

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.09.2017

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
16.08.2017	14.09.2017

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.1905 of 2017 &
W.M.P.No.1925 of 2017

M/s.Jayanthi Natarajan

... Petitioner

Vs.

Assistant Commissioner of Income Tax,
Non Corporate Circle 1(1),
121, MG Road, Nungambakkam,
Chennai-600 034.

... Respondent

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records of the respondent contained in its Assessment Order dated 21.12.2016, passed under Section 143(3) read with Section 147 of the Income Tax Act, 1961, in PAN AAAPN3735D, for the assessment year 2009-10, assessing the petitioner's total income at Rs.3,53,39,451/- and to quash the same as arbitrary, unjust and illegal.

For Petitioner : Mr.Suhrith Parthasarathy

For Respondent : M/s.Hema Muralikrishnan
Senior Standing Counsel

ORDER

The petitioner has filed this Writ Petition challenging an assessment order under the provisions of the Income Tax Act, 1961, (Act) for the assessment year 2009-10, as being arbitrary, unjust and illegal.

2. The petitioner filed return of income for the assessment year 2009-10, admitting a taxable income of Rs.35,17,267/- and subsequently, revised on 08.12.2009, admitting an enhanced income of Rs.36,92,211/-. The petitioner's return was selected for scrutiny, the return was accepted and an assessment order dated 18.11.2011, was passed under Section 143(3) of the Act. By notice dated 30.03.2016, issued under Section 148 of the Act, the respondent sought to reopen the petitioner's income tax assessment for the assessment year 2009-10, on the ground that income had escaped assessment within the meaning of Section 147 of the Act.

3. The petitioner by letter dated 04.04.2016, requested the respondent to furnish reasons for reopening. Before the petitioner could receive the reasons for reopening, a notice, dated 23.08.2016, was issued under Section 143(2) of the Act, directing the petitioner to submit revised

computation with sale and other agreements/records in hard copy format to substantiate that disputed capital gain were offered to tax. The petitioner would state that she had no idea of what transaction the respondent was referring to as she had not been furnished the reasons on which, the income tax assessment had been reopened on the said date. By letter dated 01.09.2016, the respondent furnished the reasons for reopening. The petitioner sent her objections, by letter dated 28.09.2016, wherein, apart from furnishing various factual details, the petitioner pointed out that the proviso to Section 147 of the Act is clear in that, when more than four years have lapsed from the end of the relevant assessment year, where a scrutiny assessment has already been made under Section 143(3), it is necessary for the Income Tax Department to show that the assessee had failed to truly and fully disclose all material facts in order to invoke jurisdiction under Section 147 of the Act. In spite of such specific objection, the respondent failed to pass a speaking order disposing of the petitioner's objections as per the principles laid down by the Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd. v. ITO**, reported in **259 ITR 19 (SC)**. While so, the respondent on 21.12.2016, passed an assessment order, where while disposing of the petitioner's objections, merely holds that the argument that the transfer of immovable property occurred during assessment year 2007-08, was incorrect

and that the actual conveyance was undertaken only through the registered sale deed, dated 04.09.2008. Furthermore, the respondent completely disregarded the fact that the Commissioner of Income Tax (Appeals) has expressly held in the case of one of the co-owners of the property, that capital gains had not arisen in the assessment year 2009-10, but in the assessment year 2007-08. On the above grounds, the petitioner challenges the impugned assessment order.

4. Mr.Suhrith Parthasarathy, learned counsel for the petitioner submitted that as per the mandate of the Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd.**, (supra), the assessing officer is required to dispose of the objections placed to the reopening of the assessment with a speaking order and in the petitioner's case, the respondent failed to dispose of the objections raised by the petitioner and on that ground, proceedings initiated under Section 147 of the Act is liable to be set aside. In support of such contentions, reliance has been placed on the decision of the Bombay High Court in the case of **IOT Infrastructure and Energy Services vs. ACIT**, reported in **329 ITR 547** and **Rabo India Finance Ltd. vs. DCIT**, reported in **346 ITR 81**. It is further submitted that the petitioner is entitled to challenge an order passed by the assessing officer disposing of the objections raised to

the notice for reopening by approaching this Court and in the instant case, without passing such speaking order, the objections have been disposed of in the impugned assessment order itself, which is liable to be set aside. Reliance was also placed on the decision of the High Court of Bombay in the case of ***KSS Petron Private Ltd. vs. Assistant Commissioner of Income Tax*** in ***Income Tax Appeal No.224 of 2014, dated 03.10.2016.***

5. Mrs.Hema Muralikrishnan, learned Senior Standing Counsel appearing for the Department submitted that the assessment order has been passed dealing with the objections raised by the petitioner for reopening the assessment and after elaborate discussion, the assessment has been completed. In the initial part of the assessment order, the correctness of reopening has been affirmed by proper rebuttal to the objections against reopening. Further, there is no requirement in terms of Section 147 of the Act to pass a separate or distinct order while disposing of the objections for reopening and it only insisted that the objections should be necessarily brought on record and countered in a speaking manner and in the impugned assessment order, the objections have been dealt with and the petitioner if aggrieved, should prefer an appeal as against the impugned assessment order.

