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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.2051 OF 2017

Tata Projects Limited	...Petitioner
vs.	
Deputy Commissioner of Income-tax	
Range 2(3)(2) & Ors.	...Respondents

ALONG WITH
WRIT PETITION (L)NO.2498 OF 2017

Tata Projects Limited	...Petitioner
vs.	
Assistant Commissioner of Income-tax	
Range 2(3)(1) & Ors.	...Respondents

ALONG WITH
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.782 OF 2017

Tata Teleservices (Maharashtra) Limited	...Petitioner
vs.	
The Central Board of Directions Taxes and Others	...Respondents

Mr.J.D.Mistry, Senior Counsel a/w Mr.Nishant Thakkar
and Ms Jasmin Amalsadwala i/b PDS Legal for the
Petitioners in W.P.Nos.2051/2017 and W.P.(L)
No.2498/2017

Mr.Anil Singh, ASG a/w Mr.A.R.Malhotra and Ms
Geetika Gandhi for the respondents
Mr.Prakash Shah, Mr.Jas Sanghvi i/b PDS Legal for
the petitioner in W.P.No.782 of 2017
Mr.Anil C.Singh, ASG a/w Mr.Suresh Kumar for
respondents in W.P.No.782 of 2017

CORAM : A.S.OKA, & A.K.MENON,JJ.
DATE : 21st,22nd and 23rd NOVEMBER, 2017

ORAL JUDGMENT: (PER A.S.OKA,J.)

1 We have heard these petitions at some length as
certain important procedural and legal issues are

involved in these petitions which arise out of the provisions of the Income Tax Act, 1961 (for short 'the said Act'). The issues relate to implementation of the Centralised Processing of Return Scheme, 2011 published under the notification SO-16E dated 4th January 2012 and especially the processing of the returns which are transmitted by the Centralised Processing Centre (for short "the Centre") to Assessing Officers having jurisdiction in accordance with sub clause (iii) of clause (8) of the Centralised Processing of Return Scheme, 2011 (for short "the said Scheme of 2011"). The petitions also concern issue of interpretation of sub-section 1(D) of section 143 of the said Act as existing on the relevant date.

2 Writ Petition No.2051 of 2017 and WP(L) 2498 of 2017 have been filed by the same Company. Writ Petition No.2051 of 2017 concerns the assessment year 2015-16 and Writ Petition (L) No.2498 of 2017 concerns the assessment year 2016-17. In the case of assessment year 2015-16, return was filed by the petitioner-company on 30th November 2015 claiming refund. A revised return was filed on 9th January 2016 claiming higher refund. Both the returns were filed electronically. In relation to the said returns filed for the assessment year 2015-16, a notice under sub-section 2 of section 143 of the said Act was issued by the respondents on 19th September 2016. It is stated in the petition that as scrutiny proceedings of the cases of the assessment year 2014-15 are not yet concluded, the

scrutiny proceedings of the returns of the assessment year 2015-16 have been kept pending. According to the case of the petitioner, on 6th June 2016, Income Tax e-filing website showed that the returns were transferred by the Centre to the jurisdictional Assessing Officer for processing. Reliance is placed on screen shot of the concerned page of the website. The petition refers to communications of the Officer of the petitioner to the offices of the first and second respondents for the purposes of pursuing return and the claim for refund. Reliance is placed on several letters addressed by the petitioner from time to time. According to the case of the petitioner, on 19th May 2017, the first respondent (Assessing Officer) signed intimation under clause (a) of sub-section 1 of section 143 of processing the refund of Rs.28,75,27,080/- along with interest payable under section 244A of the said Act. The case made out by the petitioner in the Writ Petition is that the refund was not issued by the first respondent but it was orally informed that the refund will not be issued due to expiry of limitation contained in the second proviso to clause (a) of sub-section 1 of section 143 of the said Act. Writ Petition No.2051 of 2017 is filed seeking a writ of mandamus directing respondents to process of return for the assessment year 2015-16 and to issue the refund.

3 As stated earlier, Writ Petition (L) No.2498 of 2017 relates to the returns filed for the assessment year 2016-17. In this case, a return

claiming refund was filed on 30th November 2016 and the return was subsequently revised on 20th December 2016. According to the case of the petitioner, on 23rd December 2016, the Centre transferred the returns filed by the petitioner to jurisdictional Assessing Officer for its processing. Even in this petition, reliance is placed on the visits made by the Officers of the Petitioner to the Office of the Assessing Officer and the letters addressed by the petitioner to the Assessing Officer. According to the case of the petitioner, on 12th July 2017, after manually processing the return, the first respondent came to the conclusion that the petitioner is entitled to refund of Rs.10,88,85,962/-. Thereafter, a representation was made requesting the second respondent to issue the refund. As no action was taken by the respondents, this petition was filed seeking a writ of mandamus enjoining the respondents to issue the refund of the amount already determined by the Assessing Officer after manually processing the return.

4 As far as Writ Petition No.782 of 2017 is concerned, the relief sought in this writ petition under Article 226 of the Constitution of India is in relation to the returns filed by the petitioner company for the assessment years 2014-15 to 2016-17. An order was passed on 25th October 2016 (Exhibit-A to the petition). The said order is under section 119 of the said Act which notes that the returns containing claims for refund for the assessment years 2012-13, 2013-14, 2014-15 were not processed

within the time frame prescribed under sub-section 1 of section 143 of the said Act. It was pointed out that as a result of this delay the Tax Payers were deprived of legitimate refund. By the said order, the power under section 119 was exercised by the Central Board of Direct Taxes by which the time frame prescribed in second proviso to sub 1 of section 143 was relaxed and returns were permitted to be processed by 31st March 2017. In paragraph 3 of the said order, it is stated thus:

"3 However, the above relaxation shall not be applicable to those cases where the said return-of-income was not processed in view of provisions of sub-section (1D) of section 143 of the Act. Further, this relaxation shall not be applicable to those cases where either demand is shown as payable in the return-of-income or is likely to so arise after processing the return-of-income."

