



W.P.(MD).No.21357 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 16.11.2022

CORAM

THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

W.P.(MD).No.21357 of 2022

and

W.M.P.(MD).Nos.15525 & 15526 of 2022

Mr.Beboy Joseph John

... Petitioner

Vs.

Assistant Commissioner of Income Tax,
Non Corp Circle 1, MDU
No.2, V P Rathinasamy Road,
CR Building, Bibikulam,
Madurai 625 002.

...Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, calling for the records in PAN:AAOPS0589G and quash the impugned order under Section 148A(d) of the Income Tax Act, 1961 in ITBA/COM/F/17/2022-23/1044114387(1) dated 26.07.2022 passed by the Respondent and the consequential notice under Section 148 of the Income Tax Act, 1961 in ITBA/AST/M/148_1/2022-23/1044182701(1) dated 26.07.2022 issued by the Respondent for the AY 2016-17.

For Petitioner : Mr.Vandana Vyas

For Respondent : Mr.N.Dilip Kumar
Standing Counsel



W.P.(MD).No.21357 of 2022

ORDER

WEB COPY This Writ Petition is filed challenging the impugned order under Section 148A(d) of the Income Tax Act, 1961 in ITBA/COM/F/17/2022-23/1044114387(1) dated 26.07.2022 passed by the Respondent and the consequential notice under Section 148 of the Income Tax Act, 1961 in ITBA/AST/M/148_1/2022-23/1044182701(1) dated 26.07.2022 issued by the Respondent for the AY 2016-17.

2. The question that arises for consideration in this writ petition is whether an order under Section 148 A (d) of the Income Tax Act ought to be made after providing a personal hearing to the Petitioner/assessee. It is submitted by the counsel for the petitioner that Section 148 A (b) of the Income Tax Act would indicate that the legislative intent was to extend personal hearing before passing an order under Section 148 A (d) of the Income Tax Act, as would be evident from the expression “opportunity of being heard” employed therein.

3. To the contrary, it is submitted that the learned Standing Counsel for the Respondent submits that the expression “opportunity of being heard” does



W.P.(MD).No.21357 of 2022

not indicate that personal hearing is mandatory.

WEB COPY

4. The above issue has engaged the attention of various High Courts including Calcutta as well as Gujarat High Court, wherein, it was held as under:

(a) The Calcutta High Court in the case of **Babcock Borsig Limited Vs Union of India** reported in [2022] 141 taxmann.com 85 (Calcutta) while considering the scope of Section 148 A of the Income Tax Act had held that the assessing officer on receipt of the reply shall consider the same and thereafter, afford an opportunity of personal hearing as would be evident from the following passage:

“6. In the light of the above, the order dated 30.03.2022 under Clause (d) of Section 148A of the Act shall be reckoned for reasons for reopening and the appellant assessee is directed to file an objection not later than two weeks from the date of receipt of server copy of this order and also enclose all documents in support of the claim and thereafter the assessing officer shall consider the reply and documents and afford an opportunity of personal hearing to the appellant/writ petitioner and pass fresh orders under Section 148A(d) of the Act in accordance with law.”

(b) The Gujarat High Court in the case of **Studio Virtues Vs Income Tax Officer** reported in [2022] 140 taxmann.com 73 (Gujarat) held as under:



W.P.(MD).No.21357 of 2022

“6.1 Learned Advocate Mr.Divatia for the petitioner submitted that the respondent-Authority should not have passed the impugned order without giving opportunity of having been heard as well as considering the case on merits after scrutinizing the evidence and the documents produced by the petitioner on record.”

While considering the submission, that orders under Section 148 A (d) of the Income Tax Act was made without providing an opportunity of being heard, it was held as under:

“10. On perusal of the above provisions, the Assessing Officer before issuing the notice under Section 148 is required to conduct an inquiry with respect to the information which suggests that income chargeable to tax has escaped assessment and thereafter provide an opportunity of being heard to the assessee by serving upon him a show cause notice to show cause as to why the notice under Section 148 should not be issued on the basis of the information with the Assessing Officer as per clause A(a). The Assessing Officer has to consider the reply furnished by the assessee, if any, in response to the show cause notice and thereafter decide on the basis of the material available on record including the reply of the assessee, whether or not it is a fit case to issue a notice under Section 148 by passing an order under clause (d) of Section 148 A within one month from the end of the month in which the reply referred to in clause (c) is received by him or otherwise.

