THE INCOME TAX APPELLATE TRIBUNAL
"SMC" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 7369/Mum/2019 (Assessment Year 2012-13)

Manish K. Ajmera (HUF) 4th Floor, Ajmera House Pathakwadi, L.T. Marg Mumbai-400 002. PAN : AADHM4708A	Vs.	DCIT, Circle-2(2) Room No. 806 8th Floor Old CGO Building M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

I.T.A. No. 7396/Mum/2019 (Assessment Year 2011-12)
I.T.A. No. 7397/Mum/2019 (Assessment Year 2012-13)

Ashish K. Ajmera (HUF) 4th Floor, Ajmera House Pathakwadi, L.T. Marg Mumbai-400 002. PAN : AAEHA0500K	Vs.	DCIT, Circle-2(2) Room No. 806 8th Floor Old CGO Building M.K. Road Mumbai-400 020.
(Appellant)		(Respondent)

Assessee by	Shri Dinkle Hariya
Department by	Shri Anoop
Date of Hearing	18.05.2021
Date of Pronouncement	09.06.2021

O R D E R

Per Shamim Yahya (AM) :-

These are appeals by two assessees belonging to the same group against respective orders of learned CIT appeals. Since the issues are common and connected and the appeals were heard together these are being consolidated and disposed off together for the sake of convenience.

2. Since common grounds have been raised we are referring to grounds of appeal in ITA No. 7369/Mum/2019

1. NATURAL JUSTICE

1.1 The Learned Commissioner of Income-tax (Appeals)-48, Mumbai ["Ld. CIT (A)"] erred in not granting proper, sufficient and adequate opportunity of being heard to the Appellant while framing the appellate order.

1.2 It is submitted that, in the facts and the circumstances of the case, and in law, the appellate order so framed be held as bad and illegal, as: (i) The same is framed in breach of the principles of natural justice; and (ii) The same is passed without application of mind to the facts and the submissions brought on record by the Appellant.

WITHOUT PREJUDICE TO THE ABOVE

2. REASSESSMENT

2.1 The Ld. CIT (A) erred in confirming the action of the A.O. in initiating reassessment proceedings and framing the assessment of the Appellant by invoking the provisions of section 147 r.w.s. 148 of the Income tax Act, 1961 ["the Act"].

2.2 While doing so, the Ld. CIT (A) failed to appreciate that:

(i) The case of the appellant did not fall within the parameters laid down by section 147 r.w.s. 148 of the Act;

(ii) The necessary preconditions for initiating and completion thereof were not satisfied.

2.3 It is submitted that in the facts and the circumstances of the case, and in law, the reassessment framed is bad, illegal and void.

WITHOUT FURTHER PREJUDICE TO THE ABOVE

3.1 The Ld. CIT (A) erred in confirming the addition made by the A.O. of Rs.27,07,327/- u/s. 68 of the Act, on account of alleged bogus/unexplained long term capital gain.

3.2 While doing so, the Ld. CIT (A) erred in:

(i) Basing his action on wrong/erroneous facts.

(ii) Basing his action only on surmises, suspicion and conjecture;

(iii) taking into account irrelevant and extraneous considerations; and

(iv) Ignoring relevant material and considerations as submitted by the Appellant.

3.3 It is submitted that in the facts and the circumstances of the case, and in law, no such addition was called for.

3.4 Without prejudice to the above, assuming - but not admitting - that some addition was called for, it is submitted that the computation of the addition made by the A.O. is arbitrary, excessive and not in accordance with the law.

WITHOUT FURTHER PREJUDICE TO THE ABOVE

4.1 The Ld. CIT (A) erred in confirming the addition made by the A.O. of Rs.1,42,135/- u/s. 69 of the Act, on account of alleged estimated unexplained expenses.

4.2 While doing so, the Ld. CIT (A) erred in:

(i) Basing his action only on surmises, suspicion and conjecture;
(ii) Taking into account irrelevant and extraneous considerations; and
(iii) Ignoring relevant material and considerations as submitted by the Appellant.

