आयकर अपीलीय अधिकरण "ई" न्याय□पीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI

मा□नीय श्री सी. एन. प्रसाद,न्यायिक सदस्य **एवं**
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI C.N. PRASAD, JM AND HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आ□करअपील सं./ I.T.A. No.6206/Mum/2017
(**निर्धारण वर्ष** / Assessment Year: 2011-12)

ACIT-11-(3)(1) Room No.204, 2nd Floor Aaykar Bhavan M.K. Marg, Mumbai-400 020.	**बनाम**/ Vs.	**M/s. TPL Plastech Ltd.** 10-11, Shivali Indl. Estate Andheri(E) Mumbai -400 072.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AAACT-1968-P**		
(□ पीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Shri Rakesh Joshi – Ld. AR
Revenue by	:	Shri Mayura Pratap-Ld.DR

सुनवाई की तारीख/ **Date of Hearing**	:	02/12/2019
घोषणा की तारीख / **Date of Pronouncement**	:	07/01/2020

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1.1 Aforesaid appeal by revenue for Assessment Year [in short referred to as 'AY'] 2011-12 contest the order of Ld. Commissioner of Income-Tax (Appeals)-18, Mumbai, [in short referred to as 'CIT(A)'], Appeal No. CIT(A)-18/IT-331/AC-11(3)(1)/16-17 order dated 30/05/2017 on following grounds of appeal: -

1. Whether in law and on the facts and in the circumstances of the case, the Ld. CIT(A) erred in appreciating the fact that the notices u/s 143(2) & 142(1) were served on 4.10.2016 fixing the date of compliance on 20.10.2016. The assessee failed to comply with statutory notices u/s 143(2) & 142(1) on the stipulated date. Instead the assessee filed a casual objection on 2.11.2016 captioned as "Sub: Response to the notice providing of reasons recorded for issue of notice u/s 148 of the Income Tax Act, 1961 2011-12 TPL Plastech Ltd. (PAN AAACT 1968P) citing Ref:- ACIT-II(3)(I)/Notice u/s 148/2016-17." Filing objection after a span of almost one month from the date of receipt of notices u/s. 143(2) & 142(1) is not tenable. Hence, the objection was not disposed of."

2. "Whether in law and on the facts and in the circumstances of the case, the Ld. CIT(A) erred in appreciating the fact that the assessee used the assets previously used by its parent company, had not disclosed the same and was still claiming additional depreciation in violation of provisions of the Act."

3. "Whether in law and on the facts and in the circumstances of the case, the Ld. CIT(A) erred in appreciating the fact that the assessee had purchased new plant and machinery worth Rs.9,27,41,361/- from the manufacturing division of Time Technoplast Ltd. which was duly supported by the documentary evidence and claimed the additional depreciation as per the provisions of the Act."

4. "The appellant prays that the order of the CIT (A) on the above grounds be set aside and that of the A.O. be restored."

1.2 We have carefully heard the rival submissions, perused relevant material on record including documents placed in the paper book and deliberated on various judicial pronouncements as cited before us. Our adjudication to the appeal would be as given in the succeeding paragraphs.

2.1 Facts as emanating from case records are that the assessee being resident corporate assessee stated to be engaged in the business of manufacturing of polymer products was assessed for year under consideration u/s. 143(3) r.w.s. 147 on 28/12/2016 wherein the income of the assessee was determined at Rs.623.07 Lacs after sole addition on account of additional depreciation for Rs.338.34 Lacs as against returned income of Rs.284.66 Lacs e-filed by the assessee on 22/09/2011. The regular assessment was framed u/s. 143(3) of the Act on 27/02/2014 assessing the income at Rs.284.72 Lacs.

2.2 Subsequently, the case was reopened by issuance of notice u/s 148 on 30/03/2016 which was duly served upon assessee. In response, the assessee, vide letter dated 28/04/2016, offered original return of income and requested for reasons recorded to reopen the assessment. The reasons were furnished to the assessee on 01/08/2016 and thereafter, notices were issued u/s 143(2) & 142(1) on 04/10/2016 calling for requisite details and explanations.