6. It is further submitted that the petitioner had omitted to offer true and correct long term capital gains on transfer of asset through the Joint Development Agreement (JDA). As per the JDA the petitioner was to receive 40% constructed space in lieu of transfer of 60% UDS of land that belonged to the petitioner. Obviously the sale consideration ought to be the cost of construction space received by the petitioner which comes to Rs.3,55,78,630/-

7. It is further submitted that the petitioner by omitting to offer true and correct capital gains in the appropriate year, has failed to disclose all materials at the time of original assessment and therefore, the assessing authority was correct in assuming jurisdiction under Section 147 of the Act, even after the lapse of 4 years. It is further submitted that since the petitioner has an alternate remedy of challenging the impugned assessment by way of an appeal, writ petition is not maintainable. In support of her contention, the learned counsel relied on the decision of the Division Bench of this Court in the case of *Areva T & D India Ltd. vs. Assistant Commissioner of Income-tax* reported in **2007 165 Taxman 123 (Madras)** and the decision of the High Court of Gujarat in the case of *Principal Commissioner of Income-tax-2, Vadodara vs. Sagar Developers* reported in **[2016] 72 Taxman.com**

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8. In reply, the learned counsel for the petitioner would submit that the Writ Petition is maintainable, as the impugned assessment is without jurisdiction, as it is in blatant breach of the decision of the Hon'ble Supreme Court in *GKN Driveshafts (India) Ltd., (supra)*. It is reiterated that the reopening of the assessment in the instant case is not based on any new facts, but it is rather based on a change of opinion on facts. It is further submitted that the decision relied on by the Revenue in the case of *Areva T & D India Ltd. vs. Assistant Commissioner of Income-tax*, the Court held that both on failure to issue notice under Section 143(2) and failure to follow the procedure prescribed in *GKN Driveshafts (India) Ltd. (supra)*, are only procedural defects that can be cured and however, the fundamental basis for this conclusion has been overruled by the Hon'ble Supreme Court in *ACIT vs. Hotel Blue Moon* reported in (2010) 321 ITR 362(SC), which has been followed by a Division Bench of this Court in the Case of *N.Ahamed Ali vs. Income Tax Officer in Tax Case (Appeal) No.766 of 2014. dated 19.11.2014*. Reference was made to the decision of the Division Bench of the High Court of Andhra Pradesh in the case of *B.F.Dittia vs. Appellate Authority, Income Tax Department and the Income Tax Officer (Public Relations)* reported in (2008) 307 ITR 158 (A.P), in which, the decision of the Hon'ble Supreme Court

in *Sona Builders vs. Union of India* reported in (2001) 10 SCC 280 was followed and it was held that an order in violation of principles of natural justice deserves to be quashed and not set aside and remanded. It is submitted that this decision in the case of *Sona Builders vs. Union of India* was not considered by the Division Bench of this Court in the case of *Areva T & D India Limited vs. Assistant Commissioner of Income-tax*. Reliance was placed on the decision of the Division Bench of this Court in the case of *Sterlite Industries (India) Ltd. vs. Assistant Commissioner of Income Tax and another* reported in (2008) 304 ITR (Mad), wherein, it was held that when a notice under Section 148, is without jurisdiction, especially in cases beyond four years, where there is no failure on the part of the assessee, to fully and truly disclose all material facts, the proceedings deserves to be quashed simplicitor.

9. Heard the learned counsels appearing for the parties and perused the materials placed on record.

10. The material facts as set out above, are not in dispute. The assessment for the year 2009-10 was taken up for scrutiny and an order dated 08.11.2011, was passed under Section 143(3) of the Act. On 30.03.2016, the

petitioner received a notice under Section 148 of the Act, seeking to reopen the income tax assessment for the year 2009-10. The petitioner immediately sent a letter dated 04.04.2016, requesting the respondent to furnish the reasons for reopening. However, even before the reasons for reopening were furnished, the respondent issued a notice to the petitioner under Section 143(2) of the Act on 23.08.2016, directing the petitioner to submit revised computation. The petitioner's case is that she had absolutely no idea as to what was the transaction, which is being referred to by the respondent, as she had not been furnished the reasons on which, the income tax assessment had been reopened. Along with letter dated 01.09.2016, the respondent furnished the reasons for reopening. The petitioner submitted her detailed objections vide letter dated 28.09.2016, the gist of which is as follows:

I along with four others, viz. M/s Gay Travels Limited, B.S.Adityan and M/s VMD Enterprises, and Mr.Balasubramanian Adityan were joint owners of an extent of land admeasuring 15.17 acres in Perungudi village, Tambaram Taluk, Kancheepuram District. We had entered into a joint development agreement on 25.12.2004 with M/s RMS Infotech Private Limited for the development of the property. By virtue of the development agreement M/s RMS Infotech Private Limited had undertaken to construct and

deliver to the 5 joint owners including myself 40% of the saleable built-up area in the exclusive blocks of building. In consideration of the above, we the joint owners undertook to convey to RMS Infotech Private Limited 60% of the undivided interest in the schedule property. We had also executed a general power of attorney in favour of M/s RMS Infotech Private Limited on 12.05.2006 to develop the property. I further stated that in the return originally filed by me for the assessment year 2007-08, I had not offered any capital gains for the transactions. I was later informed that capital gains arises in view of the decisions in (1) **Chaturbuj Dwarkdoss Kabadia vs. CIT, 260 ITR 491**, a decision of the Hon'ble Bombay High Court and (2) **Mr. Jisbir Singh Sarkaria's case (294 ITR 196)**, a ruling of the Authority for Advance Rulings. In view of the fact that the above decisions had held that the date of entering into the development agreement/power of attorney was the effective date for transfer of property, I filed a revised return for the assessment year 2007-08 and paid the difference in tax to the tune of Rs.11,51,422/-.

11. Thus, the petitioner represented that she has already offered capital gain tax on transfer of property in question during the assessment year 2007-08 and requested the respondent to drop the proceedings. Further, it was pointed out that in respect of one of the co-owners, the Commissioner of Income Tax (Appeals) has passed orders, dated 15.02.2016, annulling the reassessment of income on the ground that the capital gains tax had already been paid during the assessment year 2007-08. Admittedly, after the receipt of the objections, the respondent did not pass a separate order disposing of the objections. However, the respondent passed the impugned assessment order, in which certain objections raised by the petitioner for reopening the assessment were rejected.

12. Thus, two issues fall for consideration namely, whether the respondent was duty bound to pass a separate speaking order on the objections raised by the petitioner for reopening. (2) If the answer to the above question is in the affirmative, should the matter be remanded to the respondent for fresh consideration or is it a ground to quash the entire proceedings?

13. The Hon'ble Supreme Court in the case of **GKN Driveshafts (India) Ltd., (supra)**, held 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 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 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. This procedure has been carved out by the Hon'ble Supreme Court in **GKN Driveshafts** (supra), which binds not only the assessee, but the revenue as well. It has been pointed out that on receipt of the reasons, the noticee is entitled to file objections to issuance of notice for reopening and if he files such objections, the Assessing Officer is bound to dispose of the same by passing a speaking order. Thus, the procedure, which was required to be followed by the respondent is to dispose of the petitioner's objections by passing a speaking order.

14. Admittedly, in the instant case, this has not been done by the respondent, but the respondent seeks to sustain the impugned assessment order stating that in the first few paragraphs of the order, he has dealt with objections and disposed of accordingly. Unfortunately, the manner in which the respondent has decided the issue is wholly unsustainable in law. The purpose for passing a separate speaking order on the objections is with a view

to afford an opportunity to the assessee to question such an order, if he is aggrieved. The respondent by passing the impugned order has taken away such valuable right from the petitioner inasmuch as the impugned proceedings is an order of assessment under Section 143(3) of the Act. Therefore, if an order of assessment has to be challenged, necessarily an appeal has to be preferred and only in rarest of rare case, Courts would entertain challenge to assessment orders in writ proceedings. Thus, the procedure adopted by the respondent is completely flawed, which goes to the root of the matter, thereby, vitiates the entire proceedings.

15. In some what similar circumstances, the Division Bench of the Bombay High Court in **KSS Petron Private Ltd.** (supra), held that the Assessing Officer was not justified in finalizing the assessment without having first disposed of the objections of the assessee. While testing the correctness of the decision of the CIT (Appeals), which quashed the order of the Assessing Officer restored the assessment to the Assessing Officer to pass fresh orders after disposing of the objections to reopening notice in accordance with law, the Division Bench held that once the impugned order finds the assessment order is without jurisdiction, as the law laid down by the Apex Court in the case of **GKN Driveshafts (India) Ltd.**, (supra), has not been followed, then

there is no reason to restore the issue to the Assessing Officer to pass fresh/further orders and if this is permitted, it would give license to the Assessing Officer to pass orders on reopening notice, without jurisdiction (without compliance of the law in accordance with the procedure). Further it was pointed out that to ensure that the reopening notices are disposed of expeditiously, the Parliament itself has provided in Section 153(2) of the Act, the period within which the Assessing Officer must pass orders on notice of reopening (i.e.) within one year from the end of the financial year, in which the notice was issued. Thus, on facts having found that the procedure required to be followed had not been adhered to, it has to be held that the entire proceedings are vitiated.

