IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 38 OF 2017

The Goa State Coop. Bank Ltd.,
through it sManaging Director,
Shri S. V. Lotlikar,
Having Head Office at Sahakar Sakul,
Patto Plaza, EDC Complex, Panaji, Goa. … Petitioner

V e r s u s

1. The Asst. Commissioner of Income Tax,
   Circle1(1), having office at Ayakar Bhavan,
   Patto Plaza, EDC Complex,
   Panaji, Goa.

2. The Income Tax Officer,
   W-2(4), 3rd floor,
   Pundalik Niwas, Rua-d-Ourem,
   Panaji, Goa.

3. The Principal Commissioner of Income Tax,
   Having office at Aayakar Bhawan
   EDC Complex, Patto Plaza,
   Panaji, Goa. … Respondents

Mr. S. R. Rivankar and Mr. Rama Rivankar, Advocates for the Petitioners.

Ms. Susan Linhares, Advocate for the Respondents.

Coram :- **F. M. REIS,**
NUTAN D. SARDESSAI, JJ.
Date : **14th February, 2017**

ORAL JUDGMENT*(Per F. M. Reis, J.)*

Heard Shri S. R. Rivankar, learned Counsel appearing for the Petitioners and Ms. Susan Linhares, learned Counsel appearing for the

Respondents.

2. Rule. Heard forthwith with the consent of the learned Counsel. Learned Counsel appearing for the Respondents waives service.

3. The challenge in the above Petition is to the refusal of the Assessing Officer passing a speaking Order on the objections raised by the Petitioners after filing the return and obtaining reasons for the intended re-opening of the Assessment in terms of Section 148 of the Income Tax Act.

4. Mr. S. R. Rivankar, learned Counsel appearing for the Petitioners, has pointed out that the Petitioners were served with a notice under Section 187 of the Income Tax Act on 03.03.2016. The Petitioners thereafter submitted their returns and sought reasons for such action and, accordingly, reasons were provided to the Petitioners somewhere on 09.08.2016. The Petitioners thereafter on 06.12.2016 raised objections to the intended re-opening based on the reasons submitted to the Petitioners. The learned Counsel further pointed out that subsequently the Petitioners were served with a notice on 14.12.2016 under Section 142(1) of the Income Tax Act to remain present on 19.12.2016 for hearing on the re-opening of the Assessment. The learned Counsel further pointed out that as the Petitioners believed that on 19.12.2016 was a public holiday for the State of Goa, the Petitioners did not remain present on such dated but, however, the

Petitioners were served with the Assessment Order on 23.12.2016. The learned Counsel further pointed out that the Assessing Officer has failed to pass a speaking Order on the objections raised by the Petitioners which itself vitiates the subsequent proceedings initiated by the Assessing Order under Section 142 of the Income Tax Act. The learned Counsel further pointed out that on perusal of the objections raised by the Petitioners on 06.12.2016, there were different legal issues raised with regard to the intended re-opening of the Assessment and also brought to the notice of the Assessing Officer that the Tribunal for the previous assessment year 2010-11 had in fact allowed the deduction as claimed by the Petitioners. The learned Counsel further pointed out that as the Assessing Officer has failed to pass a speaking Order, the subsequent proceedings itself stands vitiated and, as such, according to him, the impugned Order as well as the Assessment Order passed on 23.12.2016 be quashed and set aside.

5. On the other hand, Ms. Linhares, learned Counsel appearing for the Respondents, submits that the Assessment Order has already been passed and the Petitioners have an alternate remedy to challenge the Assessment Order before the learned Tribunal. Learned Counsel further pointed out that the contention of the Petitioners that they had raised objections on 06.12.2016 to the intended re-opening is totally misplaced as, according to the learned Counsel, no such objections were raised but only submissions were advanced which cannot take the place of objections as

permitted in terms of the Judgment of the Apex Court. Learned Counsel further pointed out that though there is no separate speaking Order dealing with the objections raised by the Petitioners, nevertheless, in the notice issued under Section 142 of the Income Tax Act, the recital therein would clearly disclose that all the objections have been rejected. The learned Counsel has also brought to our notice the observations in the said recital to the effect that the submissions raised in the communication dated 06.12.2016 have been rejected. Learned Counsel further submits that though there is no separate speaking Order, the recital itself would meet the requirements of examining the objections raised by the Petitioners to the intending re-opening. Learned Counsel as such pointed out that the Petition be rejected.

6. We have considered the submissions of the learned Counsel and we have also gone through the records. The Apex Court in the Judgment reported in ***(2003) 259 ITR 19*** in the case of ***GKN Driveshafts (India) Ltd. vs. Income Tax Officer & Ors.,*** has observed thus :

> "We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file 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 noticee 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 instant 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."