5 The grievance made in this petition is about the failure of the respondents to process the returns for the refund. A prayer is made firstly for setting aside the impugned order dated 25th October 2016 to the extent to which it restricts relaxation for processing of returns by 31st March 2017 where returns could not be processed in view of Section 143 (1D) as notices were issued under sub-section (2) of section 143. The second prayer is for a writ of mandamus enjoining the respondents to process the returns and sanction the refund for the

assessment years 2014-15, 2015-16 and 2016-17. It is not in dispute that with the passage of time, this petition survives only as regards the assessment year 2016-17.

6 Coming back to the first two petitions, at two stages, affidavits in reply have been filed. The first affidavit is dated 27th October 2017 in implementation of the order dated 11th October 2017. Paragraph 1 of the said order reads thus:

"1 Heard the learned Additional Solicitor General of India appearing for the respondents. We have perused the letter dated 29th September 2016 addressed by the Assistant Commissioner of Income Tax-2(3)(1), Mumbai to the learned senior standing counsel of the Income Tax Department. The said letter discloses shocking state of affairs. It records that as far as return filed by the petitioner for the assessment year 2016-2017 is concerned, an attempt was made on 12th June 2016 to process the return through ITD systems. The system denied processing of the return on the ground that ITD software is under construction. Another attempt was made on 27th September 2016 to process the return electronically which could not be successful on the same ground. The letter records that the ITD software for the year 2016-2017 is likely to be released by the end of October 2017. Thus, all concerned departments were

aware at least on 27th September 2016 that the said software was not available for the year 2016-2017. That is the status which continues till today."

7 A direction was issued in paragraph 3 of the said order which reads thus:

"3 We direct the appropriate Officer of the Income Tax Department to file an affidavit setting out as to why there is a gross delay in providing ITR software for the year 2016-2017. The affidavit will also state what action the Government of India proposes to take against those who are guilty of dereliction of duty. Today, we are not passing any order directing that the manual process be adopted as the learned ASG stated that the software will be released by the end of this order and the processing of return of 2016-2017 will be completed by end of November 2017. The affidavit shall be filed by 30th October 2017."

8 An Affidavit in response to the said direction is filed by K. Ravi Ramachandran, Additional Commissioner of Income-tax - 2(3), Mumbai. On the basis of the said order, clarifications were sought by him which have been reproduced in paragraph 6 of the said affidavit. It is contended that out of 4.35 crore e-filed Returns for the assessment year 2016-17, 1% income tax returns were transferred to the

Assessing Officer (AO) as the same were selected for Scrutiny and therefore, assessment was required to be done by the AOs. It is stated that only a small percentage of the returns was pushed to AO and it is stated that 79,936/- returns were transferred by the Centre to the AOs for processing. It is stated that certain category of returns which were transferred to AOs by the Centre are not processed normally. It is stated that a category of cases was transferred to AOs was of cases where a claim under sections 90 and 91 of the said Act was made by the taxpayer. It is stated that from the assessment year 2015-16, ambitious project was undertaken by the Income Tax Department called as Income Tax Business Application (ITBA). It is stated that in ITBA, many modules of software were launched. Various details of the softwares have been mentioned. Ultimately, it is stated in the affidavit that a software to process the returns of the assessment year 2016-17 will be available by 31st October 2017 and that if any subsequent technical issue arises, that will be expeditiously addressed. An assurance was given that returns for the year 2016-17 will be processed by not later than 30th November 2017.

9 There is a separate affidavit filed by the Assistant Commissioner of Income Tax in Writ Petition No. 2051 of 2017 concerning assessment year 2015-16. It is contended therein that the case of the petitioner was selected for scrutiny under CASS cycle, and thereafter, the return was pushed to AO

by the Centre at Bangalore. Subsequently, a notice under sub-section 1 of section 143 was issued to the petitioner-assessee. It is specifically contended in paragraph 6 that as a notice under sub-section 2 of section 143 was issued on 19th September 2016, in view of sub-section 1 (D) of section 143, the assessment under sub-section 1 of section 143 was not done and the time provided in the second proviso of sub-section 1 of section 143 expired on 31st March 2017. It is further stated that the Principal Commissioner of Income Tax, Mumbai declined to grant permission for manual processing of the return of the said year. Further, it is stated that the time is available to complete assessment till 31st December 2017 and therefore, if refund is due, the same will be granted latest by 31st December 2017.

10 As far as Writ Petition no.782 of 2017 is concerned, there is no affidavit in reply filed by the respondents.

11 Before we advert to the submissions made across the bar, certain more factual aspects which are relevant will have to have noted. As far as Writ Petition No.2051 of 2017 is concerned which deals with the Assessment Year 2015-16, a notice under sub-section (2) of Section 143 was served only on 19th September, 2016. As regards Writ Petition (st) no.2498 of 2017, a notice under sub-section (2) of Section 143 of the said Act was issued for the Assessment Year 2016-17 on 16th August, 2017.