2.3 The reason which triggered reassessment proceedings, was the fact that the assessee had claimed additional depreciation of Rs.338.34 Lacs on account of addition of plant and machinery, moulds etc. It was noted that during AYs 2010-11 and 2011-12, the assessee had purchased fixed assets of Rs.540.78 Lacs and Rs.988.10 Lacs respectively from its holding company i.e. M/s. Time Technoplast Ltd. Upon perusal of Schedule 'E' of annual accounts of holding company, it was noted that the said entity had alienated assets from its books of accounts for Rs.1179.02 Lacs and Rs.1884.05 Lacs during AYs 2010-11 and 2011-12 respectively. The said fact led Ld. AO to form a belief that the assets purchased by the assessee were previously used by its holding company and assessee was claiming additional depreciation on the previously used assets.

2.4 The assessee, vide submissions dated 02/11/2016, defended the same by submitting that the holding company had machine building division and the entire purchase of machinery was made during AYs 2010-11 and 2011-12. It was wrong presumption on the part of Ld. AO that used machinery was purchased by the assessee. In support, copies of purchase invoices were furnished and the attention was drawn to the

fact that excise duty was charged in the invoices itself because goods could not be removed out of the factory without charging excise duty as the excise duty was levied on manufacture. In case of old machinery, no excise duty would be charged.

2.5 However, the said submissions could not find favour with the Ld. AO, who concluded that the assessee could not furnish any irrefutable and clinching evidence to differentiate between the old and new machinery. The assessee failed to furnish one to one reconciliation and mapping of depreciation claimed with item-wise and block-wise plant and machinery. Accordingly, the additional depreciation of Rs.338.34 Lacs claimed by the assessee u/s 32(1)(iia) was disallowed and added to the income of the assessee.

3.1 Before first appellate authority, the assessee assailed the stand of learned AO on legal grounds as well as on merits by way of elaborate written submissions, which have already been extracted on page nos. 3 to 14 of the impugned order. The assessee in its ground of appeal, contested the validity of reassessment proceedings, *inter-alia,* on the ground that the objections raised by the assessee on 02/11/2016 against reopening were not disposed-off by way of speaking order which was in violation of the procedure laid down by Hon'ble Apex Court rendered in **GKN Driveshafts India Ltd. V/s DCIT (259 ITR 19)** and also the decision of Hon'ble Bombay High Court rendered in **Asian Paints Ltd. V/s DCIT (296 ITR 96), IOT Infrastructure & Engg. Services Ltd. V/s ACIT (329 ITR 547) & Allana Cold Storage V/s ITO (287 ITR 1).**

3.2 The assessee also pleaded that there was no tangible material before Ld. AO so as to form a belief that certain income escaped

assessment rather the belief was formed merely after going through the existing records and there was a bald assertion that there was failure on the part of the assessee to disclose fully and truly all material facts during assessment proceedings. The Ld. AO merely on surmises and conjectures, held that the alienated assets were transferred to assessee without bringing anything on record to prove the same. Therefore, the notice u/s 148 was nothing but notice to make roving enquiries and issued under vague suspicion. The claim of additional depreciation was allowed during original assessment proceedings and disallowing the same in reassessment proceedings would merely be a change of opinion based on existing material on record which was impermissible under law. Reliance was placed on various judicial pronouncements including the decision of Hon'ble Supreme Court rendered in **CIT V/s Kelvinator of India Ltd. (320 ITR 561)** as followed by Hon'ble Bombay High Court in the case of **Rallis India Ltd. V/s ACIT (323 ITR 54).**

