

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'B' JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 477/JP/2019
निर्धारण वर्ष / Assessment Year : 2009-10

Shri Paresh Kumar Jain, A-21, Bajaj Nagar, Jaipur	बनाम Vs.	ITO, Ward 6(3), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AFDPJ6938C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Sh. Vikash Jain (CA)
राजस्व की ओर से / Revenue by : Ms. Chanchal Meena (JCIT)

सुनवाई की तारीख / Date of Hearing : 17/03/2020
उद्घोषणा की तारीख / Date of Pronouncement: 20/03/2020

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. CIT(A), Ajmer dated 07.01.2019 wherein the assessee has taken the following grounds of appeal:-

- "1. Under the facts and circumstances of the case and in law, the Ld. CIT Appeals erred in confirming the action of addition of Rs. 1,68,310/- in gross violation of supreme courts directions as contained in the decision in GKN Driveshaft for disposal of objection raised for reopening of the assessment proceedings u/s 148 of the Income Tax Act, 1961.*
- 2. Under the facts and circumstances of the case, the Ld. below authorities has erred in completing the assessment proceedings in gross violation of principles of natural justice.*

3. Under the facts and circumstances of the case and in law the reassessment proceedings u/s 148 are bad in law as it was based on borrowed satisfaction of the Id. AO.

4. Under the facts and circumstances of the case the Id. CIT Appeals has erred in the confirming the action of addition of Rs. 1,68,310/- made by the Id. AO. "

2. During the course of hearing, the Id. AR submitted that the assessee is engaged in trading of shares & future and has filed his return of income declaring loss of Rs. 1,98,551/- on 30.09.2009. Thereafter, the case of the assessee was reopened by issuance of notice u/s 148 dated 29.03.2016. In response to the notice u/s 148, the assessee filed his return of income on 12.05.2016 and requested for a copy of the reasons for reopening the case u/s 148 vide letter dated 09.06.2016. The copy of the reasons was duly supplied by the Assessing officer to the assessee. Thereafter, the assessee filed his submission vide letter dated 09.08.2016 raising objections against the reopening the case and our reference was drawn to the said letter and the relevant content reads as under:-

"(a) Kindly arrange to provide in writing the basis of how it has been gathered that some brokers have misused the client code modification facility in derivatives transactions in NSE during March 2010 Here it is pertinent to note that our case pertains to F.Y 2008-09 and not F.Y 2009-10, hence your own basis is contradicting here that the facility was misused in March 2010 and not in F.Y 2008-09. Kindly arrange to provide the same in writing only. Further, the assessee is not the broker himself and was a client of a broker. The facility of client code modification was given by SEBI to broker only and is not available with the client. Further, the client, as usually

takes place, used to place order on phone from his home/office place. And while placing orders he did not know what the code broker dealer was feeding, and how many clients he was handling over phone and in his office. It is most likely that while dealing with many clients at a time, it possible to punch a wrong code and in such cases of genuine mistakes, he had to be change to code as he had no choice. But for all these changes, client would never know what has taken place inside broker room, and in the pressure of informing correct position to the client concerned, broker and his person has not option but to correct the code wrongly punched, as if code is not changed in the evening in the specified time given by the exchanges, no client would take any responsibility of financial losses suffered in the next morning due to global financial conditions in other stock markets. Hence, broker has no choice but to correct the wrong code punched by his staff and for this we cannot be penalized by making addition to our returned income from deeds which are beyond our knowledge.

(b) Kindly arrange to provide the details of surveys carried out u/s 133A on such brokers and of the copy of their affidavit/oath showing the proof that they have confirmed of having misused the facility of client code modification to create fictitious losses.

(c) From the above reasons of opening the case u/s 148 of the Income Tax Act, 1961, in the case of the assessee." It is gathered that during the year under consideration the assessee has taken entries of fictitious profit/loss by misusing of facility of client code modification". In this regard, kindly arrange to provide the basis of such" it is gathered", so that we can also analyze and reply accordingly.

