

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"G" BENCH, MUMBAI

SHRI NARENDRA KUMAR BILLAIYA, HON'BLE ACCOUNTANT MEMBER
&
BEFORE SUNIL KUMAR SINGH, HON'BLE JUDICIAL MEMBER

I.T.A. No. 1752/Mum/2024
Assessment Years: 2016-17

The Shipping Corporation of India Limited 245 Shipping House Madam Cama Road Nariman Point Mumbai - 400021 Maharashtra [PAN: AA ACT1524F]	Vs	Additional/Joint/Deputy/Assistant Commissioner of Income Tax, National Faceless Assessment Centre, Delhi
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

I.T.A. No. 1970/Mum/2024
Assessment Years: 2016-17

Additional/Joint/Deputy/Assistant Commissioner of Income Tax, National Faceless Assessment Centre, Delhi	Vs	The Shipping Corporation of India Limited 245 Shipping House Madam Cama Road Nariman Point Mumbai - 400021 Maharashtra [PAN: AA ACT1524F]
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Nitesh Joshi & Neha Vikam, A/Rs
Revenue by :	Shri Dr. Kishor Dhule, CIT D/R

सुनवाई की तारीख/Date of Hearing : 06/01/2025
घोषणा की तारीख /Date of Pronouncement: 09/01/2025

आदेश/ORDER

PER NARENDRA KUMAR BILLAIYA, AM:

I.T.A. No. 1752/Mum/2024 & I.T.A. No. 1970/Mum/2024, are cross-appeals by the assessee and the revenue against the very same order dated 09/02/2024 by NFAC, Delhi [hereinafter 'the Id. CIT(A)'] pertaining to AY 2016-17.

2. The cross-appeals were heard together and are disposed off by this common order for the sake of convenience and brevity.

3. Grievance of the assessee reads as under-

"1.0 GROUND NO. 1

The CIT(A) has erred in law and on facts in upholding validity of reassessment proceedings, despite the same having been initiated on the basis of mere change of opinion, without any new tangible material/ information coming to the possession of the assessing officer subsequent to completion of assessment under section 143(3) of the Income Tax Act, 1961 ('the Act').

GROUND NO. 2

The CIT(A) has erred in not treating reimbursement of overheads for managed vessels as profit from core activities.

3.0 GROUND NO. 3

The CIT(A) has erred in law and on facts in directing the assessing officer to make addition towards mark-up calculated @ 2.50% on reimbursement of overheads for managed vessels.

The appellant craves leave to add and/or to amend and /or to delete any ground out of the foregoing grounds of appeal, at any time before the hearing or during the course of hearing."

4. The grievance of the revenue reads as under:-

"1. Whether on the facts of the case and in law, Ld. CIT(A) was justified in deleting the mark-up on reimbursement of overheads for managed vessels from the total income of the appellant?

2. Whether on the facts of the case and in law, Ld. CIT(A) was justified in deleting the foreign fluctuation gain from the total income of the appellant?

3. The Appellant craves leave to add, amend and/or vary the grounds of Appeal before or during the course of hearing."

5. Vide application dated 26/07/2024, the assessee sought permission to raise the following additional ground of appeal:-

"1. That on the facts and in circumstances of the case, the Id. AO has erred passing the Assessment order without disposing the objections filed by the appellant which is in violation of the procedure as laid down by the Hon'ble Supreme Court in KN Driveshafts (India) Ltd and hence the reassessment proceedings are invalid and bad in law."

6. Since the additional ground mentioned hereinabove, goes to the root of the matter, we decided to adjudicate it first.

7. Representatives of both the sides were heard at length. Case records carefully perused and the relevant documentary evidence brought on record along with judicial decisions referred, duly considered in light of Rule 18(6) of the ITAT Rules, 1963.