3.3 On merits, the assessee submitted that the Machinery under consideration was acquired from 'Machinery Division' of its holding company situated at *Pantnagar and Daman* and it was entirely new plant and machinery which was eligible for claiming additional depreciation. It was wrong presumption in the mind of Ld. AO that machinery was used machinery merely because the same was purchased from a related party. There was nothing on record which would prove that the said machinery was used machinery and not eligible for claiming additional depreciation. It was quite evident from the fact that excise duty was charged in the purchase invoices which would only be in the case of manufacturing and not in case of old machinery. The attention was also

drawn to confirmatory letter of machinery supplier i.e. M/s Time Technoplast Ltd., verifying the same along with the statement showing bifurcation of old and new machinery as purchased by the assessee. It was submitted that Ld. AO failed to appreciate that the description of the assets was clearly mentioned in the invoices. However, no notice u/s 133(6) was ever issued to the holding company to verify the submitted details. The Ld. AO chose not to take any action against submissions made by assessee but chose to make additions for the simple reason that the assessee was not able to furnish the details of the books of account of another entity. Therefore, the approach adopted by Ld. AO was absurd and no addition could be sustained on that basis. In the above background, it was submitted that the assessee had provided all the evidences as asked for by Ld. AO in discharging the onus of proving the genuineness of said claim of additional depreciation. But Ld. AO did not make any inquiry in order to prove that the transaction was not genuine and merely rejected the evidences without commenting on the same.

3.4 The Ld. CIT (A), concurred with assessee's submission on legal grounds as well as on merits by observing as under: -

> **Decision**
> 2. I have considered the facts, oral contentions and written submissions of the appellant as against the observations/findings of the AO in assessment order. The submissions and contentions of the appellant are being discussed and decided as under:
> 3. The case of the appellant was reopened u/s 147 of the Act and the assessment u/s 143(3) r.w.s 147 was completed on 28.12.2016. The appellant contested that the action of reopening u/s 147 of the Act is bad in law and is not justified. It was contested that there was no fresh tangible material available with the assessing officer so as to form a belief that the income of the assessee has escaped assessment. The Learned Assessing Officer has reopened the case on the following reasons:

"Subsequently, it is notice noticed that as per section 32(1)(iia) of the Act, the additional depreciation of twenty percent is allowable on new machinery purchased by an assessee engaged in manufacture of an article or thing. In the instant case, the assessment was completed under section 143(3) of the Act determining total income at Rs.2,84,68,834/-. It was seen from the depreciation schedule of the assessee that it had claimed additional depreciation of Rs.3,38,34,570/- on addition of P&M and mould etc. However, the notes to account revealed that the assessee had purchased fixed assets of Rs.9,88,10,992 during the AY 2011-12 and Rs.5,40,78,376/-during AY 2010-11 from its Holding Company M/s Time Technoplast Ltd. The assessment of the Holding Company of the assessee was also in the same charge. The scrutiny file of Holding Company was perused and it was noticed that the Holding Company had alienated these assets from its books of account during AY 2011-12"

Thus, from the reasons recorded, I am of the view that it was only from the records that the Assessing Officer came to the conclusion that the additional depreciation are not allowable and there was escapement of income. The only information which the AO had was that the scrutiny file of Time Technoplast Ltd., the company from whom the asset was purchased, showed that certain assets were alienated during the year. However, there was no information which showed that these alienated assets were actually transferred to the assessee company. Thus, the same cannot be considered to be a **tangible** material in order to form a reasonable belief that income of the assessee had escaped assessment. Moreover, the availability of tangible material in the possession of AO at the time of recording is a sine qua none, before the AO can record reasons for reopening of the case. Thus, in view of these facts, I am satisfied that the reopening is bad in law and need to be quashed. The following cases are in support of the appellant:

a) In the case of Bombay Stock Exchange Ltd. (writ petition no.2468 dt. 12.06.2014) (89 CCH 118), ;

b) The Mumbai ITAT in the case of Motilal R.Todi (supra)

c) In the case of CIT vs. Shri Atul Kumar Swami in ITA No.112/2014 dated 18-03-2014 reported at 52 Taxmann.com 47;

d) General Machinery & Technical Services Ltd. Vs. ACIT (ITA No. 1176/Mum/2011)

4. Further, the only information which the AO had was that certain assets were alienated during the year by Time Technoplast Ltd. and no enquiry whatsoever was conducted by the AO in order to form a belief that these alienated assets were actually transferred to the appellant. Thus, the AO merely on surmises and conjecture held that these alienated assets were transferred to the assessee company without bringing on record anything to prove the same. Hence, it is quite clear that the notice u/s. 148 had been issued only with the intention of making roving enquiries which is not permissible as per law. The following decisions are in favor of the appellant:

a) High Court of Rajasthan- Mukesh Modi vs Deputy Commissioner of Income Tax. The Hon"ble HC of Rajasthan has held that "The reasons which were spelt out in the notice was nothing but an attempt to clear the suspicion of the AO by simply changing its opinion, which per-se cannot satisfy the test of expression "reason to believe". A rowing and fishing enquiry in the hands of AO on mere suspicion or

change of opinion cannot satisfy expression "reason to believe" exposing the assessee for reopening of assessment.

