

AO has to dispose of objections against reason recorded before proceeding with reassessment

August 8, 2015 [2015] 59 taxmann.com 328 (Gujarat)

IT : Before proceeding with assessment in case of reassessment, Assessing Officer is under a mandate to dispose of preliminary objections raised by assessee against reasons recorded for reopening

■ ■ ■

[2015] 59 taxmann.com 328 (Gujarat)

HIGH COURT OF GUJARAT

Banaskantha District Oilseeds Growers Co-op. Union Ltd.

v.

Assistant Commissioner of Income-tax*

M.R. SHAH AND S.H. VORA, JJ.

SPECIAL CIVIL APPLICATION NO. 7813 OF 2015

MAY 7, 2015

Section 147, read with section 148, of the Income-tax Act, 1961 - Income escaping assessment - General (Preliminary objections) - Assessment year 2009-10 - Whether Assessing Officer was under a mandate to dispose of preliminary objections raised by assessee against reasons recorded for reopening assessment by passing speaking order before proceeding with assessment - Held, yes [Para 7] [In favour of assessee/Matter remanded]

FACTS

- The assessee a co-operative society was engaged in the business of processing of oil seeds and trading of oil. The assessee filed the return of income for the relevant year declaring total loss of Rs. 87.95 lakhs that the case was selected for scrutiny under section 143(3).
- The Assessing Officer finalized the assessment and passed the assessment order. Within a period of four years from the end of relevant

year, the Assessing Officer issued the notice to reopen the assessment. On the request made by the assessee, the Assessing Officer communicated the assessee the reasons recorded for reopening the assessment immediately thereafter the assessee submitted the detailed objection against reopening of the assessment. The Assessing Officer did not disposed of the said objections earlier and disposed of the said objections simultaneously while passing the assessment order.

- On application:

HELD

- The notice under section 148 to reopen the assessment was issued by the Assessing Officer as far as back on 26-2-2014. That thereafter on the request made by the assessee, the Assessing Officer communicated the petitioner-assessee the reasons recorded for reopening of the assessment. That immediately thereafter the petitioner submitted the detailed objections against reopening of the assessment on 11-6-2014. For the reasons best known to the Assessing Officer, the Assessing Officer did not dispose of the said objections earlier and has dealt with and disposed of the said objections simultaneously while passing the assessment order dated 20-3-2015. It is required to be noted that between the objections raised on 11-6-2014 and the order of assessment dated 20-3-2015, there was sufficient time with the Assessing Officer to deal with and dispose of the objections *i.e.* approximately 9 months. That the Assessing Officer has dealt with and disposed of the objections raised by the petitioner, simultaneously while passing the impugned order of assessment dated 15-3-2015 and that too by passing a non-speaking order. [Para 6]
- In view of the binding decisions of the Supreme Court as well as Full Bench and Division Bench of this Court, the impugned order of assessment cannot be sustained. As observed herein above though the detailed objections were raised against reopening of the assessment on 11-6-2014, the Assessing Officer did not disposed of the same till the assessment order came to be passed under section 143(3), read with section 147 and has dealt with and disposed of the objections simultaneously while passing the assessment order and that too by a non-speaking order.

- The Assessing Officer is not only under a mandate to dispose of such preliminary objections before proceeding with the assessment, even the Assessing Officer is under a mandate to dispose of such preliminary objections by passing a speaking order. Under the circumstances, the impugned assessment order cannot be sustained and the matter is remanded to the Assessing Officer by directing the Assessing Officer to pass a speaking order and to dispose of the objections raised by the petitioner against reopening of the assessment and/or against reasons recorded for reopening of the assessment and thereafter to communicate the outcome of the same to the petitioner and after giving reasonable time to the petitioner to challenge the same before higher Court/Forum, may proceed further with the assessment in respect of the assessment for which such notice has been issued. [Para 7]

CASE REVIEW

Arvind Mills Ltd. v. Asstt. CWT [2004] 270 ITR 469/141 Taxman 210 (Guj.); *Garden Finance Ltd. v. Asstt. CIT* [2004] 268 ITR 48/137 Taxman 49 (Guj.) (FB) and *GKN Driveshaft (India) Ltd. v. ITO* [2003] 259 ITR 19/[2002] 125 Taxman 963 (SC) (para 7) followed.