12 In all the three petitions, various issues are canvassed. The first issue canvassed especially in the Writ Petition relating to the Assessment Year 2016-17 is regarding the failure of the department to provide proper software under ITBA for processing the returns which were forwarded by the Centre to AO for processing. Reliance is placed on various orders passed by this Court from time to time. The crux of the submission is that there is no law which prevents AO from processing the returns manually when requisite software is not available. Another issue canvassed is on the interpretation of sub-section (1D) of Section 143 of the said Act and especially with reference to the stand taken in both the affidavits that in every case where a notice under sub-section (2) of Section 143 is issued, the return cannot be processed. Another issue canvassed is about the delay in processing the returns as a result of which the petitioners have been denied legitimate refund. There are submissions canvassed on the interpretation of various sub-sections of Section 143. There are also submissions canvassed on the said scheme of 2011. We must also note here that as far as Writ Petition (L)no.2498 of 2017 is concerned, after commencement of hearing of the petition, the returns for the Assessment Year 2016-17 have been processed and refund has been issued. We have heard the learned Senior Counsel appearing for the petitioner in Writ Petition (L)No.2498 of 2017 and Writ Petition No.2051 of 2017. We have heard the learned counsel representing the petitioner in Writ Petition No.782 of 2017. We

have also heard the learned Additional Solicitor General of India on the provisions of the said Scheme and in general on the submissions canvassed across the bar.

13 One of the main reasons for giving detailed hearing to the parties is the admitted failure of the department to provide proper software for processing of returns of the Assessment Year 2016-17 which were sent by the Centre to AOs for assessment.

14 To the affidavit of Shri K. Ravi Ramachandran, Additional Commissioner of Income Tax-2(3), Mumbai, there are various annexures which include a letter dated 26th October, 2017 issued by the Directorate of Income Tax (Systems) which accepts the fact that out of the returns filed for the Assessment Year 2016-17, the Centre at Bangalore forwarded 79,936 returns to the AOs for processing. A stand has been specifically taken that in view of the provisions of sub-section(1D) of Section 143, the processing of the returns selected under scrutiny shall not be necessary. The stand taken in the said letter issued by the Directorate is that the returns submitted for the Assessment Year 2016-17 will have to be processed in ITBA. It is stated that the module for processing of the returns was launched on 3rd October, 2017 and it is stated that the module will be ready for implementation by 31st October, 2017. Thus, the returns filed for the Assessment Year 2016-17 which were forwarded to the AOs for processing were not processed at least till 31st

October, 2017 only on the ground that the module in ITBA was not ready. The consequence of this delay is that the returns which were pushed to AOs remained pending and could not be processed. It is in this context that the issue of non-availability of proper software assumes importance.

15 Section 143 of the said Act as it exists today, reads thus:-

143. [(1) Where a return has been made under section 139, or in response to a notice under **sub-section (1) of section 142, such return shall be processed in the following manner, namely:—**

(a) the total income or loss shall be computed after making the following adjustments, namely:—

(i) any arithmetical error in the return; or

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

(b) the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a);

(c) the sum payable by, or the amount of refund due to, the assessee shall be determined after adjustment of the tax and interest, if any, computed under clause (b) by any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VIII, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest;

(d) an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee under clause (c); and

(e) the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee:

Provided that an intimation shall also be sent to the assessee in a case where the loss declared in the return by the assessee is adjusted but no tax or interest is payable by, or no refund is due to, him:

Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made.

Explanation.—For the purposes of this sub-section,—

(a) "an incorrect claim apparent from any information in the return" shall mean a claim, on the basis of an entry, in the return,—

(i) of an item, which is inconsistent with another entry of the same or some other item in such return;

(ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or

(iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction;

(b) the acknowledgement of the return shall be deemed to be the intimation in a case where no sum is payable by, or refundable to, the assessee under clause (c), and where no adjustment has been made under clause (a).

(1A) For the purposes of processing of returns under sub-section (1), the Board may make a scheme¹⁶ for centralised processing of returns with a view to expeditiously determining the tax payable by, or the refund due to, the assessee as required under the said sub-section.

(1B) Save as otherwise expressly provided, for the purpose of giving effect to the scheme¹⁶ made under sub-section (1A), the Central Government may, by notification¹⁶ in the Official Gazette, direct that any of the provisions of this Act relating to processing of returns shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in that notification; so, however, that no direction shall be issued after the 31st day of March, [2012].

(1C) Every notification issued under sub-section (1B), along with the scheme made under sub-section (1A), shall, as soon as may be after the notification is issued, be laid before each House of Parliament.]

[(1D) Notwithstanding anything contained in sub-section (1), the processing of a return shall not be necessary, where a notice has been issued to the assessee under sub-section (2).]

[(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,—

(i) where he has reason to believe that any claim of loss, exemption, deduction, allowance or relief made in the return is inadmissible, serve 20 on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

[Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003;]

(ii) notwithstanding anything contained in clause (i), if he considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in

support of the return:

[Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.]]

[(3) On the day specified in the notice,—

(i) issued under clause (i) of sub-section (2), or as soon afterwards as may be, after hearing such evidence and after taking into account such particulars as the assessee may produce, the Assessing Officer shall, by an order in writing, allow or reject the claim or claims specified in such notice and make an assessment determining the total income or loss accordingly, and 24adetermine the sum payable by the assessee on the basis of such assessment;

(ii) issued under clause (ii) of sub-section (2), or as soon afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment:]

[Provided that in the case of a—

(a) [research association] referred to in clause (21) of section 10;

(b) news agency referred to in clause (22B) of section 10;

(c) association or institution referred to in clause (23A) of section 10;

(d) institution referred to in clause (23B) of section 10;

(e) fund or institution referred to in sub-clause (iv) or trust or institution referred to in sub-clause (v) or any university or other educational institution referred to in sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (via) of clause (23C) of section 10, which is required to furnish the return of income under sub-section (4C) of section 139, no order making an assessment of the total income or loss of such 26[research association], news agency, association or institution or fund or trust or university or other educational institution or any hospital or other medical institution, shall be made by the Assessing Officer, without giving effect to the provisions of section 10, unless—

(i) the Assessing Officer has intimated the Central Government or the prescribed authority the contravention of the provisions of clause (21) or clause (22B) or clause (23A) or clause (23B) or sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10, as the case may be, by such [research association], news agency, association or institution or fund or trust or university or other educational institution or any hospital or other medical institution, where in his view such contravention has taken place; and