While examining the matter in its entirety and on the basis of findings and conclusions, notices issued to the assessees by the AO u/s 147/148 were not satisfying the pre-requisites for the same. There was no whisper in the notice, or iota of proof that while issuing the same the AO had reason to believe that any income chargeable to tax has escaped assessment for the assessment year".

b) ACIT vs Shri O.P. Chawla (Delhi ITAT): "2.1 Keeping in view the above mentioned observations I have no hesitation in holding that while the AO might have had a faint "reason to suspect" that income has escaped assessment, it cannot be said that he had "reason to believe" that the income has escaped assessment. I cannot over emphasise that the requirements of law, specially when it comes to taking action Under Section 147/148, have to be met within letter and spirit. The AO would do well to bear this in mind in future. In this case, there is no doubt that the AO has acted illegally and in an unwarranted manner in issuing notice Under Section 148 when he had no reason to believe that income has escaped assessment. Notice Under Section 148 cannot be issued for making roving enquiries on the basis of vague suspicions. Accordingly, in view of the above the assessment order dated 30-3-2000 is annulled as the same is bad in law and is ab initio null and void. These grounds are decided in favour of the appellant."

5. Further, the appellant on receipt of the copy reasons recorded has filed an objection against the same before the AO on 02/11/2016. Copy of the same was provided during the course of appellate proceedings. However, no speaking order was passed by the AO in order to dispose-off the objections so raised and proceeded to pass the reassessment order u/s 147. Further, no reference of the same was made by the AO in his assessment order. Thus in view of the these facts, I am of the opinion that the AO has grossly erred in law as any objection filed against the reasons for reopening need to be disposed-off by the AO before proceeding to complete the reassessment proceedings. The following cases are in support of the appellant:

a) The Apex Court in the case of **GKN Driveshafts (India) Ltd.** v/s **D.C.I.T. (2003) 259 ITR 19 (SC)** has laid down the procedure to challenge the reassessment proceedings and held as follows: "We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee 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. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

b) In the case **of Asian Paint Ltd. vs. Dy. CIT (2008) 296 ITR 96 (Bom),** the Hon'ble Bombay HC held that Assessing officer should dispose off the assessee objection and serve the order on assessee.

c) Hon'ble Bombay High Court in the case of IOT Infrastructure and Eng. Services Ltd. vs. ACIT (2010) 329 ITR 547 (Bom) held that the reassessment framed by the assessing officer without disposing of the primary objection raised by

the assessee to the issue of reassessment notice issued by him was liable to be quashed.

d) Hon'ble Bombay HC in the case of Allana cold storage vs. ITO (2006) 287 ITR 1 (Bom.) (Asst Yr 2001-2002) following the order passed by Supreme Court in the case of GKN Driveshaft held that reasons for notice must be given and objections of assessee must be considered.

6. Further, ongoing through the records it was seen that the said claim of additional depreciation was allowed to the assessee during the course original assessment proceedings completed u/s 143(3) of the Act. However, the same has now been disallowed by the AO without bringing on record any tangible material. Thus, in my opinion disallowing the claim of depreciation now is only a mere change of opinion of the Assessing Officer based on the materials already available on record which it is not permissible under law. Following cases are in support of the appellant:

a) Hon'ble Supreme Court in the case of CIT vs. Kelvinator India Ltd. 320 ITR 561 (SC):

b) Hon'ble Bombay High Court in the case of Rallis India Ltd.

