

THE INCOME TAX APPELLATE TRIBUNAL
"I" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 4528/Mum/2008 (Assessment Year 2002-03)

Tata Consultancy Services Ltd. (upon merger of CMC ltd. with Tata Consultancy Services Ltd.) 9 th Floor, Nirmal Building Nariman Point Mumbai-400 021. PAN : AAACC2030K (Appellant)	Vs.	ACIT Range-10(1) Mumbai. (Respondent)
---	-----	---

Assessee by	None Nitesh Joshi
Department by	Shri V. Sreekar
Date of Hearing	05.12.2019
Date of Pronouncement	06.02.2020

ORDER

Per Shamim Yahya (AM) :-

This appeal by the assessee is directed against the order of learned CIT(A) dated 15.4.2008 pertains to A.Y. 2002-03.

2. The grounds of appeal read as under :-

The appellant objects to the order dated 15 April 2008 passed by the Commissioner of Income Tax (Appeals)-X, Mumbai ["CIT(A)"] for the aforesaid assessment year on the following among other grounds:

1(a) The learned CIT(A) erred in confirming the reopening of the assessment under section 147 of the ITA.

(b) The learned CIT(A) erred in observing that the grievance of the appellant that its objections raised during the course of assessment proceedings to the reopening of the case under section 147 were not dealt with by the assessing officer by a speaking order now stands remedied.

2. The learned CIT(A) erred in confirming the action of the assessing officer in restricting the deduction under section 35(l)(iv) of the Income-tax Act ("ITA") to Rs. 1,02,86,739 i.e. after excluding government grant of Rs. 61,13,697 received by the appellant as against Rs. 1,64,00,436 claimed by the appellant.

3(a) The learned CIT(A) erred in confirming the action of the assessing officer in reducing certain expenses from the STP profits while computing deduction under section 10A of the ITA.

(b) The learned CIT(A) erred in directing the assessing officer to follow the ratio of the decision taken in the appellant's own case for assessment year 2004-05 wherein the learned CIT(A) had upheld the reduction of unallocable expenses on proportionate basis from the STP profits while computing deduction under section 10A of the ITA.

(c) The learned CIT(A) further erred in directing the assessing officer to reduce a percentage of depreciation on the building in which the STP is located on the ratio of FSI occupied by the STP from the STP profits while computing deduction under section 10A of the ITA.

4. The learned CIT(A) erred in confirming the reduction of double taxation relief claim by Rs. 8,32,990.

5(a) The learned CIT(A) erred in confirming the action of the assessing officer in excluding income from lease rentals of Rs. 1,20,19,000 from the profits of the business for the purpose of computing deduction under section 80HHE of the ITA.

(b) Learned CIT(A) erred in observing that the assessing officer is entitled to go into fresh grounds once an assessment has been reopened.

(c) The learned CIT(A) further erred in holding that the lease rentals cannot be said to be derived from the business of computer software and that lease of computers is not covered by the definition of computer software as provided in explanation (b) to section 80HHE of the ITA and hence on both these counts, lease rent cannot be included in profits of business while computing deduction under section 80HHE of the ITA.

6. The learned CIT(A) erred in not deciding ground no. 8(c) raised before him, which reads as under:

“(c) Similarly, the learned ACIT erred in considering the total turnover of the business at Rs. 6,30,45,49,000 as against Rs. 4,99,63,43,712 as per the Audit Report.”

7. The learned CIT(A) erred in confirming the levy of interest under section 234D of the ITA by holding that it is consequential in nature.

3. This appeal was disposed of by this Tribunal by an ex-parte order dated 4.1.2018. Subsequently, pursuant to Miscellaneous Application by the assessee the same was recalled vide order dated 11.7.2019 in M.A. No.

333/Mum2018. Pursuant to the above said recall, this appeal has been heard by us.

