IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (L) NO.11040 OF 2021

Piramal Enterprises Limited,]
having its address at Piramal Antana]
Agastya Corporate Park, Kamani Junction]
Kurla, Mumbai – 400 070.] … Petitioner

Versus

1. Additional/joint/Deputy/Assistant]
Commissioner of Income-tax/Income-tax Officer]
National e-Assessment Centre,]
having address at Room No.401, 2nd Floor, E-Ramp,]
Jawaharlal Nehru Stadium, Delhi 110 003,]
Email id : feedback.notice.neac@incometax.gov.in]
and delhi.ito.hq.pccit.neac@incometax.gov.in]

2. Deputy Commissioner of Income-tax,]
Circle 8(2)(1), Mumbai,]
having address at Room No.624, 6th Floor,]
Aaykar Bhavan, Maharshi Karve Road, Mumbai,]
Maharashtra – 400020.]
Email id : Mumbai.dcit8.2.1@incometax.gov.in]

3. Principal Commissioner of Income-tax-8,]
having address at Room No.611, 6th Floor,]
Aaykar Bhavan, Maharshi Karve Road, Mumbai,]
Maharashtra – 400020.]
Email id : Mumbai.pcit8@incometax.gov.in]

4. Central Board of Direct Taxes,]
North Block, New Delhi.]

5. Union of India,]
through the Secretary, Department of Revenue,]
Ministry of Finance, Government of India,]
North Block, New Delhi – 110 001.]… Respondents

Mr. Percy Pardiwala, Senior Advocate a/w Mr. Madhur Agarwal i/b Ms. Priyanka Bore for Petitioner.
Mr. Sham Walve for Respondents.

CORAM :- SUNIL P. DESHMUKH &
ABHAY AHUJA, JJ.
RESERVED ON :- 12 JULY, 2021
PRONOUNCED ON :- 30 JULY, 2021
(THROUGH VIDEO CONFERENCING)

ORAL JUDGMENT (PER : SUNIL P. DESHMUKH, J.) :-

1. The petitioner – a registered company - is before the court aggrieved by the draft assessment order dated 22/04/2021 (for the assessment year 2017-18) under Faceless Assessment System / e-Assessment.

2. Petitioner carries on various businesses including pharmaceuticals comprising manufacturing pharmaceutical formulations as well as trading in pharmaceutical goods. It purchases raw material for manufacturing its formulations as well as purchases goods for trading.

3. The petitioner had filed its original return of income for the assessment year 2017-18 in November 2017 declaring NIL income. The petitioner has filed a revised return of income in March 2019 for said assessment year electronically in the prescribed fixed format.

4. According to petitioner, in its profit and loss account, it breaks up expenditure in broad categories viz; cost of material consumed, purchase of stock in trade and change in inventory of finished goods,

work in progress and stock in trade. Its details are disclosed in schedule to profit and loss account. In the balance-sheet, inventory (closing stock) comprises the items raw material, work in progress, finished goods, stock in trade and spares and is given in consolidated figures.

5. It is referred to that petitioner has tendered and uploaded profit and loss account and balance-sheet by filling up relevant columns of the format of return of income. Columns in the return of income are pre-determined and inflexible and since it provided for only one column for purchase, it was not possible for petitioner to show purchases of raw material and purchases of trading goods separately. There is no column to show opening and closing stocks of stock in trade. In the circumstances, in the profit and loss account, as there are no sufficient columns to give details of transactions, the petitioner had made disclosures in certain columns and schedule to annual accounts.

6. The petitioner submits that the aforesaid disclosures are made for understanding as to the amount shown in profit and loss account of income tax return tallies with annual accounts. It is being submitted that such a method of disclosure in return of income does not, in any way, affect the income declared or the correctness of amount declared in the profit and loss account or the return of income. Since the

return of income comprises fixed line items, the petitioner had to make the disclosures as aforesaid in particular form which practice it has been following from the beginning of filing of return of income electronically. The petitioner discloses all types of inventories (closing stocks) as is disclosed in annual accounts, in the balance-sheet.

7. It is referred to, it is considered that there is substantial difference between the value of receipts from services in the service tax return received from CBEC and the values disclosed in income-tax return. It is contended that while the petitioner had sought material to understand the basis of respondent no.1 coming to such consideration, the respondent no.1 had not furnished any material / information and arbitrarily addition was made.

8. It is stated petitioner had also filed along with return transfer pricing audit report in Form 3-CEB showing international transactions entered into and their arm's length price. It is submitted that the transactions of granting corporate guarantee in respect of borrowing of Associate Enterprises ('AE'), the petitioner had charged the transaction @ 0.75% or 0.50% of the guarantee amount. The petitioner has made *suo-motu* adjustment @ 0.25% for certain guarantees given for the performance of AEs as being the arm's length price of the international

transactions. The transfer pricing officer under his order dated 29/01/2021, proposed adjustment of Rs.23.62 crore rejecting submission of petitioner with respect computation of arm's length price and computed corporate guarantee and performance guarantee @ 1.68% and accordingly proposed the adjustment.