c) CIT vs Amitabh Bachchan (ITA No. 4646 of 2010 Bom HC)

d) M.J. Pharmaceutical Ltd. vs. CIT (2008) 297 ITR 119 (Bom)

e) D. T. & T. D. C. Ltd. vs. CIT (2010) 324 ITR 234 (Del.).

f) Godrej Agrovat Ltd. Vs DCIT 323 ITR 97 (Bombay HC)

7. In a nutshell, the reopening of the assessment in the case of appellant was bad in law on the following grounds:

a) Absence of fresh tangible material in order to form a reasonable belief that income of the appellant had escaped assessment;

b) The notice u/s. 148 was issued only with the intention of making roving enquiries which is not permissible as per law;

c) The AO didn't dispose-off the objection filed against the reasons for reopening;

d) The claim of additional depreciation was allowed to the appellant during the course of original assessment proceedings and disallowing the same now in the absence of fresh tangible material is merely change of opinion which is not permissible as per law.

Decision

Ground No. 1 & 2.

Thus, initiation of reassessment proceedings by the Assessing Officer itself was bad in law and the reassessment completed in pursuance thereof is liable to be quashed being invalid. Accordingly, the Ground No. 1 & 2 of the said appeal is allowed.

Ground No. 3 & 4.

As a result of the decision rendered above on the preliminary issue quashing/cancelling the assessment made by the Assessing Officer u/s. 143(3) read with section 147, the Ground No.3 & 4 raised in the appeal in respect of addition made in the assessment have become infructuous and not necessary or expedient to decide the same the appeal of the assessee is allowed.

Aggrieved by aforesaid adjudication, the revenue is under further appeal before us.

4.1 We have applied our mind to the adjudication of learned fist appellate authority in the impugned order. It is quite evident that Ld. CIT(A), upon due consideration of factual matrix, came to a conclusion that there was no fresh tangible material on record which would suggest escapement of income in the hands of the assessee. The reopening was resorted to with a view to make roving enquiries. The reassessment proceedings also suffered from legal infirmities since the objections raised by the assessee against reopening were not disposed-off by way of speaking order which was contrary to settled legal position that the objections raised by the assessee must be disposed-off before proceeding to reassess assessee's income. Further, the said claim of additional depreciation was already allowed to the assessee during the course of original assessment proceedings and in the absence of any fresh tangible material on record, disallowing the same in reassessment proceedings would be mere change of opinion which is impermissible under law.

4.2 We find that learned first appellate authority has clinched the issue in correct perspective. As rightly noted by Ld. CIT(A), the assessee's objection to the reassessment proceedings were not disposed-off by Ld.AO with due application of mind which was in violation of the procedure laid down by Hon'ble Apex Court rendered in **GKN Driveshafts India Ltd. V/s DCIT (259 ITR 19).** We also find that the stated factual matrix was squarely covered by the recent decision of Hon'ble High Court of Bombay at Goa in the case of **Fomento Resorts & Hotels Private Ltd. V/s ACIT (ITA No. 63 of 2007 dated 30/08/2019)**

wherein the reassessment proceedings were set aside by Hon'ble Court for want of jurisdictional requirements by observing as under:-

