

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 7864 of 2022

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

and

HONOURABLE MR. JUSTICE DEVAN M. DESAI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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DINESHKUMAR CHHAGANBHAI NANDANI

Versus

INCOME TAX OFFICER, ITO WD 2(1)(1), RKT

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Appearance:

MR B S SOPARKAR(6851) for the Petitioner(s) No. 1

MR KARAN SANGHANI FOR MRS KALPANAK RAVAL(1046) for the Respondent(s) No. 1

SERVED BY RPAD (N) for the Respondent(s) No. 2

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CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

and

HONOURABLE MR. JUSTICE DEVAN M. DESAI

Date : 19/06/2023

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

1. This petition is filed under Article 226 of the Constitution of India in which the petitioner has prayed for the following relief/s:

"(a) quash and set aside the impugned assessment order dated 31.03.2022 at Annexure-A to this petition;

(b) allow the Petitioner to file his reply to show cause notice dated 29.03.2022 and direct the Respondents to pass the fresh assessment order after considering the reply of the Petitioner.

(c) pending the admission, hearing and final disposal of this petition, to stay implementation and operation of the impugned order at Annexure- A to this petition and stay further proceedings of recovery for A.Y. 2014-15;

(d) any other and further relief deemed just and proper be granted in the interest of justice;

(e) to provide for the cost of this petition."

2. Looking to the issue involved in the present petition, learned advocates appearing for the parties jointly requested that this petition be taken up for final disposal at the admission stage. Hence, Rule. Learned Standing Counsel Mr. Karan Sanghani for Revenue waives service of notice of Rule for the respondents.

3. The factual matrix of the present case is as

under:

3.1. It is the case of the petitioner that petitioner filed return of income for the Assessment Year 2014-2015 on 24.07.2014 declaring total income of Rs.3,39,730/-. The said return was processed under Section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act' for short). Thereafter, the respondent No.1 issued impugned notice under section 148 of the Act on 31.03.2021 asking the petitioner to file return of income of A.Y. 2014-2015. The petitioner without prejudice submitted his return of income in compliance of the said notice on 30.04.2021. The reasons recorded by the respondents were provided on 11.11.2021.

3.2. It is also the case of the petitioner that thereafter the concerned respondent issued various notices under Section 143(2) and 142(1) of the Act, whereby, the petitioner was asked to supply necessary details. Thereafter, show cause notice under Section 144 of the Act was issued on 15.02.2022. The petitioner submitted preliminary objections along with supporting evidence and requested to drop the assessment proceedings. The said objections were sent on 23.02.2022. The objections raised by the petitioner were rejected vide letter dated 03.03.2022.

3.4. Now, it is the case of the petitioner that

thereafter the respondent No.2 issued show cause notice dated 29.03.2022 as to why proposed variation should not be made. It is stated that the said show cause notice was sent at 11:41 a.m. on 29.03.2022 and it was stated in the said notice that petitioner shall submit reply by 23:59 p.m. on the very same day i.e. on 29.03.2022 and thereby time of 12 hours only was given to the petitioner.

3.5. It is further stated that petitioner hurriedly filed part submissions/reply on 29.03.2022 and requested to grant an opportunity of hearing through video conference. It is stated that the said opportunity was provided on 30.03.2022 and thereafter the impugned assessment order dated 31.03.2022 came to be passed under Section 147 read with Section 144B of the Act. The petitioner has, therefore, challenged the same by preferring the present petition.

4. Learned advocate Mr. Soparkar appearing for the petitioner mainly submitted that the act of giving only 12 hours to file reply to the show cause notice by the respondents is in clear violation of the principles of natural justice. It is submitted that though the petitioner hurriedly filed a reply to the said show cause notice, the respondents have failed to grant adequate opportunity of hearing to the petitioner. It is further submitted that in the reply dated 29.03.2022 submitted by the petitioner, copy of which is placed on record at page 82 of the

compilation, the petitioner has specifically asked for certain documents for cross-verification and also requested that petitioner be permitted to cross-examine one Mr. Saurabh Kathwadia based on whose statement the petitioner was asked to provide explanation. It is submitted that such documents asked for by the petitioner were not provided to the petitioner and opportunity of cross-examination is also not granted to the petitioner, and thereby, the respondents have violated the principles of natural justice. It is, therefore, urged that only on this ground the impugned order passed by the respondents be quashed and set aside and the matter be remanded back to the respondent Authority for fresh consideration.