9. The petitioner's case was selected for scrutiny assessment and during the course of submissions, petitioner wanted to opt out of e-proceedings and to have physical submission but its case was transferred to e-proceedings / faceless assessment.

10. The petitioner also refers to that during course of assessment proceeding, various show-cause notices were issued from time to time seeking details and the petitioner had filed its replies with submissions with respect to issues sought to be raised.

11. Petitioner states, it received a purported draft assessment order in the form of a show-cause notice dated 25/03/2021 stating that certain additions are proposed to be made while completing assessment, purporting to give opportunity to show cause, up to 26/03/2021.

12. The notice, *inter alia*, also states that the petitioner may file response in writing and may also file request for personal hearing through video conferencing. The notice proposed to disallow a sum of Rs.167.57 crore under section 14A of the Income Tax Act, 1961 (for short, 'IT Act') and an amount of Rs.430.35 crore based on difference of turnover disclosed by the petitioner and information received from CBEC, addition to value of closing stock as there being difference between value of closing stock, in the profit and loss account, in the income tax return and in the balance-sheet, addition with respect to opening stock as the opening stock in the profit and loss account in the income tax return is more than the closing stock disclosed in the income tax return of earlier year and transfer price adjustment of Rs.23.62 crore.

13. In its letter dated 26/03/2021, the petitioner asked for time up to 09/04/2021 as a day's time was not sufficient with respect to issues raised in the proposed draft assessment order. On 28/03/2021, the petitioner submitted a letter seeking hearing through virtual conferencing in the assessment proceedings for AY 2017-18. The petitioner refers to that it filed responses to notice on 07/04/2021 and 08/04/2021 giving explanation, particulars and details with respect to the issues.

14. The petitioner received a draft assessment order dated 22/04/2021 under section 144C(1) read with 143(3) of the IT Act disallowing sum of Rs.167.57 crore under section 14A of the Act, adding Rs.362.72 crore to income rejecting submissions of the petitioner stating that burden was on petitioner to reconcile the data with the service tax returns holding that request of the petitioner for further time for reconciliation is not justifiable, adding a sum of Rs.343.10 crore on account of closing stock, with addition of Rs.810.33 crore on account of opening stock and transfer pricing addition of Rs.23.62 crore.

15. The petitioner is, thus, before the court contending that impugned draft assessment order dated 22/04/2021 by respondent no. 1 for assessment year 2017-18 is ex-facie illegal, untenable, unsustainable, unreasonable and contrary to the provisions of the IT Act and infringes petitioner's rights under Articles 14 and 19 of the Constitution of India, invoking Articles 226 and 227 of the Constitution of India.

16. The revenue has filed its reply through Deputy Commissioner of Income Tax, Circle 8(2)(1), Mumbai, wherein it has been referred to that the case of petitioner for Assessment Year (AY) 2017-18 had been selected for complete scrutiny and verification, as according to Computer Assisted Scrutiny Scheme (CASS), various aspects had cropped up on account of issues referred to in the reply.

17. It is contended that adjustment of Rs.23.62 crore was based on transfer pricing officer's order under section 92CA(3) before which the petitioner had been issued notices from time to time and the petitioner's submissions were duly considered and are incorporated in transfer pricing order.

18. It has been referred to that in CASS, additional income in respect of closing stock has been properly made having regard to the differences of values appearing in profit and loss account and balance sheet. Similar is the case of the opening stock, as there have been differences in the opening stock of the current year which should have been generally the same, as the closing stock of the preceding year. It is sought to be submitted that after satisfaction, there has been disallowance under section 14A of the Act r/w Rule 8D in the draft assessment order. The assessee had failed to furnish computation as per rule 8D and instead had furnished scientific working of disallowance which is less than expenses already debited in profit and loss account for earning exempt income, as such, 1% of investment less expenses had been added to total income.

19. It is contended that a show cause notice issued on 25.03.2021 to the petitioner. However, pursuant to the same, there had

been no compliance on 26.03.2021. On 28.03.2021, the petitioner had sought an adjournment and submitted response on 07.04.2021 urging to explain specific points through video conferencing and had also filed response on 08.04.2021. All responses and replies filed in response to the notice were duly considered and examined and accordingly, draft assessment order was passed under section 144C(1) r/w 143(3) on 22.04.2021 and assessee had been given 30 days time from the date of receipt of draft assessment order to file its acceptance of variations made to the total income or to file objections, if any, as per the provisions of section 144C(2). Draft assessment order passed on 22.04.2021 is valid and in accordance with law.

20. It is contended that assessee will be given principles of natural justice before passing final assessment order after filing objection to variations in total income under section 144C(2) of the Income Tax Act.

21. Mr. Percy Pardiwala, learned senior advocate for petitioner, submits that impugned order is passed in contravention in principles of natural justice and contends that opportunity of personal hearing is an essential requisite before passing an order prejudicing interest of the assessee. He submits that petitioner had requested for personal hearing

in response to the notice dated 25/03/2021, *inter alia,* through video conferencing. He submits that despite requests, on many occasions for hearing, physical as well as through video conferencing, the same have not been heeded and / or attended to and directly order detrimental to the interest of the petitioner has been passed.

22. Mr. Pardiwala submits that respondent no.1 has failed to appreciate the response to the show-cause notice-cum-draft assessment order dated 25/03/2021 on the issues on which additions to income have been made in impugned draft assessment order dated 22/04/2021. He submits that the impugned order is devoid of proper reasoning and does not take into account the submissions and its underlying purport.

23. He submits that respondent no.1 has made additions to income in excess of Rs.1,000 crores with respect to opening stock and closing stock without appreciating the case of petitioner that there have been no incorrect disclosures. He submits that respondent no.1 has failed to appreciate that balance-sheet in the annual accounts disclosing correct figures of opening stock and closing stock and the income tax return are cumulative which do not change the amount of income chargeable to tax.

24. He goes on to submit that an Assessing Officer cannot proceed to make disallowance under section 14A by applying Rule 8D of Income Tax Rules without recording subjective satisfaction. Despite scientific working apportioning the cost to the tune of Rs.3,26,18,604/- been given, respondent no.1 has proceeded to disallow Rs.167 crore under Rule 8D. He submits that this is completely arbitrary and irrational and is contrary to binding principles laid down by superior courts. The order is without application of mind.

25. He submits that addition of Rs.362.72 crore is on the basis of alleged information received from CBEC of the sales tax returns of the petitioner. The petitioner has given details of sales tax returns filed by it which show that petitioner had rendered services to the extent of Rs.272.41 crore. The basis for computing Rs.567.76 crore by respondent no.1, despite being sought, yet has not been given to the petitioner. He submits that reconciliation was not possible unless the petitioner is given proper and relevant information.

26. He submits that this court as well as other High Courts have consistently taken a view that 0.5% is a reasonable arm's length price for determination of guarantee fees and as such, finding of respondent no.1 that corporate guarantee fees should be computed at 1.68% is contrary to the decisions of high courts and earlier decision in petitioner's own case.

27. Mr. Pardiwala, during course of his submissions, has taken us through the provisions of sections 144B and 144C. From the provisions of section 144B(1), he submits that relevant in present controversy would be the provisions from section 144B(1)(xvi) whereunder National Faceless Assessment Centre ('NFAC') shall, if the draft assessment order prejudicial to the interest of the assessee is proposed, issue a show-cause notice as to why proposed variation should not be made giving an option to the assessee to ask for personal hearing according to sub-clause (b) of clause (xiv) of sub-clause(1) of section 144B.

28. He submits, after receipt of show-cause notice, assessee is supposed to furnish response as referred to in sub clause (xxii) within specified time, inter alia, requesting opportunity for personal hearing. In case, no response is furnished, the NFAC can proceed with the draft assessment order / final draft assessment order as referred to in clause (xxiii)(a)[A], [B]. However, if response is furnished and request for hearing is made, NFAC, under clause 144B(1)(xxiii)(b) has to assign responsibility to the Assessment Unit. After considering the response and after giving opportunity of being heard, Assessment Unit shall send revised draft assessment order to NFAC. He submits that after receipt of the revised draft assessment order, NFAC shall, in case of variation in the revised draft assessment order is prejudicial to the interest of the assessee

in comparison to the draft assessment order or final draft assessment order, follow the procedure under sub-clause (b) of clause (xvi) of sub-section (1) of section 144B.

29. He submits that in the present scenario, an opportunity of hearing as is available and allowed pursuant to section 144B(xvi)(b) is getting lost.

30. He submits that as in e-assessment system / faceless assessment system, information given in fixed format of the department appears to be taken into account and the particulars given provided schedules and appendices do not appear to have been appreciated, hearing is eminently imperative as there are several issues which would be required to be addressed to and explained. There are certain aspects which can be peculiarly explained and understood during oral submissions and thus a hearing is a must which is allowed in the scheme, however, is not afforded and is wanting in the present case.