4.3 It is submitted that in the facts and the circumstances of the case, and in law, no such addition was called for.

4.4 Without prejudice to the above, assuming - but not admitting - that some addition was called for, it is submitted that the computation of the addition made by the A.O. is arbitrary, excessive and not in accordance with the law.

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5. The Appellant craves leave to add, alter, delete or modify all or any the above ground at the time of hearing.

3. At the outset learned counsel of the assessee stated that in these appeals the assessing officer has passed the order without disposing of the assessee's objection to the reopening. Hence learned counsel of the assessee pleaded that the jurisdiction of the Assessing Officer to make the assessment are invalid. He submitted that in another assessee of the same group on identical circumstances this ITAT has set aside the orders of authorities below on the ground of non-disposal of objections to reopening finding the same to be fatal. In this regard learned counsel of the assessee has referred to the following decision of ITAT in the case of Manish K. Ajmera(HUF) (ITA No. 5001/Mum/2018 order dated 8.12.2020), the order of the ITAT is reproduced as under :-

3. Ld. Counsel for the assessee at the outset submitted that the reassessment order passed by the Assessing Officer is bad, illegal and without jurisdiction for the reason that the Assessing Officer ignored the mandatory requirement of disposing off objections raised by the assessee for reopening the assessment u/s. 147 of the Act. Ld. Counsel for the assessee referring to Para No.4 of the re-assessment order at Page No.11,submitted that the Assessing Officer stated that assessee never submitted any

objections and therefore disposing off the objections does not arise is contrary to record. Referring to Page Nos. 16 to 27 of the Paper Book Ld. Counsel for the assessee submits that in the course of proceedings before the Assessing Officer assessee made elaborate submissions and preliminary objections on reopening of assessment and these objections were never disposed off by the Assessing Officer before framing the assessment, therefore, rendering the assessment order bad in law.

4. Ld. Counsel for the assessee placed reliance on the following decisions: -

(i) DCIT v. M/s. Firstsource Solutions Ltd., in ITA.No. 3985 & 3986/Mum/2016 dated 22.05.2019.
(ii) Maharashtra State Power Generation Co. Ltd., v. Addl. CIT in ITA.No. 2043/Mum/2011 dated 31.07.2019.

Referring to these two decisions Ld. Counsel for the assessee submits that the Tribunal following the decisions of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd., v. ITO [259 ITR 19] and the decision of the Hon'ble Jurisdictional High Court in the case of KSS Petron Pvt. Ltd., v. ACIT in ITA.No. 224 of 2014 dated 03.10.2016 set-aside the Assessment Order as there was no separate order passed by the Assessing Officer dealing with the preliminary objections filed by the assessee in reopening the assessment.

5. Ld. Counsel for the assessee also placed reliance on the decision of the Hon'ble Bombay High Court at Goa Bench in the case of Fomento Resorts & Hotels Ltd., v. ACIT in Tax Appeal No. 63 of 2007 dated 30.08.2019and submitted that it has been held by the Hon'ble Bombay High Court that the Assessing Officer has to pass a separate order disposing off the preliminary objections and he cannot dispose off the objections while passing the Assessment Order itself.

6. On the other hand, Ld. DR strongly supported the orders of the Authorities below.

7. We have heard the rival submissions, perused the orders of the authorities below. In this case the Assessing Officer issued notice u/s.148 of the Act dated 25.02.2016 for reopening of assessment u/s. 147 of the Act. Assessing Officer also issued notice u/s. 143(2) of the Act calling for the details and objections. Assessee vide letter dated 28.07.2016 submitted detailed preliminary objections for reopening of assessment and not to proceed further and these objections are as under: -

> "With reference to your above Notice, we have to submit as under:-
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> 1.Vide your Notice dated 16.07.2016 you have called upon us to explain as to why the Long Term Capital (LTG), gain earned by us not be taxed.
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> 2.At the outset, we strongly object to the observation made by you in your reason for reopening of assessment given alongwith notice dated

08.04.2016 for the following amongst other grounds as mentioned herein below.