8. Briefly stated, the facts of the case are that the assessee electronically filed its return of income on 29/11/2016 declaring total income of Rs.1,79,14,88,584/- under normal provisions of the Act and book profit of Rs.1,65,32,24,597/- u/s 115JB of the Act. The return was selected for scrutiny assessment and vide order dated 11/12/2018, framed u/s 143(3) of the Act, the returned income was assessed at Rs.2,23,10,90,360/- under the normal provisions of the Act and book profit at Rs.1,88,11,20,919/- u/s 115JB of the Act. Vide notice dated 27/03/2021 issued u/s 148 of the Act, the AO proposed to assess/re-assess the income of the assessee asking the assessee to file its return of income. Vide letter dated 19/04/2021, the assessee asked the AO to treat the return filed u/s 139(1) of the Act as the return filed pursuant to the notice u/s 148 of the Act. The AO gave following reasons for re-opening of assessment:-

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GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE DEPUTY
COMMISSIONER OF INCOME TAX
DCIT/ACIT, Cir.-3(4), Mumbai

To, THE SHIPPING CORPORATION OF INDIA LIMITED 245 SHIPPING HOUSE, MADAM CAMA ROAD NARIMAN POINT MUMBAI 400021, Maharashtra India	
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PAN: AAACT1524F	Assessment Year: 2016-17	Dated: ✓ 17/11/2021	DIN & Letter No : ITBA/AST/F/17/2021-22/1037026532(1)
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Sir/ Madam/ M/s,

Subject: Communication of reasons of reopening u/s 147 for A.Y -2016-17 in the case of THE SHIPPING CORPORATION OF INDIA LIMITED reg.

The assessee had filed e-return on 29.11.2016 declaring total income of Rs.179,14,88,584/- under normal provision of the Act and Book Profit of Rs.165,32,24,597/- u/s 115JB of the Income tax Act. The case was selected for scrutiny and assessment for A.Y. 2016-17 was completed on 11.12.2018 after scrutiny assessed income of Rs.223,10,90,360- under normal provision of the Income tax Act and computed Book Profit of Rs.188,11,20,919/-u/s 115JB of the Income tax Act.

2. Subsequently on perusal of the records it was observed that the assessee had opted tonnage tax scheme i.e presumptive tax Chapter XII G and approved by the competent authority under section 115VP of the IT Act. Thus the income was offered from Core activity, Incidental Activity under tonnage tax and Income from Other source in their computation.

The Assessee had offered Net gain on foreign currency transaction of Rs.13.24 crore and Income from Rescindment of contracts of Rs.19.52 Crore under the Head Other Income (Note-24) in Profit and Loss Account. Further, it was noticed that the assessee had neither offered these incomes under the head as Incidental Activity under tonnage tax nor as Income from Other source in their computation. However, it was observed that during assessment the Income from Rescindment of

contracts of Rs.19.52 Crore had been considered as business income under Incidental Activity and brought to tax, whereas gain on foreign currency transaction of Rs.13.24 crore was neither discussed nor brought to tax.

It is pertinent to mention here that the assessee himself considered both the transaction as Other Income in their profit and loss account, hence foreign currency transaction of Rs.13.24 crore should have also been considered as income due to their incidental to the business only and brought to tax. However, the same income was not added while assessment. This has resulted in under assessment of income amounting to Rs. Rs.13,24,00,000/-.

2.1 Therefore I am of the view that income to the extent of amount of Rs. 13,24,00,000/- as explained above, has escaped assessment.

2.2 Further it was observed that during assessment it was mentioned that the core activity and incidental activity has been properly defined in section 115V-1(2) and 115V-1(5) respectively. Therefore the income from Reimbursement of overhead for managed vessel amounting to Rs.35,79,48,794/- is considered as income from incidental activity and excluded from the core activity turnover in para 1.3 (page 1 of 33) of the assessment order. As the income was excluded from the Core activity turnover, the said income should have been considered as Income from Incidental Activity while computing the income under the head incidental activity under tonnage tax. However, it was observed that during assessment the same had considered as income under the head Incidental Activity under tonnage tax, even it was excluded from the turnover of Core Activity. This has resulted in under assessment of income amounting to Rs. Rs.35,79,48,794/-.

2.3 Therefore I am of the view that income to the extent of amount of Rs. 35,79,48,794/-, as explained above, has escaped assessment.

9. Vide submissions dated 30/11/2021, the assessee objected the reopening of the assessment strongly contending that reopening is invalid in absence of any new material on record to establish that income has escaped assessment. The objections raised by the assessee read as under:-



भारतीय नौवहन निगम लिमिटेड

(भारत सरकार का उद्यम)

पंजीकृत कार्यालय: शिपिंग हाउस, 245 मादाम कामा रोड, मुंबई - 400 021.

फोन: 91-22-2202 6666, 2277 2000 फैक्स: 91-22-2202 6905 वेबसाइट: www.shipindia.com

The Shipping Corporation Of India Ltd.

