRE, DELHI

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Appearance:
MR HARDIK V VORA(7123) for the Petitioner(s) No. 1
MR M R BHATT & CO.(5953) for the Respondent(s) No. 1
MR KARAN SANGHANI, ADVOCATE FOR MRS KALPANA K RAVAL(1046) for the Respondent(s) No. 2

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CORAM:**HONOURABLE MR. JUSTICE BIREN VAISHNAV**
and
HONOURABLE MR. JUSTICE DEVAN M. DESAI

Date : 19/08/2023

CAV ORDER

(PER : HONOURABLE MR. JUSTICE BIREN VAISHNAV)

1. The present petition has been filed praying for a writ of certiorari or writ, order or direction in the nature of certiorari quashing/setting aside the assessment order passed under section 144 read with section 263 read with section 144B of the Act for the assessment year 2015-16 making addition of Rs.85,36,152/-.

2. Facts in brief would indicate that the petitioner is engaged as an intermediary, agent, advisor, stockist, distributor, consultant to deal in all sorts of raw materials, finished, processed or in any other form and other allied materials. The petitioner had filed return of income declaring total loss of Rs.33,78,626/-.

2.1 The case of the petitioner was selected for limited scrutiny for issue regarding large increase in unsecured loans in comparison to high loans/advances/investment in shares. The Assessing Officer made a disallowance of

Rs.41,044/- under Section 14A read with Rule 8D of the Income Tax Act, 1961 and Income Tax Rules in the aseessment order dated 08.02.2017.

2.2 Subsequently, notice under section 263 of the Act came to be issued invoking the provisions of Section 2(22) (e) of the Act on the ground that the assessment order dated 08.12.2017 was passed which was erroneous and prejudicial to the interest of revenue. The order was passed on 16.03.2020. Being aggrieved by the order passed by the revisionary authority, the petitioner filed an appeal on 31.03.2021 before the ITAT.

2.3 It is the case of the petitioner that in pursuance of the order dated 16.03.2020, notices were issued on 08.09.2021 and 21.09.2021 asking for various details. Since the notices went to an old authorized representative on his email address, it is the case of the petitioner that he could not represent on 28.09.2021. A draft assessment order was passed proposing to make an

addition of Rs.85,36,152/- under section 2(22)(e) of the Act. The show-cause notice and the draft assessment order required the petitioner to comply with the same on or before 29.09.2021. In response to the show-cause notice, the petitioner with the help of a new authorized representative on 28.09.2021 filed a response to the show-cause notice taking various contentions.

2.4 It is the case of the petitioner that without considering these objections, the respondent on 30.09.2021, completed the assessment proceedings ex-parte under section 144 read with section 263 of the Act.

3. Mr. Hardik Vora, learned advocate appearing for the petitioner has challenged this order on various grounds:

(I) Mr. Vora would submit that the order has not considered the detailed submissions point wise made by the petitioner in his reply dated 28.09.2021. He would submit that the first notice was issued on 08.09.2021,

second on 21.09.2021 and the final show-cause notice on 28.09.2021. A short time to file reply was given especially when the time limit to complete the assessment was expiring on 30.09.2021. He would submit that it was apparently unfair and unreasonable for the respondents to work out a schedule of responding to the notices at the fag end of the last month i.e. September 2021 when the proceedings would be time barred on 30.09.2021.

(II) Mr. Vora would submit that the notice was issued just two days before the limitation was to expire and only a days' time was provided which deprived the petitioner of reasonable opportunity of being heard.

(III) Mr. Vora would further submit that despite the fact that the petitioner did manage to file a reply on the same date i.e. on 28.09.2023 along with necessary documents, however, an ex-parte order was passed simply stating that 'submission filed by the assessee is verified, no further modifications in this regard'.

(IV) Mr. Vora would rely on clause xxiv of Section 144B of the Act which requires that the assessment shall be completed only after taking into account the response furnished by the assessee which was not done and therefore the assessment order violates the principles of natural justice.