3.We say that our all transactions executed are genuine, and at the prevailing market rate, as per the trend of the market and are duly supported by all possible evidences.

4.On perusing your reason for reopening of assessment it is seen that, you have relied upon two so called evidences to support the allegation,

A. The statement of Shri Jasmin Ajmera taken during the search operation and

B. Alleged evidences collected in course of the search proceeding against one Shri Shirish C. Shah.

In this preliminary submission, we deal with each of the two allegations as under: -

A. Statement of Shri Jasmin Ajmera:-

Here, the sole reliance is placed on the fact that in the statement Shri Jasmin Ajmera he had agreed to offer the amount of capital gain for taxation. In this regard, the following points are noteworthy:-

i.First of all, except for this statement there is absolutely no evidence in support of the allegation. No incriminating document/ evidence were found during the search from his or our property. Now, as far as the sole reliance on statement is concerned, we understand that such action is contrary to the specific directions issued by the CBDT. In any case, and otherwise also, we believe that the law is quite well settled in this regard and it has been emphatically held that no addition can be made to the income of an assessee, merely on the basis of a statement, without any corroborative evidence found during the search supporting such addition.

ii.In any case, the statement of Shri Jasmin Ajmera was taken in coercion, pressure and undue influence and given in stress and utter duress. Therefore, we believe such statement is not a valid statement in the eyes of law and consequently, is not binding on the person who gave the statement and least binding on any third party. Further, the entire statement stood fully retracted by Shri Jasmin Ajmera in his detailed affidavit dated 02/08/2013 and 14/08/2015, submitted to the department, Shri Jasmin Ajmera In his affidavits, have very exhaustively dealt with the entire chain of events which transpired during the course of the search, as well as, has also placed on record the manner in which he was pressurized, threatened and also the circumstances under which this so called confession in the form of statement was extracted from him

iii.Shri Jasmin Ajmera has retracted from the statement/ confession so extracted. We say that in the given circumstances, the so called statement has absolutely no evidentiary value, on fact, as well as in law.

iv.In any case, the statement of Shri Jasmin Ajmera is not bindingon us and we have not confessed any such disclosure, we saythat in the given circumstances, even this so called statement hasabsolutely no evidentiary value, on fact, as well as in law.In view of the above, It is submitted that your reliance on the statement of Shri Jasmin Ajmera is not valid, on fact, as well as in law.

B. Search proceeding against Shri Shirish C. Shah

It appears that your observation is also based on the alleged information gathered in course of search action against one Shri Shirish C. Shah. Your good office has provided us data collected by you from BSE Ltd. with respect to the transactions in the shares of Prraneta Industries Ltd., now known as Adhaar Venture India Ltd. ["Prraneta"] for the period 01.04.2009 to 31.12.2011 and a pen drive, which contains copies of the material alleged to have been seized in course of the search and survey action taken against one Shri Shirish C. Shah, running into thousands of pages. You have also given hard copies of some affidavits of various persons, who are alleged to be directors of various companies, again alleged to be managed by Shirish Shah. In this regard, we have to submit as under:-

1. Data provided of BSE Ltd1. It appears that this data shows sale and purchase transactions of Prraneta.

2. Our preliminary observation on going through this data is as under:

i. It is seen that the scrip was actively traded during this period.

ii. It is seen that there were multiple buyers and sellers in the market.

iii. It is seen that there was participation from all kind of cliental like retails/Corporate/Institutions.

iv. It is further seen that, In fact many parties who had purchased the shares sold by us in the market had resold in the open market.

v. Please note this data confirms our transactions are executed through the Stock Exchange, at the prevailing market rate and same authenticates the bills cum contracts and bank statements already submitted by us in our previous submissions.

