

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 4193 of 2015

With

SPECIAL CIVIL APPLICATION NO. 4194 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

sd/-

and

HONOURABLE MR.JUSTICE S.H.VORA

sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

PUSHPAK BULLION PVT. LTD.....Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME TAX....Respondent(s)

Appearance:

MR MANISH J SHAH, ADVOCATE for the Petitioner No. 1

MR NITIN K MEHTA, ADVOCATE for the Respondent(s) No. 1

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE S.H.VORA

Date : 07/05/2015

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.0. As common question of law and facts arise in both these petitions, they are disposed of by this common judgment and order.

2.0. By way of this petition under Article 226 of the Constitution of India, common petitioner assessee has prayed for an appropriate

writ, direction and order to quash and set aside the impugned notices under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the “Act”) for AY 2007-08 and 2009-10 as well as respective orders disposing of the objections raised against the initiation of reassessment proceedings.

2.1. Special Civil Application No.4193 of 2015 has been preferred by the petitioner to quash and set aside the impugned notice under Section 148 of the Act for AY 2009-10 and Special Civil Application No.4194 of 2015 has been preferred by the petitioner challenging the impugned notice under Section 148 of the Act, by which, the assessment for AY 2007-08 has been reopened.

2.2. As the controversy in both these petitions is in a narrow compass, the facts necessary for determination of the present Special Civil Applications are narrated, which are as under:

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3.0. That the petitioner filed return of income for AY 2009-10 at Rs.4,43,44,610/- with its Assessing Officer at Mumbai. That the Assessing Officer passed a scrutiny assessment order under Section 143(3) of the Act on 30th December 2011. That thereafter, the AO has issued the notices under Sections 148 of the Act dated 14.03.2014 and has reopened the assessment for AY 2009-10 stating that he has reasoned to believe that income had escaped assessment and asking the petitioner to file return within a period of 30 days from the service of the said notice. That thereafter, vide communication dated 08.12.2014 AO called upon the petitioner-assessee to furnish in writing and verified in the prescribed manner information called for as per annexures to the

said communication on the points or matters specified therein before him at his office on 22.12.2014. That vide communication dated 22.12.2014 the petitioner assessee addressed a letter requesting the AO to consider its revised Section 139 return as the one in response to Section 148 notice. That thereafter, the petitioner also requested to provide reason for reopening of the case if any. That thereafter, vide letter / communication dated 12.1.2015, AO supplied the copy of the reasons recorded for reopening of the assessment for AY 2009-10. That thereafter, the petitioner raised the objection against reopening of the assessment for AY 2009-10 vide his objection dated 16.02.2015. By impugned order dated 27.02.2015, the AO has disposed of the said objections without dealing anything on merits and solely on the ground that the petitioner had not filed return of income within a period of 30 days from receipt of the notice under Section 148 of the Act, objections on merits are not required to be dealt with or considered. That the AO while disposing of the objection has observed that as the petitioner-assessee has not complied with the notice under Section 148 of the Act within the stipulated time i.e. not within 30 days of receipt of notice under Section 148 of the Act, the assessee's objections raised against reopening proceedings is not acceptable as the case warrants scrutiny on the same lines. That while disposing of the objections and observing as above, the AO has considered and relied upon the decision of the Division Bench of this Court in the case of **Sahakari Khand Udyog Mandal Ltd vs. ACIT** reported in **(2015)370 ITR (Guj)**.

3.1. Hence, as the objections raised by the petitioner against the reopening of the assessment for AY 2009-10 has not been decided and dealt with by the AO on merits and without considering the objections on merits the AO has disposed of / overruled the said objection, the petitioner has preferred present Special Civil Application under Article

226 of the Constitution of India challenging notice under Section 148 of the Act as well as order disposing of the objections against reopening of the assessment for AY 2009-10.

