

**IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI**  
**BEFORE SHRI ABY T. VARKEY, JM AND SHRI OM PRAKASH KANT, AM**

आयकर अपील सं/ I.T.A. No.18/Mum/2023  
(निर्धारण वर्ष / Assessment Years: 2009-10)

Shree Raj Foundation 201, 2 <sup>nd</sup> Floor, Krishna Kunj, VL Mehta Rd, JVPD Scheme, Vile Parle (W), Mumbai-400056.	<b>बनाम/</b> Vs.	DDIT(E)-1(2) [Now ITO (Exem), Ward- 2(3), Mumbai] Income Tax Office, MTNL Building, Peddar Road, Mumbai-400026.
<b>स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AADTS9658M</b>		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Paresh Shaparia	
Revenue by:	Shri Anil Kumar Das (Sr. AR)	

सुनवाई की तारीख / Date of Hearing: 30/06/2023  
घोषणा की तारीख /Date of Pronouncement: 18/07/2023

**आदेश / ORDER**

**PER ABY T. VARKEY, JM:**

This is an appeal preferred by the assessee foundation against the order of the Ld. Commissioner of Income Tax/NFAC, Delhi dated 02.12.2022 for assessment year 2009-10.

2. At the outset, the Ld. AR of the assessee has challenged the action of the AO re-opening the assessment of AY 2009-10 u/s 147 of the Income Tax Act, 1961 (hereinafter "the Act") without following the binding decision of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. ITO (SC) (259 ITR 19) and Jurisdictional High Court decision in the case of Fomento Resorts Hotels Ltd Vs. ACIT (238 ITR 38) (Bom) and Asian Paints Ltd. Vs. DCIT (2008) (296 ITR 90) (Bom).

3. The facts relevant to the legal issue are that the assessee had filed its return of income on 30.09.2009 along with the income and expenditure account, balance-sheet and audit report in Form No. 10B



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declaring total income of Rs. Nil. The assessee is a trust registered as a Charitable Trust with Charity Commissioner, Mumbai vide order dated 02.07.2004; and Ld. CIT(E) has granted registration u/s 12A vide order dated 18.11.2004. Original Assessment u/s 143(3) of the Act was completed on 27.12.2011 accepting the income at nil (as per the return filed). Subsequently, the assessment was re-opened u/s 147 of the Act by issuing notice u/s 148 of the Act dated 08.02.2013. After receiving the notice, the assessee requested for a copy of the “*reasons recorded*” for re-opening the assessment, and the same was furnished to the assessee by letter dated 05.09.2013; and the reasons the AO had recorded for reopening were that exemption of income claimed by assessee u/s 11 of the Act was to be denied, since assessee was advancing/disbursing loans not in accordance to CBDT Circular No.100 of 1973 and not as per the object of assessee, therefore according to AO, it was colorable device to avoid taxation and therefore there was escapement of income. So, he reopened the assessment. The assessee objected to the reopening by filing letter dated 23.01.2014. However, the AO passed the re-assessment order on 07.03.2014 computing the income of assessee at Rs.5,56,16,118/- in place of nil returned by assessee and accepted in scrutiny assessment dated 27.12.2011.

**4.** This action of the AO has been challenged by the assessee on the ground that AO has failed to follow the binding decision of Hon’ble Supreme Court and Jurisdictional High Court on the impugned action of re-opening of assessment. According to Ld AR, as per the decision of the Hon’ble Supreme Court in the case of GKN