Without prejudice to above,

(1) *The facts of the case are that the assessee has filed original return of income at a loss of Rs. 1,98,924/- and also filed return of income in response to notice u/s 148 at a Loss of Rs. 1,98,924/- there is no change in the return of income filed. The assessee has done total 8 future and options transactions with the broker Maverick Share Brokers Pvt. Ltd., during the period under review. The transactions in question were done by the assessee only and assessee had no control, as discussed above, if the order placed by him was punched in wrong code and later on rectified by the broker concerned and thus falling in the net of what is mentioned in your reasons for opening the case u/s 148 of the Income Tax Act, 1961.*

(2) *Further, as the assessee had filed the return at a loss of Rs. 1,98,924/- even if the amount impugned in above of Rs. 1,65,010/- is added back to the income of the assessee, even then there will be no liability of income tax as the amount will still be below the amount not chargeable to tax, but however, that is not in question. Question is of genuineness of transaction and intention to do such kind of transaction on the part of the assessee. Normally, as everybody knows, such type of transactions are done with the intent to hide the profit while taking losses from such transactions and to avoid payment of actual taxes to the Government. But in our case. From the transactions done and the kind of profit shown from the business income, no body even in dreams will take such decision/intent to buy so called losses from the broker, as when already there was no income in the hands of the assessee to offer for tax and what is offered is much below taxable income.*

(3) *Hence from the facts of the above case, it is clear that there was neither intent nor such circumstances were there in which assessee would have thought of taking losses in his name when he was not*

having any income even to an amount which is not chargeable to tax. Such mistakes done on the part of broker, must have been genuine only and must have been done during the normal course of business.

(4) Hence, in view of above, it is requested your kind honour to kindly drop the proceedings initiated u/s 148 of the income tax which have been done only on guess work and pure imagination. Hence, it is requested that adverse inference should be taken from what is stated above and assessment should be made at the return income only, we should not be penalized for mistake of other persons, which was not in our knowledge.”

3. It was further submitted that after receipt of the objections so filed by the assessee, the AO did not dispose off the objections so raised by the assessee by any speaking order and went on to complete the assessment which is in clear violation of the decision of Hon'ble Supreme Court in case of GKN Driveshaft & others (2003) 259 ITR 19 (SC). It was accordingly submitted that the order passed by the AO is bad in law as very basic objections raised by the assessee have not been dealt with by the AO before the passing the assessment order. It was accordingly submitted that the order passed by the AO does not satisfy the legal requirements and should be quashed.

4. Per contra, the Id. DR submitted that the non disposal of objections raised by the assessee against the reasons recorded by the AO before issuance of notice u/s 148 is a mere technicality which cannot be fatal in terms of making the whole reassessment proceedings as bad in law. In support, she relied on the decision of Hon'ble Madras High Court in case of Home Finders Housing Ltd. vs. ITO and it was submitted that the SLP against the said decision has since been dismissed by the Hon'ble Supreme Court as reported in 94 Taxamann.com 84.

5. We have heard the rival contentions and perused the material available on record. In this case, the undisputed facts which are emerging from the records are that the assessee has originally filed his return of income on 30.09.2009 and thereafter, in response to notice u/s 148 dated 29.03.2016, the assessee filed his return of income disclosing the income as originally filed, the assessee requested for the copy of the reasons to be supplied to him which were duly supplied by the Assessing officer on 9.06.2016 and thereafter, the assessee filed his objections on 09.08.2016 against the reopening of the assessment and requesting for dropping the proceedings initiated by issuance of notice u/s 148 of the Act. Thereafter, the notice u/s 143(2) was issued and the reassessment was completed U/s 143(3) r.w.s. 147 of the Act vide order dated 14.12.2016. There is no mention in the assessment order that before completing the assessment proceedings, the objections were disposed off by the Assessing officer. Further, there is nothing on record or brought to our notice during the course of hearing that the Assessing officer has disposing off the objections so raised by the assessee through a separate order. We therefore find that it is an undisputed fact that the assessee has raised objections against initiating of reassessment proceedings by issue of notice u/s 148 of the Act and the Assessing Officer has proceeded with the reassessment proceedings and passed the order U/s 143(3) r.w.s. 147. Disposing off the objections raised by the assessee against the reasons recorded before issuance of notice u/s 148 though not part of statutory requirement as prescribed under the Income Tax Act, however, the same is guided by the directions issued by the Hon'ble Supreme Court in case of GKN Driveshafts (India) Ltd (supra). There is thus a clear violation of the directions issued by the Hon'ble Supreme Court. The question that arises for consideration is whether such violation of the directions issued by the Hon'ble Supreme Court is a mere technicality and breach of such technicality can be made good by remanding the matter

back to the file of the Assessing officer. Alternatively, whether the same is in nature of an illegality which has prejudiced the interest of the assessee to challenge the same before the Courts as the Assessing officer has already passed the reassessment order and thus cannot be cured and will result in quashing of the reassessment order.