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4.0. That the petitioner-assessee filed return of income for AY 2007-08 at Rs. 1,32,04,634/- on 15.11.2007. That the return was accepted by the department under Section 143(1) of the Act. That thereafter, AO has issued and served upon the impugned notice under Section 148 of the Act to the petitioner for AY 2007-08 dated 21.03.2014 to reopen the assessment for AY 2007-08 stating that he has reason to believe that income had escaped the assessment and asking the petitioner to file return within a period of not less than 30 days. That by communication dated 08.12.2014, AO at Ahmedabad addressed a letter to the petitioner stating that in response to notice under Section 148 issued by the AO at Mumbai, the petitioner had not filed the return and asked the petitioner to file the return as early as possible. That the petitioner by its letter dated 22.12.2014 requested the AO to treat its section 139 return as the one in compliance of Section 148 notice. The petitioner was requested to supply the copy of reasons recorded while reopening the assessment for AY 2007-08. That AO by his letter dated 12.01.2015 supplied the copy of the reasons recorded to the petitioner. That the petitioner raised the objection against reopening of the assessment for AY 2007-08 and against the reasons recorded, vide objection dated 19.02.2015. Thereafter by impugned order dated 27.02.2015 the AO has disposed of the said objection without dealing anything on merits and solely on the ground that the petitioner had not filed return of income within a period of 30 days from receipt of the notice under Section 148 of the Act, objections on merits are not

required to be dealt with or considered. That the AO while disposing of the objection has observed that as the petitioner-assessee has not complied with the notice under Section 148 of the Act within the stipulated time i.e. not within 30 days of receipt of notice under Section 148 of the Act, the assessee's objections raised against reopening proceedings is not acceptable as the case warrants scrutiny on the same lines. That while disposing of the objections and observing as above, the AO has considered and relied upon the decision of the Division Bench of this Court in the case of **Sahakari Khand Udyog Mandal Ltd vs. ACIT** reported in (2015)370 ITR (Guj).

4.1. Hence, as the objections raised by the petitioner against the reopening of the assessment for AY 2007-08 has not been decided and dealt with by the AO on merits and without considering the objections on merits, the AO has disposed of the said objection, the petitioner has preferred present Special Civil Application under Article 226 of the Constitution of India challenging notice under Section 148 of the Act as well as order disposing of the objections against reopening of the assessment for AY 2007-08.

5.0. Shri J.P. Shah, learned advocate for the petitioner-assessee has vehemently submitted that the AO has materially erred in not considering, deciding and disposing of the objection raised by the petitioner against reopening of the assessment on merits.

5.1. It is vehemently submitted by Shri J.P. Shah, learned advocate for the petitioner – assessee that the AO has materially erred in not disposing of the objection on merits solely on the ground that the petitioner – assessee had not filed the revised the return pursuant to the notice under Section 148 of the Act within a period not less than 30 days

from receipt of the notice under Section 148 of the Act. It is submitted that by not deciding / disposing of the objection on merits on the aforesaid ground, the AO has misinterpreted the directions issued by the Division Bench of this Court in the case of **Sahakari Khand Udyog Mandal Ltd (supra)**. It is vehemently submitted that in the aforesaid decision the Division Bench has never observed and / or directed that the assessee has to file return pursuant to notice under Section 148 of the Act within a period not less than 30 days from the date of receipt of notice under Section 148 of the Act and if the return pursuant to notice under Section 148 of the Act is not filed within a period not less than 30 days, the AO need not decide / dispose of the objections on merits. It is submitted that on the contrary in para 14(4) the Division Bench has specifically observed that requirement and time-frame for supplying the reasons without being demanded by the assessee would be applicable only if the assessee files his return of income within the period permitted in the notice for reopening and likewise the time frame for the Assessing Officer to dispose of the objections would apply only if the assessee raises objections within the time provided. It is submitted that the Division Bench further clarified this, however, would not mean that if in either case, the assessee misses the time limit, the procedure provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd (supra) would not apply. It is submitted that the Division Bench has further observed and clarified that it only means that the time frame provided hereinabove would not apply in such cases.

5.2. It is submitted that therefore, the AO has materially erred in not disposing of the objections on merits and has, as such misinterpreted and misread the directions issued by the Division Bench of this Court in the case of GKN Driveshafts (India) Ltd (supra).

5.3. It is further submitted by Shri Shah, learned advocate for the petitioner-assessee that after receipt of the reasons recorded for reopening by the assessee, once assessee raises objection against the reopening and reasons recorded, the AO is bound to dispose of the same on merits before proceedings further with the reassessment proceedings and / or before passing the reassessment order.