(ii) the approval granted to such [research association] or other association [or fund or trust] or institution or university or other educational institution or hospital or other medical institution has been withdrawn or notification issued in respect of such news agency or fund or trust or institution has been rescinded :]

[Provided further that where the Assessing Officer is satisfied that the activities of the university, college or other institution referred to in clause (ii) and clause (iii) of sub-section (1) of section 35 are not being carried out in accordance with all or any of the conditions subject to which such university, college or other institution was approved, he may, after giving a reasonable opportunity of showing cause against the proposed withdrawal to the concerned university, college or other institution, recommend to the Central Government to withdraw the approval and that Government may by order, withdraw the approval and forward a copy of the order to the concerned university, college or other institution and the Assessing Officer:]

[Provided also that notwithstanding anything contained in the first and the second provisos, no effect shall be given by the Assessing Officer to the provisions of clause (23C) of section 10 in the case of a trust or institution for a previous year, if the provisions of the first proviso to clause (15) of section 2 become applicable in the case of such person in such previous year, whether or not the approval granted to such trust or institution or notification issued in respect of such trust or institution has been withdrawn or rescinded.]

[(4) Where a regular assessment under sub-section (3) of this section or section 144 is made,—

(a) any tax or interest paid by the assessee under sub-section (1) shall be deemed to have been paid towards such regular assessment ;

(b) if no refund is due on regular assessment or the amount refunded under sub-section (1) exceeds the amount refundable on regular assessment, the whole or the excess amount so refunded shall be deemed to be tax payable by the assessee and the provisions of this Act shall apply accordingly.”

Sub-section (1D) which was on the statute book on the relevant date reads thus:-

“[(1D) Notwithstanding anything contained in sub-section (1), the processing of a return shall not be necessary, where a notice has been issued to the assessee under sub-section (2).]”

16 When returns are filed either under Section 139 or pursuant to a notice under sub-section (1) of Section 142, sub-section (1) of Section 143 mandates that the returns shall be processed in the manner laid down in clauses (a) to (e) thereof.

Thus, the processing of a return involves determination of total income or loss, tax and interest, if any, payable and sum payable by, or the amount of refund due to the assessee. Clause (d) of sub-section (1) lays down that an intimation shall be prepared or generated and sent to the assessee specifying the sum determined payable by, or the amount of refund due to the assessee under clause(c). Clause (e) of sub-section (1) further provides that the amount of refund due in pursuance of the determination under clause (c) shall be granted to the assessee. If the proviso to sub-section(1) of section 143 is read, it mandates that the intimation as provided in clause (d) has to be issued before the expiry of one year from the end of the financial year in which the return is made. Before we go to sub-section (1D) as it stood at the relevant time, we must make a reference to sub-sections (2) and (3). Sub-section (2) contemplates issuance of a notice in the contingency covered by the said provision. Sub-section (3) provides that once such a notice is served, after following the procedure laid down therein, the Assessing Officer is required to pass an order in writing making an assessment of the total income or loss and determine the sum payable by the assessee or refund of any amount due to him on the basis of the assessment. Thus, the net result of the processing done under sub-section (1) of Section 143 and the order passed under sub-section (3) of Section 143 is the same. The time within which the exercise of passing an order under sub-section(3) of Section 143 should be

done is provided in sub-section(1) of Section 153 of the said Act.

17 Now we come to the interpretation of sub-section(1D) which was on the statute book with effect from 1st July, 2012. It provided that notwithstanding anything contained in sub-section (1), the processing of return shall not be necessary where a notice has been issued to the assessee under sub-section(2) of section 143. The Central Board of Direct Taxes issued instructions dated 13th January, 2015 which state that the provision of sub-section (1D) was enacted to prevent the grant of refund after processing as the scrutiny proceedings may result in demand for taxes on finalization of the assessment subsequently. Thus, in short, the instructions provided that in no case, the return can be processed where a notice under sub-section (2) of Section 143 was issued. This instruction was a subject matter of challenge before the Delhi High Court. A Division Bench of Delhi High Court in the case of Tata Teleservices v/s. Union of India¹ decided the issue. Paragraphs 23 and 24 of the said decision are relevant which read thus:-

“23. The real effect of the instruction is to curtail the discretion of the AO by 'preventing' him from processing the return, where notice has been issued to the Assessee under Section 143(2) of the Act. If it the legislative intent was that the return would not be processed at all once a

1 Writ Petition-Civil No.12304 of 2015 decided on 11th May, 2016

notice is issued under Section 143(2) of the Act, then the legislature ought to have used express language and not the expression “shall not be necessary”. By the device of issuing an instruction in purported exercise of its power under Section 119 of the Act, the CBDT cannot proceed to interpret or instruct the income tax department to 'prevent' the issue of refund. In the event that a notice is issued to the Assessee under Section 143(2) of the Act, it will be a matter the discretion of the concerned AO whether he should process the return.