4. First issue raised in this appeal is that reassessment is bad in law in as much as assessee's objection to the reopening is not being disposed of by the Assessing Officer by a speaking order. In this connection learned Counsel of the assessee has placed reliance upon following case laws :-

- Fomentro Resorts & Hotels Ltd. Vs. ACIT (ITA No. 63 of 2007)
- DCIT Vs. M/s. Firstsource Solutions Ltd. (ITA No. 3985/Mum/2016 and others dated 22.5.2019)
- Asian Paints Ltd. Vs. DCIT (296 ITR 90)
- Bayer Material Science (P) Ltd. Vs. DCIT (66 Taxmann.com 335)
- KSS Petron Private Ltd. Vs. ACIT (ITA No. 224 of 2014)

5. Brief facts of the case on the assessee's challenge to the reopening is that the challenge was noted by learned CIT(A). He agreed with the assessee that the Assessing Officer has failed to pass a speaking order on objection raised by the assessee to the reopening. However, learned CIT(A) was of the opinion that the same is a curable defect, hence, he noted in the course of appellate proceedings the Assessing Officer was given a opportunity to reply to the objections raised by the assessee vide his order dated 11.12.2007. Learned CIT(A) noted the following response by the Assessing Officer :-

"In this case assessee has objected to the reopening of assessment u/s. 147 on the ground that this is a change of opinion by the assessing officer had the same is not permitted u/s. 147 of the Act. Contention made by the assessee is not acceptable. In the case of Indo Aden Salt Manufacturing & Trading Co. P. Ltd. (159 ITR 624) it has been held that mere production of evidence before the assessing officer is not enough. There may be omission or failure to make a true and full disclosure, if some material for the assessment lay embedded in the evidence which the assessee could have uncovered but did not, and then it is the duty of the assessee to bring it to the notice of the assessing authority. The assessee knows all the material and relevant facts of the case but the assessing officer may not. In respect of the failure to disclose the omission to disclose may be deliberate or inadvertent. That is immaterial. But if there is omission to disclose the material facts then subject to the other conditions jurisdiction to reopen is attracted. "

6. Considering the above learned CIT(A) was of the opinion that the assessee's objection raised during the course of assessment proceedings the same were not dealt with by the Assessing Officer by a speaking order now stands removed. Hence, he held the objection to this extent no longer stands.

7. Now against the above order learned Counsel of the assessee that non disposal of the objection against reopening by the Assessing Officer is fatal to the assessee as held by Hon'ble Jurisdictional High Court in number of cases as referred above.

8. Per contra, learned Departmental Representative referred to the decision of Hon'ble Supreme Court in the case of Home Finders Housing Ltd. Vs. ITO (94 taxmann.com 84). In this case Hon'ble Apex court has dismissed the Special Leave Petition against the judgement of Hon'ble Madras High Court, wherein it was held that non-compliance of procedure indicated by Supreme Court in GKN Driveshafts (India) Ltd. Vs. ITO(125 Taxman 963) would not make order void or non-est and such a violation was a procedural irregularity which could be cured by remitting matter to the authority.

9. In rejoinder to this, learned Counsel of the assessee submitted that this is a dismissal of Special Leave Petition simplicitor by the Hon'ble Supreme Court. Hence, he submitted that the same cannot be considered to be the order of Supreme Court which is binding on the authorities below. He submitted that dismissal of the SLP simplicitor cannot be equated to laying down the law by the Supreme Court. He submitted that the decision of Hon'ble Bombay High Court in favour of the assessee is correctly applicable. He submitted that this view has also been accepted by this Tribunal in the case of DCIT Vs. M/s. Firstsource Solutions Ltd. (ITA no. 3985/Mum/2016 others vide order dated 22.5.2019).

10. Upon careful consideration, we find that the Coordinate Bench of this Tribunal in the case of M/s. Firstsource Solutions Ltd. (supra) has considered similar issue. By elaborate order the Tribunal came to the conclusion that in view of the Hon'ble Jurisdictional High Court decision, non-disposal of the objection by the Assessing Officer by speaking order is fatal to the assessment and matter cannot be restored back to the Assessing Officer. The Tribunal also accepted that Hon'ble Madras High Court decision is contrary to the view expressed by Hon'ble Jurisdictional High Court.

