

आयकर अपीलीय अधिकरण एक सदस्य मामला न्यायपीठ पुणे में ।
IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH, PUNE

श्री अनिल चतुर्वेदी, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI ANIL CHATURVEDI, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.1937/PUN/2016

निर्धारण वर्ष / Assessment Year : 2008-09

The Income Tax Officer,
Ward – 2(1), Nashik

.....अपीलार्थी / Appellant

बनाम / V/s.

Smt. Nirmala Vijay Sanklecha,
11, City Plaza, Opp. Kalika Mandir,
Old Agra Road, Nashik-422002

PAN : ACVPS3608K

.....प्रत्यर्थी / Respondent

प्रत्याक्षेप सं. / CO No.35/PUN/2016

निर्धारण वर्ष / Assessment Year : 2008-09

Smt. Nirmala Vijay Sanklecha,
11, City Plaza, Opp. Kalika Mandir,
Old Agra Road, Nashik-422002

PAN : ACVPS3608K

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward – 2(1), Nashik

.....प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.1938/PUN/2016
निर्धारण वर्ष / Assessment Year : 2008-09

The Income Tax Officer,
Ward – 2(1), Nashik

.....अपीलार्थी / Appellant

बनाम / V/s.

Smt. Nirmala Prakash Shah,
Flat No. 4, Shrimant Icchamani Society,
Old Pandit Colony, Sharanpur Road,
Nashik – 422001

PAN : DJDPS7721H

.....प्रत्यर्थी / Respondent

प्रत्याक्षेप सं. / CO No.36/PUN/2016
निर्धारण वर्ष / Assessment Year : 2008-09

Smt. Nirmala Prakash Shah,
Flat No. 4, Shrimant Icchamani Society,
Old Pandit Colony, Sharanpur Road,
Nashik – 422001

PAN : DJDPS7721H

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward – 2(1), Nashik

.....प्रत्यर्थी / Respondent

Assessee by : Shri Pramod Shingte
Revenue by : Shri Mukesh Jha

सुनवाई की तारीख / Date of Hearing : 19-02-2018

घोषणा की तारीख / Date of Pronouncement : 23-02-2018

आदेश / ORDER**PER VIKAS AWASTHY, JM :**

These two appeals have been filed by the Department in the case of two different assessees. ITA No. 1397/PUN/2016 is directed against the order of Commissioner of Income Tax (Appeals)-2, Nashik dated 27-06-2016 for the assessment year 2008-09 in the case of Smt. Nirmala Vijay Sanklecha. In ITA No. 1938/PUN/2016 the Department has filed appeal assailing the order of Commissioner of Income Tax (Appeals)-2, Nashik dated 27-06-2016 for the assessment year 2008-09 in the case of Smt. Nirmala Prakash Shah. The assessees have filed cross objections in the appeals filed by the Department in their respective cases.

Since, both these appeals and the cross objections are emanating from same set of facts involving identical issues, these appeals and cross objections are taken up together for adjudication and are decided vide this common order.

2. The common facts for deciding both these appeals and cross objections are : Both the assessees are part of Sanklecha group. The assessee in ITA No. 1937/PUN/2016 filed her return of income for the assessment year 2008-09 on 06-03-2009 declaring total income of Rs.1,18,980/-. The income returned was accepted u/s. 143(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). The assessee in ITA No. 1938/PUN/2016 did not file any return of income u/s. 139 of the Act. The assessee filed her return of income for the impugned assessment year on 03-03-2014 declaring total income as Nil in response to notice u/s. 148 of the Act. The Assessing Officer noticed that the assessees had entered into development agreement with M/s. Vascon Dwellings Pvt. Ltd.