3.1 Mr. Vora, learned advocate for the petitioner in support of his submissions would rely on the following decisions:

(a) Tin Box Company vs. CIT [MANU/SC/0849/2001]

(b) Dineshkumar Chhaganbhai Nandani vs ITO 2023:GUJHC:2993-DB

(c) Sharmila Vikram Mahurkar vs ACIT [[2023] 149 taxmann.com 375 (Gujarat)]

(d) Dipak Natwarlal Dholakiya vs ACIT [[2023] 149 taxmann.com 151 (Gujarat)]

(e) M/s. Advance Realty Developers vs NeAC [2021 :

GUJHC:53030-DB]

(f) Dharamshil Agencies vs. Union of India [2021 : GUJHC: 26807-DB

(g) MMG Constructions LLP vs. Union Of India & Ors. Writ Petition No. 21638 of 2021 (T-IT) at High Court of Karnataka

(h) Dipesh Lalchand Shah vs. NFAC [[2023] 146 taxmann.com 517 (Gujarat)]

(i) Darshan Enterprise vs. ACIT [[2022] 134 taxmann.com 411 (Delhi)]

(j) K.K. Wine vs. NeAC [[2022] 143 taxmann.com 411 (Delhi)

(k) Lamba Techno Flooring Solutions (P.) Ltd. vs. NFAC, Delhi [[2021] 127 taxmann.com 194 (Delhi)]

(l) Pankaj vs. NeAC [[2022] 135 taxmann.com 361 (Bombay)

(m) Swastik Wire Products vs. PCIT [[2023] 149 taxmann.com 47 (Himachal Pradesh)

(n) Divya Capital One (P) Ltd. vs. ACIT [[2022] 139 taxmann.com 461 (Delhi)

(o) Tata Capital Financial Services Ltd. vs. ACIT [[2022] 137 taxmann.com 315 (Bombay)]

4. Mr. Karan Sanghani, learned advocate appearing for the respondent submitted that the impugned assessment order was pursuant to the order passed under Section 263 of the Act which is not under challenge. During the proceedings under Section 263 of the Act, the petitioner was afforded adequate opportunity. He would draw the attention of the court to the order sheet entry dated 29.09.2021 and submit that the FAO has considered the submission filed by the petitioner on 29.09.2021 and after considering the same, order under section 144 of the Act was passed on 30.09.2021.

4.1 Mr. Sanghani has further submitted that the said issue was also discussed by the FAO in para 13 of the assessment order dated 30.09.2021. He would draw the attention of the court to the observations made in the assessment order dated 30.09.2021 which reads as

under:

> "13. A show cause notice dated 28/09/2021 was issued to the assessee for proposing to complete the assessment u/s. 144 r.w. section 263 as above and invited assessee objection if any. Assessee has submitted its reply and some of the documents. Submission filed by the assessee is verified, no further modifications in this regard. As the assessee has not produced the document in response to letter dated 08/09/2021 and 21/09/2021, the assessment is completed u/s. 144 of the act. All other details as per return and as records are verified."

4.2 Mr. Sanghani has submitted that in view of the above, there is no reason to entertain the petition and the same deserves to be dismissed.

5. Having heard learned advocates for the respective parties, the facts would indicate that the order under Section 263 of the Act was passed by the PCIT-4 on 16.03.2020. No action was taken thereafter for over a period of 17 months. At the fag end of the schedule when the time limit to complete the assessment was to

come to an end, the department on 08.09.2021 and 21.09.2021 issued first and second notices respectively which was issued to the petitioner on the old consultant's email id. Thereafter, a show-cause notice was issued asking the petitioner to submit a response on the very next date. Without considering the submissions, an order was passed on 30.09.2021.

5.1 As contended by the learned counsel for the petitioner, what is apparent and evident is that without working out a schedule so as to give a reasonable opportunity to the petitioner, particularly when the assessment is faceless, the respondents giving only a day for the petitioner to respond so as to save the limitation period, obviously created a situation where the petitioner lost an adequate opportunity to submit a response.

