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Retrospective Repeal of Section 144B(9): Opening Up of Pandora Box of Litigation?



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Epilogue:

The Hon'ble Supreme Court, on 11.4.2022, has admitted Revenue's SLP (reported in [2022] 137 taxmann.com 210 (SC)), against the Hon'ble Bombay High Court Judgement in the case of *Mantra Industries Ltd v. NFAC*(reported in [2021] 131 taxmann.com 165/283 Taxman 459/[2022] 441 ITR 467 (Bom.)), and has also stayed this Order, till next date of hearing on 4.5.2022.

The main plea of Revenue's Representative, before the Hon'ble Supreme Court was the retrospective Omission of subsection (9) of section 144B, w.e.f. 1.4.2021, the by Finance Act 2022. In its Order, the Hon'ble Bombay High Court has set aside the impugned faceless assessment order, by holding the impugned assessment order as passed in violation of the Principle of Natural Justice and in non-adherence to the prescribed procedure in section 144B, in view of express mandate in the then existing subsection (9) of section 144B of Income Tax Act.

Facts of the Case of Mantra Industries Ltd, before the Hon'ble Bombay High Court:

In this case, the Show Cause Notice and the Draft Assessment Order, proposing huge additions to the returned income of the assessee, was issued on 22.4.2021, by the National Faceless Assessment Centre (NaFAC), requiring the assessee to file its reply by 24.4.2021, i.e., just two days were given for reply.

The assessee requested for adjournment on 23.4.2021, but got no reply back from NaFAC. The assessee filed its reply on merits on 27.4.2021, and also requested for a personal hearing through video conferencing. However, no response or consideration was given by the faceless assessment unit or NaFAC, to the assessee's written reply dated 27.4.2021 and the request for personal hearing through video conferencing.

The final assessment order was passed by NaFAC on 8-6-2021, and it was the verbatim replication of draft assessment order, with no consideration of the detailed reply filed by assessee on 27.4.2021 and without granting the request of video conferencing to assessee. The Hon'ble Bombay High Court has also noted and observed a peculiar fact that in the Draft Assessment Order, addition was proposed on the presumption that assessee has not furnished quantitative details in item 35(b) of Form 3CD. The assessee has furnished the quantitative details in its reply dated 27.4.2021. However, the final assessment order still remained oblivious of this fact and same contention and addition was replicated.

It were these observations and findings of gross and blatant violation of principle of natural justice that the hon'ble Bombay High Court, has set aside the impugned faceless assessment order, in addition to referring to section 144B(9) of the Act.

Prologue:

The Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, has inserted a new section 144B, in the Income Tax Act, w.e.f. 1.4.2021. This section provided that w.e.f. 1.4.2021, the regular assessments under section 143(3) and the best judgement assessments under section 144, shall be conducted in a faceless manner, and mandated a detailed procedure to be followed in the

conduct of such faceless assessments.

Subsection (9) of section 144B (now omitted), read as under:

"(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 void if such assessment is not made in accordance with the procedure laid down under this section."

The Finance Act 2022 has omitted this sub section (9) of section 144B, retrospectively w.e.f. 1.4.2021.

The Memorandum explaining the provisions of the Finance Bill 2022, explains the rationale for this omission as under:

"Sub-section (9) of section 144B of the Act provides that the assessment proceedings shall be void if the procedure mentioned in the section was not followed. The said sub-section refers to violation of the procedure laid down by the law whereas a large number of disputes have been raised under this subsection involving technical issues arising due to use of information technology, leading to unnecessary litigation. It is, therefore, proposed to omit this subsection *i.e.*, sub-section (9) of section 144B from its date of inception."

It is pertinent to mention here that in numerous High Court Judgements, the faceless assessments for the AY 2018-19, have been set-aside, on the grounds of non-adherence to the prescribed assessment procedure by virtue of section 144B(9)/ faceless assessment scheme.

- (i) *DJ Surfactants v. National E-Assessment Centre* [2021] 127 taxmann.com 641/281 Taxman 316 (Delhi);
- (ii) *SAS Fininvest LLP v. National e-Assessment Centre* [2021] 131 taxmann.com 245 (Delhi);
- (iii) *K L Trading Corporation v. National e-Assessment Centre* in W.P. (C) 4774 of 2021, dated 16.4.2021 (Delhi High Court).

The Legislature has somehow, chosen to omit, the very same section 144(9), which was inserted by the Legislature, in the first place, to ensure adequate safeguard for adoption of principle of natural justice, (*audi alteram partem*), in the conduct of faceless assessments, instead of

encouraging the concerned assessment authorities to ensure adherence to the said subsection.

Whether the Omission of Subsection (9) of Section 144B, Make Faceless Assessments Made in Contravention of Principle of Natural Justice, Immune?

The Principle of Natural justice is the principle of Common Law which implies fairness, reasonableness, equality and equity. In India, the 'Principle of Natural Justice' has been given the Constitutional backing by Article 14 and Article 21 of the Constitution of India. Article 14 enshrines that every person should be treated equally. Article 21 provides that the law and procedure must be of a fair, just and reasonable kind. [*Maneka Gandhi v. The Union of India*(SC) AIR 1978 SC 597].

