

**IN THE INCOME TAX APPELLATE TRIBUNAL,  
MUMBAI BENCH "SMC", MUMBAI**

**BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER**

**ITA No.6408/M/2019  
Assessment Year: 2012-13**

Shri Harakh Samir Mehta Alisa Nihar Samir Mehta, FC 3040, Bharat Diamond Bourse, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051 <b>PAN: ACZPM1843N</b>	V s.	ACIT, Ward-19(2), Matru Mandir, Tardeo Road, Mumbai – 400 007
(Appellant)		(Respondent)

**Present for:**

Assessee by : Ms. Dinkle Hariya, A.R.  
Revenue by : Shri Anil Gupta, D.R.

Date of Hearing : 28 . 09 . 2022  
Date of Pronouncement : 29 . 09 . 2022

**O R D E R**

**Per : Kuldip Singh, Judicial Member:**

The appellant, Shri Harakh Samir Mehta Alisa Nihar Samir Mehta (hereinafter referred to as 'the assessee') by filing the present appeal, sought to set aside the impugned order dated 30.05.2019 passed by Commissioner of Income Tax (Appeals)-53, Mumbai [hereinafter referred to as the CIT(A)] qua the assessment year 2012-13 on the grounds inter alia that :-

**"1 NATURAL JUSTICE**

**1.1 *The Learned Commissioner of Income - tax (Appeals) - 53, 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.10,00,000/- u/s. 68 of the Act, on account of alleged bogus loan.*

*3.2 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.*

*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. 20,904/-, on account of disallowance of interest expenditure with respect such alleged bogus loan.**

**4.2 It is submitted that in the facts and the circumstances of the case, and in law, no such disallowance was called for.**

**LIBERTY**

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

2. Briefly stated facts necessary for adjudication of the controversy at hand are : assessee is into the business of trading and manufacturing of diamonds. On the basis of search and seizure operation carried out in the case of Shri Bhanwarlal Jain group on 03.10.2013 by investigating wing of Mumbai it has noticed that Shri Bhanwarlal Jain group along with associates were managing and controlling several entities used for providing accommodation entries to various beneficiaries against the cash and commission and the assessee is one of such beneficiaries who has been given loan of Rs.10,00,000/- by one M/s. Daksh Diamonds. The assessee has also claimed interest on the said loan. On failure of the assessee to produce evidence to show the creditworthiness and genuineness of the lenders the AO proceeded to make addition of Rs.10,00,000/- as income of the assessee under section 68 of the Income Tax Act, 1961 (for short ‘the Act’) and also disallowed the expenses to the tune of Rs.20,904/- claimed by the assessee and thereby framed the assessment under section 143(3) read with section 147 of the Act.

3. Assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has upheld the addition made by the Assessing Officer (AO) by dismissing the appeal. Feeling aggrieved the assessee has come up before the Tribunal by way of filing present appeal.

4. I have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

5. At the very outset, it is contended by the Ld. A.R. for the assessee that very initiation of reassessment proceedings by invoking the provisions contained under section 147 read with section 148 of the Act by the AO are invalid and as such assessment framed is not sustainable in the eyes of law, hence liable to be quashed. It is further contended by Ld. A.R. for the assessee that the AO has failed to dispose of the objections specifically filed by the assessee to the reopening and consequently further reassessment proceedings are not sustainable in the eyes of law and relied upon the decision rendered by the Hon'ble Bombay High Court in case of Fomento Resorts & Hotel Ltd. vs. ACIT (ITXA No.63 of 2007 order dated 30.08.2019 (Bom HC) and the decision of the co-ordinate Bench of the Tribunal in case of Kishore H. Ajmera (HUF) vs. DCIT in ITA Nos.7370 & 7371/M/2019 & ors. for A.Y. 2011-12 & 2012-13 & ors. order dated 06.10.2021.