11. We may gainfully referred to the adjudication by the Tribunal in the above case as under :-

“6. Shri Farookh Irani, learned Sr. Counsel for the assessee strongly supporting the decision of learned Commissioner (Appeals) submitted, non-disposal of the objections raised by the assessee by the Assessing Officer before completion of the assessment is not a mere procedural irregularity but affects the jurisdiction of the Assessing Officer to pass the assessment orders. Therefore, he submitted, such defect in the assessment orders is not a curable one which can be rectified by restoring it again to the Assessing Officer. In support of such contention, learned Sr. Counsel for the assessee relied upon the following decisions:-

- i) GKN Driveshafts India Ltd. v/s ITO & Ors., [2003] 259 ITR 019 (SC);
- ii) KSS Petron Pvt. Ltd. v/s ACIT, ITA no.224/2014, dated 03.10.3026;
- iii) TML Drive Lines Ltd. v/s DCIT, ITA no.5256/Mum./2015, dated 31.01.2018; and
- iv) DCIT v/s National Bank for Agricultural and Research Development, ITA no.4964/Mum./2014, dated 28.10.2016

7. We have considered rival submissions and perused the material on record. Undisputed factual position, as culled out from the material on record, clearly reveals that in the course of re-assessment proceedings, though, the assessee had raised objections challenging the validity of re-opening of assessments under section 147 of the Act, however, the Assessing Officer has not disposed of the objections independently by way of separate orders before completion of assessment proceedings under section 143(3) r/w 147 of the Act. The Hon'ble Supreme Court in GKN Driveshafts India Ltd. (supra) has held that before completion of the assessment, the Assessing Officer is duty bound to dispose of the objections of the assessee separately. Therefore, the Assessing Officer in the instant appeal has not followed the due judicial process while dealing with the objections of the assessee. For that reason, the impugned assessment orders are legally unsustainable. Now the issue which arises is, whether in such circumstances, the re-assessment orders passed have to be quashed as void ab initio or they are to be restored back to

the Assessing Officer for enabling him to dispose of the objections of the assessee and pass fresh assessment orders. In our view, the issue is no more res integra in view of the decision of the Hon'ble Jurisdictional High Court in KSS Petron Pvt. Ltd. (supra), wherein, the Hon'ble Jurisdictional High Court has held that if the re-assessment order is passed without disposing of the objections raised by the assessee, they have to be quashed and no second opportunity can be given to the Assessing Officer to pass fresh assessment orders after disposing of the objections of the assessee. The same view has been expressed by the Co-ordinate Bench in the decisions cited by the learned Sr. Counsel for the assessee. Upon careful reading of the decision of the Hon'ble Supreme Court in Larsen Toubro Ltd. v/s State of Jharkhand & Ors., in Civil Appeal no.5390/2007, cited by learned Departmental Representative, we find it to be not applicable to the facts of the present case, as the said decision is not on the issue of validity of re- assessment order on account of non-disposal of objection raised by the assessee. It is relevant to observe, post conclusion of hearing of the appeal, the learned Departmental Representative has submitted a note citing certain decisions in support of the proposition that non- disposal of objection is a procedural irregularity, hence, the assessment order should be set aside for enabling the Assessing Officer to dispose of the objections and pass a fresh assessment order. The first decision relied upon by the learned Departmental Representative is, Home Finders Housing Ltd. v/s ITO, [2018] 94 taxmann.com 84 (SC). This is a matter arising out of a judgment delivered by the Hon'ble Madras High Court holding that non-disposal of objection before completion of assessment is a procedural irregularity which can be cured by setting aside the assessment order to the Assessing Officer for disposing of assessee's objection and thereafter completing the assessment. Against the aforesaid decision of the Hon'ble Madras High Court, the assessee filed a Special Leave Petition (SLP) before the Hon'ble Supreme Court. The Hon'ble Supreme Court in the decision cited supra, dismissed the SLP in limine without laying down any ratio. The order passed by the Hon'ble Supreme Court is as under:-

“The Special Leave Petition is dismissed. Pending application stands disposed of.”