11. Therefore, we are of the opinion that the Petitioner ought to have been given an opportunity of hearing and the respondent-Authority thereafter ought to have considered the material produced on record by the petitioner. Paragraph No.5 of the impugned order reads as under:

“5.After the notice issued under Section 148 A (b) of the Income Tax Act, in compliance of the notices, the assessee has submitted a reply dated 21.03.2022 along with some



W.P.(MD).No.21357 of 2022

WEB COPY

documentary evidence showing that there is no escapement of income, the reply of the assessee was duly considered but not found acceptable.”

12. In view of the above observation, we are not satisfied by the reasoning part of the impugned order more particularly, when the details were supplied by the petitioner. Hence, we are of the opinion that the matter requires consideration and the same is allowed. The impugned order, dated 31.03.2022 is hereby quashed and set aside. The matter is remitted back to the respondent-Authority. The respondent-Authority shall proceed further with the case under the provisions of sub-Sections (b) and (c) of Section 148A of the Act and shall afford an opportunity of hearing to the petitioner and thereafter pass a detailed order in accordance with law under Section 148A (d) of the Act.”

(emphasis supplied)

5. This was again reiterated by this Court in the case of **Parathasarathy Chitra Vs The Income Tax Officer** in W.P(MD).No.10445 of 2022, dated 14.07.2022. The relevant portion from the order reads as under:

“12. Considering the submission and perusal of the material, it is seen that the petitioner sent a representation on 11.04.2022. The reply with the documents annexed to it has been uploaded in the Departmental portal. In the reply, the details were given how the petitioner over a period of time made all the fixed deposits initially at Tuticorin and thereafter, at Chennai and further along with the bank statement records uploaded in the portal with hash value. In the order, dated 19.04.2022, there is no reference. It is clearly stated in the impugned order inner page 2 paragraph 4, it is recorded that the petitioner had not sent any reply on or before 11.04.2022 and further in view of the same, nothing has been considered and discussed in the impugned order. Hence, the impugned order is set aside. The petitioner is permitted to file any additional reply and



W.P.(MD).No.21357 of 2022

documents in support of their contention in addition to the earlier reply, dated 11.04.2022. The Assessing Officer is directed to consider the petitioner's reply and give her an opportunity of personal hearing and pass appropriate orders on merits and in accordance with law thereafter.

(emphasis supplied)

6. The learned counsel for the Petitioner further placed reliance on the Department circular in F.No.299/10/2022-Dir(Inv.III)/611, dated 01.08.2022, wherein, it was again clarified that if the personal hearing is requested, the same shall be dealt as under:

“viii. If an assessee requests for a personal hearing, the same may be dealt with following the principle of natural justice by giving a reasonable period for compliance of notice specifying the date of hearing.”

7. Drawing strength from the above judgments, the learned counsel for the Petitioner submitted that there can be no doubt that any order under Section 148 A (d) ought to be made after granting a personal hearing.

8. It is submitted by the learned counsel for the Respondents that the opportunity of personal hearing is not mandatory under all circumstances and would depend on the facts of each case. Reliance was sought to be placed on



W.P.(MD).No.21357 of 2022

the judgment of the Hon'ble Supreme Court in the case **Carborundum**

Universal Limited Vs Central Board of Direct Taxes. The relevant portion

from the judgment reads as under:

