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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3591 OF 2022

Teerth Developers and Teerth Realties JV (AOP))
through Mr. Vijay Tukaram Raundal)
An association of Persons having)
address at: Office C 708 Teerth)
Technospace, Bangalore-Mumbai)
Highway, Baner, Pune – 411 045)
PAN: AABAT489M) ...Petitioner

Vs.

1. The Additional/Joint/Deputy/ Assistant Commissioner of Income Tax/Income Tax Officer)
National Faceless Assessment Centre,)
Delhi, Room No. 401, 2nd Floor,)
E-Ramp, Jawaharlal Nehru Stadium,)
New Delhi – 110003 through the)
Principal Chief Commissioner of)
Income Tax (National e-Assessment)
Centre), Email:)
delhi.pccit.neac@incometax.gov.in)

2. The Deputy Commissioner of Income Tax, Circle 2 Pune)
Income Tax Office, Pmt Building,)
Shankarsheth Road, Pune-411037)
Email: pune.dcit2@incometax.gov.in)

3. The Union of India)
Through the Secretary (Revenue),)
Department of Revenue, Ministry of)
Finance, Room No. 128-A, North)
Block, New Delhi – 110001)
Email: rsecy@nic.in) ...Respondents

Mr. Mihir Naniwadekar with Mr. Rohan Deshpande i/b. Ms. Farzeen Khambatta for Petitioner.
Mr. Suresh Kumar for Respondents.

CORAM: G. S. KULKARNI &
ADVAIT M. SETHNA, JJ.
DATE: 18 NOVEMBER 2024.

ORAL JUDGMENT : (Per G. S. Kulkarni, J.)

1. Rule, returnable forthwith. Respondents waive service. By consent of the parties, heard finally.

2. This petition under Article 226 of the Constitution of India challenges an assessment order dated 12 June 2021 passed by the Income Tax Officer, National Faceless Assessment Centre, Delhi. The assessment year in question is 2018-19. The petitioner assails the assessment order primarily on the ground that the Faceless Assessing Officer/ respondent no.1 has passed the assessment order in violation of the principles of natural justice and in a manner contrary to the provisions of the Income Tax Act, 1961 (for short, the "IT Act") for the reason that the petitioner was not issued a show cause notice-cum-draft assessment order, as per requirement of the provisions of Section 144B of the IT Act, as retrospectively brought into effect from 01 April 2021 by the Finance Act, 2022. The case of the petitioner is premised on the provisions of Section 144B and more particularly clauses (xiv), (xix), (xx) and (xxii) of sub-section (1) requiring

such procedure to be followed which, according to the petitioner, is completely overlooked and/or not applied in passing the impugned order.

3. Having noticed the nature of the challenge, the relevant facts need to be stated :

The petitioner filed its return of income on 29 October 2018 for A.Y. 2018-19. Between the period 15 December 2020 to 30 December 2020, the case of the petitioner was selected for scrutiny assessment and appropriate notices came to be issued including on such dates. As the period in question was a period affected by Covid-19 Pandemic, the petitioner sought an adjournment on 22 December 2020 before respondent No.1. Subsequent thereto, as sought by respondent no.1, the petitioner furnished further information /details which was in the month of January and February 2021. It is the case of the petitioner that one of the queries made to the petitioner pertained to the payments made by the petitioner to the companies which were purportedly struck off by the Registrar of Companies, the relevant details of these companies were not provided by the petitioner to respondent no.1. The petitioner in these circumstances sought further time to furnish appropriate information. However, as the information was not complete and the petitioner was desirous of furnishing further information, a specific request to that effect was made by the petitioner in its reply, that the petitioner was in the process

of collecting the details with reference to such issues as raised and requested for an adjournment to provide such details. Paragraph 26 of the reply in that regard makes such request. Thereafter, the petitioner furnished further details under petitioner's letter dated 05 February 2021 and 17 February 2021.

4. On such backdrop, the case of the petitioner is that it was expected that in the event the Assessing Officer was to take any position which was to be prejudicial to the interest of the petitioner, the procedure as permitted in law under Section 144B, was required to be followed, in as much as, a show cause notice-cum-draft assessment order was required to be issued to the petitioner. However, it did not so happen as on 12 June 2021 without following such mandatory provisions of law, so as to issue a show cause notice-cum-draft assessment order, respondent no.1 proceeded to pass the impugned assessment order. The petitioner has contended that, however, surprisingly, internal page 4 of the assessment order records that the show cause notice was issued to the petitioner, when no show cause notice was ever received by the petitioner. It is also the petitioner's case that the other defect in the impugned order was that the detailed replies submitted by the petitioner, which partly supplied the information, being replies dated 06 January 2021, 05 February 2021 and 17 February 2021 are neither referred nor discussed in the assessment order, when it proceeds to make additions

under Section 68 of the IT Act. According to the petitioner, the assessment order in a summary and cryptic manner deals on the issue of the alleged payments made by the petitioner to the companies, whose names were allegedly struck-off by the Registrar of Companies.

