NATURAL JUSTICE VIOLATION: IMPLICATIONS OF INDU GOENKA DECISION BY CALCUTTA HC ON 16.3.2023

I.The decision :

INDU GOENKA vs.ASSESSMENT UNIT, INCOME TAX DEPARTMENT & Ors. MAT 306 of 2023+ IA NO.CAN 1 OF 2023 DATED16.03.2023

1.Relevant extracts:

''3. At the first blush it may appear that the challenge is to the assessment order passed by the authority on the merits of the case. However, on a careful consideration of the entire facts and circumstances of the case, it is clear that **the appellant has not questioned the merits of the assessment but the decision making process. The Standard Operating Procedure (SOP) under the Faceless Assessment** framed under Section 144B of the Act had been issued by the National Faceless Assessment Centre, Delhi and communicated to all the Principal Chief Commissioners, Income Tax under the cover of a **letter dated 3rd August, 2022.** The **procedure enumerates as to how the assessment has to be made and in paragraph N.1.3it has been stated that the authority should ensure adherence to the principles of natural justice and reasonable opportunity to the assessee**, timelines to be given for obtaining response to the show cause notice which have also been stipulated. Further, **the SOP also gives the format of final assessment order** in AU-9 which sets out the various heads under which the assessment order has to be passed with due discussion.

4. On a cursory perusal of the assessment order dated 20^{h} December, 2022, which is impugned in the writ petition, one gets an impression that it is in **compliance with the SOP** as it contains requisite sub-headings but however,

on a closure(sic closer) reading of the assessment order it is found that **the assessing officer has acted in a most perverse manner in passing the assessment order.** We say so **because the first 21 pages of the assessment order is a verbatim extract** of the show cause notice. In page nos.22 and 23 in two paragraphs the **reply given by the assessee has been summarized**. From page nos.23 to 36 of the assessment order it is **once again extract of the show cause** and ultimately **at page nos.37 and 38 the total income has been determined and the assessment is completed.**

5. The impugned assessment order is a classical example as to how an assessment should not be made. The assessing officer has reduced the procedure to an empty formality, which has to be deprecated. This leaves us with no other option except to quash the assessment order. In the result, the appeal as well as the writ petition are allowed and the assessment order dated 20th December, 2022 is quashed. Consequently,I.A. No. CAN 1 of 2023 is disposed of.''

2.Key Takeaways:

1.Decision making **PROCESS** of A.O. IS **JUSTICIABLE.**

2.Principles of natural justice –lack to adherence therewith-can lead to QUASHING of assessment with no second innings to revenue.

3.The method of framing assessment : reproduction of show cause-summarization of objections-reiteration of show cause-computing of taxable income :is an empty formality.Judicially deprecated.

4.AO has, in this case ''acted in a most perverse manner''.

3.Amour propre of the almighty officers of the department shall be offended**.**The likely **contra rantings** of department on a guesstimate:

a.why not a set aside?

b.show cause is speaking one.

c.HC order too is perverse without discussion.

d.Some may think how such interference in writ.

e.How natural justice is violated?

These protests betray the unnecessary tunnel vision approach of revenue officers.The set aside cry comes from the fact that Rules of natural justice are not codified and are held by some commentators to be procedural in nature unlike in the United States wherein the expression 'natural justice' has already been guaranteed by the text of the Constitution.

The principles of natural justice may not be codified in India but are widely accepted .Hence ,depending on facts ,violation of n.j.may not always be a curable irregularity but a fatal illegality , esp where it provides the offending authority a second innings.

The clarity of show cause is a one way street and does not ensure adherence to natural justice fully as it is by and large an ex parte statement.

Writ jurisdiction is of wide amplitude and if fundamental rights are violated then the writ is not precluded.A wide body of legal literature exists to support it.

To call such an order as the HC one perverse as some in revenue may be prone to is in itself a perversity and it is as speaking as a judgement can be.

As to how natural justice was violated ,it is set out in the following discussion.

As usual the contrarians miss the point by a mile and till such mindset

prevails (which ironically has crept in after greater digitisation ,culminating in the farce called faceless assessment) such orders are going to be the order of the day.