> 5. Mr. Dada, the learned Senior Advocate for the Appellants submits that the decision of the Supreme Court in GKN Driveshafts (India) Ltd . (supra) is quite clear, inasmuch as it provides that the Assessing Officer is bound to furnish the Assessee, reasons for reopening of the assessment, on demand. Further, the Assessee is entitled to raise objections and the Assessing Officer is bound to dispose of such objections by passing a speaking order, before he proceed with reopening of the assessment. Mr. Dada submits that this decision was applied by the Respondent to the case of this very Appellants for the Assessment Year 1995-96. Such application was expressly upheld by this Court, as well as by the Hon'ble Apex Court in the case of this very Appellant. Mr. Dada submits that the Assessing Officer, without disposing of the objections raised by the Appellants, could not have proceeded to make the assessment, which has been done in the present case. He submits that such a course of action has been expressly held as impermissible by this Court in the cases of Bayer Material Science (P) Ltd. vs. Deputy Commissioner of Income-tax-10(3), and KSS Petron Private Ltd. vs. The Assistant Commissioner of Income Tax Circle 10(2). For all these reasons, Mr. Dada submits that the first substantial question of law is required to be answered in favour of the Appellant-Assessee and against the Respondent Revenue.
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> 6. Mr. Dada adopted the submissions made by him in Tax Appeal No.32/2006 and other connected Appeals, in so far as the second substantial question of law is concerned. However, he submits that should the first substantial question of law be answered in favour of the Appellant, then, at least. in this appeal, there is no necessity of adverting to the second substantial question of law.
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> 7. Ms. Linhares, learned Standing Counsel for the Respondent submitted that the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra), as well as the said two decisions relied upon by Mr. Dada relate to the provisions of the Income Tax Act. She submits that in the present case, we are concerned with the provisions of the Expenditure Act. She submits that the rulings cited, therefore, are not applicable or, in any case, are inapplicable with all their vigour. She submits that along with the notice dated 13th March, 2003, the Assessing Officer had furnished reasons to the Assessee and, therefore, there was no question of furnishing any further reasons to the Assessee. She submits that in the assessment order dated 26th March, 2004, the Assessing Officer has dealt with and disposed of the objections raised by the Appellant to the reopening of the assessment. She, therefore, submits that without prejudice to the applicability of the decisions cited by Mr. Dada, there is substantial compliance.
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> 8. Ms. Linhares also adopts the submissions made by her in Tax Appeal No.32/2006 and other connected Appeals, in so far as the second substantial question of law in this Appeal, is concerned. For these reasons, Ms. Linhares submits that this Appeal is liable to be dismissed.
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> 9. Rival contentions now fall for determination.

10. As noted by us above, should the first substantial question of law be answered in favour of the Appellant-Assessee, and against the Respondent-Revenue, then, there will be no necessity to advert to the second substantial question of law framed by us in our order dated 20th November, 2007.

11. In this case, the Assessing Officer, vide notice dated 13th March, 2003, sought to reopen the assessment by invoking the provisions of Section 11 of the said Act. At the reverse of this notice, the Assessing Office, had stated the reason for reopening. Accordingly, it cannot be said that no reasons were furnished to the Appellant for reopening of the assessment or that there is breach of the law laid down by the Hon'ble Apex Court in GKN Driveshafts (India) Ltd. (supra), at least, in so far as requirement of furnishing of the reasons for reopening of the assessment is concerned. To that extent, therefore, we are unable to agree with the contention of Mr. Dada that this is a matter where the Assessing Officer failed to furnish the reasons for reopening of assessment whilst invoking the provisions of Section 11 of the said Act.

12. Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. (supra) has, however, further held that once reasons are furnished, the Assessee is entitled to lodge his objections and the Assessing Officer is duty bound to dispose of such objections, by passing a speaking order.

13. In the present case, the Appellants did lodge their objections vide letter dated 14th April, 2003. By a further letter dated 25th March, 2004, the Appellants requested the Assessing Officer to dispose of such objections by passing a speaking order before proceeding with the reassessment in respect of the Assessment Year 1997-98. However, the Assessing Officer, without proceeding to dispose of the objections raised by the Appellants by passing a speaking order, straight away proceeded to make the assessment order dated 26th March, 2004, bringing to charge taxable expenditure on ₹10,22,73,987/-. The assessment order dated 26th March, 2004, no doubt, deals with the objections raised by the Appellant and purports to dispose of the same. Ms. Linhares contends that this is a sufficient compliance with the procedure set out in GKN Driveshafts (India) Ltd. (supra), assuming that the same is at all applicable to the proceedings under the said Act. Mr. Dada, however, submits that such disposal in the assessment order itself does not constitute the compliance with the mandatory conditions prescribed by the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. (supra). In support, as noted earlier, Mr. Dada relies upon Bayer Material Science (P) Ltd. (supra) and KSS Petron Private Ltd. (supra).

