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W.P. No.24032 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.11.2023

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THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. No.24032 of 2021 and
W.M.P. Nos.13559, 25348 and 25349 of 2021

M/s.CPF (INDIA) Private Limited
Represented by its Director,
Mr.Chainan Nuphet,
No.40, 2nd Street, 1st Floor,
F2, Sparton Nagar, Mogappair East, Chennai 600 037. ..Petitioner

Vs.

1. Additional / Joint / Deputy / Assistant
Commissioner of Income Tax / Income-Tax Officer,
National Faceless Assessment Centre,
2nd Floor, E-Ramp, Jawaharlal Nehru Stadium,
Delhi - 110003.
2. Assistant Commissioner of Income - Tax (e-verification),
Represented by the Jurisdictional Assessing Officer,
Corporate Circle 1(2),Room No.613, 6th Floor,
Wanaparthi Block, 121, M.G. Road, Chennai 600 034.
3. Additional / Joint / Deputy / Assistant Commissioner of
Income Tax / Income-Tax Officer,
National e-Assessment Centre, Delhi,
Room No.401, 2nd Floor, E-Ramp,
Jawaharlal Nehru Stadium, Delhi 110 003.
4. ACIT/DCIT, Corporate Circle1(2),
Room No.613, 6th Floor,
Wanaparthi Block 121, M.G.Road, Chennai 600 034. ..Respondents



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PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari calling for the records on the file of the First Respondent and quash the impugned assessment order in ITBA/AST/S/143(3)/2021-22/1035927272(1) dated 27.09.2021 passed by the First Respondent under Section 143(3) r/w Section 144B of the Income Tax Act, 1961 as illegal, in violation of principles of natural justice and contrary to the provision of the law.

For Petitioner : Mr.Chythanya KK
Senior Advocate

For Respondents : Mr.B.Ramanakumar
Standing Counsel

ORDER

The writ petition is filed challenging the impugned order of assessment passed under Section 143(3) read with Section 144B of the Income Tax Act, 1961(hereinafter referred to as "the Act") passed by the 1st Respondent for the assessment year 2018-19.

2. Brief facts of the case:

2.1. The petitioner is engaged in the business of manufacture/production and sale of animal feed, aquatic feed, aquatic health care products, broiler birds, shrimp seeds, processed food and ready to eat chicken products. It filed its return of income for Assessment Year 2018 – 2019 electronically on 30.11.2018 declaring “Nil” income after set-off of brought forward losses of Rs. 353,55,31, 348/-. The same was selected for scrutiny under CASS by issuing a notice under



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Section 143 (2) of the Act read with Rule 12E of the Income Tax Rules, 1962 on 22.09.2019. The petitioner submitted its reply on 04.10.2019 and the assessment was taken under Faceless Assessment Scheme, 2019. The 3rd Respondent issued notice on 11.12.2020 under Section 142 (1) of the Act wherein after recording the anxiety and uncertainty faced in view of COVID pandemic, required the petitioner to furnish accounts and documents specified in the Annexure to the notice. The petitioner vide its reply dated 04.03.2021, furnished the details / accounts / documents sought for.

2.2. During the course of the above proceeding reference was made to Transfer Pricing Officer (TPO) under Section 92CA (1) of the Act on 13.07.2021 and *vide* order dated 30.07.2021 the TPO found that the international transactions entered by the Petitioner were at arm's length.

2.3. On 19.08.2021, the 1st Respondent issued a notice under Section 142 (1) of the Act seeking details not furnished earlier by the petitioner to be furnished on 25.08.2021. Notices dated 31.08.2021 and 03.09.2021 under Section 274 read with section 272A(1)(d) of the Act were also issued. The Petitioner furnished the information on 22.09.2021.

2.4. Thereafter, the 1st Respondent issued a show cause notice on 22.09.2021 proposing to make additions of Rs. 416.93 Cr to the “Nil” income return filed by the petitioner while invoking penalty under Section 270A of the



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Act. The petitioner was required to submit its reply within two days i.e. 24.09.2021 to the notice dated 22.09.2021. Whiles, another notice under Section 142(1) dated 23.09.2021 was issued on the above grounds. The Petitioner filed its reply on 24.09.2021 to the above show cause notice dated 22.09.2021 along with supporting evidence. On 27.09.2021 the impugned assessment order under Section 143 (3) read with Section 144B of the Act was passed making additions to the income along with demand notice. Challenging, the above assessment order dated 27.09.2021 the present writ petition is being filed.