“6. There is no procedural statutory requirement of a hearing for the disposal of an application under Section 220(2A) of the Act. The legal position is that where a statutory provision does not exclude natural justice the requirement of affording an opportunity of being heard can be assumed, particularly when the proceedings are quasi-judicial. Exclusion, however, can either be by a clear provision inferred from the scheme, as also the nature of power which is being exercised. We have : already noticed that the power of the Board which was invoked was discretionary. It was to be exercised on the basis of the recommendation of the Commissioner and the material provided by the assessee. Personal hearing in every situation is not necessary and there can be compliance of the requirements of natural justice of hearing when a right to represent is given and the decision is made on a consideration thereof. Keeping the nature of the power invoked for exercise, the fact that the petitioner had an opportunity to represent its case in writing and the further fact that the Board had taken into consideration the report of the Commissioner in the background that it is not the allegation of the petitioner that the Commissioner's recommendations were different, we do not think in the facts of the case it can be held that the petitioner was entitled to a right of being personally heard before the petition under Section 220(2A) of the Act was disposed of as aforesaid. The petitioner has claimed that he was entitled to a notice of the Commissioner's report and an opportunity to canvass that the contents thereof, to the extent they went against it, were incorrect. We do not think there is scope to contend that the assessee is entitled to such a procedural safeguard. Our conclusion is, however, confined to the facts of the case and as and when the question arises in a different situation, the matter may be open to examination.”



WEB COPY

9. Reliance was also placed on the judgment in the case of **Union of India Vs Jesus Sales Corporation** reported in (1996) 4 SCC 69, wherein, while dealing with the issue as to whether the provision, which provides for an opportunity to be heard would necessarily require a personal hearing in all situations, it was held as under:

“5. The High Court has primarily considered the question as to whether denying an opportunity to the appellant to be heard before his prayer to dispense with the deposit of the penalty is rejected, violates and contravenes the principles of natural justice. In that connection, several judgments of this Court have been referred. It need not be pointed out that under different situations and conditions the requirement of the compliance of the principle of natural justice vary. The courts cannot insist that under all circumstances and under different statutory provisions personal hearings have to be afforded to the persons concerned. If this principle of affording personal hearing is extended whenever statutory authorities are vested with the power to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions. Many statutory appeals and applications are disposed of by the competent authorities who have been vested with powers to dispose of the same. Such authorities which shall be deemed to be quasi-judicial authorities are expected to apply their judicial mind over the grievances made by the appellants or applicants concerned, but it cannot be held that before dismissing such appeals or applications in all events the quasi-judicial authorities must hear the appellants or the applicants, as the case may be. When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned



W.P.(MD).No.21357 of 2022

to present his case before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. Of course, if in his own discretion if he requires the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide the appeal or the application only after affording a personal hearing. But any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded. This is all the more important in the context of taxation and revenue matters.”

10. Drawing support from the above judgments, the learned Standing counsel for the Respondent would submit that personal hearing may not be a condition precedent before an order is made under Section 148 A (d) of the Income Tax Act under all circumstances.

11. The learned counsel for the respondent, thereafter proceeded to submit that on a reading of Section 148 A of the Income Tax Act as a whole, it would be evident that personal hearing is not mandatory. In this regard, reliance was placed on Section 148 A of the Income Tax Act, wherein, sub clause (c) to Section 148A only requires consideration of the reply of the assessee furnished and again sub clause (d) which provides for the terms on which the order is to be made, only requires that the order shall be made on the basis of the material



W.P.(MD).No.21357 of 2022

available on record including reply of the assessee. It is submitted that one cannot read the expression of “opportunity of being heard” in isolation but would have to be read along with the other sub-clauses and if read as a whole, it is beyond the pale of any doubt that the legislation never intended personal hearing as a condition precedent before an order is made under Section 148 A (d) of the Income Tax Act. It is further submitted that Section 148 A (d) of the Income Tax Act prescribes time limit which would again indicate that insistence on personal hearing as a matter of right or treating it to be a condition precedent would possibly render the provisions un-workable.

12. In the circumstances, though this Court finds that the arguments of the learned Standing Counsel for the Respondent may have merits, I do not intend to express any view in the light of the Circulars which has prescribed the procedure to be followed if a request for personal hearing is made and which expressly provides for grant of personal hearing vide Clause viii of the Department circular in F.No.299/10/2022-Dir(Inv.III)/611, dated 01.08.2022 reads as under:



W.P.(MD).No.21357 of 2022

“viii. If an assessee requests for a personal hearing, the same may be dealt with following the principle of natural justice by giving a reasonable period for compliance of notice specifying the date of hearing.”

I am of the view that the above Circular is binding and it may not be open to the Revenue to contend to the contrary. In this regard, it may be relevant to refer to the following judgments, wherein, it has been consistently held by the Supreme Court that Circulars issued by the Department are binding unless withdrawn.

