

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO.1282 OF 2021

Golden Tobacco Limited, a company
incorporated in India having office at
Tobacco House, S. V. Road, Vile Parle
(W), Mumbai 400 056

...Petitioner

Vs.

1. The National Faceless Assessment
Centre, 2nd Floor, E-Ramp,
Jawaharlal Nehru Stadium,
Delhi 110003

2. The Principal Chief Commissioner
of Income Tax- National Faceless Assessment
Centre, 2nd Floor, E-Ramp,
Jawaharlal Nehru Stadium,
Delhi 110003

3. Deputy Commissioner of Income-tax-
2(1), National Faceless Assessment
Centre, 2nd Floor, E-Ramp,
Jawaharlal Nehru Stadium,
Delhi 110003

4. Deputy Commissioner of Income-tax-
1(3)(1), Mumbai, Aaykar Bhavan,
M. K. Road, Mumbai 400 020

5. The Union of India
Through the Secretary , Ministry of
Finance, Government of India,
North Block, New Delhi-110 001

...Respondent

Mr Dharan V. Gandhi for Petitioner.
Mr Suresh Kumar for Respondent.

**CORAM : K. R. SHRIRAM AND
AMIT B. BORKAR, JJ.**

DATE: 28 OCTOBER 2021

ORAL JUDGMENT : (Per Amit B. Borkar, J.)

Rule. With the consent of both sides, Rule made returnable forthwith.

2. Petitioner has invoked the power of this court under Article 226 of the Constitution of India by challenging the assessment order dated 26/4/2021 passed under Section 143(3) read with 144B of the Income Tax Act, 1961 (for short the said Act) along with notice of demand under Section 156 of the Act also dated 26/4/2021 on the ground of breach of principles of natural justice.

3. Petitioner is a company incorporated under the Companies Act, 2013. Petitioner company is engaged in the business of manufacturing tobacco products and real estate. Petitioner had filed its return of income for the Assessment Year 2018-2019 under Section 139 of the said Act declaring total losses of Rs.40,65,00,408/-. Income Tax Authority on 22/9/2019 issued a notice under Section 143(2) of the said Act to Petitioner initiating scrutiny assessment for

Assessment Year 2018-2019. Petitioner filed its reply on 7/10/2020, giving computation of income, tax audit report and financial for Assessment Year 2018-2019. Respondent No.1 on 15/10/2020 informed Petitioner that Faceless Assessment Scheme, 2019, shall apply to the pending assessment proceedings. On 23/12/2020, respondent No.1 issued a notice under Section 142(2) of the Act requesting Petitioner to submit various details. Petitioner, on 7/1/2021, filed a partial reply giving details of other allowable deductions, disallowance under Section 40(a) (ia) of the said Act. Respondent No.1 on 26/3/2021 issued another notice to Petitioner seeking various details, which was replied online by Petitioner on 28/3/2021. Respondent No.1 on 26/4/2021 issued impugned order making an addition of Rs.120.94 crore in the total income of Petitioner and also issued Notice of Demand in Form No.156 raising demand of Rs.8,14,31,550/-. Petitioner has therefore challenged assessment order dated 26/4/2021 and Notice of Demand dated 26/4/2021 by way of the present petition.

4. This court, on 1/7/2021, issued notice to respondents, and until the next date, directed them not to take further action based on the impugned assessment order.

5. Respondents have filed their reply dated 16/9/2021 affirmed by Sakshi Kalra, Assistant Commissioner of Income Tax-1(3) (1), Mumbai. In the said reply, apart from justifying additions on merits, they disputed the absence of service of the draft assessment

order and lack of opportunity of hearing to Petitioner. It is stated that there is no violation of provisions of the Act as ample opportunity was granted to petitioner from time to time to explain its claim with supporting documents.

6. For efficacious adjudication of the issue involved, it is necessary to consider relevant provisions of section 144B of the Act. Accordingly, in the context of opportunity of personal hearing and service of the draft assessment order, the relevant portion of section 144B is quoted as under:

"144B. (1) Notwithstanding anything to the contrary contained in any other provisions of this Act, the assessment under sub-section (3) of section 143 or section 144, in the cases referred to in sub-section (2), shall be made in a faceless manner as per the following procedure, namely:—

.....

xiv) the assessment unit shall, after taking into account all the relevant material available on the record make in writing, a draft assessment order or, in a case where intimation referred to in clause (xiii) is received from the National Faceless Assessment Centre, make in writing, a draft assessment order to the best of its judgment, either accepting the income or sum payable by, or sum refundable to, the assessee as per his return or making variation to the said income or sum, and send a copy of such order to the

National Faceless Assessment Centre;

.....

