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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No.39020 of 2021

M. M. Engineers and Consultants .... ***Petitioner***

Mr. Rudra Prasad Kar, Advocate

-versus-

The Union of India and others .... ***Opposite Parties***

Mr. R.S. Chimanka, Senior Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE R. K. PATTANAIK

Order No.

ORDER
16.03.2022

Dr. S. Muralidhar, CJ.

02. 1. The present petition challenges an Assessment Order dated 30th September 2021, passed by the National Faceless Assessment Centre (NFAC) under Section 143(3) read with Section 263 and 144 B of the Income Tax Act, 1961 ('Act') for the Assessment Year (AY) 2015-16.

2. While directing notice to issue in the present petition on 16th December 2021, this Court restrained the Opposite Parties from taking any coercive steps against the Petitioner till the next date.

3. The Petitioner is a partnership firm engaged primarily in the business of Real Estate Development and Construction activities. This is also its main source of income.

4. For AY 2015-16, the Petitioner filed its return on 1st January. 2016. The return was picked up for limited scrutiny. An assessment order was passed by the Assessing Officer (AO) on 4th July, 2017 under Section 143 (3) of the Act accepting the returned income as declared by the Petitioner.

5. On 6th September 2019, a Show Cause Notice (SCN) was issued under Section 263 of the Act by the Principal Commissioner of Income Tax, Cuttack (PCIT) forming the opinion that the assessment order was erroneous and prejudicial to the interests of the Revenue. The Petitioner submitted its objection to the SCN on 15th November, 2019. By an order dated 17th March, 2020, the PCIT completed the revision proceedings, set aside the assessment order, directed the AO to examine the identity and creditworthiness of the creditors under Section 68 of the Act and frame a fresh assessment order. The Petitioner states that the appeal filed by it against the above order in ITA No.151/CTK/2020 is pending before the Income Tax Appellate Tribunal, Cuttack (ITAT).

6. According to the Petitioner, while the matter stood thus on 27th September, 2021, it was served with a notice by hand at its registered office granting the Petitioner final opportunity to furnish reply in response to the notices sent to it by the NFAC for AY 2015-16.

7. On receipt of the aforementioned notice, the Petitioner is stated to have logged on to the Income Tax Department Portal and found that under the 'E-proceedings Tab' it was stated that notices had

been issued to the Petitioner on 13th August, 8th September and 23rd September of 2021, pursuant to the order passed by the PCIT under Section 263 of the Act on 17th March, 2020.

8. The Petitioner contends that none of the above notices was in fact received by it either at its postal address or via e-mail. A reference has been made to the details of the Petitioner available on Income Tax Portal which shows the Petitioner's E-mail address to be mmeconsult@yahoo.com. The Petitioner further states that on searching the Portal, it could not find any of the above notices. On the next date i.e., 28th September, 2021, it submitted an objection stating that it had not received any of the notices. The Petitioner sought a personal hearing and for some more time to make detailed submissions.

9. It is stated that notwithstanding the request, the impugned assessment order dated 30th September, 2021 was passed by the NFAC. This was followed by notice of demand dated 8th November, 2021. A penalty notice dated 30th September, 2021 was also issued.

10. The two principal grounds on which the impugned assessment order is challenged, are that the impugned orders are in violation of the principles of natural justice since none of the notices stated to have been issued to the Petitioner were in fact received by it. Secondly, in terms of Section 144 B of the Act, the mandatory requirement of the final order in faceless assessment to be preceded by a draft assessment order was not complied with.

11. In response to the notice issued by the Court, a reply has been filed by the Income Tax Officer, Ward-1(1), Cuttack. On the aspect of service of notice through e-mail, it is asserted that these were sent to the Assessee at its registered e-mail address i.e., 'mmconsultancy@yahoo.com'. As regards the non-passing of a draft order under Section 144 B of the Act, it is simply contended that the said provision has been adhered to by issuing an SCN to the Assessee by e-mail on 23rd September, 2021.

12. This Court has heard the submissions of Mr. R.P. Kar, learned counsel for the Petitioner and Mr. R.S. Chimanka, learned Senior Standing Counsel for the Department.

13. It plain from a reading of the counter affidavit of the Department that the notices to the Assessee were sent at the wrong e-mail address. The Portal of the Department itself reveals the e-mail address of the Petitioner to be mmeconsult@yahoo.com whereas the notices were sent to the addresses 'mmeconsultancy@yahoo.com'. Although a copy ('cc') appears to have marked to 'mmeconsult@yahoo.com', as pointed out by Mr. Kar, such e-mails that are 'cc' ed invariably end up in the spam mail and are not received in the 'Inbox'. Therefore, there is no difficulty in the Court coming to the conclusion that the e-mail notices addressed to the Petitioner by the Department were sent to the wrong E-mail ID and therefore not received by the Petitioner. As a result, the Petitioner did not have sufficient opportunity to

place its version before the NFAC prior to the impugned assessment order being passed.

14. As regards the mandatory requirement of a draft assessment order under Section 144 B of the Act having to be issued prior to the final assessment order, this Court in its order dated 1st October, 2021 in W.P.(C) No.29279 of 2021 (***Sribasta Kumar Swain v. Union of India***) has, following decisions of the Delhi High Court as well as this Court in ***Orissa Stevedores Ltd. v. Union of India*** (decision dated 8th July, 2021 in W.P.(C) No.19402 of 2021), has invalidated similar assessment orders issued by the NFAC without complying the mandatory requirement of Section 144 B of the Act.

15. Consequently, for both the above reasons, the impugned assessment order is held to be unsustainable in law and is hereby set aside. The consequential demand and the penalty notice are also hereby quashed.

16. Nevertheless, the Department is granted liberty to pass a fresh assessment order for the AY in question after complying with the requirement of the law under Section 144-B of the Act and after giving the Petitioner a personal hearing at a date and time which shall be communicated to the Petitioner sufficiently in advance. The Petitioner will cooperate in the fresh assessment proceedings and furnish all the documents and information available with it relevant to the proceedings. The Petitioner is also permitted to urge in the fresh assessment proceedings all contentions, including one of the contentions raised in the present petition that proceedings pursuant

to an order passed by the PCIT under Section 263 of the Act should have been in conformity with the Section 150 of the Act and not Section 143(3) thereof.

17. The writ petition is disposed of in the above terms.

18. Issue an urgent certified copy of this order as per rules.

(Dr. S. Muralidhar)
Chief Justice

(R. K. Pattanaik)
Judge

M. Panda