16. In **Sona Builders** (*supra*), the Writ Petitions were filed by the appellant therein and the transferer impugning the order of compulsory purchases. It was contended that no reasonable opportunity had been given to them to meet the case in the notice with reference to the sale. The writ petition was dismissed and confirmed by the Division Bench. On appeal, the Hon'ble Supreme Court found that there has been a gross breach of principles of natural justice because adequate opportunity to meet the case made out in the notice was not given to the appellant therein and having regard to the

statutory limit within which the appropriate authority has to act and it is failure to act in conformity with the principles of natural justice, the Hon'ble Supreme Court refused to remand the matter to the appropriate authority and set aside the order.

17. The law declared by the Hon'ble Supreme Court is of binding character and is a source of law and to itself, which will bind all authorities. *GKN Driveshafts (India) Ltd., (supra)*, lays down a law and failure to comply would render the assessment order as without jurisdiction (*Nand Kishore vs. State of Punjab* reported in (1995) 6 SCC 614 and *Nair Services Society vs. State of Kerala* reported in (2007) 4 SCC 1).

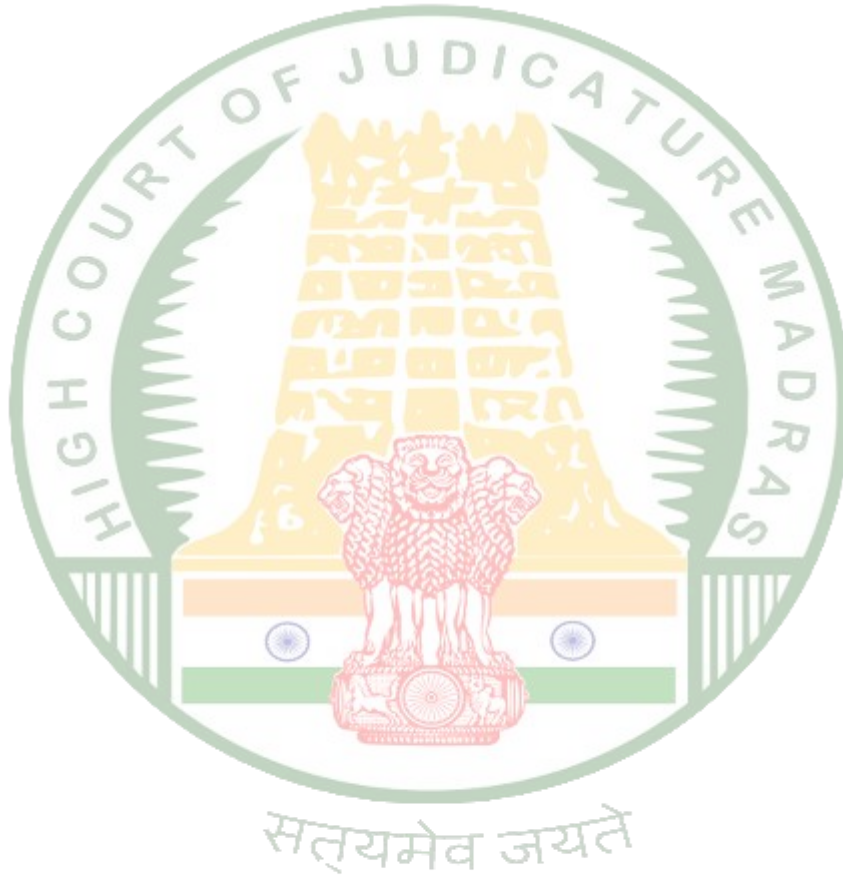
18. Thus, for the above reasons, the impugned proceedings are held to be unsustainable in law and accordingly, this writ petition is allowed, the impugned order is quashed. No costs. Consequently, the connected miscellaneous petition is closed.

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Index:Yes/No

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T.S.SIVAGNANAM, J.

pbn

To

Assistant Commissioner of Income Tax,
Non Corporate Circle 1(1),
121, MG Road, Nungambakkam,
Chennai-600 034.



Pre-Delivery Order in
W.P.No.1905 of 2017 &
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