in respect of property bearing S. No. 82/1/1/1+2+3 at Wadala Shivar, Nashik. The Assessing Officer further noticed that the aforesaid property was purchased in the name of both the assesseees along with Smt. Sushilabai Kachardas Sanklecha (hereinafter referred to as “the co-owner”). A registered development agreement was executed in the name of assesseees and the co-owner. The assesseees had earned Short Term Capital Gain from the sale of aforesaid property during the impugned assessment year and the same was not offered to tax in their respective return of income for the impugned assessment year. However, capital gain was offered to tax in the case of firm M/s. Sanklecha Constructions. Accordingly, statutory notice u/s. 148 of the Act was issued to both the assesseees. In the re-assessment proceedings, the Assessing Officer observed that by virtue of execution of registered development agreement dated 06-06-2007 in favour of M/s. Vascon Dwelling Pvt. Ltd. has resulted in generation of Short Term Capital Gain of Rs.1,25,00,000/-. The share of assesseees and the other co-owner in the impugned plot was 1/3rd each, hence, the Short Term Capital Gain in the hands of each assesseee works out to Rs.41,66,666/-. The Assessing Officer completed assessment u/s. 143(3) r.w.s. 147 by making addition of Rs.41,66,666/- on account of Short Term Capital Gain in respect of each assesseee.

Aggrieved by the assessment orders in their respective cases, the assesseees filed appeals before the Commissioner of Income Tax (Appeals) inter alia challenging the re-assessment proceedings on account of non-disposal of objections raised by assesseees with respect to reasons for re-opening. The contention of the assesseees is that the Assessing Officer has not disposed off the objections of assesseee by passing order/speaking order. The Commissioner of Income Tax (Appeals) in the case of both the assesseees held that the Assessing Officer has not adhered to the procedure

laid down by the Hon'ble Supreme Court of India in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors. reported as 259 ITR 19 and held that the assessment orders to be invalid. Against the said findings of Commissioner of Income Tax (Appeals), the Department is in appeal in the case of both the assesseees before the Tribunal.

3. The assesseees have filed cross objections in their respective cases assailing the findings of Commissioner of Income Tax (Appeals) on merits.

4. The grounds raised by the Department in ITA No. 1937/PUN/2016 reads as under :

“1. Whether on the facts & circumstances of the case and in law, the Ld. CIT(A) was justified in quashing the reassessment order u/s 147 passed by the AO. relying on the decision of the Hon'ble Supreme court in the case of GKN Drive Shaft (India) Ltd. Vs. ITO 259 ITR 19 without appreciating the fact that the AO. had disposed off the objection filed by the assessee by way of making a noting in the order sheet and signed by the AR. of the assessee?”

2. Whether on the facts & circumstances of the case and in law, the CIT(A) was justified in quashing the reassessment order u/s 147 passed by the AO. by not considering section 2928 of the Income-tax Act-1961?”

3. The appellant prays leave to add, alter, clarify, amend or to withdraw any grounds of appeal as and when the occasion demands.”

Identical grounds have been raised by the Department in ITA No. 1938/PUN/2016 assailing the findings of Commissioner of Income Tax (Appeals).

5. Shri Pramod Shingte appearing on behalf of the assessee vehemently supporting the findings of Commissioner of Income Tax (Appeals) submitted that the assesseees had sought reasons for re-opening the assessment and thereafter had filed objections against re-opening of the assessment. The Assessing Officer without disposing of the objections as has been laid down by the Hon'ble Supreme Court of India in the case of