In Indian Income Tax Laws, this Latin maxim '*Audi alteram partem*' meaning "no one should be condemned unheard", has been given an absolute recognition and our Indian counterpart to this Latin phrase is "*Reasonable Opportunity of Being Heard*".

The Hon'ble Supreme Court in the case of '*Manohar v. State of Maharashtra* [2013] 35 taxmann.com 67/120 SCL 179 (SC) has held that adjudicatory process has to be in consonance with the doctrine of *audi alteram partem*, i.e., no one should be condemned unheard and *nemo debet esse iudex in propria causa sua*, i.e., no one should be judge in his own case.

Likewise, the Apex Court in the case of '*Mohinder Singh Gill v. Chief Election Commissioner*' reported in 1978 AIR 851, 1978 SCR (3) 272, has observed,

"Indeed, from the legendary days of Adam-and of Kautilya's Arthashastra- the rule of law has had this stamp of natural justice, which makes it social justice. Today its application must be sustained by current legislation, case law or other Extant principle...."

It is also pertinent to mention here that sub section (1) of section 144B of the Income Tax Act, mandates that assessments covered under the said section shall be made in a faceless manner as per the prescribed procedure. Therefore, even after the omission of sub section (9) of section 144B retrospectively w.e.f. 1.4.2021, the compulsory

requirement of adherence to the prescribed procedure of conduct of faceless assessments, u/s 144B, still remains intact, by virtue of subsection (1) of section 144B of the Act.

Therefore, in view of the express and mandatory requirement of adherence to the prescribed procedure in conduct of faceless assessments, in sub section (1) of section 144B of the Income Tax Act and also on account of the well settled legal position that the principle of natural justice is a principle of common law and has the constitutional backing of Article 14 and Article 21 of the Constitution of India, the faceless assessments, conducted in contravention of the principle of natural justice, say, without issuing the mandatory show cause notice, or granting an opportunity of personal hearing to the assessee through video conferencing, are still liable to be set aside and considered as nonest in law, even after the omission of the said sub section (9) in section 144B, by the Finance Act 2022.

However, the above attempt of the Revenue Authorities, in the case of Mantra Industries, in filing an SLP before the hon'ble Supreme Court, on the plea of retrospective omission of section 144B(9) of the Act, to overturn the judgement of the Hon'ble Bombay High Court, signifies the beginning of many such attempts, in all other cases also, where the faceless assessment orders, passed in violation of the principle of natural justice, had met the similar fate of getting set-aside, by the hon'ble High Courts.

Thus, this retrospective repeal of section 144B(9) of the Income Tax Act, has indeed opened up the Pandora box of litigation again.

However, in view of the above analysis, if a claim is being made by an assessing authority, that the mandatory show cause notice could not be issued, or the opportunity of personal hearing through video conferencing could not be given to the assessee, during the conduct of faceless assessments, due to some technical glitches or errors in the system, then such a claim is bound to fail and should not hold its ground, before the higher appellate forums.

Useful Reference: For having more detailed analysis and 360 degrees insights on all important and crucial litigative issues, as above, a reference to the thoroughly re-written and curated fifth edition of the Book titled, "Faceless Assessment Appeals & Penalty Ready Reckoner

with Real Time Case Studies, authored by the author of this Article, Shri Mayank Mohanka, FCA, and published by Taxmann publications, is desirable and useful.

This Book is a 'READY RECKONER' & Your 'Go-TO-GUIDE' for each and everything, which You may wish to Know, Understand & Learn about the New 'Faceless Taxation Regime'.

Crafted with acute precision, this Special & Exclusive Edition of the Book, will help and support the assesseees and tax practitioners in carrying out of their faceless assessments, faceless appeals, faceless penalty and all other faceless proceedings, in an effective, qualitative, professional and timely manner.

This Book is characterised by its 'Thread Bare Analysis of the Newly Amended Faceless Regime by the Finance Act, 2022. An honest and sincere effort has been made in this Book to explain and demonstrate the practical aspects and nitty-gritties of the New 'Faceless Taxation Regime' in a '*step-by-step-manner*' through '*real-time practical case studies*' in the *new e-Proceedings utility*, in the *new e-Filing portal* of Income tax department, encompassing crucial and significant scrutiny and appeal issues having immense relevance and practical utility for all the assesseees and tax practitioners.

This Book contains 20+ Practical Case Studies on important and recurring issues in assessments and appeals, along with their suggestive qualitative submissions.

This Book Deciphers & Decodes Many Critical & Litigative Issues in the Faceless Taxation Regime, like:

What Would Constitute a Valid Issuance & Service of a Faceless Income Tax Notice;

Whether Omission of section 144B(9), Makes Faceless Assessments conducted in Violation of Principle of Natural Justice, Immune?

Whether NaFAC can be considered as a Lawful Substitute for Recording of Satisfaction by Jurisdictional AO?

Validity of Frequent Transfer of Faceless Assessments & Penalty Cases, from Faceless Hierarchy to Jurisdictional AO

Legality of the fixing of the maximum time limit for filing all the 'e-responses' by the assessee under the 'e-proceedings' functionality under faceless assessments.

Validity of Exercise of Revisionary Powers by an Individual Jurisdictional CIT(Appeal) u/s 263/264, over an Order passed by a Dynamic Jurisdiction in Faceless Hierarchy.

What are adequate Safeguards for Avoiding High-Pitched Assessments in Faceless Regime?