24. *Consequently, the Court is of the view that the impugned Instruction No.1 of 2015 dated 13th January, 2015 issued by the CBDT is unsustainable in law and it is hereby quashed. It is directed that the said instruction shall not hereafter be relied upon to deny refunds to the Assesseees in whose cases notices might have been issued under Section 143(2) of the Act. The question whether such return should be processed will have to be decided by the AO concerned exercising his discretion in terms of Section 143(1D) of the Act.”*

(emphasis added)

18 Thus, the legal position which emerges from the decision of the Delhi High Court is that, it is the discretion of the AO whether to process the return or not, after a notice under sub-section(2) of Section 143 of the said Act is issued and it cannot be said that in every case in which a notice under sub-section (2) of Section 143 has been issued, the AO has no power to process the return. This view of

the Delhi High Court has been quoted with approval by a Division Bench of this Court in the case of Group M. Media India Pvt. Ltd. v/s. Union of India and Others². The Division Bench in paragraph 8 held that AO would independently apply his mind and take a decision in terms of Section 143 of sub-section (1D) of the Act whether or not to grant a refund in the facts and circumstances of each case. As noted earlier, the stand of the department as is reflected from the affidavits on record and the communication dated 26th October, 2017 issued by the Directorate of Income Tax (Systems) is that once a notice under sub-section (2) of Section 143 of the said Act is issued, there is no discretion left with the AO whether to process the return or not. Thus, the said stand taken by the department is completely contrary to sub-section (1D) and the interpretation put to the said Section by the Delhi High Court as well as this Court, and therefore, the said stand deserves to be rejected.

19 While we are on the decision in the case of M/s. Group M. Media India Pvt. Ltd. (supra), we must also refer to the other aspects dealt with and decided by the Division Bench. Paragraphs 9 and 10 of the said decision are relevant for our consideration which reads thus:-

“9. The only contention on behalf of the Revenue to oppose the petition is that as the Assessing Officer has time available to process the refund till 31st March, 2017, no mandamus

2 Writ Petition No.2067 of 2016 decided on 15th October, 2016

can be issued till 31st March, 2015. We repeatedly asked of Mr. Mohanty, the learned Counsel for the Revenue, if there was any reason why the return could not be processed before 31st March, 2017. No reasons are forthcoming from the Revenue as to why the Assessing Officer will not be able to dispose of the application for refund or process the return under Section 143(1) of the Act before 31st March, 2017. This conduct/stand of the Assessing Officer, to say the least, is most disturbing in the context of the fact that the petitioners have been seeking refund since April, 2016. First, he does not deem it proper to inform the petitioner in writing why he cannot deal with the application and after the petitioner moves the Court, the stand taken is that no direction can be given to him till 31st March, 2017 which is the last date to process the return under Section 143(1) of the Act. This attitude on the part of the Assessing Officer is preposterous.

10. The action of the officer on the ground urged seems to be in complete variance with the higher echelons of administration of the tax administration being an assessee friendly regime. In fact, the CBDT has itself issued Instruction No.7/2012, dated 1st August, 2002 wherein they have specifically directed the officers of the Revenue to process all returns in which refunds are payable expeditiously. Similarly, as late as in 2014 in the Citizen's Charter issued by the Income Tax Department in its vision statement states that the Department aspires to issue refunds along with interest under Section 143(1) of the Act within 6 months from date of electronically filing the returns. **In this case, the return was filed on 29th November, 2015, yet**

there is no reason why the Assessing Officer has not processed the refund and taken a decision to grant or not grant a refund under Section 143(1D) of the Act. This attitude on the part of the Assessing Officer leaves us with a feeling (not based on any evidence) that the Officers of the Revenue seem to believe that it is not enough for the assessee to please the deity (Income Tax Act) but the assessee must also please the priest (Income Tax Officer) before getting what is due to him under the Act. The officers of the State must ensure that their conduct does not give rise to the above feeling even remotely.”

(emphasis added)

20 In the facts of the case, the averments made in the first two petitions (of Tata Projects Ltd) and annexures to the petitions show that after the returns were transferred to the AO much before notices were issued under sub-section (2) of Section 143, the petitioner made repeated representations to the AO to process the returns and number of visits were made by the officers of the petitioners. Perhaps, the AO was under an impression that he can wait till the last date provided for processing of the returns. If we peruse the affidavit of Mr. Madhukar AVES, Assistant Commissioner of Income Tax-2(3)(1), Mumbai, filed in Writ Petition No.2051 of 2017 and in particular paragraph 9, it is very clear that he is under an impression that as the last date for completing scrutiny assessment for the Assessment Year 2015-16 is 31st December, 2017, he

can wait till 31st December, 2017 for completing the scrutiny assessment. This approach which is reflected from the said affidavit, has to be deprecated. Secondly, he has completely ignored that the return has to be processed as there was no discretion exercised after service of notice under sub-section (2) of section 143.

21 In Writ Petition (L)No.2498 of 2017, the assurance given in the affidavit is that the return would be processed and refund will be released by the end of November 2017. Accordingly, refund has also been issued. In writ petition no.782 of 2017, when the petition was argued day before yesterday, the stand taken by the learned counsel appearing for the Income Tax Department, on the basis of written instructions was that due to technical difficulties in ITBA system, processing cannot be done. It is stated that in the written note of the Deputy Commissioner of Income Tax-8(3)(1), Mumbai, that numerous complaints have been lodged with the ITBA help desk highlighting the issue so as to enable the said office to process the returns of income for the Assessment Year 2016-17. There are specific statements made that due to the technical errors, the return of Assessment Year 2016-17 of the petitioner cannot be processed. It appears that on the same day in the evening, after the submissions were heard, an attempt was made to process the return of the petitioner. From the snapshot of the relevant page of ITBA which is tendered across the bar by the income tax department, it is clear that

this exercise was done on 20th November, 2017 at 6.25 p.m. which records that the return is submitted successfully. Perhaps, only after the submissions were heard that some efforts was made to process the return.

22 We made a query to the learned ASG whether there is any policy of the department as regards priority to be given to the returns which are to be processed AOs. The returns are required to be processed by AO under the said scheme of 2011 either by reason of a notice having been issued under sub-section (2) of Section 143 or because the returns are pushed to AOs for processing for other reasons. It cannot be that the Assessing Officer gives priority for processing of the returns of those assessees who file petitions in this Court and make a grievance. There has to be a rational policy for processing the returns which are sent to the AO and which are required to be dealt with either under sub-section(1) or sub-section(3) of Section 143. There cannot be a pick and choose policy and the AOs will have to be guided by a rational policy which will stand the test of Article 14 of the Constitution of India. As a Writ Court, we cannot appreciate the practice of giving priority to the processing of the returns of those assessees who approach to this Court with a grievance. We have already quoted paragraph 10 of judgment of this Court in the case of M/s. Group M. Media India Pvt. Ltd. (supra) and very pertinent observations made by the Division Bench in the last part of paragraph 10.