Making above submissions and relying upon the decision of the Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd vs. Income Tax Officers and Ors** reported in **(2003) 259 ITR 19** and the decision of the Full Bench of this Court in the case of **Garden Finance Limited vs. Assistant Commissioner of Income Tax** reported in **(2004) 268 ITR 48** as well as decision of the Division Bench of this Court in the case of **Arvind Mills Limited vs. Assistant Commissioner of Wealth Tax** reported in **(2004) 141 Taxman 210(Guj)**, it is requested to allow the present Special Civil Applications and grant the reliefs as prayed for.

6.0. Shri Nitin Mehta, learned advocate has appeared on behalf of revenue and has tried to support the impugned order, by relying upon the affidavit in reply. It is vehemently submitted that while disposing of the objections raised by the assessee against reopening of the respective assessments, the AO has considered and followed the decision of the Division Bench of this Court in the case of **Sahakari Khand Udyog Mandal Ltd (supra)**. It is submitted that as for number of months the assessee did not respond to the notice under Section 148 of the Act and did not file any return of income pursuant to the notice under Section 148 of the Act, the AO has rightly disposed of the objections by impugned orders. Therefore, it is requested to dismiss the present Special Civil Applications.

6.1. At this stage, it is required to be noted that learned

advocates for the parties have tried to make submission on merits, however for the reasons stated herein after, this Court proposes to remand the matters to the AO, we deem it proper not to enter into the merits and / or observe anything on merits with respect to the reopening of the respective assessments.

7.0. Having heard the learned advocates for the respective parties and considering the impugned orders by the AO disposing of the objections, it appears that the AO has disposed of the said objections without deciding it on merits and solely on the ground that as the assessee has not filed the return pursuant to the notice issued under Section 148 of the Act within a period not less than 30 days from the date of receipt of the notice under Section 148 of the Act. That while disposing of the said objections on the aforesaid ground, the AO has relied upon and considered the decision of the Division Bench of this Court in the case of **Sahakari Khand Udyog Mandal Ltd (supra)**. However, on considering the directions issued by the Division Bench of this Court in the case of **Sahakari Khand Udyog Mandal Ltd (supra)**, it appears that AO has misread and / or misinterpreted the directions issued by the Division Bench of this Court in the case of **Sahakari Khand Udyog Mandal Ltd (supra)**.

8.0. In the case of **Sahakari Khand Udyog Mandal Ltd (supra)** the Division Bench had an occasion to consider the various difference stages from the date of notice under Section 148 of the Act to the reassessment order and ultimately after considering the decision of the Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd (supra)**, in para 14 had issued the following directions;

“1. Once the Assessing Officer serves to an assessee a notice of reopening of assessment under section 148 of the Income Tax Act,

1961, and within the time permitted in such notice, the assessee files his return of income in response to such notice, the Assessing Officer shall supply the reasons recorded by him for issuing such notice within 30 days of the filing of the return by the assessee without waiting for the assessee to demand such reasons.

2. Once the assessee receives such reasons, he would be expected to raise his objections, if he so desires, within 60 days of receipt of such reasons.

3. If objections are received by the Assessing Officer from the assessee within the time permitted hereinabove, the Assessing Officer would dispose of the objections, as far as possible, within four months of date of receipt of the objections filed by the assessee.

4. This is being done in order to ensure that sufficient time is available with the Assessing Officer to frame the assessment after carrying out proper scrutiny. The requirement and the time-frame for supplying the reasons without being demanded by the assessee would be applicable only if the assessee files his return of income within the period permitted in the notice for reopening. Likewise the time frame for the Assessing Officer to dispose of the objections would apply only if the assessee raises objections within the time provided hereinabove. This, however, would not mean that if in either case, the assessee misses the time limit, the procedure provided by the Supreme Court in the case of *GKN Driveshafts (India) Ltd (supra)* would not apply. It only means that the time frame provided hereinabove would not apply in such cases.

5. In the communication supplying the reasons recorded by the Assessing Officer, he shall intimate to the assessee that he is expected to raise the objections within 60 days of receipt of the reasons and shall reproduce the directions contained in sub-para 1 to 4 hereinabove giving reference to this judgment of the High Court.