6. Mr. Hardik Vora, learned counsel for the petitioner has cited several decisions on the issue of inadequate opportunity as a result of such an exercise at the hands of

the authorities. In the case of **Dineshkumar Chhaganbhai Nandani** (supra), the co-ordinate bench of this court was faced with a case where a show-cause notice was issued on 29.03.2022 to show cause as to why the proposed variation should not be made. The show-cause notice was sent at 11.41 am on 29.03.2022 and it was stated in the said notice that the petitioner shall submit reply by 23.59 pm on the very same day i.e. on 29.03.2022 and thereby time of 12 hours was given.

6.1 The facts of the case in the present are similar to the one in the case of **Dineshkumar Chhaganbhai Nandani** (supra) inasmuch as the notice of 28.09.2021 called upon the petitioner to file a response by 29.09.2021 at 11.59 pm. On the very next date, since the assessment was getting time-barred, an order of assessment was passed only for the compliance of the provisions and depriving the petitioner of a reasonable opportunity of being heard. The Division Bench in the case of **Dineshkumar Chhaganbhai Nandani** (supra)

has considered several decisions of this court on the issue of reasonable opportunity of being heard in context of Section 144B of the Act. Paras 11 to 14 of the decision read as under:

> "11. In the aforesaid factual aspect of the present case, the decisions relied on by the learned advocates appearing for the parties are required to be examined.
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> 12. In the case of Gandhi Realty (India)(P) Ltd. (supra), it was the case of the concerned petitioner that a show cause notice-cum-draft assessment order was not issued to the concerned assessee, and therefore, in the facts of the said case, this Court held that though earlier various notices were issued to the concerned assessee, the respondent was required to issue show cause notice-cum-draft assessment order, which is mandatory requirement for faceless assessment. However, we are of the view that the aforesaid decision would not be applicable to the facts of the present case because in the present case, show cause notice-cum-draft assessment order was issued to the petitioner.
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> 13. In the case of Agrawal JMC Joint Venture (supra), similar type of objection was raised by therespondents in the affidavit-in-reply. The contention was raised in the said case that petitioner is having alternative efficacious

remedy of filing an appeal before the Appellate Authority and therefore petition may not be entertained. However, the Division Bench of this Court, after considering various aspects and after considering the submissions canvassed by learned advocates appearing for the parties, observed in para 18 and 19 as under:

> "18. In summation, it can be deduced from the provisions, as also the decisions discussed that Section 144B of the IT Act under heading of the Faceless Assessment provides for the assessment under Section 143 (3) and 144 to be carried out as per the procedure contained in Section 144 B of the IT Act. As noted above, Sub-section (9) of Section 144B of the IT Act in no uncertain term provides that after the 1st day of April, 2021, the assessment made under Section 143 (3) or under Section 144(4) of the IT Act shall be non est, when not made in accordance with the procedure detailed in Section 144B of the IT Act. The opportunity of hearing as envisaged under Section 144B of the IT Act also shall need to be scrupulously adhered to as the principles of natural justice are unfailingly ingrained in this provision.
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> 19. Reverting to the facts on the matter on hands, it is quite clear that the notice along with the draft assessment order was given to the petitioner on 04.04.2021, the

response to the same was given within two days by the petitioner in the mode as prescribed under the Law. It also filed further reply to the said notice on 08.04.2021 as well as on 15.04.2021 in continuation of the first reply of 06.04.2021. It is also a matter of record that there is no reference of the request made on 07.04.2021 in a subsequent reply made in continuity on the part of the petitioner of 08.04.2021 as well as 15.04.2021. However, that would not in any manner question his conduct of requesting for the personal hearing in as much as that aspect is neither disputed nor belied from the material which is available from the eportal of the Income Tax Department. In fact in the affidavit-in-reply itself there is a reference of such a request made by the petitioner which according to the respondent-revenue is impermissible as he has not exercised the option while responding to the notice and the draft assessment order on 06.04.2021."