(A GOVERNMENT OF INDIA ENTERPRISE)

Regd. Office: Shipping House, 245, Madame Cama Road, Mumbai-400 021. Ph: 91-22 2202 6666, 2277 2000

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सीआईएन/CIN-L63030MH1950G0I008033

30th November 2021

Ref: ITBA/AST/F/17/2021-22/1037026532(1)

To
Deputy Commissioner of Income Tax
Circle 3(4), Mumbai

Kind Attention: Shri DEEPAK SHUKLA

Dear Sir,

Sub: The Shipping Corporation of India Limited. PAN: AAAC1524F. Assessment Year: 2016-17

The assessee refers to the captioned notice dt. 27th March 2021 issued u/s 148 of the Act. The assessee further refers to its reply dt. 19th April 2021 filed in response to the said notice and reasons for reopening dt. 17th November 2021 received by the assessee on 18th November 2021. In this regard, the assessee would like to submit its objections to issuance of notice u/s 148 as under:

A. Background

A.1 The return of income for AY 2016-17 was filed by the assessee on 29 November 2016 declaring total income of Rs. 179,14,88,584/- under normal provisions of the Act and book profit of Rs. 165,32,24,597/-. The return was selected for scrutiny and the assessment order was passed on 11th December 2018 assessing total income at Rs. 223,10,90,360/- under normal provision of the Act and book profit at Rs. 188,11,20,919/-.

A.2 Vide notice u/s 148 dt. 27th March 2021, the assessment for AY 2016-17 was sought to be reopened. In response to the said notice, the assessee vide reply dt. 19th April 2021 requested your goodself to treat the return of income filed for AY 2016-17 as return in response to notice u/s 148. Further, vide the said reply, the assessee requested your goodself to provide reasons for reopening. However, the assessee had replicated its original ITR and filed the ITR again on 20th May 2021.

A.3 Vide letter dt. 17th November 2021 (enclosed as Annexure-A), your goodself has provided reasons recorded for reopening. The relevant paras of the said reasons are reproduced below:

“...
DIA LTD

2. The Assessee had offered Net gain on foreign currency transaction of Rs.13.24 crore and Income from Rescindment of contracts of Rs.19.52 Crore under the Head Other Income (Note-24) in Profit and Loss Account. Further, it was noticed that the assessee had neither offered these incomes under the head as Incidental Activity under tonnage tax nor as Income from Other source in their computation. However, it was observed that during assessment the Income from Rescindment of contracts of Rs.19.52 Crore had been considered as business income under Incidental Activity and brought to tax, whereas gain on foreign currency transaction of Rs.13.24 crore was neither discussed nor brought to tax.

It is pertinent to mention here that the assessee himself considered both the transaction as Other Income in their profit and loss account, hence foreign currency transaction of Rs.13.24 crore should have also been considered as income due to their incidental to the business only and brought to tax. However, the same income was not added while assessment. This has resulted in under assessment of income amounting to Rs. Rs.13,24,00,000/-.

2.1, Therefore I am of the view that income to the extent of amount of Rs. 13,24,00,000/- as explained above, has escaped assessment.

2.2 Further it was observed that during assessment it was mentioned that the core activity and incidental activity has been properly defined in section 115V-1(2) and 115V-1(5) respectively. Therefore the income from Reimbursement of overhead for managed vessel amounting to Rs.35,79,48,794/- is considered as income from incidental activity and excluded from the core activity turnover in para 1.3 (page 1 of 33) of the assessment order. As the income was excluded from the Core activity turnover, the said income should have been considered as Income from Incidental Activity while computing the income under the head incidental activity under tonnage tax. However, it was observed that during assessment the same had considered as income under the head Incidental Activity under tonnage tax, even it was excluded from the turnover of Core Activity. This has resulted in under assessment of income amounting to Rs. Rs.35,79,48,794/-.

2.3 Therefore I am of the view that income to the extent of amount of Rs.35,79,48,794/-, as explained above, has escaped assessment.

...”

