

SECTION 144B(1) & THE IVORY TOWER ASSESSMENTS

I. The officers of Income tax department have yet again landed with egg on their faces in the decision by hon'ble Bombay High Court in **Milestone Brandcom Private Limited In WRIT PETITION (L) NO.28212 OF 2021 decided on 14th December 2021**. Yet again, rightly so. In fact they have been let off liberally I would say.

II. The decision is brief and worth reading in full (parts highlighted by me).
[quote]

“1. This is another matter where Court’s precious judicial time is spent due to utter disregard for orders and remarkable ineptitude of the Assessing Officer.

2. Petitioner was served with **a draft Assessment Order** dated 06/05/2021 with a notice by which Petitioner was called upon to show cause as to why the assessment should not be completed as per the draft Assessment Order. In paragraph 4, it is stated, ‘But the assessee company did not respond or remain silent on this issue’. **Petitioner responded to this by its letter dated 12/05/2021 and also sought personal hearing.** In the reply, Petitioner explained why it could not respond earlier and also showed cause as to why the order as per draft Assessment Order should not be passed. **Notwithstanding this reply, Respondents have gone ahead and passed the impugned order dated 23/09/2021 almost 4.1/2 months later simply cutting and pasting the draft Assessment Order.** Paragraph 4 of the Assessment Order also reads as, ‘But the assessee company did not respond or remain silent on this issue’.

No personal hearing has been granted and the reply dated 12/05/2021 has also not been considered.

3. In our view, there has been **total non-application of mind and we would add gross abuse of process** by Respondents. Due to the actions / inaction of Respondents, **parties are made to incur substantial legal costs and Court's judicial time has also been wasted.** It is another case in which, in our view, costs have to be imposed on the Assessing Officer hoping that the concerned parties will also take action against the Assessing Officer for passing such orders without application of mind.

4. **The Assessment Order dated 23/09/2021 is hereby quashed and set aside. The matter is remanded for de novo consideration.** The Assessing Officer, **who will not be the same officer** who passed the earlier Assessment Order, shall consider the reply filed by Petitioner on 12/05/2021 and pass an Assessment Order as he deems fit in accordance with law, within 8 weeks from the time this order gets uploaded but before passing the order shall give a personal hearing to Petitioner. **The notice of personal hearing shall be issued at least one week in advance.**

5. Consequently, notices issued under Sections 156 and 270A are also quashed and set aside.

6. **As regards the Assessing Officer who has passed the Assessment Order, the Assessing Officer shall pay a sum of Rs.10,000/- (Rupees Ten Thousand Only) as donation from his / her personal account to P. M. Cares Fund.** The account details are as under :

Name of the Account : PM CARES

Account Number : 60355358964

IFSC : MAHB0001160

Branch : UPSC – New Delhi

7. **The said Assessing Officer shall thereafter file an Affidavit of proof of payment within 2 weeks of this order getting uploaded and annex thereto a copy of bank's statement proving that it has been paid from the Assessing Officer's personal account, under advise to Petitioner's Advocate.** If Petitioner's Advocate does not receive this Affidavit within 2 weeks of this order getting uploaded, liberty is granted to Petitioner's Advocate to mention this matter for compliance.

8. Petition disposed”

[unquote]

III. The key points may be noted:

1. Per Court: **”Utter disregard for orders and remarkable ineptitude of the Assessing Officer.”**

2. Per Court: **”total non-application of mind and gross abuse of process** by Respondents.”

3. **Non application of mind:**” *Simply cutting and pasting the draft Assessment Order*”

4. **Violation of natural justice:**” *No personal hearing has been granted and the reply dated 12/05/2021 has also not been considered.*”

5.Waste of Court's time and legal costs: *"Due to the actions / inaction of Respondents, parties are made to incur substantial legal costs and Court's judicial time has also been wasted."*

6.Undue delay; Final order was passed 4 ½ months after the final hearing.{What was happening in the interim?}

7.Quashed and set aside.Personal hearing granted : *"The Assessment Order dated 23/09/2021 is hereby quashed and set aside. The matter is remanded for de novo consideration. The Assessing Officer, who will not be the same officer who passed the earlier Assessment Order."*

"The notice of personal hearing shall be issued at least one week in advance."

8.Personal Costs: *"As regards the Assessing Officer who has passed the Assessment Order, the Assessing Officer shall pay a sum of Rs.10,000/- (Rupees Ten Thousand Only) as donation from his / her personal account to P. M. Cares Fund"*

IV.Analysis

a.The provisions:

144B(1)(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 hearing so as to make his oral submissions or present his case before the income-tax authority in any unit;

- (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 (xiii) 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) *the assessment unit shall, while making draft assessment order, provide details of the penalty proceedings to be initiated therein, if any;*
- (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;*

b. All old timers who prided upon solid following of natural justice principles and passing speaking orders would hang their head in shame at shocking incompetence. This malady crept in specially in 2000s and 2010 decade onwards has spiralled into a literal epidemic sweeping the AOs and a large part of the FAAs across board, of the department .

c. Principles of natural justice not followed ,speaking order not passed ,mind not applied. The **Manual of Office Procedure of the department ,freely available on the internet**, laid this down way back in 2003;

“quote”

M.O.P VOL II

Chapter- 2

ASSESSMENT PROCEDURE (SCRUTINY)

5.1 Regular assessment

The following points are to be kept in mind while passing the order of assessment:-

i. **The assessment order must be a speaking one**, giving:- All introductory details on the assessee and his sources of income, The additions or disallowances made and reasons thereof, Details on the assessment procedure followed:-

a. **Details of hearing opportunities given-whether availed or not**

b. Details of the copies of documents given

c. **Details of cross-examination opportunities given** whether availed or not.

“unquote”

18 years on ,AOs still haven't read it. The vertical chain of command is unaware of the legacy issues. And the rank and file, with zero responsibility is in a moonlighting zone.

d. Again ,in **INSTRUCTION NO. 20/2015, DATED: 29-12-2015** titled “SCRUTINY ASSESSMENTS-SOME IMPORTANT ISSUES AND SCOPE OF SCRUTINY IN CASES SELECTED THROUGH COMPUTER AIDED SCRUTINY SELECTION ('CASS')-REG.-“it is directed as under:

“4. The Board further desires that in all cases under scrutiny, where the Assessing Officer proposes to make additions or disallowances, the assessee would be given a fair opportunity to explain his position on the proposed additions/disallowances in accordance with the principle of natural justice. In this regard, the Assessing Officer shall issue an appropriate show-cause notice duly indicating the reasons for the proposed additions/disallowances along with necessary evidences/reasons forming the basis of the same. Before passing the final order against the proposed additions/disallowances, due consideration shall be given to the submissions made by the assessee in response to the show- cause notice.”

These are self instructions.Do the AOs or their JCs or CITs even know such instructions exist?No wonder there is “remarkable ineptitude”.

e. Luckily for AO ,it was not brought to the knowledge of the Court that **passing order 4 ½ months after final hearing is itself violation of extant instructions by the parent Board.**

Central Board of Direct Taxes National e-Assessment Centre New Delhi
ISSUED SOP for Assessment Unit under the Faceless Assessment Scheme,
2019.Dated: 19/11/2020

Relevant part reads as under:

“U: Passing of Final Assessment Order

1. The AU is to invariably preview the assessment order to be issued to ensure that the assessment order has properly framed the issue in dispute and incorporated all facts relevant to the issue.
2. The AU while finalizing the assessment order is to ensure that penalty proceedings, if any required to be initiated for imposition by Jurisdictional Assessing Officer, are discussed in the body of order as well as initiated in the system through a specific format.
3. **Draft assessment order is to be monitored to ensure that assessment order is passed well in time and without any delay. Any unwarranted delay shall be brought to the notice of the PCIT (AU).”**

The impugned order was well out of reasonable time and invites **administrative laches**. It was certainly “unwarranted”.

An RTI on this would be interesting to find out, how many instances of delay were reported and what action was taken on them. IN fact CBDT should issue an instruction for assessment in line with the one issued to FAAs. *Instruction No 20/2003, dated 23.12.2003 mandates even FAA, regarding issue of appellate order within 15 days of the last hearing.*

f. Also luckily for him the order was set aside .If the hon’ble Court were to simply invoke subsec 9 literally, which was fully applicable, there may have been a different result:

144B (9) *Notwithstanding anything contained in any other provision of this Act, assessment made under sub-section (3) of section 143 or under section 144 in the cases referred to in sub-section (2) [other than the cases transferred*

under sub-section (8)], on or after the 1st day of April, 2021, **shall be non est** if such assessment is not made in accordance with the procedure laid down under this section.

Unless some orders are held non est in the sense of nullity, the AOs won't learn their lesson I am afraid.

V. CONCEPT OF DRAFT ASSESSMENT ORDER. A DEEPER ANALYSIS.

A. Someone in TPL division of CBDT is very fond of the older provisions of the Income Tax Act and is pretty impressed by it. But unmindful that coherence between parts is an indispensable part of drafting legislation. Many would feel more aware as I dwell into this concept as it evolved and later done away with, in the Act.

Income-tax Act, 1961

i. **1976**

144B. REFERENCE TO INSPECTING ASSISTANT COMMISSIONER IN CERTAIN CASES

(1) Notwithstanding anything contained in this Act, where, in an assessment to be made under sub-section (3) of section 143, the Income-tax Officer **proposes to make any variation in the income or loss returned which is prejudicial to the assessee and the amount of such variation exceeds the amount fixed by the Board** under sub-section (6), the Income-tax Officer **shall, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the assessee.**

(2) On receipt of **the draft order**, the assessee may forward his objections, if any, to such variation to the Income-tax Officer within seven days of the receipt by him of the draft order or within such further period not exceeding fifteen days as the Income-tax Officer may allow on an application made to him in this behalf.

(3) If no objections are received within the period or the extended period aforesaid, or the assessee intimates to the Income-tax Officer the acceptance of the variation, the Income-tax Officer shall complete the assessment on the basis of the **draft order**.

(4) If any objections are received, the Income-tax Officer shall forward the **draft order** together with the objections to the Inspecting Assistant Commissioner and the Inspecting Assistant Commissioner shall, after considering the **draft order** and the objections and after going through (wherever necessary) the records relating to the **draft order**, issue, in respect of the matters covered by the objections, such directions as he thinks fit for the guidance of the Income-tax Officer to enable him to complete the assessment ;

Provided that no directions which are prejudicial to the assessee shall be issued under this sub-section before an opportunity is given to the assessee to be heard.

(5) Every direction issued by the Inspecting Assistant Commissioner under sub-section (4) **shall be binding** on the Income-tax Officer.

(6) For the purposes of sub-section (1), the Board may, having regard to the proper and efficient management of the work of assessment, by order, **fix, from time to time, such amount as it deems fit:**

Provided that different amounts **may be fixed for different areas:**

Provided further that the amount fixed under this sub-section shall, in **no case, be less than twenty-five thousand rupees.**

(7) **Nothing in this section shall apply to a case where an Inspecting Assistant Commissioner exercises the powers or performs the**

functions of an Income-tax Officer in pursuance of an order made under **section 125 or section 125A.**

ii.

1984

144B. REFERENCE TO INSPECTING ASSISTANT COMMISSIONER IN CERTAIN CASES.

(1) Notwithstanding anything contained in this Act, where, in an assessment to be made under sub-section (3) of section 143, the Income-tax Officer proposes to make, *before the 1st day of October, 1984, any variation in the income or loss returned which is prejudicial to the assessee and the amount of such variation exceeds the amount fixed by the Board under sub-section (6), the Income-tax Officer shall, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the assessee.

(2) On receipt of the draft order, the assessee may forward his objections, if any, to such variation to the Income-tax Officer within seven days of the receipt by him of the draft order or within such further period not exceeding fifteen days as the Income-tax Officer may allow on an application made to him in this behalf.

(3) If no objections are received within the period or the extended period aforesaid, or the assessee intimates to the Income-tax Officer the acceptance of the variation, the Income-tax Officer shall complete the assessment on the basis of the draft order.

(4) If any objections are received, the Income-tax Officer shall forward the draft order together with the objections to the Inspecting Assistant Commissioner and the Inspecting Assistant Commissioner shall, after considering the draft order and the objections and after going through (wherever necessary) the records relating to the draft order, issue, in respect of the matters covered by the objections, such directions as he thinks fit for the guidance of the Income-tax Officer to enable him to complete the assessment ;

Provided that no directions which are prejudicial to the assessee shall be issued under this sub-section before an opportunity is given to the assessee to be heard.(5) Every direction issued by the Inspecting Assistant Commissioner under sub-section (4) shall be binding on the Income-tax Officer.

(6) For the purposes of sub-section (1), the Board may, having regard to the proper and efficient management of the work of assessment, by order, fix, from time to time, such amount as it deems fit:

Provided that different amounts may be fixed for different areas:

Provided further that the amount fixed under this sub-section shall, in no case, be less than twenty-five thousand rupees.

(7) Nothing in this section shall apply to a case where an Inspecting Assistant Commissioner exercises the powers or performs the functions of an Income-tax Officer in pursuance of an order made under section 125 or section 125A.

iii.

1988

144B. REFERENCE TO DEPUTY COMMISSIONER IN CERTAIN CASES

(1) Notwithstanding anything contained in this Act, where, in an assessment to be made under sub-section (3) of section 143, the Assessing Officer proposes to make, before the 1st day of October, 1984, any variation in the income or loss returned which is prejudicial to the assessee and the amount of such variation exceeds the amount fixed by the Board under sub-section (6), the Assessing Officer shall, in the first instance, forward a draft of the proposed order of assessment (hereafter in this section referred to as the draft order) to the assessee.

(2) On receipt of the draft order, the assessee may forward his objections, if any, to such variation to the Assessing Officer within seven days of the

receipt by him of the draft order or within such further period not exceeding fifteen days as the Assessing Officer may allow on an application made to him in this behalf.

(3) If no objections are received within the period or the extended period aforesaid, or the assessee intimates to the Assessing Officer the acceptance of the variation, the Assessing Officer shall complete the assessment on the basis of the draft order.

(4) If any objections are received, the Assessing Officer shall forward the draft order together with the objections to the Deputy Commissioner and the Deputy Commissioner shall, after considering the draft order and the objections and after going through (wherever necessary) the records relating to the draft order, issue, in respect of the matters covered by the objections, such directions as he thinks fit for the guidance of the Assessing Officer to enable him to complete the assessment ;

Provided that no directions which are prejudicial to the assessee shall be issued under this sub-section before an opportunity is given to the assessee to be heard.

(5) Every direction issued by the Deputy Commissioner under sub-section (4) shall be binding on the Assessing Officer.

(6) For the purposes of sub-section (1), the Board may, having regard to the proper and efficient management of the work of assessment, by order, fix, from time to time, such amount as it deems fit: Provided that different amounts may be fixed for different areas: Provided further that the amount fixed under this sub-section shall, in no case, be less than twenty-five thousand rupees.

(7) Nothing in this section shall apply to a case where an Deputy Commissioner exercises the powers or performs the functions of an Assessing Officer in pursuance of an order made under section 125 or section 125A.

**DELETED by the Direct Tax Laws (Amendment) Act, 1987 ,
w. e. f. 1- 4- 1989.**

B.Parallel to these ,there existed s 125 and 125A,since 1962 which are referred above and concerned **POWERS OF COMMISSIONER RESPECTING SPECIFIED CASES OR PERSONS(125) or CONCURRENT JURISDICTION OF INSPECTING ASSISTANT COMMISSIONER AND INCOME-TAX OFFICER(125A).**

Now we have s 119 onwards to s 127 those sections in rehashed /modified /amended forms.

C.The biggest danger of having old wine in a new bottle is that the wine may not fit.Or,if it gets in, conflicts with some parts of the bottle.This is precisely what has happened.And in their anxiety to establish their scrutiny procedure as a living embodiment of transparence and audi alteram partem, they,in the Faceless assessment and appeal provisions, have committed the biggest cardinal sin in drafting of any law: that of the **PROCEDURAL LAW SUPERSEDING AND SUBSUMING THE SUBSTANTIVE LAW.**

C1. I humbly believe as a student of law and as an ex-officer in the IRS that this fatal unmindfulness has done away all the good intent (if there was one)behind the scheme, besides knocking off the indispensable structure ,procedure and mechanism of implementing a fiscal law while ensuring justice ,to both,the tax payer and the revenue.There has been a singular unpardonable disservice to all the stakeholders which has resulted in decisions like these and if some serious remedy(including a possible rollback)is not effected the fence shall eat the grass it is supposed to

protect. Corrective to the rampant corruption was the defining narrative behind the FAS. They forgot a simple rule. Procedural law revamp cannot be a corrective for administrative misdemeanors. Morality is not taught in/via tax law, nor is it supposed to. Neither to administrators nor to taxpayers. There is no chapter on ethics in IT Act, the last time I checked.

C2. This subsuming has also caused disaster **in new 148 provisions** on which I wrote a series of articles.

[Web links are given below for the desirous:

1. <https://taxguru.in/income-tax/reassessment-proceedings-including-search-mechanism.html>

2. <https://taxguru.in/income-tax/risk-management-strategy-occurring-section-148-income-tax.html>

3. <https://taxguru.in/income-tax/books-accounts-documents-evidence-occurring-amended-section-149-act-1961.html>

4. <https://taxguru.in/income-tax/tax-assessment-evidence-reveals-conundrum.html>]

D. To my mind, the biggest principle and embodiment of natural justice admirably existed and mercifully still exists in the Act and there was only need to remember and implement it instead of creating the buffoonery of draft assessment order which makes the position of AO completely untenable (since it is without checks and balances of the earlier provision aped mindlessly). Here is the provision we don't remember:

Inquiry before assessment.

142 (3) The assessee shall, except where the assessment is made under **section 144, be given an opportunity of being heard** in respect of any **material gathered on the basis of any inquiry** under sub-section (2) [or any audit under sub-section (2A)] and proposed to be utilised for the purposes of the assessment.

What is subsection 2?-it's the most powerful enabling provision for the AO to make a scrutiny assessment.

“(2) For the purpose of obtaining full information in respect of the income or loss of any person, the [Assessing] Officer may make such inquiry as he considers necessary.”

D1.This had to be read with s 143(2) and 143(3):

[Assessment.

143. [(1) Where a return has been made under [section 139](#), or in response to a notice under sub-section (1) of [section 142](#), such return shall be processed in the following manner, namely:—

.....

[(2) **Where** a return has been furnished under [section 139](#), or in response to a notice under sub-section (1) of [section 142](#), the Assessing Officer or the prescribed income-tax authority, as the case may be, if, **considers it necessary or expedient** to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, **shall serve on the assessee a notice requiring him**, on a date to be specified therein, either to attend the office of the Assessing Officer or to produce, or cause to **be produced before the Assessing Officer any evidence on which the assessee may rely in support of the return:**

Provided that no notice under this sub-section shall be served on the assessee after the expiry of [three] months from the end of the financial year in which the return is furnished.]

[(3) [On the day specified in the notice issued under] sub-section (2), or as soon afterwards as may be, **after hearing such evidence as the assessee**

may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment:]

D2. All assessments were, and in my view still are, required to issue a notice under s 142(3)[& 143(2)] before completing a regular scrutiny assessment. How many even know s 142(3) exists in the statute?

And so the draft assessment order was born as an infructuous self defeating conjunct of a illogical procedural behemoth called faceless heaped upon the unsuspecting. Results are there for all to see -and more are coming.

Nowhere in the world, not even in the most fair taxation systems in the world, there exists such blasphemy in the name of fairness and transparency. This gutted the department too, taking it back to dark ages, led to a big and continuing exodus of officers and which, quite spectacularly, failed its stated objective. It's the biggest disservice done by the so called tax brains, the select few in the IRS, to the people and to the IRS officers at large, the once mighty and largely fair, now reduced to "glorified service providers" desperate to prove their non adversarial credentials and failing brilliantly in that too. Well done.

E. The older 144B had a clear logic behind it : providing a protection to the assesseees where the income is likely to vary, so that high-pitch assessments

are not made and the assessee is not harassed.[REF: Commissioner Of Income Tax vs Sundaram Spinning Mills & Ors. (1997) 141 CTR Mad 109]

E 1. Its source can be found in **Wanchoo Committee recommendations made in the Final Report of December, 1971** the relevant part of which reads as follows:

"As regards disputed additions in assessments, a point has been made before us that often decisions are taken by the Income-tax Officer behind the assessee's back and the assessee comes to know of additions and disallowances only after the assessment has been made and an order is received by him. In many cases, the dispute could have been avoided if adequate opportunity had been given to the taxpayer to explain the position. We are aware that such situations do frequently arise. To ensure that the assessee gets a reasonable opportunity of meeting the objections of the Income-tax Officer before an assessment is finalised, we recommend that there should be a provision in the law requiring the Income-tax Officer to send a draft assessment order to the assessee, to start with, in all cases where the additions or disallowances proposed to be made in an assessment under sub-section (3) of section 143 exceed in the aggregate Rs. 25,000. Where the taxpayer objects to the assessment being made on the basis of the draft order, he should intimate his objections within seven days to the Inspecting Assistant Commissioner who will, after hearing the assessee and the Income-tax Officer, pass the final order of assessment himself. For this purpose, the Inspecting Assistant Commissioner should have the power to accept, reduce, or enhance the income proposed in the draft order. Such a measure will

also ensure that major disputes with the taxpayer are settled or dealt with at a level higher than that of the Income-tax Officer. "

E 2. The provisions of Sections 144-A and 144-B of the Income-tax Act came into force with effect from 1st January 1976. Instructions explaining the legal provisions contained in these sections were issued **in Board's Instruction No.907, dated the 24th December 1975.** Though DOMS-CIRCULAR NO. 11 XII/I/29-PROCEEDINGS UNDER SECTIONS 144-A AND 144-B OF THE INCOME-TAX ACT, 1961-PROCEDURAL INSTRUCTIONS were further issued prescribing the work-procedures, the non-statutory forms of the letters to be issued and the registers to be maintained, and the proformae of the periodical statements to be furnished to the Board.

E 3. In **CIT vs. V. D. Saraf (HUF) (1994) 207 ITR 217 (Bom)** [approved in **R Dalmia v. CIT [1999] 236 ITR 480 (SC).**]we saw that Sec. 144B is intended to safeguard the interest of the assessee,**and** provides to the assessee a forum in the nature of a mini appeal against such proposed assessment. Therefore, in truth and substance,the older s. 144B though inserted as an independent section, virtually functioned like a proviso to s. 143(3) .

F.Coming to the sheer superfluosness of the draft assessment provision,we can see by now ,that despite being a technically much more superior and sound provision in 1976,it was done away with in 1989.**There has to be a lesson in it somewhere.**Only ,the revenue deptt failed to read it.And created a procedural white elephant which it cannot manage.

G.Finally to the sheer magnificence of s 142(3) and how it demonstrates the collective stupidity(in form of new FAS) replacing individual stupidity[exemplified in AO not following 142(3)pre FAS]What better than to cite some leading authorities on the subject:

1.In JOSEPH THOMAS & BROS.v.CIT[1968] 68 ITR 796 (Ker) it was held as follows:

“Sub-section (3) of section 142 only gives statutory recognition to a principle of natural justice. It was being observed during the currency of the Indian Income-tax Act, 1922, even though that Act contained no express provision in that behalf. It formed the foundation for the decision of the Supreme Court in *Dhakeswari Cotton Mills Ltd. v. Commissioner of Incometax* [1954] 26 I.T.R. 775 and of this court in *Swamy Bros. v. Commissioner of Income-tax* [1958] 34 I.T.R. 123.