13.1.In the case of Dipak Natwarlal Dholakiya (supra), the Court observed in para 5 and 6 as under:

> "5. We have heard, learned advocate Mr. S. N. Divatia for the petitioner who has vehemently urged before the Court that the impugned order passed under Section 143(3) read

with Section 263 with Section 144B of the Act and consequential notice of demand and penalty, are in gross violation of the principles of natural justice and statutorily, it was mandatory for the respondent to issue a showcause notice cum draft assessment order whenever there is variation from the returned income as provided under Section 144B(1)(xiv) of the Act. Therefore, he has urged that notice was uploaded on 17.03.2022 at 12:41 IST and asked the petitioner to comply before 6:00 p.m. on 18.03.2022. Thereby, the petitioner was allowed hardly a time of 12 hours to comply to the aforesaid notice. Further, 18.03.2022 was a holiday on account of Dhuleti and yet the petitioner uploaded all the possible and available details with him. There was gross violation of the principles of natural justice and the entire action of the respondent of completing the assessment was not in consonance with the legislative intent. Heavy reliance was placed on the decisions in Calcutta Discount Co. Ltd. v. ITO, 41 ITR 191 (SC) and in Radhakishan Industries v. State of Himachal Pradesh and Others, (2021) 6 SCC 771. The addition made herein of Rs.39,87,750/- allowing less than four hours to make necessary calculations and collect the details is

next to impossible task and hence, the order is sought to be interfered with.

6. Having thus heard both the sides, on the ground of non-compliance of mandatory statutory provisions and for grant of less than four hours to respond to the notice on 29.03.2022, interference is desirable. We could notice that the final show-cause notice cum draft assessment order proposing huge additions aggregating Rs.39,87,750/- was issued at 17:22 IST on 29.03.2022, which was to be responded to by 23:59 IST on the very day. This, surely, is in gross violation of the principles of natural justice as to ask some one to respond to the same in less than four hours, amounts to nearly achieve impossible. When it is being terms as violation of principles of natural justice, it is mild expression to the conduct of the respondent. The least that could have been done was to regard the objective and very purport of introducing service of show-cause notice cum draft assessment order under Section 144B of the Act. Such Faceless Assessment Scheme 2019 has been incorporated under the Tax regime vide Taxation and Other Laws (Relaxation and Amendment of

Certain Provisions) Act, 2020, whereby, Section 144B was inserted from 1st April 2021. The circular of Central Board of Direct Taxes (CBDT) deals with the procedure of faceless assessment, scope of work to be done by different units such as assessment unit, verification unit, technical unit etc. Non-compliance of subsection (9) of Section 144B of the Act would render the issue non est. Our attention is drawn that the provisions of sub-section (9) of Section 144B of the Act though have been omitted from the statute book, there is no running away from the fact that the time given is in no manner can be said to be in due compliance of the statutory provisions or in satisfaction of fulfilling the objectives of newly introduced provisions.

13.2.In the aforesaid case, less than five hours time was given to the concerned assessee for filing reply and this Court observed that the respondent had failed to grant reasonable opportunity of hearing to the concerned assessee and therefore it was held that it is the case of gross violation of principles of natural justice.

14. In the present case, as discussed hereinabove, it is the specific case of the petitioner that a show cause notice-cum-draft assessment order was issued on

> 29.03.2022 and petitioner was asked to submit his reply within less than 12 hours. Though the petitioner submitted reply, it is the specific case of the petitioner that the respondents have failed to grant adequate opportunity of hearing/ an opportunity to defend was not given to the petitioner assessee. We have gone through the reply dated 29.03.2022 submitted by the petitioner, copy of which is placed on record at page 82 of the compilation. A specific request was made by the petitioner to the respondent that particular documents/details be supplied for cross verification and an opportunity to crossexamine one Mr. Saurabh Kathwadia be given to the petitioner. However, it is not in dispute that the said documents as asked for by the petitioner were not supplied to him nor any opportunity of crossexamination of the aforesaid person was granted to the petitioner. Even otherwise, within less than 12 hours, it is difficult for the petitioner to submit complete reply to the respondents."