B. In the instant case, Reopening is invalid absence of any new material on record to establish that income has escaped assessment

- i. The reasons recorded in the instant case clearly reveal that there was no new information on record to support the reopening. It is respectfully submitted that the reasons recorded are merely re-appreciation of the material already available on record.
- ii. The Hon'ble Supreme Court in the case of CIT -vs.- Kelvinator of India Ltd [2010] 187 Taxman 312 (SC)(order dt. - 18-01-2010) has held that when a regular order of assessment is passed in terms of Sec. 143(3) of the Act, a presumption can be raised that such an order has been passed by due application of mind. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the AO to reopen the proceeding without anything further,

the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong. Sec. 147 of the Act does not postulate conferment of power upon the AO to initiate reassessment proceedings upon a mere change of opinion. The relevant extract of the decision is reproduced below:

“Though the power to reopen under the amended s. 147 is much wider, one needs to give a schematic interpretation to the words “reason to believe” failing which s. 147 would give arbitrary powers to the AO to re-open assessments on the basis of “mere change of opinion”, which cannot be per se reason to re-open. One must also keep in mind the conceptual difference between power to review and power to re-assess. The AO has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the AO. Hence, after 1.4.1989, the AO has power to re-open, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. This is supported by Circular No.549 dated 31.10.1989 which clarified that the words “reason to believe” did not mean a change of opinion.”

In the case of *Sabh Infrastructure Ltd. -vs.- ACIT [W.P.(C) 1357/2016]*(order dt. 25-09-2017] the Hon’ble Delhi High Court, has held as under:

“14. A perusal of the order disposing of the objections reveals that it proceeds on the basis that the information sought for by the Petitioner which formed the basis for the reasons to believe, including the evidence collected, was required to be provided only in the further assessment proceedings. The said order overlooks the fact that the reasons for reopening do not mention as to what fact or information was not disclosed by the Petitioner. This is very vital and in fact goes to the root of the matter . .

15. The assessment proceedings, especially those under Section 143 (3) of the Act, have to be accorded sanctity and any reopening of the same has to be on a strong and sound legal basis. It is well settled that a mere conjecture or surmise is not sufficient. There have to be reasons to believe and not merely reasons to suspect that income has escaped assessment.. .

18. Thus, the Petitioner cannot be said to have failed to disclose fully and truly all the material facts. This being a jurisdictional issue, the assumption of jurisdiction under Sections 147 and 148 of the Act was erroneous.. .”

In view of the above, it is respectfully submitted that in the instant case, in the absence of any new tangible material available with the Ld. AO, the reassessment proceedings cannot be invoked.

C. Assessee's duty does not extend beyond fully and truly disclosing all material facts necessary for assessment

It is submitted that while it is duty of every assessee to disclose fully and truly all material facts necessary for his assessment, his duty does not extend beyond such disclosure. The Hon'ble Supreme Court in the case of **Calcutta Discount Co. Ltd. -vs.- ITO [1961] 41 ITR 191** has categorically held that that once all primary facts are disclosed before the Assessing Authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn.

While framing the assessment, the factual details were accepted, which were available on record. Thus, it is submitted that onus of the assessee lies only till full and true disclosure of facts. For argument sake, even if it is said that the Assessing Officer had overlooked the details submitted by the assessee while framing the assessment, still the disclosure by the assessee can be said to be full and true.

The Hon'ble Andhra Pradesh High Court in the case of **Kohinoor Hatcheries (P.) Ltd -vs.- DCIT [2016] 76 taxmann.com 150 (AP) [order dt. 16-08-2016]** has observed that by making a distinction between a mere production of necessary materials and a true and full disclosure of materials necessary for assessment, the statute ensures two things viz. (a) that an officer, who had once formed an opinion, does not seek to change it later and (b) that an officer, who, deliberately or by his negligence, omitted to form an opinion, despite being made aware of the material facts, does not take refuge later u/s 147 to cover up his negligence.

D. **Assessee's plea on merits**

Without prejudice to the assessee's plea that there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment of AY 2016-17 and hence reassessment is invalid, on merits, the assessee would like to submit as under:

D.1. **Treatment of Foreign currency transaction**

It is submitted that the assessee's only business is operation of ships i.e., carrying out shipping activity. Refer Annual Report - SIGNIFICANT ACCOUNTING POLICIES point no. 9 attached wherein treatment of foreign currency transaction is detailed as below:

- a) All foreign currency transactions for each month are recorded at the closing exchange rate of the second last Friday of the preceding month published on xe.com website.
- b) The foreign currency balances other than in US Dollars appearing in the books of account at the period end are translated into US Dollars at the closing exchange rate of the second last Friday of preceding month published on xe.com website. Thereafter, the monetary assets and monetary liabilities as well as the Long Term Loans are translated into rupees at SBI Mean Rate prevailing at the period end.
- c) Exchange difference arising on repayment of liabilities and conversion of foreign currency closing balances pertaining to long term loans for acquiring ships /

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containers / other depreciable assets and asset under construction is adjusted in the carrying cost of respective assets.

d) The exchange differences arising on translation of other monetary assets and liabilities are recognised in the Statement of profit and loss.

