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* IN THE HIGH COURT OF DELHI AT NEW DELHI
37-42
+ **ITA No. 916/2015**

PR. COMMISSIONER OF INCOME TAX-16 ..... Appellant
Through: Mr. Zoheb Hossain, Senior standing counsel.

versus

JAGAT TALKIES DISTRIBUTORS ..... Respondent
Through: Mr. Y.K. Kapur with Mr. Bhushan Kapur, Advocates.

With

+ **ITA No. 990/2015**

PR. COMMISSIONER OF INCOME TAX-16 ..... Appellant
Through: Mr. Zoheb Hossain, Senior standing counsel.

versus

JAGAT TALKIES DISTRIBUTORS ..... Respondent
Through: Mr. Y.K. Kapur with Mr. Bhushan Kapur, Advocates.

With

+ **ITA No. 1000/2015**

PR. COMMISSIONER OF INCOME TAX-16 ..... Appellant
Through: Mr. Zoheb Hossain, Senior standing counsel.

versus

JAGAT TALKIES DISTRIBUTORS ..... Respondent
Through: Mr. Y.K. Kapur with Mr. Bhushan Kapur, Advocates.

With

\+ **ITA No. 1001/2015**

PR. COMMISSIONER OF INCOME TAX-16 ..... Appellant
Through: Mr. Zoheb Hossain, Senior standing counsel.

versus

JAGAT TALKIES DISTRIBUTORS ..... Respondent
Through: Mr. Y.K. Kapur with Mr. Bhushan Kapur, Advocates.

With

\+ **ITA No. 1003/2015**

PR. COMMISSIONER OF INCOME TAX-16 ..... Appellant
Through: Mr. Zoheb Hossain, Senior standing counsel.

versus

JAGAT TALKIES DISTRIBUTORS ..... Respondent
Through: Mr. Y.K. Kapur with Mr. Bhushan Kapur, Advocates.

And

\+ **ITA No. 1030/2015**

PR. COMMISSIONER OF INCOME TAX-16 ..... Appellant

Through: Mr. Zoheb Hossain, Senior standing counsel.

versus

JAGAT TALKIES DISTRIBUTORS ..... Respondent

Through: Mr. Y.K. Kapur with Mr. Bhushan Kapur, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% **29.08.2017**

Dr. S. Muralidhar, J.:

1. These six appeals, under Section 260A of the Income Tax Act, 1961 ('Act'), have been filed by the Revenue against the common order dated 10th June 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 1068/Del/2006 to 1073/Del/2008 for the Assessment Years ('AYs') 1999-00 to 2004-05.

Question involved

2. The short question sought to be urged by the Revenue in these appeals is whether "In the facts and circumstances of the case, the ITAT could have held that since the Assessee was not given the copy of the reasons for issuing notice under Section 148 of the Act by the Assessing Officer, the whole assessment proceedings and the resultant order of assessment passed under Section 143 (3) read with 148 of the Act have become vitiated?"

Background facts

3. The background facts are that the Respondent-Assessee, a firm, was engaged in the business of exhibition of films. It also received rental income. For the AYs in question, no return of income was filed by the Assessee under Section 139 (1) of the Act, although the Assessee was a registered tax payer and had been filing its returns of income in earlier years.

4. The case of the Department was that on examination of the assessment records, it was noticed that the Assessee had income from letting out of the property to Syndicate Bank, Vijaya Bank and Canara Bank. On the basis of the information received from the said banks, it was discovered that rent had been paid to the Assessee by them after deduction of tax at source.

Notice under Section 148

5. On 2nd September 2005, the Assessing Officer ('AO') recorded reasons for reopening of the assessment in the file. On the same date, i.e. 2nd September 2005, notice was issued to the Assessee under Section 148 of the Act asking it to file the return of income within 30 days. It is stated that the Assessee filed the return of income on 16th December 2005, after a lapse of more than 3 months. Notices were issued under Section 143 (2) and 142 (1) of the Act by the AO along with a questionnaire. Separate notices were issued for each of the AYs.

6. As far as AY 1999-00 was concerned, the return of income filed by the Assessee on 31st March 2006 pursuant to the notice under Section 148 of the Act disclosed for the first time, income of Rs. 2,61,677/-, which included income from the house property and business income from Novelty Cinema.

It is stated that the Assessee firm, at various stages before the AO in the reassessment proceedings sought a number of adjournments. Admittedly, on 23rd June 2006, a letter addressed to the AO by the Assessee sought supply of the reasons for reopening of the assessment under Section 148 of the Act.

7. Admittedly, for none of the AYs were reasons for reopening furnished by the AO to the Assessee. Since the assessment was getting time barred on 22nd December 2006, the AO on 22nd December 2006 proceeded to pass separate reassessment orders in respect of each of the above AYs, making additions of the income from house property.

Proceedings before the CIT (A)

8. Aggrieved by the assessment orders, the Assessee filed separate appeals before the Commissioner of Income Tax (Appeals) ['CIT (A)']. In the appeals, one of the principal contentions raised by the Assessee was regarding failure of the AO to supply the Assessee reasons for reopening of the assessment. During the pendency of the appellate proceedings, a remand report was called for by the CIT (A) from the AO. This remand report was submitted by the AO on 13th July 2007 and a copy thereof was provided to the Assessee who filed a response thereto on 4th December 2007.