3. We further would like to draw your kind attention that, It is also a matter of elementary knowledge that in a screen based computerized trading mechanism, transactions of purchase and sale of shares of a particular company gets automatically concluded when offer of purchase of the shares

at a particular price for a particular quantity placed by a broker on behalf of a willing purchaser is match by/accepted by another broker acting on behalf of holder of the shares who accepts to sell at that price and or vis-e-versa. The important thing is that the transaction is concluded automatically through the stock exchange mechanism on the matching parameters of price and up to that quantity only without any description/choice of the selling broker/buying broker. In fact, the very purpose behind this mechanism is to bring transparency and not to give any such discretion, choice to the brokers/clients. Most importantly, neither the selling person nor his broker is aware about who is the actual purchaser of the share. As such, when we sold the shares through our broker, we were not even aware about the person purchasing the shares much less we had no means to know that.

4.None of the regulatory authorities, like SEBI, BSE, RBI etc. has even suggested, much less held, that these transactions were bogus. In other words, the transactions are accepted to be proper and genuine by the concerned regulatory authorities, without any such regulatory authorities taking any adverse view. in fact, the very same company, Prraneta Industries Ltd. has recently come out with public preferential issue of shares, which Is possible only after getting clearance of regulatory authorities. Reference copies enclosed for ready reference. Prraneta is registered as NBFC with RBI (copy enclosed). If you still intend to hold otherwise, it is your duty to bring cogent material in support thereof.

5.As such, your listing down names of various parties who supposed to have purchased the shares sold by us has absolutely no bearing on our case, as we are not at all concerned with the names of the purchasers, much less we also would not have the knowledge as to why such person purchased the said shares. Therefore, in any case, we had absolutely no concern with the alleged group purchasing the said shares, much less their reason for purchasing the same.

6.Ongoing through the list of the entities who alleged to have purchased the shares sold by us and which alleged to have been managed and owned by Shirish Shah are public limited listed companies. For example, Avance Technologies Ltd./Mahan Industries Ltd. and few more. Sir, How can that be possible? We believe that public listed companies are owned by the shareholders of the said company.

7.Kind attention Is also drawn to the quantity of the shares, i.e. to say that the quantity of the shares which were sold by us and the shares purchased by the purchasers, as shown in reason for reopening of assessment miss matches.

8.Please note that total quantities of shares of Prraneta alleged to have been purchase by companies managed and controlled by Shirish C. Shah are much lesser than the quantities traded in the exchange.

II.THE SCANNED DOCUMENTS PROVIDED IN THE PEN DRIVE:-

1.At the outset, we fail to understand the purpose of giving me 6000 to 7000 pages of material, in the pen drive form, which, as you are fully aware, is not humanly possible for anybody to scan through and verify and, that too, in a short span of time. We, therefore, have to request you to give copies of only those material on which you intend to rely while framing assessments in our case. You will appreciate that it is only after knowing the exact material on which you intend to rely, and the reason thereof, that any reply can be filed by us in defence. Otherwise, dumping 6000 to 7000 pages, that too, in a pen drive form, does not serve any purpose. In order to provide us a proper and fair opportunity of being heard and to enable us to give meaningful reply, for ourselves, we have to request you to identify and let us know the exact pages papers/documents which you intend to actually rely and also let us know as to in what way and for what purpose they are sought to be so relied upon.

2.However, strictly without prejudice to the above and under protest, we give our very preliminary and brief observations, upon going cursorily through the contents of the pen drive, herein below:

(i) In any case, many of the documents are rough notings/scribblings/chits, etc., which otherwise also have no evidentiary value, being 'dumb' documents.

(ii) We are not aware who has prepared these data/documents/chits etc. and we would like to cross -examine the person and/or the author who has prepared the data, apart from this being a normal and essential requirement of the principle of natural justice, as the data appears to be incorrect, so far as the transactions relating to us.