3. It was submitted by the the learned counsel for the petitioner in support of it challenge, that the impugned order *inter alia* suffered from the following infirmities, each one of which by itself would prove fatal to the validity of the impugned proceedings.

a) Intimation under Section 144 B(1)(iii) of the Act was not furnished which is mandatory and thus fatal to the validity of the impugned order.

b) The petitioner had filed its objections / reply on 22.09.2021 which was not considered while passing impugned order on 27.09.2021. Non consideration of reply is contrary to the mandate contained in Section 144B(1)(vii) read with (xiv) and (xvi)(b) of the Act, thereby vitiating the impugned order.



c) The impugned order of assessment traverse beyond the Draft Assessment Order, thereby causing serious and grave prejudice to the petitioner.

However, no opportunity was provided to the petitioner to deal with the same thereby violating the mandate contained in Section 144 B (7)(vii) of the Act. It was thus submitted that the impugned order is illegal and bad for the above reasons.

4. To the contrary, the learned Standing Counsel for the Respondent submitted as under:

a) The Writ Petition is not maintainable in view of the availability of alternate remedy.

b) That there is no violation of principles of natural justice as adequate opportunities was granted as contemplated under the Act.

c) The penal proceedings under Section 271AAC of the Act was initiated for addition made under Section 68 readwith Section 115BE of the Act and penal proceedings under Section 270A of the Act for mis-reporting of income.

e) The submissions/documents of the Petitioner/Assessee was considered in the impugned order and dealt with in paragraph 7.6 of the assessment order. It was submitted that there is no variation between the Draft Assessment order and Final Assessment order as submitted by the Petitioner.



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f) In view of the Amendment to Section 144B of the Act, the proper authority to consider the claim of the petitioner is 1st Respondent herein and not the National Assessment Centre as alleged by the Petitioner and there is no violation of Section 144B(9) of the Act as it is deleted with effect from 01.04.2021.

5. Before proceeding further, I intend to clarify that the argument was confined to the infirmities in the decision making process and not the decision itself. With this in mind and on considering the submission of both sides I shall now proceed to deal with the same:

a) Preliminary Objections:

With regard to the preliminary objection raised by the respondent that the writ petition ought not to be entertained inasmuch as there is an effective alternate remedy, this Court is conscious of the fact that writ petition under Article 226 of the Constitution of India would not be entertained normally, if statutory remedy is available. However, existence of alternate remedy is not an embargo or an absolute bar for exercise of power under Article 226 of the Constitution of India, but a self-imposed restriction and the following circumstances viz., violation of principles of natural justice or lack of jurisdiction or error apparent on the face of the record are some of the



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exceptions carved out to the rule of alternate remedy for exercise of discretion under Article 226 of the Constitution of India.

b) Notice under section 144B (1)(iii) of the Act was not furnished :

The petitioner had filed its return of income under section 139 of the Act and the 2nd Respondent had issued notice under section 143 (2) of the Act on 22.09.2019, thus the petitioner case falls under clause (iii)(a) of Section 144B(1) of the Act. Before proceeding further it may be relevant to note that there has been paradigm shift as to the method and manner/ procedure adopted in making the assessment. The government transitioned the tax assessment process from face-to-face assessment to electronic assessment and now to a complete faceless assessment. The faceless assessment scheme was launched in 2020 with the objective of promoting an efficient and effective tax administration, minimizing physical interface, increasing accountability. Faceless assessment is, no doubt, a major tax reform initiative and India is one of the few countries to adopt such a system. The intimation by the National Faceless Assessment Center contemplated under Section 144B(1)(iii) of the Act has not been furnished. The relevant provision reads as under:

“(iii) where the assessee-

(a) has furnished his return of income under section 139 or in response



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to a notice issued under sub-section (1) of section 142 or under sub-section (1) of section 148, and a notice under sub-section (2) of section 143 has been issued by the Assessing Officer or the prescribed income-tax authority, as the case may be; or

(b) has not furnished his return of income in response to a notice issued under sub-section (1) of section 142 by the Assessing Officer; or

(c) has not furnished his return of income under sub-section (1) of Section 48 and a notice under sub-Section (1) of Section 142 has been issued by the Assessing Officer, the National Faceless Assessment Centre shall intimate the assessee that assessment in his case shall be completed in accordance with the procedure laid down under this Section”.