7. On going through the observations of the Apex Court, it is clearly stated therein that the Assessing Officer has to pass a speaking Order on the objections raised by the Assessee. In the present case, there is no speaking Order passed by the Assessing Order dealing with the objections raised by the Petitioners. The contention of the learned Counsel appearing for the Respondents-Revenue that no such objections were raised, cannot be accepted. In fact, on perusal of the communication addressed by the Petitioner to the Assessing Officer dated 06.12.2016, there are factual as well as legal objections raised to the intended re-opening of the subject assessment. The Petitioners had also disclosed that for the assessment year 2010-11, the Tribunal had in fact allowed the subject deductions claimed by the Petitioners. We also find that there are no reasons recorded by the Assessing Officer on what ground such objections were rejected. Even on

going through the recitals as pointed out by the learned Counsel appearing for the Respondents whilst issuing a notice under Section 142 of the Income Tax Act, learned Counsel appearing for the Respondents was unable to point out any reasons recorded therein dealing with the specific objections raised by the Petitioners. Though the recitals in the notice under Section 142 of the Income Tax Act cannot be a substitute to a speaking Order as envisaged by the Apex Court in the said Judgment in the case of ***GKN Driveshafts (India) Ltd. vs. Income Tax Officer & Ors.,*** (supra), we find that even on going through the recital therein, the objections raised by the Petitioners have not been dealt with by the Assessing Officer whilst proceeding to issue a notice under Section 142 of the Income Tax Act.

8. With regard to the contention of the learned Counsel appearing for the Respondents, that the Petitioners have an alternate remedy, we find that as the notice under Section 142 of the Income Tax Act itself stands vitiated for failure to issue a speaking Order in terms of Section 148 of the Income Tax Act as specified by the Apex Court in the said Judgment, we find that further proceedings by the Assessing Officer to proceed to pass an assessment Order, cannot be sustained and deserves to be quashed and set aside.

9. In fact, the Andhra Pradesh High Court in a Judgment reported in ***(2016) 389 ITR 493 (T & AP***) in the case of ***Kohinoor Hatcheries Pvt.***

Ltd. vs. Deputy Commissioner of Income-Tax & anr has observed at paras 10 and 11 thus :

> "10. In the light of the above developments, a preliminary objection is taken by Sri Narasimha Sarma, learned senior Standing Counsel for the department, on the basis of the decisions of the Supreme Court in ***Commissioner of Income Tax and others v. Chabbil Agrawal (2013) 357 ITR 357 (SC); 92014) 1 SCC 603*** and ***Ess Ess Kay Engineering Company Limited v. Commissioner of Income Tax (2001) 247 ITR 818 (SC)*** that the writ petition deserves to be dismissed on the ground of availability of alternative remedy. But we do not think that the said contention can be upheld in the case on hand. The law is well settled that the refusal to entertain writ petitions on the ground of availability of alternative remedies, is a self-imposed restriction. This self-imposed restriction, as pointed out even in ***Commissioner of Income Tax and others v. Chabbil Agrawal'****s* case is not without exceptions. These exceptions, which are not exhaustive, but only illustrative, are: (1) where the remedy available is ineffective; (2) where the statutory authority did not act in accordance with the provisions of the enactment; (3) where the statutory authority acted in defiance of fundamental principles of judicial procedure; (4) where the statutory

> authority resorted to invoke the provisions that are not available; and (5) where the statutory authority acted in total violation of the principles of natural justice.
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> 11. In the case on hand, the petitioner challenges the very initiation of proceedings for reopening of assessment, as being without jurisdiction and also in complete defiance of the statutory prescriptions. Therefore, this is not a case, which can be thrown out on the ground of availability of alternative remedy.”

10. In such circumstances, as the Petitioners have challenged the jurisdiction of the Assessing Officer to proceed to issue a notice under Section 142 of the Income Tax Act without passing a speaking Order on the objections raised by the Petitioners of the intended re-opening of the assessment, it would itself vitiate the further proceedings by the Assessing Officer to proceed to pass the Assessment Order. It is also to be noted that considering that admittedly 19.12.2016 was a public holiday for the State of Goa, the Petitioners are justified to assume that the hearing fixed on such date would not take place though it was contended by the learned Counsel appearing for the Respondents that such holiday did not apply to the Respondents-Revenue.

11. In view of the above, we pass the following :

<u>O R D E R</u>

(i) The Assessment Order dated 23.12.2016 is quashed and set aside.

(ii) The Respondents,shall proceed to pass a speaking Order on the objections filed by the Petitioners and proceed in accordance with law.

(iii) Rule is made absolute in the above terms.

NUTAN D. SARDESSAI, J. **F. M. REIS, J.**

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