14. The contention of Ms. Linhares that the decisions relied upon by Mr. Dada relate to the provisions of the Income Tax Act and, therefore, are not applicable to the proceedings under the Expenditure Tax Act, cannot be accepted. In the first place, the provisions relating to reopening of assessment are almost pari materia. Secondly, in so far as Assessment Year 1995-96 is concerned, the Respondent applied the very same ruling in GKN Driveshafts (India) Ltd. (supra) to hold that the notice of reopening of assessment was ultra vires Section 11 of the said Act. This view, in the specific context of the said Act and incidentally in the specific context of this very Appellant, was upheld not only by this Court, but also by the Hon'ble Supreme Court. This was in ETA No.1 and 5/PANJ/01 decided by the Tribunal on 4.4.2006.

15. The aforesaid decision of the ITAT was appealed by the Respondent vide Tax Appeal No.71/2006. This appeal was dismissed by this Court vide order dated 27th November, 2006, which reads thus :

> " Heard the learned counsel on behalf of the parties. This appeal is filed against the Order dated 4-4-2006 of the ITAT wherein in para 7 the learned ITAT has come to the conclusion that the Assessing Officer is required to give reasons, when asked for by the Assessee. Giving of reasons has got to be considered as implicit in Section 11 of the Expenditure Tax Act, 1987. It is now well settled that giving reasons in support of an order is part of complying with the principles of natural justice. In the light of that no fault could be found with the order of the learned ITAT and as such no substantial question of law arises as well.
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> Appeal dismissed."

16. The Respondent, instituted a Special Leave to Appeal (Civil) No.5711/2007 which was, however, dismissed by the Hon'ble Apex Court vide order dated 16/7/2007, by observing that there were no merits.

17. Accordingly, for the aforesaid reasons, we are unable to accept Ms. Linhares's contention based upon the any alleged variance between the provisions of the said Act and the provisions of the Income Tax Act, in so far as applicability of the principles in GKN Driveshafts (India) Ltd. (supra) is concerned.

18. The moot question is, therefore, the disposal of the objections by the Assessing Officer in his assessment order dated 26th March, 2004 constitutes sufficient compliance with the procedure prescribed by the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) or, whether it was necessary for the Assessing Officer to have first disposed of the Appellant's objections by passing a speaking order and only upon communication of the same to the Appellants, proceeded to reopen the assessment for the Assessment Year 1997-98.

19. Virtually, an identical issue arose in the cases of Bayer Material Science (P) Ltd. (supra) and KSS Petron Private Ltd. (supra) before the Division Benches of our High Court at Bombay.

20. In Bayer Material Science (P) Ltd. (supra), by a notice dated 6/2/2013, the Revenue sought to reopen the assessment in the year 2007-08. The Assessee filed a revised return of income and sought for reasons recorded in support of the notice dated 6.2.2013. The reasons were furnished only on 19.3.2015. The Assessee lodged objections to the reasons on 25th March, 2015. The Assessing Officer, without disposing of the Petitioner's objections, made a draft assessment order dated 30th March, 2015, since this was a matter involving transfer pricing. In such circumstances, the Division Bench of this Court, set aside the assessment order by observing that the Court was unable to understand how the Assessing Officer could, at all, exercise the jurisdiction and enter upon an inquiry on the reopening notice before disposing of the objections on the reasons furnished to the Assessee. This Court held that the proceedings initiated by the Transfer Pricing Officer (TPO), on the basis of such a draft assessment order, were without jurisdiction and quashed the same.

21. Similarly, in the case of KSS Petron Private Ltd. (supra), this Court was concerned with the following substantial question of law :

" Whether on the facts and circumstances of the case and in law, the Tribunal was justified in restoring the issue to the Assessing Officer after having quashed/set aside the order dated 14 th December, 2009 passed by the Assessing Officer without having disposed of the objections filed by the appellant to the reasons recorded in support of the reopening Notice dated 28 th March, 2008 ?"

22. In the aforesaid case, the Assessing Officer had purported to dispose of the objections to the reasons in the assessment order, consequent upon reopening of the assessment. This Court, however, held that the proceedings for reopening of assessment prior to disposing of the Asessee's objections by passing a speaking order, was an exercise in excess of jurisdiction.

