IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.11.2023

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. No.26086 of 2021 and
W.M.P. Nos.27536, 27538, 27539 of 2021

ASE Structure Design Private Limited
Represented by its Director,
Bharat Manilal Pujara,

Previously at:
377/272, Anna Salai, Teynampet,
Chennai 600 018.

Presently at:
No.6 & 7, 5th Street, Dr.Radhakrishna Salai,
Mylapore, Chennai 600 004. .. Petitioner

Vs.

The Deputy Commissioner of Income Tax
Corporate Circle 1(1)
MG Road, Nungambakkam,
Chennai - 600 034.

..Respondent

PRAYER: Writ Petitions filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus to call for the records of the Respondent contained in its notice bearing No.ITBA/AST/S/148/2019-20/1017075244(1), dated 29.07.2019, issued by the Respondent under Section 148 of the Income Tax Act, 1961, for PAN: AAECA3065E, for assessment year

2015-16, and all proceedings in furtherance thereof, including the assessment order in DIN and Order No. ITBA/AST/F/147/2021-22/1036075038(1), dated 30.09.2021 passed by the Respondent under Section 147 of the Income Tax Act, 1961, for PAN: AAECA3065E, for the assessment year 2015-16, and to quash the same as arbitrary, illegal and unjust, and to consequently forbear the Respondent or its superiors, subordinates, agents etc. from re-assessing the petitioner's income for the assessment year 2015-16 under Section 147 of the Income Tax Act, 1961.

For Petitioner : Mr.Suhrith Parthasarathy

For Respondent : Mr.B.Ramanakumar
Standing Counsel

ORDER

The writ petition is filed challenging the impugned order dated 30.09.2021 for the assessment year 2015-16 on two grounds viz., the procedure laid down by the Hon'ble Supreme Court in the case of *GKN Driveshafts Ltd v. Income Tax Officer*, reported in *259 ITR 19 (SC)* has not been followed and secondly, the show cause notice was issued on 28.09.2021 and the impugned orders of assessment has been made on 30.09.2021 i.e., in less than 72 hours, it was thus submitted that the opportunity granted was not real but illusory. Though submissions were made for a brief while on the merits, I do not propose to examine the same and I intend to confine myself as to the infirmity in the decision making process.

2. The petitioner is in the business of preparation of engineering drawing for overseas Engineering and Construction Company. For the assessment year 2015-16, the petitioner filed its original return of income on 30.11.2015 admitting a total income of Rs.1.69 Crores. The petitioner's original return of income was processed under Section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). On 13.03.2016, a tax demand of Rs.10 was determined. Thereafter, the petitioner was issued a notice under Section 148 of the Act dated 29.07.2019 seeking to reopen the assessment for the year 2015-16 under Section 147 of the Act. The respondent issued a notice under Section 142(1) of the Act dated 13.09.2019 and sought for details including documents in support of its claim of deduction under Section 35(1)(ii) and 35AC of the Act. In response, the petitioner filed its return of income on 16.10.2019 and requested the respondent to provide the reasons of re-opening the assessment. The respondent vide its letter dated 29.11.2019 furnished the reasons recorded for reopening the assessment as under :

> *"It is brought to notice that while completing assessment for the AY 2016-17, a sum of Rs.20,00,000/- being donation made to M/s.Rural Development Society and weighted deduction of Rs.35,00,000/- was disallowed. Further, the Deputy Commissioner of Income Tax (Exemptions), Vijayawada vide their letter dated 23/05/2019 in No.DCIT/Exemptions/information/2019-20 informed that a survey u/s.133A was conducted in the case of M/s. Rural Development Society, Hyderabad. As*

a result, it was found that the said society is not approved u/s 35(1)(ii) and accordingly, the donor who might have claimed weighted bogus donation needs to be looked into. They further communicated that one of the donors is M/s.ASE Structure Design Limited. Further, the CBDT vide its letter in F.No.225/26/2019-ITA(II) dated 25/02/2019 communicated information regarding bogus donation racket under Section 35(1)(ii) in the case of M/s.Rural Development Society and also communicated list of donors in which the assessee company name appears in S.No.186.

2.On perusal of the original and revised return filed by the assessee company for the AY 2015-16, it is found that the assessee company claimed weighted deduction u/s.35 Rs.35,00,000/- which appears on similar lines of bogus donation as disseminated by the Deputy Commissioner of Income Tax (Exemption), Vijayawada and CBDT, New Delhi for AY 2016-17. Further the assessee company also claimed expenditure on eligible project or scheme to the extent of Rs.2000000/- under Section 35AG without adducing evidence and Rs.3536236/- as professional/ consultancy fees/ fee for technical services which attracts the provisions of Section 40(a)(ia) and need to be disallowed."

2.1. The petitioner submitted its objection to the above, vide its letter dated 18.12.2019 *inter alia* highlighting the following:

"In the letter you refer to Deputy Commissioner of Income Tax, Exemptions, (Vijayawada) letter dated 23.05.2019 regarding survey U/s.133A in the case of Rural Development Society, Hyderabad. Further you quote CBDT in its letter in F.No.225/26/2019-ITA(II) dated 25.2.2019 regarding bogus donation racket U/s.35(1)(ii) in the case of M/s.Rural Development Society. The contents of the circular relates to Asst Years 2016-17 and 2017-18 (and not AY 2015-16, the impugned asst. year). Hence the letter and circular cited are irrelevant to this assessment year and cannot constitute

reasons for reopening of assessment."