6. The Chief Commissioner of Income Tax and Cadre Controlling Authority of the Gujarat State, shall issue a circular to all the Assessing Officers for scrupulously carrying out the directions contained in this judgment.”

8.1. From the aforesaid, it does not appear that any observation has been made by the Division Bench and / or any direction is issued by the Division Bench that assessee has to file return of income in response to the notice under Section 148 of the Act within a period not less than 30 days. What is observed / directed by the Division Bench is that if the assessee when files his return of income in response to notice under

Section 148 of the Act, the AO shall supply the reasons recorded by him for issuing such notice within 30 days of the filing of the return by the assessee without waiting for the assessee to demand such reasons. The Division Bench has further observed and directed that once the assessee receives such reasons, he would be expected to raise his objections, if he so desires, within 60 days of receipt of such reasons and if objections are received by the Assessing Officer from the assessee within the time permitted hereinabove, the Assessing Officer would dispose of the objections, as far as possible, within four months of date of receipt of the objections filed by the assessee. That the Division Bench has also further clarified that requirement and the time-frame for supplying the reasons without being demanded by the assessee would be applicable only if the assessee files his return of income within the period permitted in the notice for reopening and likewise the time frame for the Assessing Officer to dispose of the objections would apply only if the assessee raises objections within the time provided hereinabove. The Division Bench has also further observed and clarified that this however, would not mean that if in either case, the assessee misses the time limit, the procedure provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd (supra) would not apply and it only means that the time frame provided hereinabove would not apply in such cases. Meaning thereby, the aforesaid time limit shall be strictly adhered to by the AO to supply reasons recorded; by the assessee to file objections, if he so desire within 60 days and by the AO to dispose of the objections within four months. As further clarified even in case the assessee misses the time limit, the procedure provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd (supra) shall be followed. It is true that on receipt of notice under Section 148 of the Act, the assessee is required to file return within time prescribed in such notice and / or within reasonable time and simultaneously asked for the reasons recorded for

reopening and AO is bound to dispose of such objections within time provided by the Division Bench in the case of **Sahakari Khand Udyog Mandal Ltd (supra)**, however in any case before the order of assessment under Section 143(3) r/w Section 147 of the Act. However, at this stage also, the AO must give reasonable time to the assessee to challenge the order disposing of the objection by way of petition under Article 226 of the Constitution of India.

8.2. In the case of **GKN Driveshafts (India) Ltd (supra)**, the Hon'ble Supreme Court has laid down an elaborate procedure as to the manner of dealing with objections raised against a notice under Section 148 of the Act in the following words:-

...However, we clarify that when a notice under section 148 of the Income-tax Act is issued, the proper course of action for the notice is to file a return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the notice is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instance case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years.”

8.3. In a subsequent decision in the case of Garden Finance Ltd. v. Asstt. CIT reported in (2004) 268 ITR 48 (Guj.) (FB), the effect of Supreme Court decision in the case of G.K.N. Driveshaft (India) Ltd. (Supra) came up for consideration and by a majority opinion it has been thus laid down by this Court as under:

“What the Supreme Court has now done in the G.K.N. Case (2003)259 ITR 19 is not to whittle down the principle laid down by the Constitution Bench of the Apex Court in Calcutta Discount Co. Ltd. case (1961) 41 ITR 191 but to require the assessee first to lodge preliminary objection before the Assessing Officer who is bound to decide the preliminary objections to issuance of the re-assessment notice by passing a speaking order and, therefore, if such order on the preliminary objections is still against the assessee, the assessee will get

an opportunity to challenge the same by filing a writ petition so that he does not have to wait till completion of the re-assessment proceedings which would have entailed the liability to pay tax and interest on re-assessment and also to go through the gamut of appeal, the second appeal before Income-tax Appellate Tribunal and then reference / tax appeal to the High Court.