6. However, on the other hand, the Ld. D.R. for the Revenue relied upon the order passed by the Ld. CIT(A).

7. Since the assessee has challenged very initiation of the reopening, it being a legal issue, I deem it necessary to decide this issue first before going into the merits of the case. In support of her argument the Ld. A.R. for the assessee drew my attention towards letter dated 12.07.2016 available at page 31 to 33 wherein assessee has specifically filed the objections to the notice issued under section 148 of the Act which is extracted for ready perusal as under:

*“Date: 12<sup>th</sup> July 2016*

*The Asst Commissioner of Income-tax,  
Circle 19(2),  
Mumbai.*

*Dear Madam,*

*Re: Shri Nihar S Mehta  
PAN: ACZPM1943N  
Assessment Year 2012-13*

*Ref: Notice u/s 148 dated 29<sup>th</sup> March, 2016*

*With reference to the above, we are instructed by our client to state as under:*

- 1. The original return in the above case was filed on 30<sup>th</sup> September 2012 interalia declaring total income at Rs. 23,38,210/-.*
- 2. The return has been processed and intimation u/s. 143 (1) issued along with the said refund.*
- 3. The assessee submits that in the original return of income furnished, he has made true and full disclosure of the particulars of the income. The assessee further submits that no income has escaped the assessment within the meaning of the section 147 of the Income Tax Act. However, in order to meet the technical requirements of the Act, it was stated that the same return may be treated as return filed in reply to the notice u/s 148 of the Act.*
- 4. Under the provisions of section 147 the assessment can be reopened if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment. Such belief is required to be formed by the Assessing Officer only and not by any other income tax authority. The copy of the reasons supplied to us*

*clearly suggests that the assessment has been reopened on the basis of information received from DGIT (Investigation). This is amply clear from the fact that there is no discussion about the particulars of alleged transaction in the information reasons recorded. Accordingly, it is submitted that the reopening has been done in a totally arbitrary manner and without proper application of mind. Simply on this ground the notice issued u/s 148 is bad in law and, therefore, the reassessment proceedings initiated is bad, illegal and without jurisdiction.*

*5. Furthermore, it has been stated that the information by the investigation wing was gathered by conducting surveys at the premises of the few brokers. However, in this connection we may invite your kind attention to the fact that M/s. Daksh Exports was never been surveyed and therefore, entire basis of conclusion is totally on factually incorrect premises and, therefore, such conclusion cannot be any basis of reassessment.*

*6. From the copy of the reasons recorded it is clear that the reopening is based merely on some alleged information purportedly to have been received by the office of your goodself from the DGIT (Investigation), Mumbai. Your assessee has not been supplied copy of the information / letter / email purportedly received from DGIT (Investigation), Mumbai. As a matter of fact the contents of the said letter are neither incorporated in the reasons recorded prior to the issue of notice u/s 148 nor the contents of the same are produced in the said letter. Accordingly, such material is required to be ignored altogether. In simple words, such material is non-existent material in eyes of law. If such materials ignored, then admittedly, there is no other material which can lead to belief that the income has escaped assessment. As such, it is submitted that the reassessment is bad, illegal and without jurisdiction.*

*7. Without prejudice to the above, and going further it is submitted that in absence of knowledge about contents of the alleged communication, there is absolutely no clue what is the information contained and how it is related to present case. It does not disclose even the very basic information such as dates of alleged transactions, intention and contention behind the transactions, terms and conditions of transactions in which alleged modification made. Simply it is a case of no information / vague information. Such information cannot be regarded as tangible material on the basis which any person can arrive at such conclusion that any income has escaped assessment. It is also pertinent to note that merely because of the transactions of the hawala entries, accommodation entries by these concerns (not by the assessee) cannot lead to any conclusion of the escapement of income. The loan can be taken for several reasons and therefore, mere transactions between them cannot lead to conclusion about escapement of income.*