GKN Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors. (supra) proceeded on to make assessment in case of both the assesseees. The ld. AR further submitted that the Hon'ble Bombay High Court in the case of KSS Petron Private Ltd. Vs. Assistant Commissioner of Income Tax in Income Tax Appeal No. 224 of 2014 decided on 03-10-2016 held that where the assessment order is passed without jurisdiction in violation of law laid down by the Hon'ble Apex Court in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors. (supra), there is no reason to restore the issue to the Assessing Officer to pass a further/fresh order. Similar proposition has been laid down by Hon'ble Madras High Court in the case of M/s. Jayanthi Natarajan Vs. Assistant Commissioner of Income Tax in W.P. No. 1905 of 2017 decided on 14-09-2017. The Pune Bench of the Tribunal in the case of Shri Ajay Shantilal Lalwani Vs. Income Tax Officer in ITA No. 145/PN/2015 for assessment year 2005-06 decided on 25-11-2016 set aside the assessment order where the same was passed without disposing of the objections of assessee in violation of law laid down by GKN Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors. (supra). The ld. AR submitted that Pune Bench of the Tribunal has been consistently following the order of Jurisdictional High Court in the case of KSS Petron Private Ltd. Vs. Assistant Commissioner of Income Tax (supra) and have set aside the assessment proceedings where the objections of the assessee qua reasons recorded for reopening are not decide by passing speaking order. To support his submissions, the ld. AR placed reliance on the following decisions :

- i. Assistant Commissioner of Income Tax Vs. M/s. J.K. Petrochemical Industries, ITA Nos. 34 & 35/PN/2012 for assessment years 2003-04 and 2004-05 decided on 30-11-2016;

ii. Income Tax Officer Vs. M/s. Metal United Alloys Fusion, ITA No. 2286/PUN/2016 for assessment year 2010-11 decided on 21-04-2017.

6. Shri Mukesh Jha representing the Department submitted that the Assessing Officer in the case of Smt. Nirmala Vijay Sanklecha has disposed of objections by passing a separate order on 24-02-2014. The ld. DR referred to ordersheet entry dated 24-02-2014 reproduced in para 6 of the statement of facts.

7. Controverting the submissions made by DR, the ld. AR submitted that a perusal of ordersheet entry reproduced in the statement of facts clearly show that the objections raised by the assessee were not disposed of by passing a speaking order. Not admitting but assuming, even if it is considered to be a valid order for disposing of objections, sufficient opportunity was not afforded to assessee by Assessing Officer for challenging such order as has been enunciated by the Hon'ble Bombay High Court in the case of Asian Paints Ltd. Vs. Deputy Commissioner of Income Tax reported as 296 ITR 90. The Hon'ble High Court has held that the Assessing Officer shall not proceed further in the matter within a period of four weeks from the date of service of order on objections, if they are rejected by Assessing Officer. In the present case, the non-speaking rejection order has been passed on 24-02-2014 and immediately on the next day i.e. 25-02-2014 assessment order has been passed. Therefore, the alleged order disposing of the objections in the case of Smt. Nirmala Vijay Sanklecha cannot be considered as a valid order. The Assessing Officer violated the principle of natural justice and the law laid down by Hon'ble Apex Court and Hon'ble Jurisdictional High Court.

8. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. We have also considered various decisions on which the ld. AR of assessee has placed reliance. Identical issues are raised by the Department in both the appeals against the findings of Commissioner of Income Tax (Appeals) in quashing re-assessment order passed u/s. 147. The Commissioner of Income Tax (Appeals) has quashed assessment order on the ground that the objections filed by the assessee against issuance of notice u/s. 148 are not decided by passing a speaking order.

9. The Hon'ble Supreme Court of India in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors. (supra) has held that the Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the assessee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order.

10. In the instant case we find that the Assessing Officer has not disposed of objections of the assessee against issuance of notice for re-opening assessment by passing a speaking order. The assessee filed objections against re-opening. In the case of one of the assessee (Smt. Nirmala Vijay Sanklecha) the Assessing Officer disposed of the objections on 24-02-2014 by observing as under :

“Shri Girish Sathbhai, CA & AR of the ‘a’ attended and explain the facts & issue raised during scrutiny proceeding & stated that the not considered capital gain income as the income already shown in firm case. AR’s says duly considered and but not accepted & income added in total income.”

and in the case of other assessee there is no order whatsoever disposing of the objections.