(iii) The rest of the details are incoherent and in no way are connected with us. Many of the scanned pages are loose sheets, rough pages and scribblings, which do not make any sense.(iv) In the circumstances, we say that no adverse inference can be raised on the basis of the material provided to us on fact as well as in law. This is, of course, without prejudice to our preliminary objection to let us know the precise material that you intend to rely upon ultimately and the reason thereof so as to enable us to give meaningful reply thereon.

III. AFFIDAVITS FILED BY THE DIRECTORS OF THE COMPANIES ALLEGED TO BE MANAGED AND CONTROLLED BYSHIRISH SHAH:-

1.At the outset, we fail to understand in what way such affidavits are sought to be used against us. Therefore, we request you to let us know the exact relevance of these affidavits in our case, so as to give meaningful reply thereafter.

2. Strictly without prejudice to the above and under protest, our preliminary observations in this regard are as under:

i) First of all, Ex-facie, these affidavits do not at all directly, indirectly or remotely concern us, nor do they indicate involvement of ourselves in any transaction, much less in any dubious transaction.

ii) Besides, our few observations regarding the affidavits are as under:

(a) In all, there are 134 affidavits/declarations and all are stereotyped.

(b) Some documents are styled as "affidavits" and some documents are styled as "declarations". The affidavits do not appear to be legally and validly executed document of oath. All stamp papers appear to be purchased from one vendor. Almost all affidavits 134 on oath are not arised by only three notaries, and that too within few days, (81affidavits are executed notarized on one single day), which is difficult to believe as the deponents are scattered at different places. Even the format of these affidavits is not as per the Oath Act. It is not properly verified, identified or administered.

(c) The purported Declarations are not oil Paper as required under the law.

(d) There is no mention of Notarial Register Sr. No. on any of the said purported Declarations and Affidavits.

iii) In any case, as mentioned earlier, if you still intend to rely upon any of these affidavits/declarations, you are requested to let us know how and in what manner you intend to so rely and also give us an opportunity to cross -examine such persons.

iv) In any case, the affidavits/declarations do not cover many other companies/Individuals, who have alleged to have purchased shares sold by us on automated exchange platform.

v) Please let us know what actions have been taken against the deponents as well as the concerned companies as well as against Shirish C. Shah. For example, whether the income supposed to have been received by them from Shirish C. Shah has been declared/ assessed in their case?

vi) In this background, these loose papers / affidavits cannot be called any material, much less cogent material, to rebut the preliminary presumption about correctness of the transaction.

Please note that said Shirish C. Shah was nowhere concerned with our transactions of sale nor was he ever been contacted for any such transactions. Please provide us an opportunity of cross-examining said Shirish Shah and all the individuals on whose statements you are depending to bring at correct facts on record.

The above are our preliminary submissions/objections on the issue. If you still intend to proceed further, we request that the same be Intimated to us, along with the reasons thereof, to enable us to make further submissions, on fact as well as in law. Needless to say that, in the meanwhile, if any further information/explanation is required, on the preliminary aspect the same shall be readily furnished upon intimation."

8.However, the Assessing Officer without disposing off the preliminary objections proceeded and completed the assessment and while completing the assessment adverted to the objections filed by the assessee.

9.In the case of Maharashtra State Power Generation Co. Ltd., v. Addl. CIT (supra) the Tribunal considering the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd., v. ITO (supra) and the decision of the Hon'ble Jurisdictional High Court in the case of KSS Petron Pvt. Ltd., v. ACIT (supra) and also the decision of the Coordinate Bench in the case of DCIT v. First source Solutions Ltd (supra) quashed the reassessment order passed u/s. 143(3) r.w.s. 147of the Act. While quashing the re-assessment order the Coordinate Bench observed as under: -