6. In this regard, we find that similar issue has come up for consideration before the Hon'ble Rajasthan High Court in case of M/s K.C. Mercantile vs. CIT (*in D. B. Appeal No. 292/2016*) wherein the Tribunal has remanded the matter back to the file of the Assessing officer for disposing off the objections and in that context, the following substantial question of law was framed by the Hon'ble High Court which reads as under:

"whether under the facts and circumstances of the case, the Id Tribunal was justified in not declaring the reassessment proceedings and consequential assessment order passed thereto as nullity?"

And the relevant facts and findings are contained in Para 4, 4.1 and 8 which reads as under:-

"4. Counsel for the appellant has contended that the present appeal is arising out of the judgment and order of the tribunal whereby tribunal has upheld the contention of the appellant and remitted back the matter for reassessment which will give a second inning to the Assessing Officer who has to do reassessment within a period of 9 months and he will get extended time of limitation which is not the object of the Income Tax Act. When the Court has already fixed the period, it is to be construed in a very strict sense and has to be applied.

4.1 In support of his contention, he has relied upon the following decisions:

1. KSS Petron Private Ltd. vs. ACIT, ITA No. 227/2014, 03.10.2016 holding 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 in which the order under section 254 of the Act, was passed by the Tribunal and received by the Commissioner of Income tax."

The Hon'ble Rajasthan High Court, thereafter, has given its findings as under:

"8. Before proceeding with the matter, it is not out of place to mention that the law declared by the Supreme Court in GKM Driveshafts (supra) clearly held that the preliminary objection is to be decided as the first, it cannot be decided subsequently. The argument which has been canvassed by the assessee is required to be considered very seriously more particularly in view of the observations made by the Supreme Court in the case of KS Petron Private Ltd. (supra) which is followed in Hotel Blue Moon (supra), the law declared by the Supreme Court is taken in true spirit whether it will open a second inning in how own. Section 153(3) is to be read very cautiously as 153 powers are given to the Department, the Court has to look into whether the law declared by the Supreme Court is given away or protected. In the present case, as the Assessing Officer has clearly ignored the law declared by the Supreme Court, in that view of the matter, the issues which are raised in the matter, the Tribunal ought not to have remitted back for reassessment since period of limitation has already expired as the authority will get extended time of limitation beyond 9 months which is not the object of Income Tax Act.

9. In that view of the matter, on issue No. 1 and 2, the order of reassessment passed by the Tribunal is declared null and void. The questions are answered in favour of assessee and against the Department.

10. The appeal of the assessee is allowed.”

7. We find that in the aforesaid decision, the Hon'ble Rajasthan High Court has held that the law declared by the Supreme Court in GKN Driveshafts clearly require that the preliminary objection is to be decided first and cannot be decided subsequently and the Tribunal ought not to have remitted back for reassessment since period of limitation has already expired as the authority will get extended time of limitation beyond 9 months which is not the object of Income Tax Act. It is further noted that in the said decision, the Hon'ble High Court has considered the decision of Hon'ble Madras High Court in case of Home Finders Housing limited vs ITO (supra) and has followed the decision of the Hon'ble Supreme Court in case of KSS Petron Private Ltd. vs. ACIT (supra). In light of above and respectfully following the decision of the Hon'ble Jurisdictional High Court which is binding on this Tribunal, the reassessment proceedings completed without firstly disposing off the objection raised by the assessee cannot be sustained and consequent reassessment order u/s 147 r/w 143(3) is hereby quashed and set aside.

8. In light of above, the other contentions advanced by both parties are not adjudicated upon. The grounds on merit have become academic and the same are dismissed as infructuous.

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

Order pronounced in the open Court on 20/03/2020.

Sd/-
(विजय पाल राव)
(Vijay Pal Rao)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 20/03/2020

*Ganesh Kr.

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

1. अपीलार्थी / The Appellant- Sh. Paresh Kumar Jain, Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 6(3), Jaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 477/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar