IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC" NEW DELHI

BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

आ.अ.सं/.I.T.A No.2252/Del/2023
निर्धारणवर्ष/Assessment Year: 2018-19

Amarjeet Singh Aneja, **101, Aman Chamber,** **47/21, Old Rajinder Nagar,** **New Delhi.**	**बनाम Vs.**	**ACIT** **National E-Assessment Center,** **Circle 61(1)** **New Delhi.**
PAN No. AADPA1889N		
अपीलार्थी Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे **/Assessee by**	**Shri Tarandeep Singh, Advocate**
राजस्वकीओरसे **/Revenue by**	**Shri Om Prakash, Sr. DR**

सुनवाईकीतारीख/ Date of hearing:	12.10.2023
उद्घोषणाकीतारीख/Pronouncement on	18.12.2023

आदेश /O R D E R

This appeal is filed by the Assessee against the order of the National Faceless Appeal Center (hereinafter referred to as "NFAC"), Delhi dated 18.07.2023 for the AY 2018-19. The assessee has raised the following grounds of appeal:

> *"1. That on facts and in law the impugned order dated 18.07.2023 passed by the Commissioner of Income Tax (Appeals) [hereinafter referred to as the "CIT(A)"] is bad in law and void ab-initio.*
>
> *1.1 That on facts and in law the CIT(A) has erred in passing the impugned appellate order ex-parte i.e.,*

without granting opportunity of being heard either in person or in form of written submissions and thereby violating principals of natural justice.

1.2 That on facts and in law CIT(A) has erred in not acceding to the request made for adjournment vide letter dated 19.06.2023.

1.3 That on facts and in law the notice u/s 250 dated 13.06.2023 issued by CIT(A) is bad in law and void ab-initio.

2. That on facts and circumstances of the case and in law the CIT(A)/AO have erred in not accepting the nature of income of Rs. 35,27,3641/- offered to tax by the assessee as "Income from Capital Gains".

3. That on facts and in law the CIT(A)/AO have erred in holding /observing that:

(a) income derived by the assessee from transaction of shares in which delivery was taken is taxable as "business income".

(b) shares were purchased and held as stock in trade.

(c) assessee had bought and sold shares with a motive to earn profit.

(d) assessee had borrowed money for purchasing shares.

4. That on facts and in law the CIT(A)/AO has erred in not appreciating that the appellant had maintained two separate portfolios with proper demarcation in as much as :

(i) transactions undertaken in shares where delivery is taken were consistently held as investments and

(ii) transactions undertaken in futures and options were intended to earn business income.

5. That on facts and in law the CIT(A) has erred in upholding addition to total income of Rs.1,22,152/- as per para 4 of the assessment order.

6. That on facts and in laws the CIT(A) has erred in upholding levy of interest u/s 234A.

That the appellant craves leave to add, to alter, amend or vary from the above grounds of appeal at or before the time of hearing."

2. At the outset, the Ld. Counsel for the assessee referring to ground no.1.1 of grounds of appeal submits that the Ld.CIT(Appeals) grossly erred in passing ex-parte order without granting opportunity of being heard in person in spite of request made by the assessee. The Ld. Counsel for the assessee referring to page 2 of the order of the NFAC submits that in ground no.2.9 of grounds of appeal before NFAC with the assessee specifically requested to provide opportunity for representing the appeal in person as mandate by provision of section 250 of the Act which the Ld. CIT(Appeals) grossly ignored and passed an ex-parte order. Ld. Counsel further submits that this is in violation to the provisions of Faceless Appeal Scheme, 2021. Ld. Counsel submits that the Ld.CIT(Appeals) passed impugned order post introduction of Faceless Appeal Scheme, 2021 and Rule 12(3) of the Scheme stipulates allowing the request of the assessee for personal hearing.

3. Reliance was also placed in the case of Bank of India Vs. ACIT reported in 196 ITD 1. Ld. Counsel, therefore, submits that in view of the judgment of Mumbai Tribunal the order passed by the Ld.CIT(A) is in violation of the provisions of Rule 12(3) of Faceless Appeal Scheme, 2021.

4. Ld. Counsel further submits that in the course of appellate proceedings a notice u/s 250 dated 13.06.2023 was issued by NFAC notifying the date of compliance as on 19.06.2023 and in reply the assessee made submission dated 19.06.2023 online requesting for an adjournment for ten days on ground of illness. Ld. Counsel submits that thereafter there was no reply received from NFAC either accepting or rejecting the request made for adjournment and finally the order was passed on 18.07.2023 without hearing the assessee. Therefore, it is prayed that the order may be restored back to the file of the Ld.CIT(Appeals) for *denovo* adjudication.

5. Ld. DR has no serious objection.

6. On hearing both the sides and perusing the order of the Ld.CIT(Appeals)-NFAC, we observe that the assessee in grounds of appeal before Ld. CIT(Appeals) requested for opportunity grant representation of appeal in person.

7. On perusal of the Rule 12(3) of Faceless Appeal Scheme, 2021, we observe that the scheme made it mandatory to the Commissioner (Appeals) for allowing the request for personal hearing. The Mumbai Tribunal in the case of Bank of India Vs. ACIT (196 ITD 1) held as under:

> *"5. We find that, in terms of rule 12(2) of the National Faceless Appeals Scheme 2020, "(t)he appellant or his authorized 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.*
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> *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 authorized 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 ITA No.: 112 and 203/Mum/2022 Assessment year: 2010-11 Page 4 of 5 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 ITA No.: 112 and 203/Mum/2022 Assessment year: 2010-11 Page 5 of 5 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."

8. In view of the decision of Mumbai Bench, this appeal is restored to the file of the Ld.CIT(Appeals)-NFAC to provide adequate opportunity of being heard to the assessee in accordance with law.

9. In the result, appeal of the assessee is allowed for statistical purpose.

Order pronounced in the open court on 18/12/2023

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Dated: 18.12.2023

**Kavita Arora, Sr. P.S.*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

Assistant Registrar, ITAT: Delhi Benches-Delhi