5. It is on the aforesaid premise and in pursuance of the impugned assessment order, a demand notice dated 12 June 2021 was issued to the petitioner by which the petitioner was called upon to deposit an amount of Rs.4,68,20,176/- within a period of 30 days of the receipt of the said demand notice.

6. The petitioner, being confronted with the assessment order and the contents of the same recording that the petitioner was issued a show cause notice, made applications under the Right to Information Act, 2005 (for short, "**RTI Act**") so as to obtain a copy of the alleged show cause notice-cum-draft assessment order as referred to in the assessment order. The petitioner's RTI application was disposed of by the CPIO (Circle 2) by an order dated 20 September 2021, recording that based on the electronic records available with the department, no show cause notice was available as also a proof of dispatch of the same could not be provided. It is thus the petitioner's case that the impugned assessment order recording that the petitioner was issued a show cause notice-cum-draft assessment order, was ex-facie contrary to the record and not correct.

7. It may be observed that however, before the petitioner's RTI application was responded, as a matter of abundant caution, the petitioner was advised to file an appeal against the assessment order before the CIT (Appeals), National Faceless Assessment Centre, which is stated to be pending. As the petitioner was aggrieved by complete information not being supplied by the ACIT, while deciding the RTI application vide communication dated 20 September 2021, the petitioner also filed an appeal before the RTI Appellate Authority on 22 October 2021. The case of the petitioner is that based on the impugned assessment order, which according to the petitioner is illegal, recovery proceedings were initiated against the petitioner on 22 December 2021. On 07 January 2022, in such circumstances, the petitioner also filed a stay application.

8. The petitioner contends that the impugned assessment order is clearly contrary to the provisions of Section 144B of the IT Act, hence, the petitioner has filed the present petition praying for the following substantive reliefs:-

> "(a) Hold, order and declare that the Impugned order u/s 143(3) r.w.s 144B of the Act dated 12 June 2021 (Exhibit A) and consequential demand notice dated 12 June 2021 (Exhibit B) are wholly without jurisdiction, illegal, arbitrary, violate the principles of natural justice and are liable to be quashed;
>
> (b) Issue a Writ of Certiorari or a Writ in the nature of Certiorari, or any other appropriate Writ, order or direction under article 226 of the Constitution of India quashing the Impugned order u/s 143(3) r.w.s 144B of the Act dated 12 June 2021 (Exhibit A) and consequential demand notice dated 12 June 2021

(Exhibit B) as being wholly without jurisdiction, illegal and arbitrary;

(c) Issue a Writ of Mandamus or Writ in the nature of Mandamus or any other appropriate Writ, order or direction, directing the Respondents to refrain from proceedings with penalty, recovery or any coercive proceedings in the Petitioner's case for AY 2018-19."

9. Reply affidavit of Shri. Sanjiv Kumar Verma, Deputy Commissioner of Income Tax, Circle-2, Pune is filed on behalf of the respondents. Although the reply affidavit contends that the show cause notice-cum-draft assessment order dated 19 April 2021 was purportedly issued and sent to the petitioner, however the same is not supported on any acceptable material/ evidence being placed on record, namely the proof of dispatch, e-mail service details, etc. Such contentions as urged on behalf of the respondents have also been disputed by the petitioner in the rejoinder affidavit dated 25 April 2022, wherein the petitioner has annexed an extract of the electronic portal, pointing out all the communications which were received from the department, and which indicating that no show cause notice-cum-draft assessment order was ever issued to the petitioner.

10. Mr. Naniwadekar, learned counsel for the petitioner would urge that in the aforesaid facts, the primary contention of the petitioner is to the effect that the impugned order cannot be sustained and would be required to be quashed and set aside, being contrary to the provisions of Section 144B and more particularly clauses (xiv), (xix), (xx) and (xxii) of sub-

section (1) of Section 144B of the IT Act. It is submitted that no show cause notice was issued, which was a necessary requirement to be adhered by respondent no.1 in passing the impugned order, which was to be prejudicial to the petitioner. It is submitted that there is no manner of doubt that an arbitrary procedure has been followed, in complete ignorance of the statutory mandate and more particularly in gross non-application of mind, as the assessment order records issuance of a show cause notice, when there is no material to that effect that any show cause notice was issued to the petitioner. Mr. Nandiwadekar in supporting his submissions, has relied on the decision of the Supreme Court in **Tin Box Co. v. Commissioner of Income-tax**[1] and submitted that the impugned order needs to be set aside.

11. Mr. Suresh Kumar, learned counsel for the Revenue in making his submissions, has placed reliance on the reply affidavit. He would fairly state that there is no material on the basis of which the petitioner's contention on the show cause notice cum draft assessment order being not supplied to the petitioner, could be contested by the department. He is not in a position to dispute that the assessment order was passed in the absence of mandatory compliance/ requirement which is required to be complied by respondent no.1.

12. It is on the aforesaid conspectus, we have heard learned counsel for

1 [2001] 116 Taxman 491 (SC)

the parties. With their assistance, we have perused the record. At the outset, as the case of the petitioner is primarily to the effect that the impugned order is contrary to the provisions of Section 144B(1)(xiv), (xix), (xx) and (xxii) of the IT Act, as applicable at the relevant time, the said provisions are required to be noted which read thus:-

> "Faceless Assessment
> Section 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 under 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 (xii) 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;**
>
> (xv) ……
>
> (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.
>
> (xvii) …..

> (xix) the National Faceless Assessment Centre shall upon receiving suggestions for variation from the review unit, assign the case to an assessment unit, other than the assessment unit which has made the draft assessment order, through an automated allocation system;
>
> (xx) …..
>
> (xxi) ..…
>
> **(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.**
>
> …..”
>
> (emphasis supplied)

13. Thus, from a bare reading of the said provisions, it is clear that it was incumbent on the part of respondent no.1 to issue to the petitioner a show cause notice in case any variation prejudicial to the interest of the petitioner was to be proposed. It was also mandatory that the petitioner ought to have been granted an opportunity to respond to such show cause notice-cum-draft assessment order on the variations prejudicial to the assessee being proposed and only after considering the objections, further procedure was required to be adopted. Admittedly, such procedure was not adopted being the mandatory procedure as prescribed by the provisions of Section 144B as noted by us hereinabove.

14. It is thus clear that once there was an inherent and incurable defect the assessment order, when tested on the anvil of the said mandatory

provisions of the Act, we would agree with Mr. Naniwadekar that the assessment order would be required to be held to be vitiated. We would also agree with Mr. Naniwadekar that in these circumstances, the petitioner need not be relegated to pursue the appellate remedy, as the petitioner ought not to be left entangled in litigation before the appellate authority, and thereafter in the further appeals which are available as the illegality in this situation would be required to be nipped at the bud for which the appellate remedy may not be effective or efficacious, considering the patent illegality in the assessment order, as impugned. In the circumstances in hand, Mr. Naniwadekar's reliance on the decision of the Supreme Court in **Tin Box Co.** (supra) is apposite as, in a similar context, the Supreme Court has observed that the assessee ought not to be relegated to the hierarchy of the appellate remedies. The observations of the Supreme Court read thus:-

> "1. It is unnecessary to go into great detail in these matters for there is a statement in the order of the Tribunal, the fact-finding authority, that reads thus :
>
> > "We will straightaway agree with the assessee's submission that the Income-tax Officer had not given to the assessee proper opportunity of being heard."
>
> 2. That the assessee could have placed evidence before the first appellate authority or before the Tribunal is really of no consequence for it is the assessment order that counts. That order must be made after the assessee has been given a reasonable opportunity of selling out his case. We, therefore, do not agree with the Tribunal and the High Court that it was not necessary to set aside the order of assessment and remand the matter to the assessing authority for fresh assessment after giving to the assessee a proper opportunity of being heard.

> 3. Two questions were placed before the High Court, of which the second question is not pressed. The first question reads thus :
>
> > "1. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in not setting aside the assessment order in spite of a finding arrived at by it that the Income-tax Officer had not given a proper opportunity of hearing to the assessee ?"
>
> 4. In our opinion, there can only be one answer to this question which is inherent in the question itself : in the negative and in favour of the asses-see.
>
> 5. The appeals are allowed. The order under challenge is set aside. The assessment order, that of the Commissioner (Appeals) and of the Tribunal are also set aside. The matter shall now be remanded to the assessing authority for fresh consideration, as aforestated. No order as to costs."
>
> (emphasis supplied)

15. We may also observe that the principles of natural justice are statutorily recognized in the provisions of Section 144B of the IT Act. Any non-adherence to the mandatory requirement of the statutory provisions and such principles as recognized by it, would render the assessment order patently illegal. The action of the respondents which is contrary to the mandate of the statutory provisions or in breach of the principles of natural justice would be rendered illegal and invalid. It needs no elaboration that when an order under a statute is to be passed which would entail civil consequences, causing a prejudice to the person, against whom it is being passed, such order would be required to be passed in strict adherence to the

principles of natural justice i.e. after issuance of a show cause notice and an opportunity of a hearing being granted. It is well settled that an order passed in breach of the principles of natural justice would be required to be held to be vitiated, non-est and a nullity. In the present case, the impugned assessment order is passed without issuance of a show cause notice and an opportunity of a hearing being granted to the petitioner. As noted above, Section 144B inheres the application of the principles of natural justice. For such reasons, the impugned order would be manifestly illegal and a nullity in the eyes of law.

16. In the light of the aforesaid discussion, in our opinion, this is a fit case, wherein the impugned order would deserve to be quashed and set aside, so that further appropriate procedure as recognized by law under the relevant provisions of the IT Act can now be followed and an appropriate assessment order in accordance with law passed.

17. The petition thus needs to be allowed. It is accordingly allowed in terms of prayer clauses (a) and (b).

18. Respondent no.1 shall take recourse to the procedure as mandated by law, to issue a show cause notice-cum-draft assessment order, to be served on the petitioner, and by following the due procedure under the provisions of the IT Act, pass an assessment order. All contentions of the parties in

that regard are expressly kept open. Let this procedure be undertaken and completed within a period of three months from today.

19. Rule is made absolute in the aforesaid terms. No costs.

(ADVAIT M. SETHNA, J.) (G. S. KULKARNI, J.)