(xvi) the National Faceless Assessment Centre shall examine the draft assessment order in accordance with the risk management strategy specified by the Board, including by way of an automated examination tool, whereupon it may decide to—

(a) finalise the assessment, in case no variation prejudicial to the interest of assessee is proposed, as per the draft assessment order and serve a copy of such order and notice for initiating penalty proceedings, if any, to the assessee, along with the demand notice, specifying the sum payable by, or refund of any amount due to, the assessee on the basis of such assessment; or

(b) provide an opportunity to the assessee, in case any variation prejudicial to the interest of assessee is proposed, by serving a notice calling upon him to show cause as to why the proposed variation should not be made; or

(c) assign the draft assessment order to a review unit in any one Regional Faceless Assessment Centre, through an automated allocation system, for conducting review of such order;

.....

(xxii) the assessee may, in a case where show-cause notice has been served upon him as per the procedure laid down in sub-clause (b) of clause (xvi), furnish his response to the National Faceless Assessment Centre on or before the date and time specified in the notice or within the extended time, if any;

.....

(xxiv) the assessment unit shall, after taking into account the response furnished by the assessee, make a revised draft assessment order and send it to the National Faceless Assessment Centre;

(7) For the purposes of faceless assessment—

.....

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

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

(ix) where the request for personal hearing has been approved by the Chief Commissioner or the Director-General, in charge of the Regional Faceless Assessment Centre, such hearing shall be conducted exclusively through video conferencing or video telephony, including use of any telecommunication application software which supports video conferencing or video telephony, in accordance with the procedure laid down by the Board;

(x) subject to the proviso to sub-section (6), any examination or recording of the statement of the assessee or any other person (other than statement recorded in the

course of survey under Section 133A of the Act) shall be conducted by an income-tax authority in any unit, exclusively through video conferencing or video telephony, including use of any telecommunication application software which supports video conferencing or video telephony in accordance with the procedure laid down by the Board;

.....

xii) the Principal Chief Commissioner or the Principal Director General, in charge of the National Faceless Assessment Centre shall, with the prior approval of the Board, lay down the standards, procedures and processes for effective functioning of the National Faceless Assessment Centre, Regional Faceless Assessment Centres and the unit set up, in an automated and mechanised environment, including format, mode, procedure and processes in respect of the following, namely:—

.....

(h) circumstances in which personal hearing referred to clause (viii) shall be approved;

.....

9) Notwithstanding anything contained in any other provision of this Act, assessment made under sub-section (3) of section 143 or under section 144 in the cases referred to in sub-section (2) (other than the cases transferred under sub-section (8), on or after the 1st day of April, 2021), shall be non-est if such assessment is not made in accordance with the procedure laid down under this Section.

7. Section 144B(1) of the Act deals with the procedure of Faceless Assessment. Though the expression ‘shall’ used in the opening of Section 144B (1) ordinarily implies a mandate, the statute has to be looked at having regard to the legislative intent and purpose. Section 144B(1)(xvi) deals with the procedure to be adopted by the National Faceless Assessment Center on receipt of a draft

assessment order from the assessment unit. It provides that on receipt of the draft assessment order, the National Faceless Assessment Center shall provide an opportunity to the assessee in case of variations prejudicial to the assessee's interest being proposed by serving a show-cause notice. From the language of the said provision, it appears that when any variation is proposed in the draft assessment order which is prejudicial to the interest of the assessee, the National Faceless Assessment Center has to issue a show-cause notice to the assessee in the form of a draft assessment order to provide an opportunity of hearing to the assessee to submit his explanation in respect of prejudicial variation proposed. The intention behind the service of such notice is to give an idea to the assessee about the nature of prejudicial variation, which he is required to meet during the hearing before the National Faceless Assessment Center. Section 144B (1)(xxii) provides that on receipt of the show cause notice, the assessee may furnish his response to the National Faceless Assessment Center. As per sub-section (xxiv) assessment unit shall make a revised draft assessment order after considering the assessee's response and send it to National Faceless Assessment Center. As per Section 144B(7), in case of variation prejudicial to the assessee as proposed in the draft assessment order, the right is conferred on the assessee to request a personal hearing. When the assessee makes such a request, the Chief Commissioner or Director-General in charge of the Regional E-Assessment Center in which the concerned unit is set up is required to consider such request for personal hearing if he is of the view that request is covered by the circumstances provided in exercise of power

under sub-clause (h) of clause (xii) of Section 144B of the said Act.