8. It is a fairly well settled legal position that dismissal of SLP in limine at the stage of admission without a speaking or reasoned order does not constitute a binding precedent under Article-141 of the Constitution of India. This principle has been well propounded in case of Kunhayammed Vs. State of Kerala 2001(129) ELT 11 (S.C.). Aforesaid view was again affirmed by the hon'ble Supreme Court in case of Khoday Distilleries Ltd. Vs. Shree Mahadeshwara Sahakara Sakkare Karkhane Ltd. while disposing of Civil Appeal no.2432 of 2019 in judgment dated. 01.03.2019. Therefore, it cannot be said that in the aforesaid decision, the Hon'ble Supreme Court has laid down the proposition that non-disposal of objections against the validity of proceedings initiated under section 147 of the Act is a procedural irregularity which can be cured if the Assessing Officer is given an opportunity to dispose of the objections of the assessee and thereafter complete the assessment. Moreover, the decision of the Hon'ble Supreme Court in GKN Driveshafts

India Ltd. (supra) has not been overruled and still holds the field. The next decision cited by the learned Departmental Representative is of the Hon'ble Jurisdictional High Court in NTUC Income Insurance Co-operative Ltd. v/s DDIT, [2013] 33 taxmann.com 255 (Bom.). On a careful reading of the aforesaid decision, it is evident that the facts on the basis of which the Hon'ble Jurisdictional High Court restored back the issue to the Assessing Officer to re-frame assessment de novo is completely different from the present appeal. In the case before the Hon'ble Jurisdictional High Court, the Assessing Officer had not only communicated the reasons for reopening, but, by a separate communication had intimated the assessee that all conditions laid down in GKN Driveshafts India Ltd. has been met. Admittedly, the assessee did not challenge the aforesaid decision of Assessing Officer. Subsequently, the reassessment order was subjected to the proceedings under section 263 of the Act. In of revision proceeding the assessee contended that due to lack of opportunity various documents/evidences could not be produced before the Assessing Officer. Considering the aforesaid submission of the assessee, the Commissioner set aside the assessment order with a direction to frame de novo assessment. During the fresh assessment proceeding assessee pleaded that the objection against reopening of assessment should be disposed of first. In the aforesaid factual context, the Hon'ble Jurisdictional High Court did not entertain assessee's plea. However, the Hon'ble Jurisdictional High Court in KSS Petron Pvt. Ltd. (supra), in no uncertain terms, has held that if the Assessing Officer before completion of assessment has not disposed of the objection, the assessment order cannot be restored back to the Assessing Officer for framing assessment de novo after disposal of the objections of the assessee. Though, the Hon'ble Madras High Court in case of Home Finders Housing Ltd. referred to earlier as well as the Hon'ble Gujarat High Court in MGM Exports v/s DCIT, [2010] 323 ITR 33 (Guj.) and PCIT v/s Sagar Developers, [2016] 72 taxmann.com 321 (Guj.) have held contrary view, however, we are bound by the decision of the Hon'ble Jurisdictional High Court in KSS Petron Pvt. Ltd. (supra)."

12. Reading of the above makes it abundantly clear that when objections to the reopening are not disposed of by the Assessing Officer by a speaking order the same is fatal to the reassessment and it cannot be treated as procedural mistake which can be cured by remitting the matter to the Assessing Officer to dispose of the objections. In the present case learned CIT(A) erred in asking the Assessing Officer in remand to dispose of the objection and accordingly has treated the same to be sufficient compliance of Hon'ble Apex Court decision GKN Driveshafts India Ltd. (supra). As abundantly clear from the case laws referred above, this view is not sustainable. Hence, in as much as it is undisputed that the Assessing Officer has passed assessment order without

disposing of the objection of the assessee to reopening by a speaking order, the reassessment is bad in law. Hence, respectfully following the precedent, we hold that the assessment order passed is not legally sustainable. Accordingly, this issue is decided in favour of the assessee.

13. Since we have already quashed the reassessment on jurisdiction itself issues raised by the assessee on merit are now of only academic interest. Hence, we are not engaging into the same.

14. In the result, this appeal filed by the assessee stands partly allowed.

Order has been pronounced in the Court on 6.2.2020.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 6/02/2020

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

PS

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai