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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 27.02.2023**

+ **W.P.(C) 477/2023 & CM APPL. 1867/2023**

SHUBHANK GARG

.....Petitioner

Through: Mr Vikas Jain, Mr Pulkit Sharma &
Mr Aviraz Saxena, Advocates.

versus

INCOME TAX OFFICER AND ANR.

.....Respondents

Through: Mr Sanjay Kumar, Sr. Standing
Counsel with Ms Hemlata Rawat,
Advocate.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MS. JUSTICE TARA VITASTA GANJU

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J.: (ORAL)

1. We had heard this matter at some length on the previous date i.e., 16.01.2023.
2. After hearing the counsel for the parties, we had broadly noted the grievance at hand, articulated on behalf of the petitioner.
3. Before we proceed further, we may note, that a typographical error has crept in paragraph 7 of the order dated 16.01.2023. The section referred to therein is Section 144B(1)(xv) of the Income Tax Act, 1961 [in short 'the Act'], whereas, the Section to which reference ought to have been is Section

144B(1)(xvi)(a) of the Act.

3.1 The order dated 16.01.2023 shall stand corrected to that extent.

3.2 The relevant parts of the said order [as corrected] are set forth hereafter:

2. The following substantive reliefs have been sought by the petitioner in the writ petition:

“(a) That this Hon'ble Court may issue a writ in the nature of certiorari for quashing of notice u/s 133(6) dated 05.12.2022 of the Act being illegal, bad in law and without jurisdiction.

(b) That this Hon'ble Court may issue a writ in the nature of Certiorari for quashing of proposal u/s 144B(1)(xv) dated 13.12.2022 of the Act for want of service to the petitioner.

(c) That this Hon'ble Court may issue a writ in the nature of certiorari for quashing of assessment order u/s 144B dated 15.12.2022 being illegal, bad in law and without jurisdiction.”

3. Besides this, the petitioner also seeks issuance of a writ of mandamus qua the respondents/revenue to pass an assessment order, albeit after being given a hearing.

3.1 In addition thereto, the petitioner seeks a stay on the operation of the assessment order dated 15.12.2022 which is, in any event, is assailed as notice above. [See prayer clause (c)]. This relief is, really, interim in nature.

4. Although the petitioner concedes, that various notices were issued, as was revealed to him from the designated portal, it is his contention, that the e-mails sent to him were somehow directed to the spam folder.

5. According to the petitioner, no real-time alert via SMS was given, which is the usual and normal practice.

6. Mr Vikas Jain, who appears on behalf of the petitioner, says that even the show-cause notice dated 09.12.2022 proposing variation in the income was not served on the petitioner. The difficulty with the show-cause notice is the same, as noticed above, with regard to the previous notices.

7. Mr Jain also submits that, in any event, since it was a faceless assessment, under the provisions of Section 144B(1)(xvi)(a), the Assessing Officer (AO) was required to pass a draft assessment order.

7.1 In support of this plea, our attention has been drawn by Mr Jain to the communication dated 05.01.2023, in response to the request made for being furnished the draft assessment order. [See page 84 of the case file]. The relevant extract of the said communication is set forth hereafter:

“F. No. ITO WARD- 35(5)/2022-23/258 sDated: 05/01/2023

To,

*Sh. Shubhank Garg,
137, B Pocket A,
Dilshad Garden,*

New Delhi-110095

Sir,

Sub: Request for certified copy of the Draft Assessment Order reg.

In the case of Sh. Shubhank Garg, (PAN:-CERPG7503R) for the A.Y. 2021-22 the assessment was finalized as per variation sent to the assessee in Show cause notice.

As per ITBA portal the assessment proceedings completed by the Facless Assessment Unit and as per portal the draft assessment order sent to the assessee in show cause notice on 09.12.2022 with DIN NO. ITBA/AST/F/144(SCN)/2022-23/1047911207(1).

Yours Faithfully

s/d

(Lal Babu Sah)

Income Tax Officer,

Ward 35(5), New Delhi

Income Tax Officer

Ward-35(5), Room No.908,

E-2 Block, Civic Centre,

New Delhi-110002”

8. Prima facie, it appears that the draft assessment order has not been passed in this case.

9. Ms Easha Kadian, who appears on behalf of the respondents/revenue, says that she will return with instructions, inter alia, as to whether or not a draft assessment order has been passed in the instant case.

10. Apart from what is stated above, Ms Kadian will also return with instructions, as to why real-time alert(s) via SMS were not sent to the petitioner.

11. List the matter on 27.02.2023.

12. In the meanwhile, no precipitate action will be taken against the petitioner.

4. Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the respondents/revenue, has returned with instructions. Mr Kumar says, that in view of the instructions received, and the directions that we propose to pass, a formal counter-affidavit need not be filed in the matter.

5. The instructions, which Mr Kumar has received are broadly on the following lines:

(i) First, since the show-cause notice dated 09.12.2022 adverted to the variation that was proposed to be made, *albeit*, to the prejudice of the petitioner/assessee, a draft assessment order was not required to be passed.

(ii) Second, an income or loss determination proposal was indeed prepared. This was prepared for internal mechanism checks, that is for appraisal by the review unit, before passing the final assessment order. The income or loss determination proposal, according to the respondents/revenue, was not required to be issued to the petitioner/assessee.

6. Mr Vikas Jain, who appears on behalf of the petitioner, has correctly adverted to the provisions of Section 144B(6)(vii) of the Act, which clearly states, that where a variation is proposed, either in the income or loss determination proposal or the draft order, and an opportunity is required to be provided to the assessee by serving a notice, calling upon him to show cause, as to why assessment proceedings should not be completed as per such income or loss determination proposal, the assessee and/or his authorized representative, at that stage, has liberty to request for personal hearing in the matter.

7. For the sake of convenience, the relevant provision is extracted hereafter:

“(vii) in a case where a variation is proposed in the income or loss determination proposal or the draft 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 such income or loss determination proposal, the assessee or his authorised representative, as the case may be, may request for personal hearing so as to make his oral submissions or present his case before the income-tax authority of the relevant unit;”

8. Furthermore, a perusal of Clause (viii) of Subsection (6) of Section 144B of the Act demonstrates, that once a request is made, personal hearing

proceeding has to be accorded by the relevant unit of the respondents/revenue via the National Faceless Assessment Centre.

9. The said sub-clause is also extracted hereafter, for the sake of convenience:

“(viii) where the request for personal hearing has been received, the income-tax authority of relevant unit shall allow such hearing, through National Faceless Assessment Centre, which shall be conducted exclusively through video conferencing or video telephony, including use of any telecommunication application software which supports video conferencing or video telephony, to the extent technologically feasible, in accordance with the procedure laid down by the Board;”

10. In the instant case, clearly, as per the instructions received by Mr Kumar, a draft order was not prepared. However, an income or loss determination proposal was prepared.

11. Given this position, the provisions of Section 144B(6)(vii) and (viii) would get triggered, notwithstanding the fact that the draft order was not prepared by the respondents/revenue.

12. We are of the view, that the best way forward would be to set aside the impugned assessment order, with liberty to the Assessing Officer (AO) to conduct the proceedings *de novo*, after according personal hearing to the petitioner/assessee and/or his authorised representative.

12.1 It is ordered accordingly.

13. The assessment order dated 15.12.2022 is set aside.

14. The income or loss determination proposal dated 13.12.2022 will be served on the petitioner, within the next two weeks.

14.1 Upon the income or loss determination proposal being served on the petitioner/assessee, the petitioner/assessee will have liberty to respond to the same.

- 14.2 Once a response is received by the AO, he will fix a date and time for hearing, which will be carried out as per the procedure prescribed in sub-clause (viii) of Section 144B(6) of the Act.
15. The writ petition is disposed of in the aforesaid terms.
16. Consequently, the pending application shall stand closed.
17. Parties will act based on the digitally signed copy of the judgement.

**(RAJIV SHAKDHER)
JUDGE**

**(TARA VITASTA GANJU)
JUDGE**

FEBRUARY 27, 2023/ ha

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