The other reasons for reopening cited in Para 2 of the letter in reference and our comments are listed below:

No.	*Reason cited by AO*	*Rebuttal*	*Fact*
1.	*Assessee claimed deduction of Rs.35,00,000/= which appears on similar lines of bogus donation as disseminated by the DDIT(E) Vijayawada for asst. year 2016-17.*	*"appears on similar lines to bogus donations" cannot be ground for reopening of assessment. Suspicion, roving enquiry cannot be ground for reopening.*	*The assessee has not made any donation during the year to Rural Development Society.*
2.	*Assessee has claimed deduction U/s.35AC of Rs.20,00,000/= without adducing evidence.*	*The assessee had claimed only Rs.2,00,000/= U/s.35AC and has provided all details sought in the return of income.*	*The assessee has not claimed deduction of Rs.20,00,000/=*
3.	*Assessee had claimed deduction of Rs. 35,36,236/= as professional/consultancy fee/fees for technical services which attracts the provisions of Section 40(a)(ia).*	*40(a)(ia) is applicable only on expenditure which is liable to TDS and where such tax has not been deducted or been deducted but not paid within due date.*	*The assessee had deducted and paid tax on all the expenditure of Rs.35,36,236/=.*

2.2. Thereafter the show cause notice came to be issued stating that on verification of the details a sum of Rs.20 lakhs being donation was made to M/s.Rural Development Society and weighted deduction of Rs.35 lakhs was claimed by the assessee under Section 35AC of the Act. However, the above claim was not supported by cogent evidence.

2.3. It was further stated that the Deputy Commissioner of Income Tax

(Exemption), Vijayawada vide letter dated 23.05.19 had informed that a survey under Section 133A of the Act was conducted in the case of Rural Development Society, Hyderabad, and it was found that the said society was not approved under Section 35(1)(ii) of the Act and accordingly the claim of weighted bonus donation needs to be examined. Importantly, the show cause notice issued on 28.09.2021 fixed the hearing date on 29.09.2021 and thereafter, the order was passed on 30.09.2021.

3. This Court finds that the above notice was issued only at around 7.32 p.m. while fixing the hearing date on 29.09.2021 at 11.00 a.m. The following day i.e., on 30.09.2021 the impugned order came to be passed.

4. It is submitted by the learned counsel for the petitioner that the Supreme Court in *GKN Drive Shaft* had laid down the procedure to be followed while making an assessment under Section 148 of the Act. The relevant portion of the above judgment is extracted hereunder:

> *"**5.** 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 notice 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."

4.1. A reading of the above judgment would show that the assessing officer is bound to furnish the reasons if sought for by an assessee issued with a notice under Section 148 of the Act. On reasons being furnished, the assessee is entitled to file objection and if any such objection is filed, the assessing officer is bound to dispose of the same by passing a speaking order.

5. Admittedly in the instant case though the assessee filed its objections vide reply dated 18.12.2019 in response to the reasons furnished for re-assessment however the same was not disposed of as mandated by the Supreme Court in its judgment in *GKN Drive Shafts,* instead the respondent proceeded to issue show cause notice.

6. It is submitted by the learned counsel for the petitioner that the failure to dispose of the objection is fatal to the validity of re-assessment. The issue as to the consequence / effect of failure to dispose of the objections filed in

response to the reasons furnished for reassessment, has been decided by the Bombay High Court wherein it was held that re-assessment proceedings would be bad for want of jurisdiction. The relevant portion of the judgment is extracted hereunder:

i) <u>Bayer Material Science Pvt. Ltd. v. Deputy Commissioner of Income-Tax, 2016 SCC OnLine Bom 15952:</u>

> *"9. This passing of the draft assessment order without having disposed of the objections is in defiance of the Supreme Court's decision in GKN Driveshafts (India) Ltd.(supra). Thus, the draft assessment order dated March 30, 2015 is not sustainable being without jurisdiction. This for the reason that it has been passed without disposing of the objections filed by the petitioner to the reasons recorded in support of their impugned notice."*

ii) <u>KSS Petron Pvt Ltd v Assistant Commissioner of Income Tax, Income Tax Appeal No. 224 of 2014:</u>

> *"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"*

7. Applying the above judgment to the facts of the present case, I am of

the view that the impugned order under Section 147 of the Act is made contrary to and in gross disregard / non-compliance with the procedure laid down for reassessment by the Hon'ble Supreme Court inasmuch as the assessment order is passed without disposing of the petitioner's objection filed in response to the reasons furnished for reassessment. The impugned order stands vitiated and is thus set aside.

8. In view of the above, the impugned order is quashed. The writ petition stands allowed. The respondents are at liberty to reassess subject to limitation and in accordance with law. No costs. Consequently, connected miscellaneous petitions are closed.

23.11.2023

Speaking (or) Non Speaking Order
Index:Yes/No
Neutral Citation: Yes/No
Spp

MOHAMMED SHAFFIQ, J.

Spp

To:

The Deputy Commissioner of Income Tax
Corporate Circle 1(1)
MG Road, Nungambakkam,
Chennai - 600 034.

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