In this regard, the assessee places reliance on the decision of the Hon'ble ITAT, Mumbai in **Tag Offshore Ltd, Mumbai vs Department Of Income Tax** on 8 August, 2014 has observed that

"If the foreign exchange gain has arisen to the assessee during the course of shipping business, then the same derives its character from such business only and no separate treatment can be given. Once the assessee's shipping income is taxed under a special provision, then also, it will not make a difference as only the shipping income is to be taxed. There can be no separate assessment on foreign exchange gain on the ground that it is different from operation of ships. In the context of computation of deduction under section 80HHC, as cited by the learned counsel, the Courts have invariably held that the foreign exchange gain or loss directly relates to the export and same is qualified for the purpose of deduction. The same logic will follow here also and, therefore, any foreign exchange gain or loss has to be in relation to the shipping income. There is no basis for separately taxing it as some other kind of business activity. Thus, we are not inclined to agree with the reasoning and conclusion drawn by the learned Commissioner (Appeals) and the same is accordingly reversed. Ground no.1, raised by the assessee is allowed."

In view of above, it is submitted that the assessee has rightly considered Foreign currency transaction as Core shipping income in its Computation of Income.

D.2. Treatment of income from Reimbursement of overhead for managed vessel

The assessee as part of its business manages various vessels which are owned by its clients. During the course of managing vessels, the assessee incurs direct, indirect expenses as well as overhead expenses. The cost incurred by the assessee on managing vessel is accounted under various heads of expenses in the profit & Loss account. On periodical basis, the assessee raises invoices on its clients wherein the assessee charges agreed mark up on direct and indirect cost incurred as remuneration for managing vessels. Further, the assessee also recovers proportionate overhead expenses incurred for managing vessels without any mark up from the client and the same is included in the invoices raised on the client. The cost of managed vessels is incurred for the business of operating ships i.e. core activities and when the assessee recovers such cost from the parties, the same should retain the character of income from core activities.

Rule 11R of the Income Tax Rules,1962 ('the Rules') provide that income from the following specified four activities



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- (i) Maritime consultancy charges
- (ii) Income from loading or unloading of cargo
- (iii) Ship management fees or remuneration received for managed vessels
- (iv) Maritime education or recruitment fees are to treated as income from incidental activities.

It is submitted that only the aforesaid four activities have been specifically prescribed as incidental activities. As such, it implies that all activities, other than incidental activities, should be considered as core activities. It is humbly submitted that reimbursement of management overhead expenses should be treated as part of turnover from core activities and not be taxed as Income from Incidental activity.

It is to be noted that the AO in his Assessment order dated 12th December 2018, has excluded the reimbursement of managed vessel overhead expenses from Core activities for calculating the 0.25% of Turnover from core activities, as required u/s 115VI of the Act. It is respectfully submitted that the assessment order is issued to arrive at the incidental income in excess of 0.25% for core activities.

Informatively, this ground and reply thereon along with supportings were already submitted during the course of assessment proceedings for AY 2016-17 and currently the matter is lying with CIT(A).

In light of the aforesaid, the assessee would like to request your goodself to drop the reassessment proceedings, since there have been no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment and even on merits there is no case of escapement of income.

We shall be pleased to clarify any pertinent aspects.

Thanking you,

Yours faithfully

For The Shipping Corporation of India Ltd.

कृते भारतीय नौवहन निगम लिमिटेड
for THE SHIPPING CORPORATION OF INDIA LTD.

X

Authorized Signatory

उप महाप्रबन्धक / Dy. General Manager I/C (Tax)

Enclosures: As stated above

10. Without disposing off the objections raised by the assessee, the AO proceeded with the re-assessment proceedings. The assessee repeatedly pointed out to the AO that he has strong objections on the re-assessment proceedings. Specific instances are, submission dated

06/01/2022 which is placed at pages 86 to 88 of the paper books, submission dated 24/03/2022 which is placed at pages 76 to 79 of the paper book, submissions dated 30/11/2021 exhibited at pages 70 to 75 of the paper book.

