



IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA no.592 & 593/Mum./2018
(Assessment Year : 2009-10 & 2010-11)

Aarti Industries Ltd.
71, 2nd Floor, Udyog Kshetra
Mulund Goregaon Link Road
Mulund (W), Mumbai 400 080
PAN – AABCA2787L

..... Appellant

v/s

Dy. Commissioner of Income Tax
Circle-15(1)(1), Mumbai

..... Respondent

Assessee by : Shri Vijay Mehta
Revenue by : Shri Ram Tiwari

Date of Hearing – 15.04.2019

Date of Order – 29.05.2019

ORDER

PER SAKTIJIT DEY. J.M.

The aforesaid appeals have been filed by the assessee challenging two separate orders, both dated 8th October 2017, passed by the learned Commissioner of Income Tax (Appeals)-24, Mumbai, pertaining to the assessment year 2009-10 and 2010-11.

2. Grounds raised in both the appeals are identical except the figures.

3. Ground no.1 in both the appeals are general in nature, hence, do not require adjudication.

4. In ground no.2 of both the appeals, the assessee has challenged the validity of the assessment order passed under section 143(3) r/w section 147 of the Income Tax Act, 1961 (for short "*the Act*"). In addition to the aforesaid grounds, the assessee has raised common additional grounds in both the appeals challenging the validity of the assessment order passed under section 143(3) r/w section 147 of the Act on account of lack of proper approval under section 151 of the Act and due to non-disposal of the objections raised during the assessment proceedings. In our view, the issues raised in the additional grounds are not only ancillary and incidental to the main ground challenging the validity of re-assessment order. Since, the additional grounds are on purely legal and jurisdictional issues going to the root of the matter, they require consideration. Moreover, the additional grounds raised by the assessee can be decided on the basis of facts and materials available on record. That being the case, we are inclined to admit the additional grounds for adjudication on merit.

5. Brief facts are, the assessee company is engaged in the business of manufacture and trading of dyes, intermediates, organic and inorganic chemicals, and pharmaceuticals. For the assessment year

2009–10 the assessee filed its return of income on 30th September 2019, declaring total income of ₹ 79,54,12,240. Similarly, for the assessment year 2010–11 the assessee filed its return of income on 17th September 2009 declaring total income of ₹ 96,06,67,950. Assessments in respect of the aforesaid Assessment Years were initially completed under section 143(3) of the Act. Subsequently, on the basis of information gathered indicating that the assessee has booked bogus expenses towards payment of commission and brokerage amounting to ₹ 30,71,856 in assessment year 2009–10 and ₹ 5,52,840 in assessment year 2010–11, the Assessing Officer re-opened the assessments under section 147 of the Act by issuing notices under section 148 of the Act. In the course of re-assessment proceedings, the assessee raised objections challenging the validity of re-opening of assessment under section 147 of the Act. The Assessing Officer without disposing of the objections raised by the assessee proceeded to complete the assessment under section 143(3) r/w section 147 of the Act in both the assessment years under dispute by disallowing and adding back the commission and brokerage payment of ₹ 30,71,856 and ₹ 5,52,840 under section 69C of the Act in the assessment year 2009–10 and 2010–11 respectively. Against the assessment orders so passed, assessee preferred appeals before the first appellate authority challenging the validity of the re-assessment proceedings as well as merits of the disallowance made.

Learned Commissioner (Appeals), however, decided both the issues against the assessee.

6. Shri Vijay Mehta, learned Counsel for the assessee submitted, after complying to the notice issued under section 148 of the Act, the assessee had sought reasons for re-opening of assessment and after obtaining the reasons, the assessee had raised objections before the Assessing Officer vide letters dated 31st August 2016, challenging the validity of re-opening of assessments under section 147 of the Act. The learned Counsel submitted, the Assessing Officer kept the objections pending and ultimately completed the assessment under section 143(3) r/w section 147 of the Act without disposing of the objections. Thus, he submitted, the Assessing Officer has not followed the ratio laid down by the Hon'ble Supreme Court in *GKN Driveshafts India Ltd. v/s ITO & Ors.*, [2003] 259 ITR 019 (SC), which makes the assessment order void ab initio. He submitted, learned Commissioner (Appeals) without properly appreciating the aforesaid legal aspect has dismissed the appeal of the assessee. In support of his contention, learned Authorised Representative relied upon the following decisions:-