II.A preliminary tangent:

4.What ,tangentially, surprises me is what is supposed to be **''strictly for departmental use only'**'(para 4 coveering letter)is freely circulating on the internet.In the stone age of 90s and earlier the terms''confidential'', ''for departmental use'' carried some sense and meaning.The purpose was that these internal guidelines were for operational purpose ,not to be made public.I recall multiple such instructions as a serving officer, which were never a part of public discourse.The norms of speaking order were the only parameters of judging the technical soundness of an order.Of course the orders were sacrosanct as that of a quasi judicial authority and rare administrative guidance apart, spirit of s 119 was alive and well.It had judicial benediction too. In **Greenworld Corporation** [2009] 181 TAXMAN 111 (SC) it was held that *it is one thing to say that while making the order of assessment, the Assessing Officer shall be bound by the statutory circulars issued by the CBDT, but it is another thing to say that the* ***assessing authority exercising quasi-judicial function*** *keeping in view the scheme contained in the Act,* ***would lose its independence to pass an independent order of assessment.*** *[Para 31]*

4.1 In **Eastern Scales (P.) Ltd. [1978] 115 ITR 323 (CAL.) it was *held''*** *The ITO has to act judicially or quasi-judicially in the assessment proceedings and any direction by any higher authority as to* ***the manner in which such proceedings are to be disposed of*** *would be interference with the judicial or quasi-judicial functions of the ITO. If the ITO acts in*

accordance with such directions and disposes of assessment proceedings accordingly, his orders will be liable to be set aside on that ground.''

5.Orders, instructions and directions of Board *hold field in* ***administrative matters not in discharge of quasi judicial functions*** so held hon'ble SC in **Sirpur Paper Mill Ltd. [1970] 77 ITR 6 (SC).**

5.1 The hon'ble HC has referred to paragraph N.1.3 of the SOP dated 22.8 2022 wherein ,per Court '' *it has been stated that the authority should ensure adherence to the principles of natural justice and reasonable opportunity to the assessee,''*

5.2 But these are in any case inbuilt in tax jurisprudence and in Sahara India decision)**169 TAXMAN 328(SC)it was held that** 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**.

6.The Courts have held that, **unless the law expressly or by necessary implication** excludes the application of the rules of natural justice, the said requirement has to be read in enactments that are silent. It is well-settled that **the principles of natural justice shall be presumed to be necessary AND READ INTO THE UNOCCUPIED INTERSTICES OF THE STATUTE unless there exists a statutory interdict.**

7.The SOP merely says what is bedrock of a speaking order.To enforce natural justice through it is fraught with implications damaging to the revenue because the unintended consequence is that the SOP assumes a part in the statute.See the following observations of the court(supra) which give edge to this reasoning:

"the appellant has not questioned the merits of the assessment but the decision making process. The Standard Operating Procedure (SOP) under the Faceless Assessment *framed under Section 144B of the Act"*

"The assessing officer has reduced the procedure to an empty formality, which has to be deprecated. This leaves us with no other option except to quash the assessment order."

7.1 Disturbing part is that SOP is considered framed UNDER s 144B .SOP too says its issued under s 144B(6)(xi).The same reads as follows:

[**Faceless Assessment.**

144B. [*(1) Notwithstanding anything to the contrary contained in any other provision of this Act, the assessment, reassessment or recomputation under sub-section (3) of section 143 or under section 142 or under section 147, as the case may be, with respect to the cases referred to in sub-section (2), shall be made in a faceless manner as per the following procedure, namely:—*

……

(6) For the purposes of faceless assessment—

……

(**xi**) *the Principal Chief Commissioner or the Principal Director General, as the case may be, in-charge of the National Faceless Assessment Centre shall, with the prior approval of the Board,* ***lay down the standards, procedures and processes for effective functioning of the National Faceless Assessment Centre and the units set up, in an automated and mechanised environment.***

7.2 This is unbelievable.The mandate is for laying down" **standards, procedures and processes for effective functioning** of the National Faceless Assessment Centre and the units set up, in an automated

and mechanised environment.''

7.3 It is a procedural mandate to set up standards ,procedures and processes.Since when did the bedrock of natural justice come under the superficial waters of ''procedures and processes''?

7.4 There are also mandates for how 142(1) is to be operated.There are time limits set(how much self imploding can we get?)for adjournments ,for references to VU,ETC.There is a template of when a 144 assessment is to be framed ,what AU can do and what it cannot,template for special audit,**speaking ,fair and judicious proposals**(an area ripe for exploitation by the assessee-see para N.3.3 and even gives a model format!)

7.5 It is a classic executive overreach but unlikely to be challenged since it straitjackets the AO to a computerized automaton .Yet another self goal and which caricatures itself by parodying its administrative emptiness publicly.

8.It is shocking and saddening to see a sacred judicial exercise being reduced to templates and SOPs.Probably poetic justice that nothing is sacrosanct now and hence subject to public scrutiny and judicial comment.Earlier the assessment order had a face(character).It is truly faceless(……) now.A farce enacted by the incompetent for the ignorant.Only the ignorant are becoming aware.Day is not far when computers shall take over adjudication and we shall be seeing software automatons doing assessment with mere basic awareness of structure of law.

III.THE CRUX OF THE MATTER:

9.From a judicial perspective,why did the Court rule the way it did ?

The primary reason was the template assessment order which

,ironically,did follow the SOP in letter-the hon'ble Court held this to be'' **an empty formality''.**[An unsolvable dilemma presents itself to the AOs now: how to avoid this label in future assessments?]

10.Issue ,before us is THE PROCESS for making assessment.What does the SOP mandate?Let's see.(PARA N of SOP):

1.SCN in prescribed format after conducting all enquiries

2.Content as per para N.1.2

3.Time limits for NJ

4.Personal hearing if desired

5.Income and Loss determination Proposal considering assessee's reply,being SPEAKING ,FAIR and JUDICIOUS(N.3.3)in MODEL FORMAT.

6.Sending to RU,additional SCN to assessee if ILDP modified.

7.Preparing a mandated template style draft order with specified ingredients under s 144C.

AND send to NeFAC where penalties initiation shall be incorporated and final order shall be passed **in prescribed format(para O).**

10.1 Which part of this process was not followed by AO In the instant case?Nothing specific is mentioned in the decision.**At which exact point in process did the''empty formality'' happen?**

11.And yet ,revenue was unable to counter that andsucceed.The best guess I can hazard is what I call a **I SAID-YOU SAID-I SAID** kind of assessment happened.There was no interplay of why ,what the assessee stated was not correct,and why the AO thinks he was correct.There was no cross shooting,everyone was shooting inside their own perimeters.

In short ,**the order was not a speaking order.The perversity referred by the hon'ble Court,in my humble view is that there was no application of mind by AO.There were isolated set of facts and**

claims,not interwoven and countered and analyzed through a process of reasoning,no sifting of evidence,and probative values left undetermined just creating a statistical caricature called ILDP by placing disjointed facts together.

12.What is a judgement?:

Though the order of assessment does not have the status of a judgement ,an answer to what a judgement is ,can afford vital parameters for guiding the AO.Judgement is defined in s 2(9) of CPC 1908.

2(9) "**judgment**" means the statement given by the judge of the grounds of a decree or order;"

It includes:

- A concise statement of the case.(the issues involved, the evidence brought by the parties)
- The points for determination.
- The decision thereon.
- The reasons for the decision.
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In case of an assessment order we can modify this to mean:

-A concise conspectus of the facts (sifting of evidence is primary here)

-The issues impacting assessment

-Decision on each issue

-Reasons for decision

Did the AO pass this test in the impugned order?

13.What is a speaking order?

This is the crux of the issue. A speaking order is one which gives the reasons for arriving at the conclusion reached as per such order. In the

exercise of quasi-judicial power, the giving of reasons in support of the order is recognised as one of the principles of natural justice. A speaking order is necessary if the judicial review is to be effective. Lord Denning said in the case of ***Breen* v. *Amalgamated Engg. Union* [1971] 1 ALL ER 1148, 1154 (CA)** that 'the giving of reasons is one of the fundamentals of good administration'. The rule requiring reasons to be recorded by quasi-judicial authorities in support of the orders passed by them is a basic principle of natural justice(***Siemens Engg. & Mfg. Co. of India Ltd.* v. *Union of India* AIR 1976 SC 1785.)** The appropriate brief reasons though not like a judgment, are a necessary concomitant for a valid order in support of the action or decision taken by the Authority—***M.J. Sivani* v. *State of Karnataka* AIR 1995 SC 1770.**

13.1 In S. N. Mukherjee v. Union of India, AIR 1990 SC 1984, a Constitution Bench of the hon'ble Supreme Court discussed the development of law on this subject in India, Australia, Canada, England and the United States of America and after making reference to a large number of judicial precedents held among other things '' 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 stage**. The appellate or revisional authority, if it affirms such an order, need not give separate reasons if the appellate or revisional authority agrees with the reasons contained in the order under challenge."