6.2 In the case of **M/s. Advance Reality Developers** (supra), the Division Bench of this court considering the provisions of Section 144B of the Act held as under:

> "11. Wherever, there is a clear breach in

following the procedure under this provision, assessment made under Section 143 (3) or under Section 144 (other than those transferred under Section 144(8) after 01.04.2021) would be non-est. In the matter on hand, as is quite apparent by not providing the opportunity to the assessee when huge variation/addition was proposed by the authority, would naturally and obviously prove prejudicial to the interest of the assessee. The least expected of the respondent is to provide an opportunity, and that would mean that a reasonable time period would be necessary for responding to the final notice and the Draft Assessment Order. Mere service can never make revenue complacent. It is a case where only a day's time was provided, which by no stretch of reasons could be said to be a reasonable time period. Even when no time period is stipulated for seeking the response from the petitioner/assessee, the minimum reasonable time could be of 15 days where the parties can examine the details and can respond again during that period if there is a request that comes, the least that the authority can do is to respond to the same just because there is no human agency that would not mean that the National Faceless Centre would not respond to the request.

11.1 Once the statute provides that there is an opportunity to be availed to the assessee when there is a variation prejudicial to its interest is proposed, his request for adjournment as well as for the hearing also needs to be responded

> to. It is a completely unacceptable and unpalatable proposition that once a request come from the assessee, the respondent chooses not to respond to the same and go ahead with the framing of the assessment, that too when the time period was not expiring. Even if the time period expires, it is for the respondent to workout a schedule in the manner as expected particularly when there is no human agency and when the assessee also has no one to turn to but to send a request through the e-portal."

6.3 In the case of **Darshan Enterprise** (supra), once again the Division Bench of this court, in paras 4, 19 & 20 held as under:

> "4. The second submission of Mr. Shah is that the impugned assessment order is an exact reproduction of the draft assessment order. It fails to consider any of the details/information furnished by the writ applicant with respect to the specific queries raised by the Investigating Officer. Mr. Shah would submit that it is just a mechanical exercise undertaken by the Assessing Officer and the same would frustrate the very object with which Section 144B came to be introduced in the Act with effect from 01.04.2021. Mr. Shah laid much emphasis on the subclause (9) to Section 144B which starts with a nonobstante clause. Sub-section (9) to Section 144B provides that notwithstanding

> anything contained in any other provision of the Act, the assessment made under sub-section (3) of Section 143 or under Section 144 in the cases referred to in sub-section (2) would be treated as non-est if such assessment is found to be not in accordance with the procedure laid down under Section 144B of the Act.
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> 19. The relevant aspects as pointed out by the assessee cannot be said to have been looked into from a proper perspective. We don't find any discussion in the impugned assessment order. This is the reason why we are saying that the procedure as contemplated under Section 144B cannot be said to have been duly followed in the case on hand.
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> 20. In view of the aforesaid, we are left with no other option but to quash and set aside the impugned assessment order and remit the entire matter to the Assessing Officer for de novo consideration. On remand, we expect the Assessing Officer to meaningfully look into all the relevant aspects as highlighted by the assessee including the observations made by this Court in this order and even if the Assessing Officer still deems fit to reject the stance of the assessee, he shall to do so by assigning cogent reasons."

7. For the aforesaid reasons therefore, the assessment order passed under Section 144B read with Section 263 of the Act for the assessment year 2015-16 is quashed

and set aside. The matter is remitted to the Assessing Officer so as to enable the petitioner to be heard in light of the detailed submissions made by the petitioner on 28.09.2021 so as to meaningfully look into the aspects highlighted by the assessee. Petition is accordingly allowed.

(BIREN VAISHNAV, J)

(D. M. DESAI,J)

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