8. *The term "tangible material" has achieved a definite judicial connotation through series of court rulings. It does not mean any and every material that can be referred and relied upon by the Assessing Officer. The emphasis on the word 'tangible' signifies the quality of such material and its relevance to the belief that is to be arrived by the officer on the basis of such material about escapement of income. Formation of such belief should have rational connection and a live link with the material. Such satisfaction cannot be based on mere suspicion and cannot be subjective satisfaction on the part of the Assessing Officer. It may be appreciated that the law in this regard is too well settled so as to necessitate reference to any particular case law. In view of the above, it is submitted that in absence of tangible information in possession of the Assessing Officer, the reopening of the assessment is bad and illegal.*

9. *Significantly, as it appears from the reasons recorded, even after receipt of the information, your goodself is not clear about the escapement of any income. Instead the reassessment is initiated on the basis of need to verify the information. It is a well settled legal position that the reassessment proceedings cannot be initiated merely to make verification. As such the reassessment proceedings is bad in law in this ground too.*

10. *Without prejudice to the above, in any case we have to request your goodself to provide us a copy of information / communication purportedly received from DGIT (Investigation) as well as any other material which is relied upon to arrive at the satisfaction that the income has escaped assessment. This request is made to judge whether there existed 'tangible material' and thereafter "rational nexus" between such material and the satisfaction. The assessee reserves the right to raise further objection upon the receipt of such information.*

11. *In view of the above submission, we have to request your goodself to kindly drop the reassessment proceedings initiated u/s 147. In any case, pending supply of the information requested for in paragraphs 8 above, we request you not to proceed with the reassessment proceedings.*

*Kindly do the needful.*

*Thanking you,*

*Yours truly,  
For Parul Shah and Co  
Chartered Accountants*

*Parul Shah  
Proprietor"*

8. Bare perusal of the objections dated 12.07.2016 (supra) filed by the assessee with AO pursuant to the notice issued under section 148 of the Act goes to prove that assessee has specifically challenged the initiation of reopening and requested to drop the reassessment proceedings initiated under section 147 of the Act. But strangely enough AO for the reason best known to him has not given even a bald reference of the objections filed by the assessee to the initiation under section 147 of the Act in the order, what to talk of passing a separate order to dispose of the objections, rather conveniently put the same under the carpet.

9. This issue has already been decided in favour of the assessee by the Hon'ble Bombay High Court in case of Fomento Resorts & Hotel Ltd. vs. ACIT (supra) wherein assessment framed under section 147/148 of the Act without deciding objections filed by the assessee has been quashed on the ground of want of compliance with jurisdictional parameters by the AO by returning following findings:

***“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.*

*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 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 Assessee’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."***

10. The contention made by the Ld. D.R. that in such circumstances the case be remitted back to the AO to first decide the objection and then to frame the reassessment afresh is not sustainable because this issue was also decided by Hon'ble Bombay High Court in case of Fomento Resorts & Hotel Ltd. vs. ACIT (supra) which was set aside by the Tribunal to the AO to decide the objections first and then to frame the assessment on merits and the said order was also set aside by the Hon'ble Bombay High Court being not sustainable.

11. In view of what has been discussed above and following the decision rendered by the Hon'ble Bombay High Court in case of Fomento Resorts & Hotel Ltd. vs. ACIT (supra), I am of the considered view that when the AO has not decided the objections filed by the assessee to the notice issued under section 147 of the Act subsequent assessment proceedings are vitiated as the AO has

got no jurisdiction to proceed with the reassessment proceedings. Consequently, assessment framed by the AO under section 143(3) read with section 147 of the Act upheld by the Ld. CIT(A) is ordered to be quashed for not complying with jurisdictional parameters, without going into the merits of the case. Resultantly, appeal filed by the assessee is allowed for statistical purposes.

**Order pronounced in the open court on 29.09.2022.**

**Sd/-  
(KULDIP SINGH)  
JUDICIAL MEMBER**

Mumbai, Dated: 29.09.2022.

\* Kishore, Sr. P.S.

Copy to: The Appellant  
The Respondent  
The CIT, Concerned, Mumbai  
The CIT (A) Concerned, Mumbai  
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.