(i) The apex Court in *State Bank of Travancore v. Commissioner of Income-tax*, [1986] 158 ITR 102 held that even though the clarifications issued by the Revenue being executive in character cannot alter the provisions of the Act, since they are in the nature of concessions, they can always be prospectively withdrawn. In the instant case, even though the clarification dated November 9, 1989 is executive in nature, the concessions given to the assessee could be withdrawn only prospectively, but not retrospectively because, such executive circulars are binding on the authorities, as held by the apex Court in *Keshavji Ravji & Co. v. Commissioner of Income-tax*, [1990] 183 ITR 1. In *Keshavji Ravji & Co. v. Commissioner of Income-tax*, [1990] 183 ITR 1,



W.P.(MD).No.21357 of 2022

referred supra, while dealing with section 119 of the Income-tax Act, which is *pari materia* to section 28-A of the Tamil Nadu General Sales Tax Act, the apex Court held that the benefits of such circulars to assesseees have been held to be permissible even though the circulars might have departed from the strict tenor of the statutory provision and mitigated the rigour of the law.

(ii) In *Collector of Central Excise, Patna v. Usha Martin Industries*, [1998] 111 STC 254, three-Judge of the apex Court, held that when the Central Board of Excise and Customs made all others to understand a notification in a particular manner and when the latter have acted accordingly, it is not open to the Revenue to turn against such persons on a premise contrary to such instructions, and such circulars would be binding on the department.

(iii) The apex Court in *Paper Products Ltd. v. Commissioner Of Central Excise*, [1999] 112 ELT 765, while interpreting section 37-B of the Central Excise Act, 1944 which is *pari materia* to section 28-A of the Tamil Nadu General Sales Tax Act held that circulars issued by the Central Board of Excise and Customs are binding on the departmental authorities and they cannot take a contrary stand, and that the department cannot repudiate a circular issued by the Board on the basis that it was inconsistent with a statutory provision and further held that the assessee can contest the validity or legality of such departmental



W.P.(MD).No.21357 of 2022

circulars or instructions; the department do not have a right to file an appeal against the correctness or binding nature of a circular; the department's actions have to be consistent with the circulars; and that consistency and discipline are of far greater importance than winning or losing court proceedings.

(iv). In *UCO Bank v. Commissioner of Income-tax*, [1999] 237 ITR 889, the apex Court held that the circular issued by the Revenue under section 119 of the Income-tax Act are binding on the revenue and such circulars are meant for ensuring proper administration of the statute and they are designed to mitigate the rigours of the application of a particular provision of the statute in certain situations by applying a beneficial interpretation to the provision in question.

(v). In *Commissioner of Income-tax v. Kelvinator of India Ltd.*, [2002] 256 ITR 1 (Delhi), it was held that the Board has power to issue circulars under section 119 of the Income-tax Act and it is trite that circulars which are issued by the Central Board of Direct Taxes are legally binding on the Revenue.

(vi). In *Commissioner of Customs, Calcutta v. Indian Oil Corporation Ltd.*, [2004] 165 ELT 257, the apex Court held that the circulars issued by the Revenue under section 37-B of the Central Excise Act, 1944 (which is *pari materia* to section 28-A of the Act) are binding primarily on basis of language of statutory provisions buttressed by need of adjudicating officers to maintain



W.P.(MD).No.21357 of 2022

uniformity in levy of tax/duty throughout the country and not on the basis of promissory estoppel.

In view of the fact that the Circular which is binding has provided for personal hearing, I do not propose to examine Section 148 A to find if personal hearing is mandatory or otherwise.

13. In the light of the above, the Writ Petition is allowed and it is held that personal hearing is necessary in terms of the Circular. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

16.11.2022

Index : Yes / No
Internet : Yes/ No
Lm



WEB COPY



W.P.(MD).No.21357 of 2022

To

Assistant Commissioner of Income Tax,
Non Corp Circle 1, MDU
No.2, V P Rathinasamy Road,
CR Building, Bibikulam,
Madurai 625 002.



WEB COPY



W.P.(MD).No.21357 of 2022

MOHAMMED SHAFFIQ, J.

Lm

W.P.(MD).No.21357 of 2022

16.11.2022