8. Sub-section 9 of Section 144B renders assessment under Section 144 non-est, if it is not made in accordance with the procedure laid down in the said Section. Reading of sub-section 9 of Section 144B clarifies that the procedure laid down under section 144B about breach of principles of natural justice is mandatory as sub-section 9 provides for consequences of rendering assessment in case of breach of procedure laid down in said Section.

9. Canon for interpretation and the indices are well settled as to whether a provision is a directory or mandatory. To interpret a provision as mandatory, it has to be looked into, inter alia, as to whether non-compliance with the provision could render the entire proceeding invalid or not. Whether the provision is mandatory or directory, the interpretation has to be in the light of the context, circumstances, consequence, purpose, and object sought to be achieved. The issue has to be examined having regard to the context, subject matter and object of insertion of faceless assessment in the statute book. The court may find out the consequence that would flow from construing it in one way or another. The court shall also consider whether non-compliance gives rise to penalty or serious consequence and whether a particular breach will render it invalid. It is well settled insofar as mandatory provisions are concerned; it nullifies the Act if not complied with.

10. It is also one of the object behind introduction of faceless assessment to promote efficient, effective tax administration, interface to increase accountability and introduce team-based assessment. The Faceless Assessment Scheme brings greater flexibility for taxpayers, which may save the substantial time of assessees in the tax office. The object of the Faceless Assessment Scheme is to impart 'greater efficiency, transparency and accountability'. It is also for 'improvement in quality of assessment'. Thus, these provisions' beneficial purpose and importance are for the efficacious implementation of the Faceless Assessment Scheme, unerringly leading to the conclusion that the procedure prescribed under Section 144B is intended to be mandatory and neglect of any procedural safeguard would render the assessment *non-est*.

11. In the fact situation of the present case, it appears that a notice under Section 142(1) of said Act along with questionnaire was issued on 23/12/2020 and 26/03/2021. The draft Assessment Order was prepared based on information furnished by the assessee to the said notices. It was sent to the Risk Management Unit, which accommodated it to the Review Unit. The Review Unit concurred with the draft Assessment Order and submitted its report on 25/04/2021. The impugned Assessment Order was passed on 26/04/2021, and demand notice under Section 156 was also issued on 26/04/2021. From the Affidavit-in-Reply filed by the Respondents, it is not in dispute that the draft Assessment Order was not served on the Petitioner. It is also not in dispute that the variation

proposed in the draft Assessment Order is prejudicial to the assessee's interest. It is, therefore, clear that Respondent No.1 has not issued a show-cause notice to the assessee in the form of a draft Assessment Order and made an addition of Rs.120,94 Crore and second demand of Rs.8.14 Crore.

12. This Court, in Writ Petition No.1378 of 2021 dated 25/10/2021 in the case of ***Multiplier Brand Solutions Pvt. Ltd. Vs. Additional / Joint / Deputy / Assistant Commissioner of Income Tax Officer & Ors.*** has held as under:-

".....Under Section 144B(1)(xvi)(b), if there is going to be a variation prejudicial to the assessee, a draft assessment order has to be issued. Admittedly it has not been issued.

It has also been held by this court that non-compliance with the procedure laid down under Section 144B of the Act would make the assessment order non-est in view of the provisions of sub Section 9 of Section 144B of the Act."

13. In view of the reasons stated above and the Judgment of this Court in the case of ***Multiplier Brand Solutions Pvt. Ltd. (supra)***, we are of the view that the impugned order of assessment and consequent notice of demand cannot be sustained. With the result, we pass the following order:-

ORDER

- (i) Assessment Order dated 26/04/2021 passed under Section 143(3) read with Section 144 of the Income Tax Act, 1961 and notice of demand dated 26/04/2021 under Section 156 of the said Act are quashed and set aside.
- (ii) The matter is remanded to Respondent No.1 to complete assessment proceedings, by following procedure as contemplated by Section 144B of Act. The entire exercise shall be completed within 8 weeks from date this order is uploaded.
- (iii) Rule is made absolute in the above terms.

(AMIT B. BORKAR, J)

(K. R. SHRIRAM, J.)

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