CASES REFERRED TO

GKN Driveshaft (India) Ltd. v. ITO [2003] 259 ITR 19/[2002] 125 Taxman 963 (SC) (para 4.1), *Arvind Mills Ltd. v. Asstt. CWT* [2004] 270 ITR 469/141 Taxman 210 (Guj.) (para 4.1) and *Garden Finance Ltd. v. Asstt. CIT* [2004] 268 ITR 48/137 Taxman 49 (Guj.) (FB) (para 6.1).

Tej Shah, Adv. for the Appellant. **Nitin K. Mehta**, Adv. for the Respondent.

JUDGMENT

M.R. Shah, J. - RULE. Shri Nitin Mehta, learned advocate waives service of notice of Rule on behalf of the respondent. In the facts and circumstances of the case and with the consent of learned advocates appearing for respective parties, present petition is taken up for final hearing today.

2. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, direction and order to quash and set aside the

impugned notice dated 26.02.2014 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "Act") issued by the respondent for the assessment year 2009-10.

2.1 The petitioner has also prayed for an appropriate writ, direction and order to quash and set aside the order dated 20.03.2015 passed by the respondent herein - Assessing Officer under Section 143(3) read with Section 147 of the Act for AY 2009-10.

3. Facts leading to the present Special Civil Application in nut-shell are as under:

3.1 That the petitioner - assessee - Cooperative Society engaged in the business of processing of oil seeds and trading of oil filed the return of income for the Assessment Year 2009-10 declaring total loss of Rs.87,95,310/-. That the case was selected for scrutiny under Section 143(3) of the Act. That thereafter the Assessing Officer finalized the assessment and passed the assessment order on 30.11.2011.

3.2 That subsequently within a period of four years from the end of AY 2009-10, the Assessing Officer has issued the impugned notice under Section 148 of the Act on 26.02.2014, by which the petitioner - assessee has been called upon to file the revised return of income. That on the request made by the assessee, the Assessing Officer communicated to the petitioner - assessee the reasons recorded for reassessment/reopening of the assessment for AY 2009-10. That on receipt of the reasons recorded for reopening the assessment under Section 147 of the Act for the AY 2009-10, immediately the petitioner - assessee raised the objections to the reasons recorded and against reopening of the assessment by submitting detail objections on 11.06.2014. That instead of deciding the objections before proceeding further with the assessment/reassessment, and simultaneously while passing the assessment/reassessment order on 20.03.2015, the Assessing Officer dealt with/disposed of the objections raised by the petitioner - assessee and simultaneously on the very day and in the order of assessment itself, the Assessing Officer has passed the impugned assessment/reassessment order dated 20.03.2015. Hence, the petitioner has preferred the present Special Civil Application for the aforesaid reliefs.

4. Shri Tej Shah, learned advocate appearing on behalf of the petitioner has vehemently submitted that impugned assessment order under Section 143(3) read with Section 147 of the Act is absolutely illegal. It is submitted that in the present case the Assessing Officer earlier did not dispose of the objections raised by the petitioner, raised against the reopening of the assessment/reasons recorded for reopening of the assessment on 11.06.2014 and without deciding and disposing of the same earlier, the Assessing Officer had dealt with and disposed of the objections simultaneously

while passing the assessment order/reassessment order and that too by passing a non-speaking order while deciding the objections raised.

4.1 It is submitted by Shri Shah, learned advocate appearing on behalf of the petitioner that as per the decision of the Hon'ble Supreme Court in the case of *G.K.N. Driveshafts (India) Ltd. v. ITO* [2003] 259 ITR 19/[2002] 125 Taxman 963 and the decision of the Division Bench of this Court in the case of *Arvind Mills Ltd. v. Asstt. CWT* [2014] 270 ITR 469/141 Taxmann 210 (Guj.), the Assessing Officer is bound/obliged to dispose of the preliminary objections against reopening, by passing a speaking order, before proceeding with the assessment in respect of the assessment year for which such notice has been issued. It is submitted that the aforesaid is held to be mandatory.

4.2 It is further submitted that even while considering/deciding and/or disposing of the objections against the reopening of the assessment, the Assessing Officer is bound to pass a speaking order and that too before proceeding further with the assessment. It is submitted that in the present case the Assessing Officer has passed a non-speaking order while dealing with and disposing off the objections raised by the petitioner and that too while passing the order of Assessment under Section 143(3) r/W. Section 147 of the Act. It is submitted that therefore the impugned order of assessment is absolutely illegal, arbitrary and the same deserves to be quashed and set aside.