9. The case of the Assessee was that the AO had ignored the Assessee's request for being provided with the copy of the reasons. In terms of the judgment of the Supreme Court in ***GKN Driveshafts (India) Limited v. ITO [2003] 259 ITR 19 (SC)***, the entire reassessment proceedings stood vitiated on that score.

10. The CIT (A), by separate orders dated 7th January 2008, dismissed the appeals. The CIT (A) noted that the Assessee had made a request for being furnished reasons for reopening the case under Section 148 after almost a year after the first notice was issued and did not bother to follow up this request thereafter. Repeated adjournments were sought by the Assessee and therefore, reasonable opportunity was given to the Assessee. The remand report of the AO dated 13th July 2007 referred to two separate and independent facts – (i) that the Assessee had failed to file the return of income for the AY 1998-99 and the other AYs in question and; (ii) the existing assessment records showed that the Assessee was in receipt of rental income from house property and also had business income from exhibition of films. The return filed by the Assessee in response to the notice under Section 148 of the Act also proved these facts.

11. Secondly, the CIT (A) held that the Assessee's plea that the notice under Section 148 was on the basis of 'reasons to suspect' and not 'reasons to believe' was without merit. Further, the CIT (A) held that since sufficient opportunity had been vitiated by the Assessee before the AO, the failure to furnish the reasons to reopen could not be said to be fatal to the assessment proceedings. It was not as if the Assessee was unaware of the reasons for reopening the assessment. The AO's remand report did enclose a copy of the reasons. It is observed by the CIT (A) that, no doubt, the AO ought to have ensured that the reasons for issuing the notice under Section 148 was communicated formally and also immediately upon the request of the Assessee made in the letter dated 23rd August 2006, but it was also a matter of record that the Assessee did not press nor convey its grievance to any

superior authority during the assessment proceedings, which would have been the logical course of action had it genuinely felt aggrieved.

12. The CIT (A) also proceeded to distinguish the ITAT's earlier decision for the AY 1995-96 in the Assessee's own case where, for the very same reason, the assessment order was quashed.

13. As far as the previous order for the AY 1995-96 was concerned, the CIT (A) held that the Assessee had in fact never made a request for being furnished the reasons for reopening of the assessment. The letter of the Assessee to the AO relied upon before the ITAT in fact made no such request. It was accordingly contended that since the ITAT was mislead, the order of the ITAT for the AY 1995-96 was not applicable. The CIT (A) also distinguished the decision of the Supreme Court in ***GKN Driveshafts*** *(supra)* and held that the mere non-furnishing of reasons for reopening the assessment would not result in entire reassessment proceedings being invalidated. It was held that in the present case the Assessee had, despite having taxable income, failed to file returns as statutorily mandated under Section 139 (1) of the Act. The reasons for the notice under Section 148 of the Act was always in the knowledge of the Assessee. The lapse in not providing the reasons was 'procedural' and would not render the entire reassessment proceedings invalid.

Impugned order of the ITAT

14. When the matter travelled at the instance of the Assessee to the ITAT, a reference was made by the Assessee to the decision of this Court in ***Haryana Acrylic Manufacturing Company v. The Commissioner of***

Income Tax IV [2009] 308 ITR 38 (Del) and that of the Bombay High Court in ***CIT v. Fomento Resorts and Hotels Limited*** (decision dated 27th November 2006 in ITA No. 71/2006). It was held that the decision of this Court in ***Haryana Acrylic*** *(supra)* was binding on the Revenue. The failure to supply the reasons under Section 148 of the Act despite requests was held to have vitiated the entire reassessment proceedings.

Submissions of counsel for the Revenue

15. Mr. Zoheb Hossain, learned Senior standing counsel for the Revenue, submitted that even in ***GKN Driveshafts*** *(supra)* the Supreme Court did not invalidate the entire assessment proceeding but only permitted the Assessee to again avail of an opportunity of filing its objections to the reopening of the assessment. The reassessment proceedings were kept in abeyance till this procedure was completed. It is accordingly submitted that, in the present case also, if the Court is of the view that procedure outlined in ***GKN Driveshaft*** *(supra)* was not completed and that the reassessment proceedings could not have continued, the Court can direct the entire proceedings to recommence from that stage and give a time-bound direction for completing of the procedure involving consideration of the Assessee's objections to the reopening of the assessment.

16. Without prejudice to the above submissions, Mr. Hossain submitted that the present case is distinguishable from the decisions in ***GKN Driveshafts*** *(supra)* and ***Haryana Acrylic*** *(supra)*. This was a case where no return was filed by the Assessee for the AY in question despite having both business income as well as income from house property. Therefore, the AO was justified in having reason to believe that income had escaped assessment. He

referred to the decision in ***CIT v. P.C. Chemicals (2013) 359 ITR 129*** which in turn referred to the decision of the Supreme Court in ***Income Tax Officer v. M. Pirai Choodi (2011) 334 ITR 262 (SC).*** Mr. Hossain also relied on the decision of the Supreme Court in ***CIT, Shillong v. Jai Prakash Singh(1996) 3 SCC 525*** where it was held that mere failure to produce a witness for cross-examination would not vitiate the entire assessment proceedings. One more opportunity was given to the Assessee to go before the AO for that purpose.