As indicated by the said observations, the AOs cannot give priority to the processing of the returns to those assesseees who approach them. We are surprised to note that there is no order of priority laid down by any authority which will bind the AOs when it comes to processing of the returns. For example, the returns of Assessment Year 2016-17 which were transferred to AO were not processed till 31st October, 2017 as proper ITBA software was not available. Now the income tax department must ensure that the returns which are kept pending due to its own default, are processed as per a rational policy which determines the order of priority. We are on this aspect, it will be necessary to advert to the notification No.S.O.17(E) dated 4th January, 2012, sub-clause (iib) of clause 8 is relevant which confers power on the Commissioner to decide the order of priority for processing of returns of income based on administrative requirements. The phrase "administrative requirements" is very vague. In fact this clause indicates that there can be arbitrariness while deciding which returns should be given priority for the processing. Therefore, we propose to issue a direction to the respondents to formulate a rational policy on this aspect and place it before the Court within the time specified by this Court.

23 Now we come to the issue whether AOs can manually process the returns which have been transferred by the Centre at Bangalore to them for various reasons.

24 Sub-section (1A) of Section 143 lays down that for the purpose of processing returns under sub-section (1), the Board may make a scheme for centralized processing of returns with a view to expeditiously determining the tax payable by, or the refund due to, the assessee as required sub-section (1) of Section 143. Thus, the object of providing for centralized process of returns is to avoid delay in the processing of the returns.

25 The said Scheme of 2011 and in particular clause 7 provides for setting up as many centralized processing Centres as it may deem necessary. Accordingly, the Centre has been established at Bangalore. Clause 8 of the said Scheme 2011 is relevant which reads thus:-

“8. Processing of Returns.

(i) The Centre shall process a valid return of income in the following manner, namely: –

(a) the sum payable to, or the amount of refund due to, the person shall be determined after credit of such Tax Collected at Source (TCS), Tax Deducted at Source (TDS) and tax payment claims which can be automatically validated with reference to data uploaded through TDS and TCS statements by the deductors or the collectors, as the case may be, and tax payment challans reported through authorised banks in accordance with the procedures adopted by the Centre in this regard;

(b) an intimation shall be generated electronically and sent to the person by e-mail specifying the sum determined to be payable by, or the amount of the refund due to, the person; and

(c) any intimation to the person to pay any sum determined to be payable shall be deemed to be a notice of demand as per the provisions of section 156 of the Act and all other provisions of the Act shall be applicable accordingly.

(ii) The Commissioner may, –

(a) adopt appropriate procedure for processing of returns; or

(b) decide the order of priority for processing of returns of income based on administrative requirements.

(iii) Wherever a return cannot be processed in the Centre for any reasons, the Commissioner shall arrange to transmit such return to the Assessing Officer having jurisdiction to processing.”

26 Sub-clause(i) of clause 8 lays down the manner in which the centre shall process a valid return of income. Clause 8 is consistent with sub-section (1A) of Section 143. Sub-clause (ii) is very vague. It provides that the Commissioner may adopt appropriate procedure for processing of returns or decide the order of priority for processing of returns of income based on administrative requirements. It is obvious that the said discretion conferred on the Commissioner has to be exercised, consistent with the object of sub-section (1A) of Section 143 of ensuring speedy processing of returns

which are filed at the Centre. The said power cannot be exercised to delay the processing of returns or to create a situation where without following any order of priority AOs, pick and choose the returns and process the same out of turn. The only provision under the said Scheme of 2011 which enables the Centre to transmit the returns to AOs is in sub-clause(iii) of clause 8 which provides that wherever the return cannot be processed in the Centre for any reason, the Commissioner shall arrange to transmit such return to the AO having jurisdiction for processing. One such reason can be issuance of a notice under sub-section (2) of Section 143. Such a return may be covered by the regime of sub-section (3) of Section 143, but AO has a discretion to process the return in question after service of notice under Section (2) of Section 143.

27 Notification no.17E dated 4th January, 2012 (for short the "the second notification") has been issued in exercise of powers conferred under sub-section (1B) of Section 143 for giving effect to the scheme framed under sub-section (1A) of Section 143. Sub-section (1B) confers powers on the Central Government to direct that any of the provisions of the said Act relating to processing of returns, shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in the notification published in the Official Gazette. A careful perusal of the second notification and in particular clause 3 thereof will show that there is no modification made to the provisions of Section

143. Sub-clause(v) of clause (3) contains a similar provision that wherever a return cannot be processed in the Centre for any reason, the Commissioner shall arrange to transmit such return to the AO having jurisdiction for processing. Neither in the said Scheme of 2011 nor in the second notification, it is provided that in certain cases, such return can be re-transmitted by AO to the Centre. Both the notifications clearly provide that whenever such returns are transmitted by the Commissioner from the Centre to AO, the same shall be processed by the Assessing Officer in accordance with sub-section(1) of Section 143.