11. The Hon'ble Apex Court in unequivocal terms has held that the Assessing Officer is bound to dispose of objections by passing a speaking order. A perusal of the above ordersheet entry dated 24-02-2014 shows that the Assessing Officer in a single line dismissed the objections without giving any reason. Thus, the aforesaid order by Assessing Officer in the ordersheet cannot be said to be speaking order as has been envisaged by the Hon'ble Apex Court in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors. (supra).

12. Be that as it may, the Assessing Officer on the immediately next day i.e. 25-02-2014 proceeded on to pass the assessment order u/s. 143(3) r.w.s. 147 of the Act, without affording opportunity to the assessee to exhaust remedy, if any available for assailing said order before appropriate forum.

13. The Hon'ble Jurisdictional High Court in the case of Asian Paints Ltd. Vs. Deputy Commissioner of Income Tax (supra) has held that where the Assessing Officer reject the objections filed by the assessee with regard to re-opening of assessment, the Assessing Officer shall not proceed further with the same for a period of four weeks from the date of service of order on rejections. Thus, the Assessing Officer violated the conditions laid down by Hon'ble Jurisdictional High Court in accelerating finalization of assessment.

14. The procedure that has emerged from judgments discussed above is, that the Assessing Officer is duty bound to decide the objections of the assessee against initiation of reassessment proceedings by passing a separate speaking order. Thereafter, the Assessing Officer shall give four weeks time to the assessee from the date of service of the said order before proceeding with the finalization of assessment. The Hon'ble Jurisdictional High Court in the case of KSS Petron Private Ltd. Vs. The Assistant Commissioner of Income Tax (supra) has set aside reassessment proceedings where the Assessing Officer has not followed the proper procedure as mandated for disposing of the objections of the assessee on reopening. The relevant extract of the findings of the Hon'ble Bombay High Court are as under :

“8 We note that once the impugned order finds the Assessment Order is without jurisdiction as the law laid down by the Apex Court in GKN Driveshafts (supra) has not been followed, then there is no reason to restore the issue to the Assessing Office to pass a further/fresh order. If this is permitted, it would give a licence to the Assessing Officer to pass orders on re-opening notice, without jurisdiction (without compliance of the law in accordance with the procedure, yet the only consequence, would be that in appeal, it would be restored to the Assessing Officer for fresh adjudication after following the due procedure. This would lead to unnecessary harassment of the Assessee by reviving stale/ old matters.”

15. It is apparent from record that the Assessing Officer committed error in not following the proper procedure for deciding the objections of assessee against re-opening of assessment. The Assessing Officer is a quasi judicial authority and is therefore, duty bound to follow the law laid down by the Hon'ble Supreme Court of India, the Hon'ble High Courts and the Appellate Authorities. The assessment orders have been passed by the Assessing Officer in both the cases without following the principles as set out by the Hon'ble Apex Court and Hon'ble Jurisdictional High Court. Thus, considering the facts of the case and in the light of various

judgments the impugned orders are set aside and the appeals of Revenue are dismissed.

16. In cross objections the assesseees have assailed the order of Commissioner of Income Tax (Appeals) on additions made on merit. Since, we have upheld the findings of Commissioner of Income Tax (Appeals) in quashing the assessment orders the cross objections filed by the assesseees have become infructuous and are dismissed as such.

17. To sum up, the appeals by the Department and the cross objections filed by the assesseees are dismissed.

Order pronounced on Friday, the 23rd day of February, 2018.

Sd/- (अनिल चतुर्वेदी / Anil Chaturvedi) लेखा सदस्य / ACCOUNTANT MEMBER	Sd/- (विकास अवस्थी / Vikas Awasthy) न्यायिक सदस्य / JUDICIAL MEMBER
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पुणे / Pune; दिनांक / Dated : 23rd February, 2018

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आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-2, Nashik
4. The Pr. Commissioner of Income Tax-2, Nashik
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण एक सदस्य मामला बेंच,
पुणे / DR, ITAT, "SMC" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.
//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune