INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'B' BENCH, MUMBAI

[Coram: Pramod Kumar, Vice President
and, Aby T Varkey Judicial Member]

ITA No.: 112/Mum/2022
Assessment year: 2010-11

Bank of India **…….. Appellant**
8th floor, Star House, C 5 G Block, BKC,
Bandra East, Mumbai 400 051 [PAN: AAACB0472C]

Vs.

Assistant Commissioner of Income Tax
Circle 2(1)(1), Mumbai **…….Respondent**

ITA No.: 203/Mum/2022
Assessment year: 2010-11

Assistant Commissioner of Income Tax
Circle 2(1)(1), Mumbai **……...……..Appellant**

Vs

Bank of India **…….……Respondent**
8th floor, Star House, C 5 G Block, BKC,
Bandra East, Mumbai 400 051 [PAN: AAACB0472C]

Appearances:
C Naresh, *for the assessee*
Dr Mahesh Akhade, *for the revenue*

Date of concluding the hearing : June 29, 2022
Date of pronouncing the order : June 30, 2022

O R D E R

Per Pramod Kumar, VP:

1. These cross-appeals are directed against the order dated 24th November 2021, passed by the National Faceless Appeals Centre (NFAC) in the matter of order giving effect (OGE), to the order dated 11th July 018 passed by a coordinate bench, vide order dated 31st December 2019 under section 143(3) r.w.s. 254 of the Income Tax Act, 1961, for the assessment year 2010-11.

2. When this appeal was called out for hearing, learned counsel for the assessee invited our attention to a fundamental issue, with respect to the denial of opportunity to the assessee to present the case through video conferencing, raised in the first ground of appeal of the assessee. It was also pointed out that in the event of the assessee succeeding on this point, all

other issues raised in the cross-appeals will be rendered infructuous. We are thus urged to take a call on this foundational issue first. Learned Departmental Representative does not oppose this prayer. With the consent of the parties, therefore, we take up this ground of appeal first. The related grievance raised by the assessee is as follows:

> **On the facts and in the circumstances of the case and in law, the Hon'ble CIT(A), NFAC has erred in not granting an opportunity to the appellant bank to present the case through the video conferencing as specified under the Faceless Appeals Scheme 2020, provided under section 250 (6B) of the Income Tax Act, 1961 ('the Act').**

3. Learned counsel submits a copy of the proceeding sheet (acknowledgement no. 736267181261021; communication reference ID 100037386143) which takes note of the assessee's submission dated 17th August 2021 to the effect "**Please consider the response uploaded. We have earlier uploaded our response on 10.03.2021 (screenshot attached for your ready reference) Kindly consider the same and allow us the opportunity of being heard through video conferencing mode**". It is submitted that despite this specific request, and without disposing of the same, the assessee was declined an opportunity of hearing through the video conferencing, and the NFAC simply proceeded to dispose of the appeal on the basis of material on record. Learned counsel then invites our attention to the Hon'ble Madras High Court's judgment in the case of **Ramco Cements Ltd Vs National Faceless Assessment Centre [(2022) 442 ITR 279 (Madras)]** in support of the contention that when such an opportunity of video conferencing is declined, without assigning reason, and the order is passed on the basis of material on record, the resultant order is required to be set aside and the matter restored to the file of the NFAC for an adjudication *de novo.* We are thus urged to remit the matter to the file of the NFAC with a direction that the first appellate authority grants an opportunity of hearing to the assessee, through video conferencing, and then decide the matter afresh.

4. Learned Commissioner (DR) submits that under the Faceless Appeals Scheme 2020, the granting of opportunity through video conferencing was not mandatory, and it was at the sole discretion of the authority concerned to grant or not to grant the video conferencing hearing. He vehemently supports the stand of the NFAC. He, however, graciously leaves the matter to the bench.

5. We find that, in terms of rule 12(2) of the National Faceless Appeals Scheme 2020, "*(t)***he appellant 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 appeal unit under this Scheme**", and under rule 12(3) "*(t)***he Chief Commissioner or the Director-General, in charge of the Regional Faceless Appeal Centre, under which the concerned appeal unit is set up, may approve the request for personal hearing referred to in sub-paragraph (2)**" in certain circumstances. It is through this framework of rules that video conferencing, as was the permissible mode for making submissions, was sought. As to what should be such circumstances, the call once again was to be taken by the Chief Commissioner or the Director-General, with the prior approval of the Board.

6. Once a request is made for the hearing through video conferencing, in the course of the faceless appellate proceedings, in our considered view, it was incumbent upon the Chief

Commissioner or the Director-General concerned to either grant the opportunity, or, if so deemed fit, decline the same for the reasons to be set out, and there cannot be any justification for not making a decision on such a request.

7. Undoubtedly, the expression used in rule 13(2) is that the Chief Commissioner of the Director-General in charge of the related Regional Faceless Appeals Centre "may" approve such a request for personal hearing, it is only elementary that whenever law confers any powers in any public authority, such a public authority has the corresponding duty to exercise these powers when circumstances so justify or warrant. As observed by a coordinate bench of this Tribunal, in the case of **Sabnis Ashok Anant v. Asstt. CIT [(2009) 29 SOT 29 (Pune)]**, "**All the powers of someone holding a public office are powers held in trust for the good of the public at large. There is, therefore, no question of discretion to use or not to use these powers. It is so for the reason that when a public authority has the powers to do something, he has a corresponding duty to exercise these powers when circumstances so warrant or justify—a legal position which has the approval of Hon'ble Supreme Court**". **In the case of L. Hirday Narain v. ITO [(1970) 78 ITR 26 (SC)]**, Hon'ble Supreme Court has observed that "**If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for the exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling the courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right—public or private—of a citizen**" Of course, it is well within the powers of the Chief Commissioner or the Director-General concerned to decide on the prayer for personal hearing one way or the other, but he does not have a choice about taking or not taking a call on this request; such inaction on the part of the authority concerned simply cannot meet any judicial approval. In **Ramco Cement's case** *(supra),* Hon'ble Madras High Court has held that when Regional Faceless Penalty Centre does not take a decision on the request for a personal hearing, and proceeded to dispose of the matter, the matter is required to be sent back to the Regional Faceless Penalty Centre for taking a decision on the request for a personal hearing.

8. In view of the above discussions, perhaps the right course of action for us would *prima facie* seem that the matter may be sent back to the NFAC stage for taking a call on whether or not to permit the assessee to make submissions through the video conferencing- as was done by Hon'ble Madras High Court in the case of Ramco Cement *(supra)*. However, in view of the subsequent development by way of a notification of the Faceless Appeals Scheme 2021, which has come into effect from 28th December 2021 in supersession of the Faceless Appeals Scheme 2020, even a specific call on the request for video conferencing hearing may is not really necessary.

9. Taking the sting out of criticism of the then faceless appeals procedures, and as a part of the ongoing and pragmatic reforms- which are now truly a hallmark of the contemporary tax policies anyway, the grant of personal hearing through video conferencing is now virtually on-demand. While rule 12(2) of the Faceless Appeals Scheme 2021 (hereinafter referred to as '*the new rules'*) provides that "*(t)***he appellant 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 Commissioner (Appeals), through the National Faceless Appeal Centre, under this Scheme**", rule 12(3) ensures that such a

personal hearing will invariably be granted, on-demand, through video conferencing by providing that **"(3) The concerned Commissioner (Appeals) shall allow the request for personal hearing and communicate the date and time of hearing to the appellant through the National Faceless Appeal Centre"** and **"(4) Such hearing shall be conducted 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"**. As a result of these provisions in the new rules, the opportunity of a personal hearing, through video conferencing, is to be granted in all such cases in which the request for a personal hearing is made. There is no question of any discretion about allowing or not allowing the opportunity of a personal hearing, as upon a request being made by the assessee for a personal hearing, such an opportunity is required to be afforded to him. In any event, it is an amendment in the faceless appeal rules which is meant to obviate the undue hardships of the assessee in presenting their cases to the first appellate authority, and when such an amendment is made to cure the shortcomings of the scheme, and thus obviate the unintended hardships to the taxpayers, the amendment is to be treated as retrospective in effect. It is for the reason of the well-settled legal position that a curative amendment in the law is to be treated as retrospective in nature even though it may not state so specifically. In the Hon'ble Supreme Court's five-judge constitutional bench's landmark judgment, in the case of **CIT v. Vatika Townships Pvt Ltd. [(2014) 367 ITR 466 (SC)],** the legal position in this regard has been very succinctly summed up by observing that "*(i)***f a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect**" Hon'ble Supreme Court has observed that "**This** *(the foregoing analysis)* **exactly is the justification to treat procedural provisions as retrospective**", that, "**In Government of India & Ors. v. Indian Tobacco Association (2005) 7 SCC 396 the doctrine of fairness was held to be a relevant factor to construe a statute conferring a benefit, in the context of it to be given a retrospective operation**" and that "**The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of Vijay v. State of Maharashtra & Ors. (2006) 6 SCC 286. It was held that where a law is enacted for the benefit of the community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature**." Their Lordships also noted that this retrospectively being attached to benefit the persons, is in sharp contrast with the provision imposing some burden or liability where the presumption attaches towards prospectivity. What logically follows from the law so settled by a constitutional bench of the Hon'ble Supreme Court, is that when an opportunity of presenting the case, through the video conferring in the faceless appeal proceedings, is now available to every taxpayer, on-demand, the same must also be held to be admissible in the proceedings, if so demanded by the assessee, in the old rules as well.

10. In view of these discussions, as also bearing in mind the entirety of the case, we deem it fit and proper to remit the matter to the first appellate authority after giving an opportunity for a personal hearing, in terms of rule 12 of the Faceless Appeals Rules 2021, for adjudication *de novo* in accordance with the law and by way of a speaking order. Ordered, accordingly. As the matter stands restored to the file of the first appellate authority for

adjudication all other issues raised in the cross-appeals are rendered academic and infructuous, and these issues do not call for any adjudication as of now.

11. In the result, both the appeals are allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on the 30th day of June 2022.

Sd/-	**Sd/-**
Aby T Varkey	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 30th day of June 2022

Copies to:	*(1)*	*The appellant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Senior Private Secretary
Income Tax Appellate Tribunal
Mumbai benches, Mumbai