- i) *GKN Driveshafts India Ltd. v/s ITO & Ors.*, [2003] 259 ITR 019 (SC);
- ii) *Bayer Materials Science Pvt. Ltd. v/s DCIT*, [2016] 382 ITR 333 (Bom.);

iii) KSS Petron Pvt. Ltd. v/s ACIT, ITA no.224/2014, dated 03.10.2016; and

iv) Hindustan Uniliver Ltd. v/s DCIT, ITA no.3701/Mum./2016, dated 01.01.2018.

7. Shri Ram Tiwari, learned Departmental Representative submitted, non-disposal of the objections by the Assessing Officer is curable procedural lapse which can be rectified by passing fresh assessment orders after disposal of objections raised by the assessee. Thus, he submitted, the orders passed may be restored back to the Assessing Officer with a direction to dispose of the objections raised by the assessee and thereafter complete the assessments.

8. We have considered rival submissions and perused the material on record. We have also applied our mind to the decisions relied upon. The undisputed facts emerging from record indicate that in the course of re-assessment proceedings, the assessee vide letters dated 31st August 2016, had raised objections before the Assessing Officer specifically challenging the validity of re-opening of assessment under section 147 of the Act in both the assessment years under dispute. The fact that before completion of the assessment under section 143(3) r/w section 147 of the Act, the Assessing Officer has not disposed off the objections raised by the assessee through separate orders, remains uncontroverted before us. The Hon'ble Supreme Court

in GKN Driveshafts India Ltd. (supra) has held that if in the course of re-assessment proceedings, the assessee raises objections challenging the validity of re-opening of assessment under section 147 of the Act, the Assessing Officer is duty bound to dispose of such objections independently before completing the assessment. Following the aforesaid decision of the Hon'ble Supreme Court, the Hon'ble Jurisdictional High Court in Bayer Materials Science Pvt. Ltd. (supra), has also quashed the draft assessment order since it was passed without disposing off the objections filed by the assessee. Similarly, the Hon'ble Jurisdictional High Court in case of KSS Petron Pvt. Ltd. (supra) has held that if the Assessing Officer passes the re-assessment order without disposing of the objections raised by the assessee, such assessment order will be without jurisdiction and only consequence which can follow is to declare the assessment order null and void, hence, there is no reason to restore the issue to the Assessing Officer to pass a fresh assessment order. Admittedly, the Assessing Officer while completing the assessment for the impugned assessment years under section 143(3) r/w section 147 of the Act has not followed the ratio laid down by the Hon'ble Supreme Court and the Hon'ble Jurisdictional High Court, referred to above. Therefore, the issue which requires consideration is, whether non-disposal of the objections raised by the assessee is a procedural defect, as urged by the learned Departmental Representative. In our view, non-disposal of

objections challenging the validity of re-opening of assessment under section 147 of the Act is not a mere procedural lapse but effects the jurisdiction of the Assessing Officer to pass the assessment order under section 143(3) r/w section 147 of the Act. Therefore, following the ratio laid down in the decisions referred to above, we have no hesitation in holding the impugned assessment orders passed under section 143(3) r/w section 147 of the Act as void ab initio. Accordingly, we quash the assessment orders impugned in the present appeal. As a natural corollary, impugned orders passed by learned Commissioner (Appeals) are hereby set aside. As we have quashed the assessment orders on the reasoning of non-disposal of objections raised by the assessee, the other propositions advanced by the assessee challenging the validity of the re-assessment orders are of mere academic importance, hence, not required to be adjudicated upon. These grounds are allowed to the extent indicated above.

9. In view of our decision in ground no.2 of both the appeals, grounds no.3 and 4 in both the appeals have become academic, hence, do not require adjudication. However, the issues raised therein are left open for adjudication if they arise in any other assessment year in future.

10. In the result, appeals are partly allowed.

Order pronounced in the open Court on 29.05.2019

Sd/-
MANOJ KUMAR AGGARWAL
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 29.05.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

True Copy
By Order

Assistant Registrar
ITAT, Mumbai