APPLICATION OF MIND.IMPLICATIONS AND ISSUES ARISING OUT OF SHARVAH MULTITRADING COMPANY DECISION

1.Hon'ble Bombay HC has exposed a familiar failing of IT Deptt once again in a very welcome and hard hitting decision in **Sharvah Multitrade Company Private Limited V/s. Income Tax Officer Ward 4(3)(1) & Anr. in WRIT PETITION NO.3581 OF 2021** decided on 20th December 2021.

2.FAMILIAR FAILINGS:

A.There are three seasoned failings of an overwhelming majority of almighty officers of Income tax department which are repeatedly strictured and fined by Tribunals and Courts, but the imperious officers pay no heed to it.These are:

1.Adequate and effective opportunity of being heard not given

2.Failure to give reasoned orders

3.Lack of application of mind

B.As an ex officer in IRS I can add a few more:

4.Blissful ignorance of judicial authorities and binding precedents.

5. Absence of judicial and judicious mindset.

6.Contemptuous disregard of established procedure.

7.Shockingly abysmal standard of drafting of orders

8.Mulish obstinacy to learn and improve.(Arrogance and ignorance are good bedfellows.)

9. Risible incompetence .

10.Bias and prejudice,half knowledge, suspicion ,surmises, and conjectures .

3.The decision in Sharvah Multitrade:

PER COURT:

''1 Petitioner is impugning ***a notice dated 31st March 2021 issued under Section 148 of the Income Tax Act, 1961*** *(the said Act)* ***and order on objections dated 23rd July 2021.***

2 Petitioner has raised various grounds but the primary ground is total non application of mind while issuing the notice under Section 148 of the said Act and even while passing the order on objections. We would add that there has been total non application of mind even while filing the affidavit in reply to the petition by the same officer – Mr. Shailendra Damodar Suryavanshi, Income Tax Officer, Ward 4(3)(1), Mumbai. ***Perhaps this officer does not know the meaning of the words "application of mind" because he seems to be using this expression without applying his mind.*** *The notice has been issued under Section 148 of the said Act on 31st March 2021 for Assessment Year 2015-2016. The assessment had been completed under Section 143(3) of the said Act on 28th September 2017.* ***Therefore, proviso to Section 147 of the***

said Act shall apply and respondents will have to make out a case of failure on the part of petitioner to truly and fully disclose material facts.

3 ***In the reasons recorded for reopening***, *respondents miserably fail in this primary obligation. Moreover, the reasons indicate total non application of mind in as much as in the tabular form, it is stated that Sharvah Multitrade Company Private Limited for F.Y. 2014-15 had been a beneficiary through fund trail of Rs.3.72 Crores. Then again, it is mentioned that the above mentioned bogus entities managed, controlled and operated by M/s. Sharvah Multitrade Company Private Limited for providing bogus accommodation entries, hence, all the transactions entered into between the above mentioned entities and the assessee/beneficiary are bogus accommodation entries in nature.* ***What perplexes us as much as the assessee was perplexed is how can a company provide bogus entry to itself. Sharvah Multitrade Company Private Limited is alleged to be a beneficiary identified through fund trail and its PAN number is shown to be AAQCS2595H. Petitioner, who is the assessee, is also Sharvah Multitrade Company Private Limited and its PAN number is AAQCS2595H. Therefore, this clearly shows total non application of mind by the Assessing Officer Mr. Suryavanshi. His statement in the reasons "..... and after careful application of mind ....." is risible. There is total non application of mind.***

4 In the affidavit in reply, the same Mr. Suryavanshi states "as Annexure – 2 is the copy of the approval u/s 151 of the Act". ***There is no annexure – 1*** *mentioned anywhere.* ***Moreover, in the affidavit filed in the Court, even***

this annexure is missing. This further displays total non application of mind by this officer.

5 Mr. Walve tendered a copy of the approval under Section 151 of the said Act which he had in his file where it says "In view of reasons recorded, I am satisfied that it is a fit case to issue notice u/s. 148 ". ***This has been signed by PCIT, Mumbai one Anil Kumar. If this PCIT only read the reasons recorded, he would have raised a query how can an entity provide bogus entry to itself. That shows total non application of mind by the said Mr. Anil Kumar as well. We have to also note that in the format for approval under Section 151 of the said Act, one Vijay Kumar Soni, Range 4(3), Mumbai, has recommended grant of approval. That shows non application of mind even by this Vijay Kumar Soni. We wonder whether the officers of respondents ever bother to read the papers before writing the reasons or recommending for approval or while granting approval.***

6. We must also note that in the objections filed by petitioner vide its letter dated 10th May 2021 to the notice issued under Section 148 of the said Act, petitioner have raised these points and also alleged lack of application of mind. ***The said Mr. Suryavanshi while rejecting the objections, by an order dated 23rd July 2021, first of all makes a false statement*** *that "the assessee's above submissions and objections* ***have been carefully considered*** *and the same are dealt with as under "* ***but he does not deal with the objection of the assessee of lack of application of mind.*** *We have to also note that* ***the said Mr. Suryavanshi is totally silent about***

the objections raised on non application of mind*. In the affidavit in reply, at paragraph 9 he says it was a typographical error and inadvertent mistake* ***because in the case information received in insight portal on 27th March 2021, only first page was displayed****. Even if we accept what he says for a moment,* ***still anyone reading the reason would realise that it defies sensibility that how the company will provide bogus entry to itself. Even otherwise this Mr. Suryavanshi had an opportunity to correct the error when he passed the order on objections but he chose to skirt the issue*** *and he went on to say in his affidavit in reply that the objection was duly dealt with by issuing a letter dated 23rd July 2021. In our view, it has not been duly dealt with because* ***this Mr. Suryavanshi*** *had an obligation to deal with the objections raised by petitioner in their objections to reopening.* ***In our view, all these grounds require us to allow the petition in terms of prayer clause*** *– (a), which we hereby do. Prayer clause – (a) reads as under :*

(a) Declare that the Impugned Notice u/s 148 of the Act dated March 31, 2021 (Exhibit A) and the Impugned Order on objections dated July 23, 2021 (Exhibit B) and the ***impugned reassessment proceedings for AY 2015-16 are wholly without jurisdiction, illegal, arbitrary, and liable to be quashed.***

7 Petition disposed.

8 A copy of this order be placed before the Principal Chief Commissioner of Income Tax, Mumbai for information and necessary action. A copy of this order also be sent to Mr. Shailendra Damodar Suryavanshi so that he would be careful in future. A copy of this order be also sent to the Chairman, CBDT, who may perhaps formulate a

scheme whereby the officers are trained how to apply their mind and what all points should be kept in mind while recording the reasons. The Chairman, CBDT may also advise the concerned Commissioners not to grant approval under Section 151 of the said Act mechanically but after considering the reasons carefully and scrutinizing the same."

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4.KEY HIGHLIGHTS:

This is condemnation in the strongest possible terms and a sheer disgrace to the service.I feel ashamed and disgusted as an ex officer and as a student of law as to how the mighty have fallen.Some points need reiteration and highlighting:

a. Per Court:"Perhaps this officer does not know the meaning of the words "application of mind" *because he seems to be using this expression without applying his mind."*

b.P.C.:"In the reasons recorded for reopening, respondents miserably fail in this primary obligation"

c."What perplexes us as much as the assessee was perplexed is how can a company provide bogus entry to itself."

At another place again this is reiterated *" **it defies sensibility** that how the company will provide bogus entry to itself."*

*d.His statement in the reasons "…… and after careful application of mind ……" **is risible.** There is total non application of mind.*

e."Moreover, in the affidavit filed in the Court, even this annexure is missing. This further displays total non application of mind by this officer."

*f.**Supervisory failure** is noted and condemned:"If this PCIT only read the reasons recorded, he would have raised a query how can an entity provide bogus entry to itself. That shows total non application of mind"*

[Same is reiterated for Range Head]

*g."**We wonder whether the officers of respondents ever bother to read the papers** before writing the reasons or recommending for approval or while granting approval."*

*h.P.C.:"'The said Mr. Suryavanshi while rejecting the objections, by an order dated 23rd July 2021, **first of all makes a false statement**…."*

i. ''In the affidavit in reply, at paragraph 9 he says it was a typographical error and inadvertent mistake because in the case information received in insight portal on 27th March 2021, only first page was displayed"

[**MY NOTE:**this is a self indictment if true.It shows the miserable state of affairs of information management system of department and much hyped 360 degree profiling….borrowing empty management hyperboles and borrowing jargon from enforcement agencies abroad won't make the home agency competent.]

*j.''Even otherwise this Mr. Suryavanshi had an opportunity to correct the error when he passed the order on objections but **he chose to skirt the issue**"*

k P.C.: ''impugned reassessment proceedings for AY 2015-16 are ***wholly without jurisdiction, illegal, arbitrary, and liable to be quashed.''***

l. P.C.: ''A copy of this order be also sent to the Chairman, CBDT, who may perhaps formulate a scheme ***whereby the officers are trained how to apply their mind*** *and what all points should be kept in mind while recording the reasons. The Chairman, CBDT may also* ***advise the concerned Commissioners*** *not to grant approval under Section 151 of the said Act mechanically but after considering the reasons carefully and scrutinizing the same.''*

4.1 Still the buzz would be that the officers are hard done by.Some are happy (I know it as a matter of fact)that now ''reason to believe'is done away with,in new 148,they shall no longer face such censure.How abysmally low can we get?Its beyond pathetic,this mindset.This is what I call **STANDARD EVADING PROCEDURE** of the officers.That is why these strictures happen and will keep on happening.

5.WHAT IS APPLICATION OF MIND IN LAW?

5.1 The decision of the hon'ble Court brings us to the main aspect of this article.**What is application of mind in law?**In my three decades plus as an IRS officer and exposure to law,here is my modest understanding of the concept from perspective of an authority enjoined to pass an order under law.It means **conscious and objective consideration of evidence on record & pleadings made with reference to issues at hand,observing principles of natural justice. It has been held to be a** *''A judicial view consciously based upon proper inquiries and appreciation of all the relevant*

factual and legal aspects of the case" **[ARVEE INTERNATIONAL vs. ADDITIONAL CIT(2006) 101 ITD 495(MUM)]**

5.2 This should result in a reasoned and speaking order on issues raised and considered after due consideration of applicable law,judicial precedents and relevant instructions and circulars.

5.3 The application of mind and giving of reasons is inextricably intertwined.There is no other way to discern whether mind has been applied or not.There is no greater exposition of this than in the Constitution Bench decision in the case of **S.N. Mukherjee vs. Union of India AIR 1990 SC 1984 :**

"35. Reasons, when recorded by an administrative authority in an order passed by it while exercising quasi-judicial functions, would no doubt facilitate the exercise of its jurisdiction by the appellate or supervisory authority. But the other considerations, referred to above, which have also weighted with this Court in holding that ***an administrative authority must record reasons for its decision are of no less significance.*** *These considerations show that* ***the recording of reasons by an administrative authority serves a salutary purpose, namely, it excludes chances or arbitrariness and ensures a degree of fairness in the process of decision-making.*** *The said purpose would apply equally to all decisions and its application cannot be confined to decisions which are subject to appeal, revision or judicial review. In our opinion, therefore, the requirement that reasons be recorded should govern* ***the decisions of an administrative authority exercising quasi-judicial functions*** *irrespective of the fact*

whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a Court of law. The extent and nature of the reasons would depend on particular facts and circumstances. ***What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original state.*** *The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appeal or revisional authority agrees with the reasons contained in the order under challenge." (p. 1995)*

5.3.1 Similar view was earlier taken by the Hon'ble Supreme Court in **Siemens Engg. & Mfg. Co. Ltd. vs. Union of India AIR 1976 SC 1785.**

5.3.2 The aspect was reiterated in another landmark decision later in **Secretary and Curator, Victoria Memorial Hall Vs Howrah Ganatantrik Nagrik Samity And Others.** **AIR 2010 SC 1285, 2010 (2) SCALE 739, (2010) 3 SCC 732, 2010 (3) UJ 1540 (SC) Civil Appeal No. 2225 of 2010 (Arising out of SLP (C) No. 2708 of 2010).**