28 There is no provision in both the notifications which lays down that after the returns are sent to the Assessing Officer, if he finds that the returns cannot be processed on ITBA or any other software, the same cannot be processed manually. In the context of the discretionary powers conferred on the Commissioner of adopting the appropriate procedure for processing of the returns, it will be necessary to make a reference to the facts of the case in Writ Petition (L)No.2498 of 2017 which is for Assessment Year 2016-17. The AO had sought a permission from the Principal Commissioner of Income Tax, Mumbai, to assess the return manually. The said permission was denied though the Principal Commissioner was aware that the module in ITBA will be ready for implementation earliest by 31st October, 2017. We presume that the Commissioner exercised his discretion under sub-clause(ii) of clause 8 of the

said scheme of 2011 or sub-clause(iv) of clause (3) of the second notification. The only object served by the refusal of the Commissioner to grant permission to process return manually was that the processing of the return was unduly delayed. In fact, the Principal Commissioner ought to have taken steps to remedy the situation and with a view to ensure that the returns transmitted to AO are not kept pending, ought to have authorised manual processing of returns. The said scheme of 2011 was brought into force with the object of expediting the processing of returns. Due to the approach adopted by the Principal Commissioner, in fact there was a delay caused in processing of the returns.

29 The situation arising due to non-availability of software has been dealt with by this Court in the past. In the case of ***Shapoorji Pallonji & Co. v/s. Deputy Commissioner of Income Tax 3(1) and another***³, this issue arose before a Division Bench of this Court. The petitions were disposed of by order dated 27th October, 2016. Paragraph 1 of the said order notes that the Assessing Officer was rendered helpless to process the returns for Assessment Year 2014-15 and 2015-16 due to technical difficulties in running of the software. Only after the petition was filed that a statement made by the learned ASG on behalf of the respondent that the system was functional. Paragraphs 3 and 4 of the said order

3 Writ Petition Nos.2424 and 2425 of 2016 decided on 27th October 2016

reads thus:-

“3. In terms of Section 143(1) of the Act, the Assessing Officer is required to process a return of income by making adjustment as specified thereunder and sending an intimation to the assessee. This intimation is required to be sent before the expiry of one year from the end of the financial year in which the return of income is filed, if any demand is payable or an amount is refundable to an assessee. In terms of Section 143(1D) of the Act, the Assessing Officer has a discretion whether to process or not a return of income under Section 143(1) of the Act, where notices have already been issued under sub-section(2) to Section 143 of the Act. In the facts of this case, the Assessing Officer is unable to process the return of income not of his volition but because the technology employed by the Income Tax Department fails him and the Act. On being asked, Mr. Malhotra, learned counsel appearing for the Revenue, on instructions, states that the systems difficulty continues till date even though the Commissioner of Income Tax has taken up the issue with the System Administrator, it is not possible to state how much longer it would take to fix the problem.

4. The convenience of modern technology and computerization of the system is to enable/assist the Income Tax Officers to discharge its statutory obligations under the Act in a more transparent and time efficient manner and not as a substitute for

human action. Therefore, where the computer system, as operating, is an hindrance to the discharge of statutory obligations, then the least that would be expected is that the senior most Officers of the Department would address this issue on war-footing. This inability to process a return of income would cause tremendous hardship to a large number of assesseees, particularly retired individuals and others similarly placed who would be entitled to refund of taxes as a large quantum of amounts received by them would be subject to Tax Deducted at Source, when the tax payable by them is minimal.”

30 There is one more relevant order passed by a Division Bench of this Court in the case of Fedex Express Transportation And Supply Chain Services (India) Pvt. Ltd. v/s. Deputy Commissioner of Income Tax-circle 9(3)(1) & 2 Ors⁴. Even the said order shows that even in July 2017, the department was made aware that the returns cannot be processed due to non availability of software. We have already referred to the letter dated 16th August, 2017 addressed by the Assessing Officer to the Principal Commissioner of Income Tax. 4th paragraph of the said letter refers to the case of Shapoorji Pallonji Co. Pvt. Ltd. (supra) which holds that computerization is to enable / to assist the Income Tax Department to function smoothly and the same cannot act as an excuse/deterrent in addressing to the queries/requests of genuine tax payers and an

4 Writ Petition No.1243 of 2017 decided on 25th July 2017

alternate mechanism should be provided for such genuine requests. In the light of this observation that a request was made to permit to manual processing, but the Principal Commissioner of Income Tax completely ignored the order of this Court which is referred in the letter dated 16th August, 2017.

31 Therefore, as far as the Assessment Year 2016-17 is concerned, the department was fully aware that returns which were sent to AOs will not be processed till 1st November, 2017. Therefore, immediate directions ought to have been issued for permitting the manual processing of the returns by the AOs. One must note here that the refund claims attract liability to pay interest.

32 We, therefore, hold that whenever returns are transferred by the Centre to AOs for processing, if the returns cannot be processed immediately because of lack of availability of proper software, or because of technical difficulties in functioning of the software, the returns must be permitted to be processed manually. There will not be any illegality attached to it. If at all software is not provided to deal with the returns of a particular year, there is no embargo imposed by law which prevents AOs from processing the returns manually. If returns cannot be processed due to system failure and if the errors cannot be rectified and system cannot be made functional within a reasonable time, the Commissioner ought to permit the AOs to process the returns manually.

33 The learned ASG was at pains to point out that in the era of digitization/computerization, taking such a view may not be proper. We are taking this view firstly because in law we see no such prohibition. The second reason for taking the said view is to ensure that the department will make sure that proper software is always available and functional which can be used by AOs for processing the returns which are pushed to them by the Centre.