A reading of the above provision would show that the expression employed in Section 144B (1) (iii) of the Act viz., “shall”, is prima-facie indicative of being mandatory, though the same may be rebutted by other considerations such as the object and scope of the enactments and the consequences flowing from such construction. I do not propose to get into the above question for the present. The intimation under Section 144B(1)(iii) of the Act, informs an assessee of the fact that the assessment would be made in terms of Section 144B of the Act, which is important if one bears in mind that Faceless Assessments under Section 144B of the Act comes with its own set of obligations and rights in making the assessment.



c) Non-consideration of reply - Violation of procedure under section

144B(1)(vii) read with (xiv) and (xvi)(b) of the Act:

The petitioner had responded to the notice dated 19.08.2021 vide letter dated 07.09.2021 and sought for time till 22.09.2021. It is submitted that as there was no response from the 1st Respondent as to whether the above request is accepted or rejected, the petitioner filed its reply on 22.09.2021 as the portal was kept open. The 1st Respondent without considering the above reply, issued a show cause notice cum draft assessment order on the same the day i.e. 22.09.2021 proposing huge addition and sought reply from the petitioner by 24.09.2021 for which a reply was submitted by the petitioner on 24.09.2021. However, the impugned order of assessment under Section 143(3) read with Section 144(3) of the Act was passed two days thereafter i.e., on 27.09.2021. Importantly, in the counter it has been submitted that the above objections dated 22.09.2021 has not been taken into account while making the draft assessment order, which vitiates the impugned proceedings inasmuch as it is contrary to the mandate in Section 144 B((1)(vii) read with (xiv) and (xvi)(b) of the Act.

d) Violation of the procedure under Section 144B(1)(xi) to (xiv) / Non-consideration of Petitioner's Reply dated 22.09.2021:

I also find that the impugned order is made in disregard to the procedure



laid down in Section 144 B(1) (xi) to (xiv) of the Act. It may be relevant to refer to the above provisions :

Section 114B(1)(xi) to (xiv) of the Act :

(xi) where the assessee fails to comply with the notice referred to in clause (vi) or notice issued under sub-section (1) of section 142 or with a direction issued under sub-section (2A) of section 142, the National Faceless Assessment Centre shall serve upon such assessee a notice under section 144 giving him an opportunity to show-cause, on a date and time to be specified in the notice, why the assessment in his case should not be completed to the best of its judgment;

(xii) the assessee shall, within the time specified in the notice referred to in clause (xi) or such time as may be extended on the basis of an application in this regard, file his response to the National Faceless Assessment Centre;

(xiii) where the assessee fails to file response to the notice referred to in clause (xi) within the time specified therein or within the extended time, if any, the National Faceless Assessment Centre shall intimate such failure to the assessment unit;

(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;”

A reading of the above provisions would show that in the event of an assessee failing to comply with the notice referred to Clause (vi) of Section 144 B of the Act or notice under sub-Section (1) of Section 142 of the Act or with a direction issued under sub-Section (2) of Section 142 of the Act, the National Faceless Assessment Center shall serve upon such assessee, a notice under Section 144B giving an opportunity to show cause as to why the assessments



should not be completed to the best of the judgment of the assessing officer. The

assessee would then have to respond to the notice under Clause (xi) of sub-Section(1) of Section 144B of the Act. In the event of failure, the National Faceless Assessment Center shall intimate the failure of the assessee to respond to the notice under Clause (xi) to sub-Section(1) of Section 144B of the Act to the concerned assessment unit. The assessment unit would then proceed to make a draft assessment order taking into account all relevant material on record. However in the instant case admittedly the draft assessment order has been made without taking into account the objections filed by the petitioner on 24.09.2021, which vitiates the entire proceeding. In any view even if the Petitioner had failed to reply to the notice dated 19.08.2021, the 1st Respondent should have issued notice under Section 144B of the Act as contemplated under Section 144B(1)(xi) of the Act before preparing the Draft Assessment order under Section 144B(1)(xiv). Importantly, a duty is cast on the assessing authority in terms of Section 144B(1)(xiv) of the Act to take into account all relevant material and thereafter frame the draft assessment order. The respondent has erred in not complying with the above mandatory requirement inasmuch as the draft assessment order has been made without even examining / taking into account the objections / response of the petitioner made vide letter dated 22.09.2021. Thus the draft assessment order suffers from non-application



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of mind to matters that are relevant and on record, thus stands vitiated.

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6. In the light of the above discussion, I am inclined to set aside the impugned proceedings while leaving it open to the respondent authority to proceed, to frame the assessment in accordance with law, after following the procedure contemplated under Section 144B of the Act. If the Respondent chooses to proceed with the assessment it shall continue with the assessment proceedings from the stage of intimation in terms of Section 144B(1)(iii) of the Act. The writ petition stands disposed of. No Costs. Consequently, connected miscellaneous petitions are closed.

24.11.2023

Speaking (or) Non Speaking Order

Index:Yes/No

Neutral Citation: Yes/No

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To:

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Commissioner of Income Tax / Income-Tax Officer,
National Faceless Assessment Centre,
Delhi, Room No.401,
2nd Floor, E-Ramp, Jawaharlal Nehru Stadium,
Delhi - 110003.
2. The Jurisdictional Assessing Officer,
Assistant Commissioner of Income - Tax (e-verification),
Corporate Circle 1(2), Room No.613, 6th Floor,
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MOHAMMED SHAFFIQ, J.

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