5. Learned advocate Mr. Soparkar has placed reliance upon the decision rendered by this Court in the case of *Gandhi Realty (India) (P) Ltd. v. Assistant/Joint/Deputy/Assistant Commissioner of Income-tax/Income Tax Officer*, reported in *441 ITR 316 (Gujarat)*. He has also placed reliance upon the order dated 11.10.2021 passed by this Court in Special Civil Application No.7477 of 2021 in the case of *Agrawal JMC Joint Venture v. Assistant/Joint/Deputy/Assistant Commissioner of Income Tax/Income Tax Officer*. He has also placed reliance upon the decision rendered by this Court in the case of *Dipak Natwarlal Dholakiya v. Additional/Joint/Deputy/Assistant Commissioner of*

Income-tax, reported in (2023) 149 *Taxmann.com* 151 (Gujarat). It is submitted that in the aforesaid cases, sufficient opportunity was not given to the concerned Assessee and therefore on the ground of violation of principles of natural justice this Court has quashed and set aside the orders passed by the concerned authority. Learned advocate, therefore, urged that this petition be allowed.

6. On the other hand, learned Standing Counsel Mr. Karan Sanghani appearing for the respondent Revenue has opposed this petition. Learned counsel has referred the averments made in the affidavit-in-reply filed on behalf of the respondents. It is mainly contended that before issuance of the show cause notice-cum-draft assessment order dated 29.03.2022, the concerned respondent issued various notices to the petitioner, however, the petitioner failed to give any reply to the said notices. By way of the said notices, the petitioner was asked to provide necessary details, however, the same were not provided to the concerned respondent. It is further submitted that show cause notice-cum-draft assessment order was issued to the petitioner, whereby, the petitioner was asked to submit his reply within stipulated time. It is pointed out from the record that the petitioner submitted his reply. In the said reply, the petitioner also requested to grant opportunity of hearing through video conference. The said request was also acceded to by the respondent

authority and opportunity of hearing through video conference was also provided to the petitioner and therefore, now, it is not open for the petitioner to contend that only 12 hours time was given to the petitioner to submit his reply. It is also submitted that no prejudice is caused to the petitioner by not providing adequate opportunity of hearing as contended by learned counsel for the petitioner in the facts of the present case.

7. Learned Standing Counsel further submitted that the petitioner is having alternative efficacious remedy to file appeal before the Appellate Authority against the impugned order passed by the concerned respondent and it is always open for the petitioner to raise all available contentions before the said Appellate Authority and therefore this Court may not entertain the present petition.

8. Learned Standing Counsel appearing for the Revenue has placed reliance upon the decision rendered by this Court in the case of ***Nileshkumar Bhupendrabhai Shah v. Union of India***, reported in ***(2021) 127 taxmann.com 159 (Gujarat)***. Learned counsel has, more particularly, referred to and relied upon para 7, 8, 9 and 11 of the said decision. Learned counsel, therefore, urged that this petition be dismissed.

9. Having heard learned advocates appearing for the

parties and having gone through the material placed on record, it would emerge that for the Assessment Year 2014-2015, the petitioner submitted return of income in July, 2014. The same was processed. Thereafter, notice under Section 148 of the Act was issued to the petitioner on 31.03.2021, whereby, the petitioner was asked to file the return of income for A.Y. 2014-2015. Pursuant to the said notice, the petitioner submitted return of income without prejudice to his rights and contentions on 30.04.2021. It is the case of the respondents that various notices under Sections 143(2) and 142(1) of the Act came to be issued in December, 2021, January, 2022 and February, 2022 to the petitioner. The petitioner was asked to supply necessary details. Thereafter, show cause notice under Section 144 of the Act came to be issued in February, 2022. The petitioner submitted his objections. However, the same was rejected on 03.03.2022. It further transpires that thereafter a show cause notice-cum-draft assessment order came to be issued on 29.03.2022 to the petitioner at 11:41 a.m. and the petitioner was asked to submit reply before 23:59 p.m. on the very same day.