> "2.1The Ld. Authorized Representative for Assessee [AR], at the outset, submitted that the objections raised by the assessee against reopening the assessment were never disposed-off by Ld. Assessing Officer as mandated by the decision of Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. Vs. ITO [259 ITR 19] and therefore, the reassessment proceedings stood vitiated in the eyes of law. Reliance has been placed on the decision of Jurisdictional Hon'ble Bombay High Court rendered in KSS Petron Private Limited Vs. ACIT [ITA No. 224 of 2014 dated 03/10/2016] to submit that the matter could also not be restored back to the file of Ld. AO to pass order on objections raised by the assessee.
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> 2.2On the other hand, Ld. CIT-DR relied on para 3.3(a) of the impugned order which would read as under: -
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> 3.3(a) The appellant's first objection is that the AO did not dispose-off objections raised by it in respect of re-opening of the assessment proceedings. On this issue the appellant has relied on various case-laws. I have considered the facts of the case and decisions relied on by the appellant. Though as per decisions of the Hon'ble Supreme Court and other decisions, it was obligatory on the part of the AO to first dispose-off, by passing a speaking order, appellant's objections raised against reopening of the assessment. However, the Assessing Officer's action of not disposing off appellant's objections was a procedural irregularity only which did not affect the legality of the assessment order passed. In the above decisions relied upon by the appellant, the assessment order passed was not held to be invalid on account of not disposing off the assessee's objections raised against re-opening of the assessment. In those cases the assessment order was set aside to the file of the AO for first disposing off the objections by passing a

speaking order and then frame assessment order. Therefore, on account of this irregularity, the assessment order passed by the AO cannot be held to be invalid. As per existing provisions of the Act, the undersigned has no power to set aside the assessment order passed by the AO. Therefore, appellant's objections/arguments on this issue are not acceptable.

In the above background, Ld. CIT-DR pleaded for restoration of matter back to the file of Ld. AO for disposal of assessee's objection against reassessment proceedings. However, the fact that the assessee had raised objections against the reopening of the assessment and the same was not disposed-off by Ld. AO, remain uncontroverted. Nothing on record would establish that the assessee's objections against reopening of assessment were ever considered and rejected by Ld. AO at any point of time, during reassessment proceedings. 3. After due consideration of factual matrix, we find that the binding judicial precedent in the shape of cited decision of Hon'ble Bombay High Court squarely applies to the fact of the case. The relevant observation of Hon'ble court, for ease of reference, could be extracted in the following manner: -

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 afurther/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.

9.In fact, to ensure that reopening notices are disposed of, expeditiously the parliament itself has provided in Section 153(2) of the Act a period of limitation within which the Assessing Officer must pass an order on the notice of reopening i.e. within one year from the end of the financial year in which the notice was issued. In fact, Section 153 (2A) of the Act as in force at the relevant time itself provides that an order of fresh Assessment, consequent to the order of Tribunal under Section 254 of the Act, would have to be passed within one year from the end of the financial year in which the order under Section 254 of the Act, was passed by the Tribunal and received by the Commissioner of Income Tax.

10. The Director of the appellant has filed an affidavit dated 19th September, 2006. In the affidavit, it is stated that consequent to the impugned order of the Tribunal dated 14th August, 2013, the Assessing Officer has not passed any order of reassessment. Time was granted on the last occasion to enable the Respondent to respond to

the affidavit dated 19th September, 2006 of the Director of the Appellant Company. The Respondent is unable to dispute the facts stated in the affidavit dated 19th September, 2016 filed by the Director of the Appellant Company. The time to pass an order on the notice dated 28th March, 2008, even consequent to the impugned order of the Tribunal, has lapsed.

11.Therefore, on the above facts and law, the substantial question of law is answered in the negative i.e. in favour of the Appellant-Assessee and against the Respondent-Revenue.

This decision has subsequently been followed by the co-ordinate bench of the Tribunal in number of cases, few of which could be tabulated as follows: -

1.DCIT M/s. National Bank for Agriculture and Rural Development [ITA No.4964/Mum/2014 (A.Y.2004-05) dated 28/10/2016]

2.Baldev Ramratan Sharma Vs. ACIT [ITA No.1909/Mum/2017 (A.Y.2009-10) dated 28/08/2018]

3.DCIT V/s Firstsource Solutions Ltd. [ITA Nos. 3985-86/Mum/2016 dated 22/05/2019]

4.The co-ordinate bench of the Tribunal in DCIT V/s Firstsource Solutions Ltd. [supra], after considering the contrary case-laws as cited by the revenue, has concluded the matter in the following manner: -

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 topass 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 incase 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).