.....There is no doubt that the Income-tax Officer in fixing the gross profit on rice at 2.5% and on provision at 5%, as far as the head office of the assessee was concerned, depended on the gross profits disclosed by cases which he considered to be comparable to that of the assessee. The following passage from his order makes this abundantly clear:

"I shall, bearing in mind the profit disclosed by traders in similar line, estimate the gross profit at 2.5% on rice and 5% on provisions and add back the difference to the disclosed results."

It is common ground that no details of the cases which the Income-tax officer considered as comparable were ever furnished to the assessee. **This is a violation of the settled principle on the subject and the provision of sub-section (3) of section 142.**

It follows that the question referred to be answered in the affirmative, that is, in favour of the assessee and against the department, as far as the assessment relating to the head office of the assessee is concerned. We do so; but in the circumstances of the case without any order as to Costs."

2..In **T. C. N. MENON v. ITO**[1974] 96 ITR 148 (Ker) it was held that **“It appears to me that sub-section (3) of section 142 deals with a stage before the Income-tax Officer comes to a tentative decision or proposal to determine the total income at a certain amount on the basis of the materials gathered by the Income-tax Officer. Those materials can be used against an assessee only after giving him an opportunity of being heard. The assessee is entitled to have a second opportunity to show cause why the total income should not be determined in the manner proposed to be done by the Income-tax Officer.”**

3. ADDITIONAL ITO v. POKUNNAM TRADERS[1976] 102 ITR 366 (Ker) HELD that:

“We straightaway point out that, under section 144, no manner of assessment is provided for, excepting that the assessment under that section is a best judgment assessment. **Provision is made for a notice before the assessment in section 142(3), which enacts that the assessee shall be given an opportunity of being heard in respect of any material gathered on the basis of any enquiry under sub-section (2) of the section. Thus, the manner, if at all, is provided under section 142(3) and not under section 144.** The counsel for the revenue has rightly conceded that the assessment that has to be made after the accounts of the assessee are rejected under section 145(2) is not an assessment under section 144, but is only an assessment " in the manner provided in section 144 ". **The counsel has also conceded, again rightly, that, though section 144 provides for best judgment assessments, all best judgment assessments are not covered by section 144.** We may refer to *Income-tax by Kanga and Palkhivala, 6th edition, volume I, page 762, where this question is discussed.* Since this is not disputed by the counsel for the revenue, we do not propose to go into the matter any further. **The language of section 142(3) is that " the assessee shall, except where the assessment is made under section 144, be given an opportunity of being heard**" **This makes the position clear that, in an enquiry before assessment, an opportunity has to be given to the assessee of being heard, if any material gathered on the basis of the enquiry under sub-section (2) of the section is proposed to be used against him.** We repeat that

the only exception to the rule that the assessee should be given such an opportunity to be heard is an assessment " under section 144 ". Since it is conceded by the counsel for the revenue (that seems to be the correct position too) that the assessment in this case, after rejecting the accounts under section 143(2), **though it is a best judgment assessment, is not an assessment under section 144**, it is patent that the case will not come within the exclusion contemplated by section 145(2). If so, it must naturally follow that the Income-tax Officer should have given an opportunity to the assessee as to what materials he proposed to use against it to make the best judgment assessment. And we agree with the single judge that the knowledge of the Income-tax Officer of the assessment for the previous year of the same assessee is material which he gathered in an enquiry under section 142(2) of the Act.