''31. It is a settled legal proposition that not only administrative but also judicial order must be supported by reasons, recorded in it. Thus, while deciding an issue, the Court is bound to give reasons for its conclusion. It is the duty and obligation on the part of the Court to record reasons while disposing of the case. The hallmark of an order and exercise of judicial power by a judicial forum is to disclose its reasons by itself and giving of reasons has always been insisted upon as one of the fundamentals of sound

administration justice - delivery system, to make known that there hadbeen proper and due application of mind to the issue before the Court and also as an essential requisite of principles of natural justice. "The giving of reasons for a decision is an essential attribute of judicial and judicious disposal of a matter before Courts, and which is the only indication to know about the manner and quality of exercise undertaken, as also the fact that the Court concerned had really applied its mind." [Vide State of Orissa Vs. Dhaniram Luhar AIR 2004 SC 1794; and State ofRajasthan Vs. Sohan Lal & Ors. (2004) 5 SCC 573].

32. Reason is the heartbeat of every conclusion. It introduces clarity in an order and without the same, it becomes lifeless. Reasons substitute subjectivity by objectivity. Absence of reasons renders the order indefensible/unsustainable particularly when the order is subject to further challenge before a higher forum……."

5.4 What does "considered"mean qua application of mind?

An interesting side issue is raised.In para 6 of the decision we have seen above hon'ble Court observes:"…… ***first of all makes a false statement*** *that "the assessee's above submissions and objections* ***have been carefully considered*** *and the same are dealt with as under "* ***but he does not deal with the objection……***

5.4.1 There is an interesting judicial authority on the subject:

CIT vs. Rai Bahadur Hardutory Motilal Chamaria (1967)66 ITR 443 (SC)

3 JUDGE BENCH

What "consideration" by the ITO means was explained :

" 'Consideration' does not mean incidental or collateral examination of any matter by the ITO in the process of assessment. There must be something in the assessment order to show that the ITO applied his mind to the particular subject-matter or the particular source of income with a view to its taxability or to its non-taxability and not to any incidental connection."

5.5 Of course ,in civil law,like the one before us,i.e.income tax, 'beyond reasonable doubt' is not a requirement to prove application of mind.It has been well held that *''Even in the case of a trial when the question arises as to whether a fact has been proved or not,* ***the question has to be answered on the basis as to whether the evidence adduced probabilises the claim*** *or contention of the plaintiff or the defendant, as the case may be".[* **Pr.CIT *v.*India Finance Ltd.** [2016] 389 ITR 242 **(Calcutta)**]

5.6 A cryptic order,by same token,runs into danger of being labelled a result of non application of mind.

6.CONCLUDING REMARKS:

6.1 It's a matter of collective humiliation for revenue deptt to be told that their officers *don't know the meaning of application of mind,miserable failure in primary obligation,risible* assertion,supervisory failure,whether

*officers ever bother to read the papers,*making *false statement,skirting the issue* leading to an order ***wholly without jurisdiction, illegal, arbitrary, and liable to be quashed.***

6.2 Last para of the decision is poignant to me.An IRS officer undergoes 20 months plus of so called world class training,simulation projects,two tranches of field exposure and On Job Training ,rigorous screening and examination before a field posting.I believe there is now also a **MENTORSHIP program for new inductees** in the field, mentored by"seniors".

6.2.1 To then be told by an hon'ble HC that officers need to be trained how to apply their minds is a scathing indictment of the highest level and a matter of collective shame,reducing officers to a laughing stock and severly damaging their prestige and awe factor before public at large and diminishing the service in no uncertain measure.

6.3 They are so self enamoured by the system behemoth they have created(FAS) to substitute raw power of mind that they feel application of mind isn't required.Because a computer does now what we ,in 90s and 2000s used to do by hand.The work was slower,but was surer.I can't recall such a stricture on competence back then, which is routine now.Save occasional jabs on integrity,which is an occupational hazard of holding a public office,the revenue services ,in their transluscence, were a subject of awe then.Not anymore.

Maybe ,not just training,an overhauling is required.