9.In view of the aforesaid, we do not find any infirmity in the orders passed by learned Commissioner (Appeals) in holding the assessment orders passed to be legally unsustainable. Accordingly, grounds raised in both the appeals are dismissed.

Respectfully following the cited binding judicial precedents, the action of Ld. first appellate authority in upholding the reassessment proceedings, could not be said to be in accordance with law. Therefore, we quash the reassessment order dated 29/12/2009 passed by Ld. Assessing Officer. In view of the same, dealing into the merits of the case become merely academic in nature and therefore, we refrain from dealing the same. Ground No. 1 stands allowed which makes other grounds of appeal infructuous."

10.In the case of Fomento Resorts & Hotels Ltd., v. ACIT (supra) (supra) the Hon'ble Bombay High Court held as under:

> "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.
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> 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. 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.1

8.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 14th 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 28th 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."

11.As could be seen from the above decision of the Hon'ble Bombay High Court even if Assessing Officer disposed off the objections raised by the assessee in the Assessment Order while completing the re-assessment that is not in compliance with the decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd., (supra) in other words the Assessing Officer shall pass a separate speaking order disposing off the preliminary objections raised by the assessee in reopening the assessment. In the case on hand before us since Assessing Officer failed to dispose off the preliminary objections of the assessee by way of a separate order, respectfully following the decision of the Hon'ble Bombay High Court in the case of Fomento Resorts & Hotels Ltd. v. ACIT (supra), we quash the re-assessment order passed u/s. 143(3)r.w.s. 147 of the Act for the A.Y. 2011-12. The preliminary ground raised by the assessee is allowed.

12. As we have allowed preliminary ground raised by the assessee we are not inclined to go into other grounds and various contentions raised by the assessee on merits as it would render only an academic exercise.

13.In the result, appeal of the assessee is allowed."

4. We have heard both the parties and perused the records. We find that in these cases the assessing officer has in his assessment order noted that assessee did not file the objection to the reopening. However learned CIT(A) in his order has noted this aspect. He has also reproduced one of the letters by the assessee to the assessing officer wherein objections to reopening were duly raised.

5. However learned CIT(A) is of the opinion that honourable Supreme Court decision in GKN Driveshaft does not hold that the reassessment will be bad if objection are not disposed of. In this regard, on this premise he has rejected the assessee's contention that assessment is bad in as much as objections to reopening have not been disposed off. However we note that the above view of

the learned CIT appeals is not in accordance with honourable Bombay High Court decision in the case of Fomento Resorts & Hotels Ltd. (supra) dealt with in the above said order of the ITAT. It is settled law the order of honourable jurisdictional High Court is binding upon the subordinate courts and tribunals. We find that learned CIT appeals has erred not following the binding order of honourable jurisdictional High Court and instead of referring to a Delhi High Court decision in this regard.

6. Accordingly it is clear that the Assessing Officer is wrong in observing that assessee has not filed objection to reopening. The objection to reopening was intimated to Assessing Officer and the objections have not been disposed off. This, as per the ratio of Hon'ble Jurisdictional High Court decision as referred above is fatal to the assessment. Hence, we set aside the orders of authorities below and decide the issue in favour of assessee.

7. Since we are holding that reopening is not valid adjudication on merits is only of academic interest and hence we are not engaging to the same.

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8. Since facts are identical and orders of the authorities below are also identical our above adjudication applies mutatis mutandis to these appeals also. Hence, the reopening in these appeals is also held to be invalid.

9. In the result, these appeals by the assessee stand allowed.

Pronounced in the open court on 9.6.2021.

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 09/06/2021

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.

BY ORDER,

//True Copy//

(Assistant Registrar)

PS ITAT, Mumbai