Even if we construe the assessment " in the manner provided in section 144 " as an assessment under section 144 (we only assume this), even then, the present case will not come within the exclusion contemplated by section 142(3), since the assessment in this case is admittedly under section 143(3) of the Act, and not under section 144 (vide the assessment order, exhibit P-1). **We point out in this connection that an assessment under section 143(3) is also a best judgment assessment. "**

4..In ASSAM FOREST PRODUCTS (P.) LTD.v.CIT[1977] 110 ITR 558 (Gau):

"The Tribunal also has held that **in the addition of this sum of Rs. 60,000 as income of the assessee from undisclosed sources there was non-compliance with the provisions of sub-section (3) of section 142 of the Act.** The Tribunal has correctly held that the alleged statements of Bidyananda Surekha, made before the income-tax authorities at Calcutta admitting that he had lent his name to various parties to enable them to bring in their concealed income in the form of loans, **were not placed before the assessee and this is in complete violation of the provisions of sub-section (3) of section 142 of the Act.** It is also not known whether those alleged statements of Bidyananda Surekha referred to the particular loan of the assessee. In the circumstances, the Tribunal was correct in setting aside the order of the Appellate Assistant Commissioner relating to the

cash credit of Rs. 60,000 and remanding the matter for further enquiry by the Appellate Assistant Commissioner.”

VI..The “strictures, costs and contempt” era:

This is not an isolated case the one which has prompted this article. We are into an age where ITATs impose costs and pass strictures, The HCs do likewise and also issue contempt notices. What was a matter of shame and shock in 80s and 90s seems like a badge of honour now for officers of the department. We are into an era of strictures, costs and contempt. **In Mantra Industries, [2021] 131 taxmann.com 165 (Bombay) decided on 11.10.2021** to cite an example, the hon’ble Court found that assessment order passed by revenue was an exact reproduction of draft assessment order without considering replies filed by petitioner and petitioner's request for personal hearing, since impugned order was passed without application of mind and was not in accordance with procedure laid down under section 144B(9), same was set aside. Thereafter it was observed as under:

“9. Respondents are put to notice, and Mr. Sharma to circulate this order right from the Revenue Secretary to everybody in the Finance Ministry, that if such orders are continued to be passed, this Court will be constrained to impose substantial costs on the concerned Assessing Officer to be recovered from his/her salary and also direct the department to place such judicial orders in the career records of such Assessing Officer.”

VII. The Ivory Tower

Ivory tower. noun. *'a state of privileged seclusion or separation from the facts and practicalities of the real world.'*

This is an age of AOs sitting in their ivory towers, contented and cocooned, behind the multi-layered, diffused responsibility environment. AO says JCIT cleared it, JCIT says review unit cleared it, review unit says NeFAC cleared it and NeFAC says it can only examine as much and no further and that AO should be more aware and mindful of procedure. The ivory tower of AO is so secure because now enquiry is done by verification unit, valuation etc is done by technical unit, supervision is done by review unit and final approval is done by national unit. If ever you wanted to understand the meaning of "too many cooks spoil the broth", see this. The buck does not stop anywhere. Because it's on everyone's table. Contrast this with days of yore. One point execution. AO fulcrum. Center of responsibility. That was it. Now they are all running into circles to the tune of incompetence, responsibility shifting, moonlighting and diffused multi-point decision making where everybody's baby is nobody's baby. There is the old management adage that where everyone is accountable none is. So unmindful the AO is on a Quixotic "blue skies research"-forgetting it's a science domain. They are all travelling. But nobody is reaching anywhere.

VIII..A tangential issue:more trouble for revenue? :

R. Dalmia decision(SUPRA) contained a telling finding in its para 22 which can create issues for revenue in case of 148A assessments.The finding is reproduced as under:

*‘22. As to the argument based upon sections 144A, 246 and 263, we do not doubt that assessments under section 143 and assessments and reassessments under section 147 are different, but **in making assessments and reassessments under section 147 the procedure laid down in sections subsequent to section 139, including that laid down by section 144B, has to be followed.**’*

By parity of reasoning,revenue should be following the same procedure in case of any scrutiny assessment.Is it doing so?Another route to litigation opens?

IX.CONCLUSION:

The income tax scrutiny assessment process earlier was occasionally accused (at times probably with reason)as being harbinger of corruption and arbitrariness as well as irresponsible and shameless exercise of power.I have a view on this,but keeping it apart,**what changed? From the **shameless** we went to **faceless** and then to **senseless.****

Tax aficionados are left **speechless.**

Ceteris paribus still remains.The last word on this saga is still to be written.

Watch this space.