Viewed in this light, it appears to me that the rigour of availing of the alternative remedy before the Assessing Officer for objecting to the re-assessment notice under section 148 has been considerably softened by the Apex Court in G.K.N. case (2003) 259 ITR 19 in the year 2003. In my view, therefore, the G.K.N. case (2003) 259 ITR 19 (SC) does not run counter to the Calcutta Discount Co. Ltd. case (1961) 41 ITR 191 (SC) but it merely provides for challenge to the re-assessment notice in two stages, that is,-

- i) raising preliminary objections before the Assessing Officer and in case of failure before the Assessing Officer,*
- ii) challenging the speaking order of the Assessing Officer under section 148 of the Act (p.87).”*

8.4. Thereafter, in the case of Arvind Mills Ltd. (Supra), the Division Bench of this Court had an opportunity to consider the aforesaid two decisions and after considering both the aforesaid decisions, in para 9 the Division Bench has observed and held as under:

“9. The position in law is thus well settled. After a notice for re-assessment has been issued an assessee is required to file the return and seek reasons for issuance of such notice. The Assessing Officer is then bound to supply the reasons within a reasonable time. On receipt of reasons, the assessee is entitled to file preliminary objections to issuance of notice and the Assessing Officer is under a mandate to dispose of such preliminary objections by passing a speaking order, before proceeding with the assessment in respect of the assessment year for which such notice has been issued.”

8.5. Thus, considering the aforesaid decision of the Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd (supra)** and the decision of the Full Bench of this Court in the case of **Garden Finance Limited (supra)** and the decision in the case of **Arvind Mills Ltd. (Supra)** and the decision of the Division Bench in the case of

Sahakari Khand Udyog Mandal Ltd (supra) impugned orders disposing of the objections without deciding the objections on merits cannot be sustained and same deserve to be quashed and set aside. The impugned orders passed by the AO disposing of the objections are absolutely on misinterpretation and / or misreading of the decision of the Division Bench in the case of **Sahakari Khand Udyog Mandal Ltd (supra)**. As observed herein above in the case of **Sahakari Khand Udyog Mandal Ltd (supra)** the Division Bench has never provided / prescribed/ stipulated any time limit for the assessee to file return of income pursuant to notice under Section 148 of the Act, more particularly within a period not less than 30 days and failure to file return of income within a period not less than 30 days, AO need not decide the objections on merits. Such interpretation by the AO is absolutely on misinterpretation and / or on misread of the decision of the Division Bench of this Court in the case of **Sahakari Khand Udyog Mandal Ltd (supra)**. As observed herein above, it is true that on receipt of notice under Section 148 of the Act, the assessee is required to file return of income pursuant to notice under Section 148 of the Act within the time prescribed in the notice and / or within extended period and / or within reasonable period and assessee may in a given case request the AO to treat the original return as return of income pursuant to the notice under Section 148 of the Act and simultaneously may request for reasons recorded and on receipt of the reasons recorded, the assessee is required to raise objection, if he so desires, within reasonable time and thereafter the AO is bound to decide the objection on merits and decide and dispose of the objections within reasonable time, more particularly, within the time prescribed / directed by the Division Bench in the case of **Sahakari Khand Udyog Mandal Ltd (supra)** and communicate the decision disposing of the objections at the earliest, however before finalizing the assessment under Section 143(3) of the Act r/w Section

147 of the Act, however after giving reasonable time to the assessee to challenge the decision / order disposing of the objections.

9.0. In view of the above and for the reasons stated above, as the AO has not dealt with and disposed of the objections raised by the assessee against reopening of the assessment on merits meaning thereby has disposed of the objections without considering the objections on merits solely on the ground that assessee has not filed return of income within period not less than 30 days from the date of receipt of notice under Section 148 of the Act, impugned orders disposing of the objections are hereby quashed and set aside and the matters are remanded to the AO to consider, decide and dispose of the objections on its own merits and in accordance with law and in light of the observations made herein above. The aforesaid exercise shall be completed by the AO within a period of two months from the date of receipt of writ of the present order. However, it is made clear that this Court has not expressed anything on merits with respect to legality and validity of the notice under Section 148 of the Act or even with respect to objections raised against the reopening of the assessment for respective assessment years. Rule is made absolute to the aforesaid extent in each of the petitions. No costs.

sd/-

(M.R.SHAH, J.)

sd/-

(S.H.VORA, J.)

Kaushik