13.2 Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or 'rubber-stamp reasons' is not to be equated with a valid decision making process. ***[COMMISSIONER OF INCOME TAX vs.RASHTRIYA VIKAS PARTY****(2015) 93 CCH 0238 PHHC]*

14.Did the learned AO pass these tests in our case?Presumably not.Had he so done I strongly doubt whether SOP would have rescued the assessee.**What AO created was a disjointed,inchoate and incoherent aggregation of material** before him ,**masquerading as an assessment order.**

CONCLUSION

15.It is clear as day that that the department ,after having a success rate in single digit percentage by the time ITAT is done ,is of the view that each step in assessment needs micromanagement,it needs standardisation and this can only happen through a template driven model.

16.I miss the vicissitudes of the human mind ,trained in law but free to spread its wings and show the ART of investigating and drafting guided by sound jurisprudential principles .What we have now is a mechanical and empty automaton created by computer driven frenzy where standard digitization is a panacea to every ill befallen.I saw its seeds in the MAHAVAT scam (and some other scams which resulted in some top brass create template questionnaires and model assessment orders)which ironically were countered by ITAT in a similar template driven appellate orders-the 12.5% ers I call it (the detailed story must be a part of a different effort ,though those in the know of the so called **bogus purchase scam** will understand what I am talking about) which

was unfolding itself in Mumbai circa 2016 when I joined there as Appellate Commissioner.Inspite of my sincerest advocacy through my appellate orders and other interactions, the misadventure in educating fell through,and what could have been the story of the decade turned itself into a tragedy of lost opportunity which remains unrecognized by revenue till date.

16.1 Irony is most don't realize till this day what was lost in translation.Those intrigued into knowing more into what and why of this are free to connect with me and indulge into a free flowing legal discourse on zoom into rain filled tea cups driven balmy Mumbai evenings around the corner this time around!

17.To return to the technical part in conclusion,the very nature of tax assessment process with its judicially benedicted description as estimation of income based on preponderance of probabilities must remain an ART-an art in LAW.Drafting remains in the realm of the free flowing.Any attempt to capture the same in templates is an attempt to capture a mountain stream in a bucket.The ART has to be mentored and learnt and the computer must be confined to the quantitative and the mechanical.Digits don't capture the inspired investigation nor the breath taking drafting.**The law captures the best of science and art.**

18.These SOPs and softwares shall keep on creating self defeating traps.You will create one SOP,then another improved version of the same and then another.All will have inbuilt unintended consequences often fatal, and the more detailed you make them the more confusing booby traps will they become.

19.The law,till it is allowed to remain what it was meant to be- a platform of broad based prescriptions to regulate human affairs and sustain civilization , a vehicle to encourage human endeavour and a support system for dignified conduct of life-the unbound human mind

has to be the final arbiter thereof.

IN PASSING

20.The appellate success rate in 90s and earlier for revenue was at least three times higher than of the SOP driven assessments we have now.The stone age computer illiterates with their dusty files,hand written blue books and manually served notices succeed against physically delivered ITRs where the high tech SOP driven wonder kids fail so spectacularly now.

I wonder why?

21.I cannot recall such stricture filled and fine levying appellate atmosphere back then .All I can remember with unfaded memory is the judicial respect we had from the Courts for technical soundness and investigative thoroughness.We did not look cute ,in fact positively ugly at times ,but we succeeded and succeeded.The social awe,the almost non interfering executive, the tag of a driven and feared enforcement unit(yes,that's what we were ,unlike the ''service provider facilitators'' today)….these are now relics of a bygone era.It had its failings,but way higher integrity and substantial dignity.The water waves riding giants then are now the computer dominated, algorithm driven pygmies.

Glad I don't need to turn up anymore.

Anadi Varma