34 We appreciate the stand taken by the learned ASG that for the sake of transparency and for ensuring that that the returns are processed expeditiously, manual processing should not be allowed. However, as can be seen from the facts on record, proper software was not available for considerably long time and therefore, large number of returns remained pending for processing. In Writ Petition No.782 of 2017, on instructions of the Deputy Commissioner of Income Tax, Mumbai, the learned counsel for the Income Tax Department stated that 55 returns could not be processed by him including the return of the petitioner in Writ Petition No.782 of 2017 and only after the petition was fully heard, the AO suddenly realised that the system was functioning and therefore, the processing of the return of the petitioner was undertaken. This shows that the if the writ petition would not have been heard, those 55 cases would have remained pending for indefinitely long time. The learned ASG had placed on record a

communication dated 10th July 2015 addressed by the Directorate of Income Tax (Systems) to the Principal Commissioner of Income Tax/Chief Commissioner of Income Tax. We have perused the said letter. As stated earlier, the provisions of the said Act are silent and there is no prohibition thereunder on manual processing of the returns. Even under the said scheme of 2011 and the second notification, there is no prohibition on the AOs manually processing returns which are transferred to them by the Centre. The letter dated 10th July 2015 notes that the CBDT has repeatedly instructed that in all cases, orders under section 143 (1)(a)/ section 143(3)/154 should be passed on the system. It is recorded that in exceptional cases such as time barring cases, CBDT has allowed processing of Returns of Income in Online TMS. In clause 6, it is stated that it is decided by the CBDT that henceforth no manual refund should be issued in a case which has been processed on AST system. It is stated that in exceptional cases manual refund may be issued with some safeguards. Thus, even in the direction issued by the Directorate of Income Tax (Systems), the issue of manual refunds is permitted in certain cases subject to safeguards provided in clause (6).

35 Other departmental instructions issued on 15th March 2016 are also placed on record. It record that certain returns filed during the financial year 2014-15 are pending for process under section 143(1) wherein the last date for processing is 31st March

2016. The said instructions takes a note that certain returns could not be processed on AST due to various technical reasons.

36 There is another letter placed on record by the learned ASG addressed by the Directorate of Income Tax (Systems) to all Principal Chief Commissioner of Income Tax, Principal Directorate of Income Tax and Principal Commissioners of Income Tax. The same is regarding ITBA for processing e-filed returns transferred by the Centre to ITBA. The said letter proceeds on the footing that module provided under ITBA will function. It only lays down the manner in which processing of returns sent to the AOs will be done under ITBA. Therefore, none of these letters establish that it is not open for AOs to process the returns manually either when a proper software is not available or when for more than reasonable time, there is a malfunctioning of the system.

37 In Writ Petition No.782 of 2017, the learned counsel for the respondents stated that the processing of the return of the petitioner for the assessment year 2016-17 has been undertaken in accordance with sub-section 1 of section 143 of the said Act. Considering the enormous delay on the part of the AO, the processing under sub-section 1 of section 143 will have to be completed within a period of two weeks from today.

38 In Writ Petition (L) No.2498 of 2017, as refund has been issued, there is no question of issuing any

specific direction. As regards return subject matter of Writ Petition No.2051 of 2017 in the affidavit of the AO, there is a statement on oath that the scrutiny assessment for the assessment year 2015-16 has to be completed by 31st December 2017 as per the provisions of section 153 of the Income Tax Act and if any refund is found to be due, the same will be granted latest by 31st December 2017. The said assurances will have to be accepted as undertakings of the respondents. But the processing of the return will have to be undertaken immediately.

39 Hence, we dispose of the petitions by passing the following order:

- (I) The processing of the return of the petitioner in Writ Petition No.782 of 2017 shall be completed in accordance with subsection 1 of section 143 of the Income Tax Act, 1961 as expeditiously as possible and in any event within a period of two weeks from today;
- (II) If any refund is found to be due and payable to the petitioner, the same shall be issued in accordance with law within a period of three weeks from today;
- (III) In Writ Petition No.2051 of 2017, we accept the following statement made in the affidavit of Shri Madhukar Aves, Assistant Commissioner of Income Tax, 2, (3)(1) Mumbai:
"I say that scrutiny assessment for AY 2015-16 has to be completed by 31.12.2017 as per

provisions of section 153 of the Income-tax Act. Consequent upon the assessment, if any refund is due, the same would be granted soon after completion of assessment latest by 31.12.2017."

This statement is accepted as undertakings of the respondents and therefore, there shall be order in terms of the statement;

(IV) Considering the erroneous interpretation put by the respondents to sub-section 1 (D) of section 143 of the Income Tax Act, 1961, we direct the Central Government or Central Board of Direct Taxes to issue necessary clarification for the benefit of the Officers of the Income Tax Department;

(V) As we have held earlier, there is no embargo on manual processing of the returns which are transmitted by the Central Processing Centre to Assessing Officers for processing, when software for processing of the returns is either not available or is not functioning properly. Necessary directions shall be issued by the Government of India or the Central Board of Direct Taxes to the Income Tax Department permitting manual processing of the returns in such cases;

(VI) The directions as above shall be issued as expeditiously as possible and in any event within a period of one month from the date on which this Judgment is uploaded;

- (VII) We hold that the power conferred on the Commissioners under sub clause (ii) of clause 8 of the Centralised Process Scheme of 2011 or under sub clause (iv) of clause 3 of the Notification dated 4th January 2012 bearing S.O. 17(E), shall be used by the Commissioners to ensure that the returns which are transmitted to the Income Tax Officers for processing are taken up in orderly manner;
- (VIII) We direct the Government of India or the Central Board of Direct Taxes to take a policy decision for ensuring that the such returns are taken up for processing in a rational order of priority. After taking appropriate policy decision, necessary directions shall be issued by the Government of India or the Central Board of Direct Taxes to the Department within a period of two months from the date on which this order is uploaded;
- (IX) The directions should be formulated in such a manner that there is no arbitrariness while taking up processing of returns by Assessing Officers;
- (X) The petitions are disposed of with above directions;
- (XI) Rule is made partly absolute on above terms;
- (XII) For reporting compliance, the petitions shall be listed under the caption of 'Directions' on 31st January 2018.

(A.K.MENON,J.)

(A.S.OKA,J.)