5. Shri Nitin Mehta, learned advocate appearing on behalf of the respondent is not in a position to dispute that the objections raised by the petitioner on 11.06.2014 which are raised against reopening of the assessment came to be dealt with and disposed of by the Assessing Officer simultaneously while passing the assessment order.

6. Heard learned advocates appearing for respective parties at length.

At the outset it is required to be noted that the notice under section 148 of the Act to reopen the assessment for AY 2009-10 was issued by the Assessing Officer as far as back on 26.02.2014. That thereafter on the request made by the assessee, the Assessing Officer communicated the petitioner - assessee the reasons recorded for reopening of the assessment for AY 2009-10. That immediately thereafter the petitioner submitted the detailed objections against reopening of the assessment for AY 2009-10 on 11.06.2014. For the reasons best known to the Assessing Officer, the Assessing Officer did not dispose of the said objections earlier and has dealt with and disposed of the said objections simultaneously while passing the assessment order dated 20.03.2015. It is required to be noted that between the objections raised on 11.06.2014 and the order of assessment dated 20.03.2015, there was sufficient time

with the Assessing Officer to deal with and dispose of the objections i.e. approximately 9 months. That the Assessing Officer has dealt with and disposed of the objections raised by the petitioner, simultaneously while passing the impugned order of assessment dated 15.03.2015 and that too by passing a non-speaking order. In the case of *G.K.N. 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 the 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 above said five assessment years."

6.1 In a subsequent decision in the case of *Garden Finance Ltd. v. Asstt. CIT [2004] 268 ITR 48/137 Taxman 49 (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).*"

6.2 In the case of *Arvind Mills Ltd. (supra)*, in para 9, the Division Bench after considering the decision of the Hon'ble Supreme Court in the case of *G.K.N. Driveshafts (India) Ltd. (supra)* and the *Garden Finance Ltd. (supra)* 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."

7. In view of the aforesaid binding decisions of the Hon'ble Supreme Court as well as Full Bench and Division Bench of this Court the impugned order of assessment cannot be sustained. As observed herein above though the detailed objections were raised against reopening of the assessment on 11.06.2014, the Assessing Officer did not disposed of the same till the assessment order came to be passed under Section 143(3) r/W Section 147 of the Act and has dealt with and disposed of the objections simultaneously while passing the assessment order and that too by a non-speaking order. As observed by the Hon'ble Supreme Court in the case of *G.K.N. Driveshaft (India) Ltd. (supra)* and the decision of the Division Bench of this Court in the case of *Arvind Mills Ltd. (supra)*, the Assessing Officer is not only under a mandate to dispose of such preliminary objection before proceeding with the assessment, even the Assessing Officer is under a mandate to dispose of such preliminary objections by passing a speaking order. Under the circumstances, the impugned assessment order cannot be sustained and the matter is remanded to the learned Assessing Officer by directing the Assessing Officer to pass a speaking order and to dispose of the objections raised by the petitioner against reopening of the assessment and/or against reasons recorded for reopening of the assessment and thereafter to communicate the outcome of the same to the petitioner and after giving reasonable

time to the petitioner to challenge the same before higher Court/Forum, may proceed further with the assessment in respect of the assessment for which such notice has been issued.

8. In view of the above and for the reasons stated above, the present Special Civil Application succeeds in part. Impugned assessment order dated 20.03.2015 passed by the Assessing Officer is hereby quashed and set aside and the matter is remitted to the file of the Assessing Officer at the stage of submitting the objections by the petitioner against reopening of the assessment for the AY 2009-10. The Assessing Officer is hereby directed to dispose of the objections raised by the petitioner on 11.06.2014 by passing a speaking order, before proceeding with the assessment in respect of the assessment year for which such notice has been issued and communicate the outcome of the same and thereafter after giving some reasonable time to the petitioner to challenge the reassessment proceedings [in case the Assessing Officer over-rules the objections raised by the petitioner by a speaking order), he may proceed further with the assessment in respect of the assessment year for which such notice has been issued. The aforesaid exercise shall be completed by the Assessing Officer within a period of two months from today. However, it is made clear that we have not expressed anything on merits and impugned assessment order has been set aside solely on the aforesaid ground and for the reasons stated above. Rule is made absolute accordingly to the aforesaid extent. However, in the facts and circumstances of the case, there shall be no order as to costs.