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Driveshafts (India) Ltd. (supra), the AO was bound to dispose of the objections filed by the assessee against reopening by passing a speaking order. According to the Ld. AR, the AO has not disposed of the objection raised by assessee by passing a speaking order [*before passing the re-assessment order dated 07.03.2014*]. According to the Ld. AR, the AO was bound to dispose of the objection raised by the assessee and give at least four (4) weeks time for the assessee to seek any legal remedy viz writ jurisdiction etc as held by the Hon'ble Jurisdictional High Court in the case of M/s Asian Paints Ltd. (supra). According to the Ld. AR, the Hon'ble Bombay High Court in the case of M/s.Asian Paints Ltd. (supra) has held that the AO should at least give four (4) weeks time to the assessee, from the date of rejection of objection, so that assessee can seek legal remedy if it preferred to do so. It was pointed out by the Ld. AR, that the Hon'ble High Court further held "*Hence we make it clear that if the AO does not accept the objection so filed, he shall not proceed further in the matter with in a period of four weeks from date of receipt of service of the said order on objection, of the assessee*". And further according to Ld. AR the Hon'ble High Court in M/s. Asian Paints further directed the AO *to follow the aforesaid procedure strictly in all cases of reopening*". According to Ld. AR, if AO doesn't follow this procedure and passes the re-assessment order within the four (4) weeks of disposal of the objection, the action of AO to pass the assessment order has to be held to be bad in law and quashed. According to the Ld. AR, in this case, not only that the AO has not passed any separate order disposing of the objection raised by the assessee against reopening of the assessment,



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instead, he disposed of the objection only in the re-assessment order which action of AO is against the binding direction of Hon'ble High Court in M/s. Asian Paints. Thus, according to the Ld. AR, the action of the AO to pass the re-assessment order is bad in law as held by the Hon'ble Bombay High Court in the case of Asian Paints Ltd. (supra) and Fomento Resorts Hotels Ltd (supra) and therefore, has to be quashed.

5. Per contra, the Ld. DR, pointed out that the AO has disposed of the objection raised by the assessee in the re-assessment order itself dated 07.03.2014. According to the Ld. DR, since the objections have been dealt by the AO while passing the re-assessment order, no interference is warranted on the legal issue.

6. We have heard both the parties and perused the records. We note that the assessee foundation is a charitable organization registered u/s 12A of the Act and enjoys certificate u/s 80G of the Act. The original return of income filed on 30.03.2009 declaring total income as nil has undergone scrutiny assessment u/s 143(3) of the Act on 27.12.2011 wherein the AO has accepted the income as returned by the assessee at nil. Subsequently the assessment was re-opened u/s 147 of the Act by issuance of notice u/s 148 of the Act dated 08.02.2013; and pursuant to the request of the assessee, copy of the reasons "*recorded for reopening*" has been furnished to the assessee on 05.09.2013; and thereafter, the assessee objected to the action of AO to have re-opened the assessment after going through the contents of "*reasons recorded for reopening*" by filing a letter dated 23.01.2014 (*which has been reproduced by the AO in the re-assessment order*



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*dated 07.03.2014*); and it is found that AO has not disposed of the objection raised before framing the re-assessment order dated 07.03.2014 (*but has disposed of the objection in the re-assessment order dated 07.03.2014*). The assessee had raised the following ground of appeal against this action of the AO before the Ld. CIT(A) who was pleased to dismiss the grounds of appeal by holding as under: -

“3 Ground | (1 to 3): Passing of order u/s 143(3) r.w.s147- without disposing the objections raised by the appellant against re-opening:-

5.3.1. The appellant has alleged that the Assessing Officer did not dispose of the objections to the notice issued u/s 148 of the I.T. Act filed by the appellant by way of a speaking order. 5.3.2 It is seen that in the assessment order passed u/s 143(3)r.w.s147 of the I.T. Act dated 07.03.2014, the Assessing Officer has reproduced the objections ‘of the appellant to the notice u/s 148 of the Act alongwith details of judicial decisions relied upon by the appellant and has dealt with all the objections. It is pertinent to note that as the objections also pertained to the merit of the case with regard to allowability of exemption, in particular, allowability of certain payments as application in the hands of the charitable entity, the Assessing Officer has dealt the same together, which perhaps makes the appellant think that its objections have not been disposed by the Assessing Officer. However, this claim is not correct.”

**7.** In the light of the aforesaid the action of the Ld. CIT(A),the assessee is before us. We note from the discussion (*supra*) that AO’s omission of not disposing of the objection filed by assessee before framing of re-assessment order cannot be countenanced, for the



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reasons that the Hon'ble Supreme Court in the case of M/s GKN Driveshafts (India) Ltd. (supra) has held that when assessee receives notice u/s 148 of the Act, the assessee has to file the return and may seeks for the reasons for re-opening the assessment by issuance of notice. And the AO is bound to furnish the reasons within the reasonable time and after receipt of the reasons, the assessee is entitled to file objections against issue of notice and the AO to bound to dispose of the same by passing a speaking order. So, the AO was bound to follow the binding direction of Hon'ble Apex Court. We note that similar question came up before the Hon'ble Jurisdictional High Court in the case of Fomento Resorts Hotels Ltd (supra) wherein the question of law before the Hon'ble High Court was as under: -

“(a) whether on the facts and in the circumstances of the case, the Income-Tax Appellate Tribunal ought to have held that since the respondent did not furnish to the appellant the reasons recorded for reopening of the assessment for the assessment year 1997-98 and did not comply with the mandatory preconditions laid down by the Hon'ble Supreme Court in GKN Driveshaft Vs. ITO 259 ITR page 19, the reassessment order was bad in law as being opposed to the principles of natural justice.?”

**8.** The Hon'ble High Court answering the question of law held as under: -

“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



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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 26<sup>th</sup> 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



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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.1and5/PANJ/01 decided by the Tribunal on 4.4.2006. 11txa63-07dt30-08-19

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 he Income Tax Act, in so far as applicability of the principles in GKN Driveshafts (India)



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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 thereopening notice before disposing of the



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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.,



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v/s. ITO259ITR 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 noticed 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 of 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



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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.

**9.** Similarly the Hon'ble Bombay High Court in the case of M/s. Asian Paints (supra) held (relevant portion) as under: -

“4. Hence we make it clear that if the Assessing Officer does not accept the objections so filed, he shall not proceed further in the matter within a period of four weeks from the date of receipt of service of the said order on objections, on the assessee.

5. Accordingly, rule is made absolute.

6. We also direct that the Income-tax Officer concerned shall follow the above procedure strictly in all such cases of reopening of assessment.

7. All the petitions stand disposed of accordingly.”

**10.** In the light of the aforesaid decisions which are binding on this Tribunal, we note in the instant case that even though the assessee had objected to the action of AO reopening the assessment for AY. 2009-10, by filing its objection vide letter dated 23.01.2014, the AO without disposing of the objection (*by passing a separate order*) has passed the re-assessment order (*by disposing of the objection in the re-assessment order dated 07.03.2014*). This action of the AO is against the binding decision of the Hon'ble Jurisdictional High Court in the case of M/s. Asian Paints (supra) wherein the Hon'ble High Court has directed the AO to give at least four weeks time [*after service of order not accepting the objection*] and thereafter only to take further action i.e., to frame re-assessment. And the Hon'ble High Court had directed the



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AO of the department to follow the afore-said procedure strictly in all cases of re-opening of assessment [*and this order of High Court was dated 29.01.2007*], so AO was bound to follow it. By rejecting the objection raised by assessee along with re-assessment order, the AO was defeating the purpose and binding decision of Hon'ble High Court which itself makes the omission on the part of AO to be classified as arbitrary, whimsical and against Rule of Law. Therefore, the action of AO being against the binding direction of Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) and Hon'ble Bombay High Court Fomento Resorts Hotels Ltd (supra) and Asian Paints (supra), the action of the AO to reopen the assessment is not legally sustainable and is held to be bad in law. And therefore, the assessee succeeds on the legal ground. And therefore, the re-assessment order passed pursuant to the reopening is consequently held to be null in the eyes of law.

**11.** The other grounds raised by the assessee are not adjudicated being academic.

**12.** In the result, the appeal of the assessee is allowed.

Order pronounced in the open court on this 18/07/2023.

Sd/-

**(OM PRAKASH KANT)**  
**ACCOUNTANT MEMBER**

Sd/-

**(ABY T. VARKEY)**  
**JUDICIAL MEMBER**

Mumbai; Dated 18/07/2023.  
Vijay Pal Singh, (Sr. PS)



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1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
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**आदेशानुसार/ BY ORDER,**

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