10. It is pertinent to note that the petitioner submitted his reply to the said show cause notice-cum-draft assessment order and in the said reply, the petitioner has specifically asked the respondents to provide certain details for the purpose of cross-

verification. It was specifically asked that petitioner be permitted to cross-examine one Mr. Saurabh Kathwadia. Petitioner also requested to grant opportunity of hearing through video conference. It is the case of the respondents that the said opportunity of hearing through video conference was provided to the petitioner.

11. In the aforesaid factual aspect of the present case, the decisions relied on by the learned advocates appearing for the parties are required to be examined.

12. In the case of *Gandhi Realty (India) (P) Ltd. (supra)*, it was the case of the concerned petitioner that a show cause notice-cum-draft assessment order was not issued to the concerned assessee, and therefore, in the facts of the said case, this Court held that though earlier various notices were issued to the concerned assessee, the respondent was required to issue show cause notice-cum-draft assessment order, which is mandatory requirement for faceless assessment. However, we are of the view that the aforesaid decision would not be applicable to the facts of the present case because in the present case, show cause notice-cum-draft assessment order was issued to the petitioner.

13. In the case of *Agrawal JMC Joint Venture (supra)*, similar type of objection was raised by the

respondents in the affidavit-in-reply. The contention was raised in the said case that petitioner is having alternative efficacious remedy of filing an appeal before the Appellate Authority and therefore petition may not be entertained. However, the Division Bench of this Court, after considering various aspects and after considering the submissions canvassed by learned advocates appearing for the parties, observed in para 18 and 19 as under:

"18. In summation, it can be deduced from the provisions, as also the decisions discussed that Section 144B of the IT Act under heading of the Faceless Assessment provides for the assessment under Section 143 (3) and 144 to be carried out as per the procedure contained in Section 144 B of the IT Act. As noted above, Sub-section (9) of Section 144B of the IT Act in no uncertain term provides that after the 1st day of April, 2021, the assessment made under Section 143 (3) or under Section 144(4) of the IT Act shall be non est, when not made in accordance with the procedure detailed in Section 144B of the IT Act. The opportunity of hearing as envisaged under Section 144B of the IT Act also shall need to be scrupulously adhered to as the principles of natural justice are unfailingly ingrained in this provision.

19. Reverting to the facts on the matter on hands, it is quite clear that the notice along with the draft assessment order was given to the petitioner on 04.04.2021, the response to the same was given within two days by the petitioner in the mode as prescribed under the Law. It also filed further reply to the said notice on 08.04.2021 as well as on 15.04.2021 in continuation of the first reply of 06.04.2021. It is also a matter of record that

there is no reference of the request made on 07.04.2021 in a subsequent reply made in continuity on the part of the petitioner of 08.04.2021 as well as 15.04.2021. However, that would not in any manner question his conduct of requesting for the personal hearing in as much as that aspect is neither disputed nor belied from the material which is available from the eportal of the Income Tax Department. In fact in the affidavit-in-reply itself there is a reference of such a request made by the petitioner which according to the respondent-revenue is impermissible as he has not exercised the option while responding to the notice and the draft assessment order on 06.04.2021."

13.1. In the case of Dipak Natwarlal Dholakiya (supra), the Court observed in para 5 and 6 as under:

"5. We have heard, learned advocate Mr. S. N. Divatia for the petitioner who has vehemently urged before the Court that the impugned order passed under Section 143(3) read with Section 263 with Section 144B of the Act and consequential notice of demand and penalty, are in gross violation of the principles of natural justice and statutorily, it was mandatory for the respondent to issue a show-cause notice cum draft assessment order whenever there is variation from the returned income as provided under Section 144B(1)(xiv) of the Act. Therefore, he has urged that notice was uploaded on 17.03.2022 at 12:41 IST and asked the petitioner to comply before 6:00 p.m. on 18.03.2022. Thereby, the petitioner was allowed hardly a time of 12 hours to comply to the aforesaid notice. Further, 18.03.2022 was a holiday on account of Dhuleti and yet the petitioner uploaded all the possible and available details with him. There

was gross violation of the principles of natural justice and the entire action of the respondent of completing the assessment was not in consonance with the legislative intent. Heavy reliance was placed on the decisions in *Calcutta Discount Co. Ltd. v. ITO*, 41 ITR 191 (SC) and in *Radhakishan Industries v. State of Himachal Pradesh and Others*, (2021) 6 SCC 771. The addition made herein of Rs.39,87,750/- allowing less than four hours to make necessary calculations and collect the details is next to impossible task and hence, the order is sought to be interfered with.

6. Having thus heard both the sides, on the ground of non-compliance of mandatory statutory provisions and for grant of less than four hours to respond to the notice on 29.03.2022, interference is desirable. We could notice that the final show-cause notice cum draft assessment order proposing huge additions aggregating Rs.39,87,750/- was issued at 17:22 IST on 29.03.2022, which was to be responded to by 23:59 IST on the very day. This, surely, is in gross violation of the principles of natural justice as to ask some one to respond to the same in less than four hours, amounts to nearly achieve impossible. When it is being terms as violation of principles of natural justice, it is mild expression to the conduct of the respondent. The least that could have been done was to regard the objective and very purport of introducing service of show-cause notice cum draft assessment order under Section 144B of the Act. Such Faceless Assessment Scheme 2019 has been incorporated under the Tax regime vide Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, whereby, Section 144B was inserted from 1st April 2021. The circular of Central Board of Direct Taxes (CBDT) deals with the procedure of faceless assessment, scope of work to be done by different units

such as assessment unit, verification unit, technical unit etc. Non-compliance of sub-section (9) of Section 144B of the Act would render the issue non est. Our attention is drawn that the provisions of sub-section (9) of Section 144B of the Act though have been omitted from the statute book, there is no running away from the fact that the time given is in no manner can be said to be in due compliance of the statutory provisions or in satisfaction of fulfilling the objectives of newly introduced provisions.

13.2. In the aforesaid case, less than five hours time was given to the concerned assessee for filing reply and this Court observed that the respondent had failed to grant reasonable opportunity of hearing to the concerned assessee and therefore it was held that it is the case of gross violation of principles of natural justice.

14. In the present case, as discussed hereinabove, it is the specific case of the petitioner that a show cause notice-cum-draft assessment order was issued on 29.03.2022 and petitioner was asked to submit his reply within less than 12 hours. Though the petitioner submitted reply, it is the specific case of the petitioner that the respondents have failed to grant adequate opportunity of hearing/ an opportunity to defend was not given to the petitioner assessee. We have gone through the reply dated 29.03.2022 submitted by the petitioner, copy of which is placed on record at page 82 of the compilation. A specific request was made by the petitioner to the respondent

that particular documents/details be supplied for cross verification and an opportunity to cross-examine one Mr. Saurabh Kathwadia be given to the petitioner. However, it is not in dispute that the said documents as asked for by the petitioner were not supplied to him nor any opportunity of cross-examination of the aforesaid person was granted to the petitioner. Even otherwise, within less than 12 hours, it is difficult for the petitioner to submit complete reply to the respondents.

15. It is contended by learned Standing Counsel for the Revenue that by not granting such adequate opportunity to the petitioner, no prejudice is caused to the petitioner as the respondents issued various notices to the petitioner to which the petitioner did not reply. However, we are of the view that when the show cause notice-cum-draft assessment order is issued to the petitioner, reasonable/adequate opportunity was required to be given to him. In the present case, adequate opportunity was not given to the petitioner and therefore only on this ground the petition deserves to be allowed.

16. Thus, in view of the aforesaid findings recorded by us, the decision upon which reliance is placed by learned Standing Counsel for the Revenue i.e. the decision in *Nileshkumar Bhupendrabhai Shah (supra)* would not be applicable to the facts of the present case.

17. In view of the aforesaid discussion, the petition is allowed. Accordingly, impugned assessment order dated 31.03.2022 is hereby quashed and set aside. This, however, would not preclude the respondent in initiating any action from the stage from where it has been left. Let the petitioner cooperate in the same. It is clarified that this Court has not examined the merits of the case of the petitioner. Rule is made absolute accordingly.

(VIPUL M. PANCHOLI, J)

(D. M. DESAI, J)

LAVKUMAR J JANI