10.1. In spite of several reminders during the course of assessment proceedings itself, the AO did not consider the submissions of the assessee insofar as, specific objections were concerned. The AO finally framed the assessment order dated 30/03/2022 u/s 147 r.w.s. 144B of the Act without disposing the objections raised by the assessee. The entire quarrel revolves around this action of the AO.

11. The ld. D/R vehemently stated that the proposed draft assessment order is nothing but the disposal of the objections raised by the assessee.

11.1. We have given a thoughtful consideration to the impugned draft assessment order dated 24/03/2022. We do not find any whisper in respect of disposal of any objection in the said draft assessment order which is placed on record.

12. The Hon'ble Bombay High Court in the case of *Bayer Material Science (P) Ltd. vs. Deputy Commissioner of Income-tax-10(3)* reported in 382 ITR 333 (Bombay) had the occasion to consider a similar quarrel and held as under:-

"11. In the present facts, we find that the draft Assessment order was passed on 30th March, 2015 without having disposed of the Petitioner's objections to the reasons recorded in support of the impugned notice. The reasons were supplied to the Petitioner only on 19th March, 2015 and the Petitioner had filed the objections to the same on 25th March, 2015. This passing of the draft Assessment order without having disposed of the objections is in defiance of the Supreme Court's decision in GKN Driveshafts (India) Ltd. (supra). Thus, the draft Assessment order dated 30th March, 2015 is not sustainable being without jurisdiction. This for the reason that it has been passed without disposing of the objections filed by the Petitioner to the

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reasons recorded in support of their impugned notice. Accordingly, we set aside the draft Assessment order dated 30th March, 2015. We are not dealing the validity of the reasons in support of the impugned notice in the present facts as the time limit to pass the Assessment order as provided under 4th Proviso to sub-section(2) of Section 153 of the Act has already expired when the petition was filed.

13. In the case of *KSS Petron Private Limited vs. ACIT in Income Tax Appeal No. 224 of 2014*, the Hon'ble Bombay High Court was seized 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.?”

13.1. And the Hon'ble High Court, *inter alia* held as under:-

*“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 28 th 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.*

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

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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 a 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."

14. In yet another case of *Fomento Resorts & Hotels Ltd. vs. ACIT*, in Tax Appeal No. 63 of 2007, the Hon'ble High Court of Bombay was seized with the following question of law:-

"(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 ?"

15. And the Hon'ble High Court held as under:-

"9. Rival contentions now fall for determination.

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

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

this is a matter where the Assessing Officer failed to furnish the reasons for reopening of assessment whilst invoking the provisions of Section 11 of the said Act.

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

13. *In the present case, the Appellants did lodge their objections vide letter dated 14th April, 2003. By a further letter dated 25th March, 2004, the Appellants requested the Assessing Officer to dispose of such objections by passing a speaking order before proceeding with the reassessment in respect of the Assessment Year 1997-98. However, the Assessing Officer, without proceeding to dispose of the objections raised by the Appellants by passing a speaking order, straight away proceeded to make the assessment order dated 26th March, 2004, bringing to charge taxable expenditure on ₹10,22,73,987/-. The assessment order dated 26th March, 2004, no doubt, deals with the objections raised by the Appellant and purports to dispose of the same. Ms. Linhares contends that this is a sufficient compliance with the procedure set out in GKN Driveshafts (India) 10 txa63-07dt. 30-08-19 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

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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 re-opening 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."

16. Considering the facts of the case in totality, in light of the procedure laid down by the Hon'ble Supreme Court in the case of *GKN Driveshafts (India) Ltd. [2003] 259 ITR 19 (SC)*, followed by the Hon'ble Bombay High Court in three decisions mentioned hereinabove, we are of the considered opinion that the assessment order dated 30/03/2022 framed u/s 147 r.w.s. 144B of the Act is without jurisdiction and deserves to be set aside. We accordingly set aside the impugned notice u/s 148 of the Act thereby setting aside the impugned assessment order. The additional ground raised by the assessee is allowed. Since we have quashed the impugned notice u/s 148 of the Act, we do not find it necessary to delve into the merits of the case.

17. In the result, appeal of the assessee is allowed and that of the revenue is dismissed.

Order pronounced in the Court on 9th January, 2025 at Mumbai.

Sd/-

**(SUNIL KUMAR SINGH)
JUDICIAL MEMBER**

Sd/-

**(NARENDRA KUMAR BILLAIYA)
ACCOUNTANT MEMBER**

Mumbai, Dated 09/01/2025

SC S.P.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Mumbai