23. KSS Petron Private Ltd. (supra), this is what the Division Bench has observed at paragraphs 7 and 8 of the Judgment:

" 7. On further appeal, the Tribunal passed the impugned order. By the impugned order it held that the Assessing Officer was not justified in finalizing the assessment, without having first disposed of the objections of the appellant. This impugned order holds the Assessing Officer is obliged to do in terms of the Apex Court's decision in GKN Driveshafts (India) Ltd., v/s. ITO 259 ITR 19. In the aforesaid circumstances, the order of the CIT(A) and the Assessing Officer were quashed and set aside. However, after having set aside the orders, it restored the Assessment to the Assessing Officer to pass fresh order after disposing of the objections to reopening notice dated 28th March, 2008, in accordance with law.

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 Officer to pass a further/fresh order. If this is permitted, it would give a licence to the Assessing Officer to pass orders on reopening 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.

24. According to us, the rulings in Bayer Material Science (P) Ltd. (supra) and KSS Petron Private Ltd. (supra) afford a complete answer to the contentions raised by Ms. Linhares in defence of the impugned order.

25. Since, in the present case, the Assessing Officer has purported to assume the jurisdiction for reopening of the assessment, without having first disposed of the Assessee's objections to the reasons by passing a speaking order, following the law laid down in GKN Driveshafts (India) Ltd. (supra), Bayer Material Science (P) Ltd. (supra) and KSS Petron Private Ltd. (supra), we are constrained to hold that such assumption of jurisdiction by the Assessing Officer was ultra vires Section 11 of the said Act. The first substantial question of law will, accordingly, have to be answered in favour of the Appellant and against the Respondent-Revenue.

26. As noted earlier, in view of the aforesaid, there is no necessity to advert to the second substantial question of law, at least, in so far as this Appeal is concerned. The Appeal is, therefore, allowed and the impugned orders dated 26th March, 2004 made by the Assessing Officer, 30th November, 2004 made by the

Commissioner (Appeals) and 12th January, 2007 made by the ITAT are set aside on the ground of want of compliance with jurisdictional parameters by the Assessing Officer, and without going into the second substantial question of law framed in this Appeal. Accordingly, we clarify that the second substantial question of law, raised in this Appeal, is not to be treated as decided in this Appeal, one way or the other.

Finding the facts in the present case to be pari-materia to be the same, we find no infirmity in the order of Ld. CIT(A) in setting aside the reassessment order passed by Ld. AO since the objections raised by the assessee were not disposed-off by Ld. AO either in assessment order or by way of separate speaking order.

4.3 Proceeding further, it is also quite evident that there was no fresh tangible material in the possession of Ld.AO to trigger reassessment proceedings against the assessee. In fact, the reassessment proceedings were triggered merely by making certain observations during the course of assessment proceedings of the parent entity without establishing that certain income escaped in the hands of the assessee. It is also to be borne in mind that the original assessment was framed u/s 143(3) on 26/02/2014 and there was complete disclosure of claim of additional depreciation in the financial statements. The perusal of assessee's financial statements, as place on record, would establish that there was clear disclosure of addition in Plant & Machinery and the claim of additional depreciation was separately shown in the depreciation schedule. After considering the same, Ld. AO chose not to make any additions in this respect. Therefore, revisiting the same issue in reassessment proceedings would tantamount to review of the order, which is impermissible under law.

4.4 It is also evident that as per assessee's submissions, it acquired new plant & machinery from the parent entity and in support of the same, it filed copies of invoices clearly mentioning the description of machinery bought by the assessee. The excise duty was charged in the invoices which would make it a case of manufacturing since no excise duty would be applicable in case of old machinery. However, no investigation, whatsoever, was done by Ld. AO during reassessment proceedings, to rebut the assessee's claim and no further verification was done. No contrary material was brought on record to fortify the stated additions except making an allegation that the assessee claimed additional depreciation on old machinery.

4.5 Keeping in view the entirety of facts and circumstances, we find that no fault could be found in the impugned order.

5. Resultantly, the appeal stands dismissed.

Order pronounced in the open court on 07th January, 2020.

Sd/-	**Sd/-**
(C.N. Prasad)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 07/01/2020
Sr.PS, Jaisy Varghese

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent

3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai.**