31. Mr. Pardiwala purports to refer to and rely, for aforesaid proposition, on a decision rendered by Delhi High Court in the case of *Moser Baer India Ltd. Vs. Additional Commissioner of Income-tax,* reported in *[2009] 176 Taxman 473 (Delhi)*. This case concerns

determination, by Transfer Pricing Officer (TPO) pursuant to section 92BA, of arm's length price of international transaction without granting opportunity of personal hearing to the assessee. He submits that in said case, the importance of personal hearing has been discussed with quite some elaboration. He points out that in aforesaid decision, judgments in the case of *Travancore Rayon Ltd. Vs. Union of India* reported in *AIR 1971 862 (7)* and in the case of *Indian Transformers Ltd. Vs. Asstt. Collector* reported in *1983 (14) ELT 2293*, by Supreme Court and Kerala High Court respectively are considered showing that oral hearing is a must on account of complexities involved in determination of arm's length price. He draws attention to paragraphs 6.1 and 7.3 from said judgment in *Moser Baer (Supra)*, reading, thus :-

> "*6.1 As regard the objection taken by the respondent, with respect, to the maintainability of the writ petition, it is our view that, in the event, we were to hold that the impugned order(s) of the TPO were passed in breach of the principles of natural justice and hence, a nullity in the eye of law, the writ petition would be a proper remedy. See observations of the Supreme Court in the case of State of U.P. v. Mohd. Nooh AIR 1958 SC 86 and Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors. (1988) 8 SCC 1.*
>
> *7.3 Keeping in mind the test as enunciated by the Supreme Court in the case of Mohinder Singh Gill (supra) and State of Orissa v. Dr. (Miss) Binapani Dei (supra), we have no doubt in our minds that the provisions of Sub-section (3) of Section 92CA cast a duty in no uncertain terms on the TPO to afford an opportunity of an oral hearing. This is clearly so in view of the fact that as courts have carved out this important*

safeguard in favour of the aggrieved parties even where the statute is silent, unless there is exclusion of such a right by way of an explicit provision or by necessary implication. In the present case, however, given the words of the statute, we have no doubt that the grant of oral hearing by the TPO is mandatory. The reason for coming to such conclusion, apart from the clear wordings of Sub-section (3) of Section 92CA, is that, apart from the civil consequences, that, the determination of ALP would have on the assessee, any adjustment by the Assessing Officer to the ALP determined, by the assessee based on the determination by the TPO under Sub-section (3) of Section 92CA, would result in imposition of penalty under Section 271(1)(c) read with explanation 7 of the Act. The Assessing Officer, after the amendment brought about by virtue of Finance Act, 2007, has no choice but to proceed to compute total income of the assessee under Sub-section (4) of Section 92C in "conformity" with the ALP determined by the TPO. In view of the consequences which result from the determination of the ALP by the TPO, which are undoubtedly severe, there can be no doubt that an oral hearing is a must."

32. He submits that there is strong possibility of a submission from the other side about an opportunity of hearing been available with Dispute Resolution Panel. Yet, according to him, the same would not dispense with hearing by the authority which is to determine the income assessible to tax according to procedure when the statutory scheme makes provisions for the same.

33. Mr. Pardiwalla submits that there is no distinction under the scheme between the eligible assessee and other assessee so far as opportunity of hearing is concerned in the scheme under section 144B.

34. Mr. Pardiwalla cites a few decisions from Delhi High Court viz;

(a) Sanjay Aggarwal Vs. National Faceless Assessment Centre, Delhi, reported in *[2021] 127 taxmann.com 637 (Delhi)* wherein, taking into account provisions in clauses under section 144B(1) for faceless assessment, it has been observed to the effect that a look at relevant provisions would give a sense as to why legislature has provided personal hearing in the matter in a case where variation is proposed in the orders of draft assessment, final draft assessment or revised draft assessment. Opportunity is made available to assessee by serving a notice calling upon him to show-cause and assessee or his representative is allowed to request for personal hearing to present oral submissions on its case before income tax authorities in any unit. Taking stock of the situation, Delhi High Court had concluded that it was incumbent on the revenue to accord personal hearing to the petitioner and its lack would result in setting aside impugned order. In aforesaid case, it appears that a show-cause notice-cum-draft assessment order had been issued on 13/04/2021 and thereafter the petitioner had responded to making several requests for personal hearing which were not heeded and the notice culminated into a draft assessment order notice dated 22/04/2021 and the petitioner contended that impugned order had been passed without affording personal hearing to the petitioner.

(b) In *Lemon Tree Hotels Limited Vs. National Faceless Assessment Centre, Delhi & Anr in W.P.(C) 5427/2021 (Delhi High Court)*, petitioner's case was that upon show-cause notice-cum-draft assessment order dated 13/03/2021, several replies were furnished and having regard to the complexity in the matter, a request for personal hearing was also made. It is observed in paragraph 7 of the decision, after taking into account section 144B(7)(vii) and clause (xii) sub-clause (h), *prima facie* once an assessee requests for a personal hearing, the officer in-charge, under the provisions of clause (viii) of section 144B(7), would have to ordinarily grant personal hearing.

(c) In the case of *Satia Industries Limited Vs. National Faceless Assessment Centre, Delhi in W.P.(C) 5587/2021 & CM APPL.17382/2021 (Delhi High Court)*, it has been considered that since an adverse view was taken, and petitioner's income got varied, provisions of section 144B(7) get triggered, and that such an aspect had received attention in the judgment dated 27/05/2021 in the matter of *Ritnand Balved Education Foundation (Umbrella Organization of Amity Group of Institutions) Vs. National Faceless Assessment Centre & Ors., in W.P.(C) 5537/2021 (Delhi High Court)*, wherein the high court has observed that impugned assessment order and consequential notices of demand and penalty were flawed being in contravention of provisions of section 144B(7)(vii) of the

Income Tax Act and the standard operation procedure (SOP) for personal hearing through video conferencing under the faceless assessment scheme, 2019 issued by the CBDT under Circular dated 23/11/2020. It has been also observed that since statute itself makes provision for personal hearing, the respondent revenue cannot veer away from the same. As such, impugned assessment had been set aside directing granting of personal hearing to the petitioner or its representative via video conferencing with the concerned officer with a prior notice therefor.

(d) In *YCD Industries Vs. National Faceless Assessment Centre, Delhi,* reported in *[2021] 127 taxmann.com 606 (Delhi)*, the High Court has observed as under :-

> "*16.1. The statute [i.e. Section 144B(1)(xiv), (xv), (xvi)b and (xxii)] provides for issuance of a show cause notice-cum-draft assessment order, and an opportunity to the petitioner/assessee to respond to the same where income of the assessee is varied by the respondent/revenue. Admittedly, the petitioner's income was varied to its prejudice with the addition of Rs.90,25,535/-. As a matter of fact, had the show cause notice cum draft assessment been served on the petitioner, its authorised representative could have requested for a personal hearing in the matter. The respondent/revenue, to our minds, could not have side-stepped such safeguards put in place by the legislature.*
>
> *16.2 The justification proffered by Mr. Bhatia that notices were issued prior to the passing of the impugned assessment order, does not impress us. This submission flies in the face of the schematic design of the statute."*

(e) Similar was a case in *RKKR Foundation Vs. National Faceless Assessment Centre, Delhi,* reported in *[2021] 127 taxmann.com 643 (Delhi).*

35. Learned Senior Advocate Mr. Pardiwala lays stress on judgment of the Supreme Court of India in the case of *Sahara India (Firm) Vs. Commissioner of Income-tax, Central-I, reported in [2008] 169 Taxman 328 (SC)* with a view to bring under focus necessity and importance of having opportunity of pre-decisional hearing to an assessee even in the absence of any express provision and requirement of following principles of natural justice and their reading into the provisions. The decision has been rendered by three judge bench of Supreme Court, in view of order passed by a two judge bench of said court where the division bench had found it necessary, since it could not align itself with another two judge bench decision in the case of *Rajesh Kumar Vs. Dy. CIT* reported in *[2006] 157 Taxman 168*. *Rajesh Kumar* (*supra*), ruled that an assessee should have an opportunity of pre-decisional hearing before issuing directions under section 142(2A) of the Income Tax Act. The three judge bench, in paragraphs 12 and 19, has observed, thus :-

> "*12. In Swadeshi Cotton Mills v. Union of India [1981] 1 SCC 664, R.S. Sarkaria, J., speaking for the majority in a three-Judge Bench, lucidly explained the meaning and scope of the concept of "natural justice". Referring to several decisions, his Lordship observed thus :*

"Rules of natural justice are not embodied rules. Being means to an end and not an end in themselves, it is not possible to make an exhaustive catalogue of such rules. But there are two fundamental maxims of natural justice viz. (i) audi alteram partem and (ii) nemo judex in re sua. The audi alteram partem rule has many facets, two of them being (a) notice of the case to be met; and (b) opportunity to explain. This rule cannot be sacrificed at the altar of administrative convenience or celerity. The general principle - as distinguished from an absolute rule of uniform application - seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post- decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature, and no full review or appeal on merits against that decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing, shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short, this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications. But, the core of it must, however, remain, namely, that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

19. Again in C.B. Gautam v. Union of India a question arose whether in the absence of a provision for giving the concerned parties an opportunity of being heard before an order is passed under the provisions of Section 269UD of the Act, for purchase by the Central Government of an immovable property agreed to be sold on an agreement to sell, an opportunity of being heard before such an order could be passed should be given or not. Relying on the decision of this Court in Union of India v. Col. J.N. Sinha case (supra) and Olga Tellis (supra) it was held that :

> *"Although Chapter XX-C does not contain any express provision for the affected parties being given an opportunity to be heard before an order for purchase is made under Section 269UD, not to read the requirement of such an opportunity would be to give too literal and strict an interpretation to the provisions of Chapter XX-C and in the words of Judge Learned Hand of the United States of America "to make a fortress out of the dictionary." Again, there is no express provision in Chapter XX-C barring the giving of a show cause notice or reasonable opportunity to show cause nor is there anything in the language of Chapter XX-C which could lead to such an implication. The observance of principles of natural justice is the pragmatic requirement of fair play in action. In our view, therefore, the requirement of an opportunity to show cause being given before an order for purchase by the Central Government is made by an appropriate authority under Section 269UD must be read into the provisions of Chapter XX-C. There is nothing in the language of Section 269UD or any other provision in the said Chapter which would negate such an opportunity being given. Moreover, if such a requirement were not read into the provisions of the said Chapter, they would be seriously open to challenge on the ground of violations of the provisions of Article 14 on the ground of non-compliance with principles of natural justice. The*

> *provision that when an order for purchase is made under Section 269UD reasons must be recorded in writing is no substitute for a provision requiring a reasonable opportunity of being heard before such an order is made.*"

And in paragraph 24, it has been concluded;

> *"24. The upshot of the entire discussion is that the exercise of power under Section 142(2A) of the Act leads to serious civil consequences and, therefore, even in the absence of express provision for affording an opportunity of pre-decisional hearing to an assessee and in the absence of any express provision in Section 142(2A) barring the giving of reasonable opportunity to an assessee, the requirement of observance of principles of natural justice is to be read into the said provision. Accordingly, we reiterate the view expressed in Rajesh Kumar's case (supra)."*

36. Mr. Pardiwalla has also pointed out that this court has followed said decision in the case of *Principal Commissioner of Income-tax Vs. Vilson Particle Board Industries Ltd.,* reported in *[2020] 116 taxmann.com 12 (Bombay)*.

37. He then refers to a decision of this court in the case of *Sahara Hospitality Limited Vs. Commissioner of Income Tax reported in [2012] 25 Taxmann.com 299 (Bombay)*. Said decision has been rendered in the context of section 127 – power to transfer cases – under the Income Tax Act. After referring to various citations, it has been considered by the court, the Supreme Court had held that a reasonable opportunity should

be given to assessee wherever it is possible to do so. The conspectus, the court had considered, led to that the word 'may' in section 127 should be read as 'shall' and had observed that requirement of giving an assessee a reasonable opportunity of being heard wherever it is possible to do so is mandatory and the discretion of authority is only as to what is a reasonable opportunity in a given case.

38. He submits that although there have been written responses and submissions explaining situation, the impugned draft assessment order does not take the same into account in proper perspective and does not give reasons for disagreement with the response.

39. He submits that the impugned order is completely contrary to the principles of natural justice and contrary to law and urges to set aside impugned notices and the impugned order and that there is no equally efficacious remedy against the impugned notices and the impugned order.

40. He, therefore, submits that the writ petition be allowed, the order be set aside and the matter be sent back to the position as had been obtaining before 22/04/2021 and to pass an appropriate draft assessment order after hearing the petitioner.

41. Mr. Sham Walve, learned Counsel appearing for the revenue defending the impugned order, reiterates the submissions in the reply and strenuously contends that there is substantial difference between the values of gross receipts from services shown in service tax return received from CBEC and values disclosed in income tax return which are significantly less in income tax return. While assessee was asked to reconcile the difference between the two, it was expected that the assessee would reconcile figures with its own books of accounts, the assessee – company has failed to do the same. Assessee's submission that services received will not form part of revenue, being an expense had been accepted.

42. He submits that it is basic that opening stock should match with the closing stock of preceding year and closing stock is derived on the basis of opening stock, purchases and consumption of the stock, that should be matched with the inventories in the balance sheet. It is incorrect to say that due to inflexibility of the software, the petitioner has put incorrect figures. The additions are based on facts, submissions and documents available on record.

43. He submits that transfer pricing is a highly fact based process. The rates fixed for another assessee cannot be adopted. The transfer

pricing officer has followed decisions while benchmarking transaction of corporate guarantee restricting adjustment in the matter to 1.68%.

44. Mr. Walve contends that the allegation about opportunity of personal hearing through video conferencing not being given is not correct and proper and the assessee would have opportunity of personal hearing through video conferencing after filing objections to variations in total income under section 144C(2) and before passing final assessment order.

45. Mr. Walve submits that instead of approaching the High Court under the writ petition, the assessee ought to have filed its objections to the variations with the Dispute Resolution Panel (DRP) and urges this court not to indulge into request by petitioner.

46. It is contended that the draft assessment order is valid, as per law and is legal and thus, the writ petition is opposed with request to dismiss the same.

47. Sum and substance of the submissions on behalf of petitioner is that personal hearing in the present matter is essential to properly appreciate the nature and manner in which the transactions are carried

out and intricacies of the same can be better explained and brought forth as well as misconstruction by the authorities can be sorted out with proper understanding of the matter. In personal hearing and by oral submissions various aspects, operations/workings which could not be properly appreciated though inscribed under the responses can be resolved. In many a case, it would be possible to appreciate unrealised aspects during hearing and can be effectively explained. According to petitioner, this is precisely the reason as to why personal hearing is included.

48. Perusal of provisions of section 144-B(1), would envince, National Faceless Assessment Centre (NFAC), shall serve a notice on an assessee u/s. 143(2) of IT Act and asessee may file response within a period of fifteen days to NFAC and in the events referred to in clause (iii) (a), (b) or (c), NFAC is to intimate the assesee about that assessment would be completed according to procedure u/s.144-B(1). It is an indication of intention to give prominence to the procedure under section 144-B(1).

49. Under sub-section (1) of section 144B, it appears to be prescribed that upon completion of process from clauses (i) to (xiii), the Assessment Unit (AU) is supposed to make a draft assessment order

(DAO), after taking into account all relevant material available on record or to the best judgment in case of the matter falling under sub-clause (xiii) wherein the AU is intimated about failure of response from the assessee.

50. Clause (xvi) of section 144-B(1) would show that, NFAC on examination of DAO would decide on further course of action to be taken, viz; NFAC may finalise assessment in accord with DAO if there is no variation prejudicial to interest of the assessee is proposed as per sub clause (a) OR in case variation prejudicial to the interest of assessee is proposed, would provide opportunity to the assessee by serving a notice to show cause according to sub-clause (b) OR under sub-clause (c) decide to assign any DAO to a Review Unit (RU), whether prejudicial to interest of assessee or not.

If the matter is referred to RU, the process according to clauses (xvii) to (xx) is to take place culminating into, a final draft assessment order (FDAO) by an Assessment Unit.

51. When draft assessment order (DAO) or final draft assessment order (FDAO) is prejudicial to the interest of the assessee, it entails an opportunity to show-cause pursuant to sub-clause (b) of clause (xvi), giving option under clause (xxii) to assessee of furnishing response to NFAC.

52. Procedure as contained in clause (xxiii) is to be followed in the cases where DAO or FDAO is prejudicial to the interest of assessee after notice has been served on the assessee.

53. It would be seen that, up to clause (xxii) there is no segregation or distinction in treatment to be given to assessees bifurcating them into two categories viz; 'eligible assessee' and 'others' (other than eligible assessee).

54. Sub-clause (a) of clause (xxiii) prescribes courses to be adopted by NFAC in the case of non-response to show cause notice by an assessee. Clause (xxiii) purports to treat the assessees according to their categorization under sub-clause (a), items (A) or (B). Clause (xxiii), sub clause (a), item (A) prescribes, in the case DAO or FDAO proposes variation prejudicial to an eligible assessee, to forward DAO or FDAO to the eligible assessee and in the case of others, pursuant item (B) NFAC may finalize DAO or FDAO and serve a copy of assessment order on the assessee.

55. Sub-clause (b) of clause (xxiii), appears to obligate NFAC, irrespective of categorization appearing under sub-clause (a) of clause (xxiii), where response from an assessee is received, to send the same to the AU.

56. If there is response to show-cause notice, sub clause (b) of clause (xxiii) comes into operation pursuant to which matter goes to the AO and hearing assumes significance and is meaningful and the provision of sub-section (7) clause (vii) would come into play. In case of response after show-cause notice, the matter would go back to the AU and pursuant to clause (xxiv) the AU is supposed to take into account response of the assessee and then a revised DAO (RDAO) emerges for further treatment in accordance with clause (xxv).

57. It appears that under clause (xv) sub-clause (a) item (A) contemplates similar treatment to an eligible assessee as in item (A) under clause (a) of clause (xxiii) and the matter has to be forwarded to the assessee in case variations proposed in the case of eligible assessee are not prejudicial to the interest in comparison to DAO or FDAO and in case of other assessees under item (B) of sub-clause (a) of clause (xxv), similar treatment as accorded under item (B) of sub-clause (a) of clause (xxiii) is given if the RDAO is not prejudicial in comparison to DAO or FDAO. However, in case of variations irrespective of whether assessee is eligible assessee or other, are prejudicial to the interest of assessee in comparison to DAO or FDAO, there is a further provision for opportunity to the assessee by serving notice, to receive treatment *mutatis mutandis* in accordance with clauses (xxii), (xxiv) and (xxv).

58. Sub-section (7) of section 144B for the purpose of faceless assessment under clause (vii) provides that in case where variation is proposed in draft assessment order, an opportunity is to be provided to the assesee by serving a notice to show-cause and the assessee or his representative can request for personal hearing so as to make his oral submissions or to present his case before the income-tax authorities in any unit. Further sub-section (7) provides under clause (ix) for hearing through video conferencing or video telephone including use of any telecommunication application software which support video conferencing or video telephone.

59. Sub section (7), clause (vii) stipulates as under :-

> "*(7) For the purpose of faceless assessment –*
> *(i) .....*
> *(ii) .....*
> *(iii) .....*
> *(iv) .....*
> *(v) .....*
> *(vi) .....*
> *(vii) in a case where a variation is proposed in the draft assessment order or final draft assessment order or revised draft assessment order, and an opportunity is provided to the assessee by serving a notice calling upon him to show cause as to why the assessment should not be completed as per the such draft or final draft or revised draft assessment order, the assessee or his authorised representative, as the case may be, may request for personal hering so as to make his oral submissions or present his case before the income-tax authority in any unit;*"

60. Plainly reading aforesaid provision would show that whenever assessee requests for personal hearing so as to make oral submissions or to present case, it is before income-tax authority in any unit. Sub-section (7), clause (viii) shows that request for personal hearing is to be approved by the authorities referred to therein upon its opinion that the request is covered by sub-clause (h) of clause (xii). Clause (xii) empowers authorities with prior approval of the Board to lay down the standards, procedures and processes for effective functioning of National Faceless Assessment Centre and others, *inter alia,* circumstances in which personal hearing referred to in clause (vii) shall be approved.

61. Legislature is not unwary of situations arising, requiring personal hearing and oral submissions and thus, has provided for the same under the faceless assessment scheme under section 144B. It emerges that where response is given by the assessee to show-cause notice, the process under sub-section (7) would follow.

62. Learned senior counsel Mr. Pardiwala, during the course of hearing, had drawn attention to 'Standard Operating Procedure' (SOP) for Assessment Unit under Faceless Assessment Scheme, 2019' under Circular F.No.PR.CCIT/SOP/2020-21 dated 19.11.2020 providing for, under its clause T, that reasonable time is to be given to an assessee to

comply with principles of natural justice. He had also referred to Circular F. No. PR. CCIT/NCAC/SOP/2020-21 dated 23.11.2020 to contend that personal hearing is to be allowed when there is response to DAO.

63. Principles of natural justice firmly run through fabric of section 144B(1) of the Income Tax Act, 1961. Whenever DAO, FDAO is prejudicial to the interest of assessee or RDAO is prejudicial to the interest of assessee in comparison to DAO or FDAO, upon a response to show-cause notice, personal hearing for oral submissions or to present its case before income tax authority is strongly entwined in the provisions on a request from an assessee unless it is absurd, strategised and/or intended to protract assessment etc. It would also emerge from various decisions, referred to above, ordinarily, such a request would not be declined.

Judgments cited on behalf of petitioner referred to hereinbefore give exposition on significance and importance of principles of natural justice.

64. Section 144-B of the Income Tax Act, 1961 captioned 'Faceless Assessment' commences vide its sub-section (1) with a non-obstante clause and compulsively requires assessment u/ss 143(3) and 144 shall be by prescribed procedure contained in sub-section (1) of section 144-B in the cases referred to in sub-section (2) thereof.

65. Sub-section (9) of section 144B declares that assessment made under section 143(3) or under section 144(4) referable to sub-section (2) other than sub-section (8) on or after 1st day of April, 2021 shall be *non est* if such assessment is not made in accordance with the procedure laid down under section 144B. There is a telling / pronounced rigour, to follow the procedure under section 144B, lest the assessment would be *non est*.

66. Going by the provisions under section 144B, when hearing has been envisioned and incorporated, it is imperative to observe principles of natural justice as stipulated.

67. In the present matter, it is not disputed that show-cause notice had been issued to the petitioner on 25/03/2021 to which the petitioner has responded to from time to time vide letters dated 26th March, 2021, 28th March, 2021 requesting for personal hearing and by sending responses dated 7th and 8th April, 2021. There is nothing to reflect upon that after receipt of response to show-cause-notice dated 26th March, 2021, 28th March, 2021, 7th and 8th April, 2021, prescribed procedure has been followed. The petitioner appears to be losing out on an opportunity as would be available to it under clause (xxiii)(b) read with sub section (7) sub-clause (vii).

68. In the circumstances, when an assessee approaches with response to show cause notice, the request made by an assessee, as referred to in clause (vii) of sub section 7 of section 144B, would have to be taken into account and it would not be proper, looking at the prescribed procedure with strong undercurrent to have hearing on a request after notice, to say that petitioner would have opportunity pursuant to section 144C in the present matter, would intercept operation of the scheme contained under section 144B.

69. Foregoing discussion leads to that impugned draft assessment order dated 22.04.2021 is unsustainable. The petition is allowed in terms of prayer clause (a) leaving it open to the authorities to carry forward the process in accordance with section 144B of the Income Tax Act, 1961 by giving opportunity of hearing to the petitioner.

(ABHAY AHUJA, J.) **(SUNIL P. DESHMUKH, J.)**