Submissions on behalf of the Assessee

17. Mr. Y.K. Kapur, learned counsel for the Assessee, on the other hand relied on the passages in ***GKN Driveshaft (India) Limited v. ITO*** (supra), ***Haryana Acrylic Manufacturing Company v. The Commissioner of Income Tax*** (supra) and the decisions of the Bombay High Court ***Commissioner of Income Tax v. Trend Electronics Manu/MH/2724/2015*** and ***CIT v. Fomento Resorts and Hotels Limited*** (*supra*).

18. Mr. Kapur submitted that the law was well settled that a failure to supply reasons under Section 148 of the Act would vitiate the entire reassessment proceedings.

Analysis and reasons

19. The above submissions have been considered. In ***GKN Driveshaft (India) Limited v. ITO*** (*supra*), the Supreme Court highlighted the procedure that ought to be followed when the assessment is proposed to be reopened under Section 148 of the Act. It explained that "the proper course of action for the notice 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 assessee 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."

20. It appears that in the above case, the reasons were furnished only during the course of the proceedings in the Supreme Court. Prior thereto no such procedure had been devised regarding raising of objections to the reopening and the disposal of such objections by the AO by a speaking order even prior to the commencement of the reassessment proceedings. On the facts of that case, the Supreme Court it was directed that "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 abovesaid five assessment orders."

21. The above decision in ***GKN Driveshaft (India) Limited v. ITO*** (*supra*) was dated 25th November 2002. After this date the law is presumed to have been within the knowledge of all the Revenue officials. The failure thereafter by the AO to provide the Assessee the reasons for reopening the assessment could not be treated as a mere procedural lapse. It would not in all cases be open to the Revenue to simply seek to overcome this lapse by offering that the AO will consider the Assessee's objections and pass a fresh reasoned order thereon. This will depend on the facts and circumstances of each case. If the lapse is discovered within a short time and the offer to rectify the apse is made soon thereafter, no prejudice could be said to be caused either to the Assessee or the Revenue. Where, however, the Revenue

contests the position at every stage and offers to consider the objections several years after it should have in the first place, the request to start the proceedings de novo may neither be fair nor efficacious.

22. In the present case the assessments of AYs 1999-2000 onwards for five years are sought to be reopened. The offer to consider the Assessee's objections to the reopening and pass an order thereon is being made after nearly two decades. Having contested these proceedings for all these years the revenue is not fair in making this offer after all these years. Consequently, this Court is unable to accept the submissions of Mr. Hossain that in the present case involving the reopening of assessments for AYs 1999-2000 to 2004-05 the proceedings in terms of the decision in ***GKN Driveshaft (India) Limited v. ITO*** (*supra*) should resume de novo before the AO.

23. The Revenue does not dispute that there was a failure to furnish the reasons for reopening of the assessment. Therefore, there was a clear violation of the procedure laid down by the Supreme Court in ***GKN Driveshaft (India) Limited v. ITO*** (*supra*). The decision of this Court in ***Haryana Acrylic Manufacturing Company v. The Commissioner of Income Tax*** (*supra*) reiterates that the it is mandatory for the AO to supply reasons for reopening the assessment and this has to be done within a reasonable time. It was further observed by this Court as under:

> ".... a notice under Section 148 without the communication of the reasons therefore is meaningless inasmuch as the Assessing Officer is bound to furnish the reasons within a reasonable time. In a case, where the notice has been issued within the said period of six years, but the reasons have not furnished within that period, in our view, any

> proceedings pursuant thereto would be hit by the bar of limitation inasmuch as the issuance of the notice and the communication and furnishing of reasons go hand-in-hand. The expression within a reasonable period of time as used by the Supreme Court in ***GKN Driveshaft (India) Limited*** (*supra*) cannot be stretched to such an extent that it extends even beyond the six years stipulated in Section 149."

24. Mr. Hossain sought to distinguish the decision in ***Haryana Acrylic Manufacturing Company v. The Commissioner of Income Tax*** (*supra*) on the ground that the Assessee in that case had filed its return which was scrutinized and an order was passed in the first instance under Section 143 (3) of the Act whereas in the present case the Assessee has not filed return at all. In the considered view of this Court, this is not a distinguishing factor. The Court is unable to discern any reason why the AO failed to furnish the reasons for reopening the assessment to the Assessee. It is not in dispute that the Assessee had made a request in writing for the reasons in respect of each of the AYs in question. Merely because the Assessee did not repeat the request cannot mean that the Assessee waived its right to be provided the reasons. The proviso to Section 292 BB (1) of the Act makes it clear that there is no estoppel against an Assessee on account of participating in the proceedings as long as it has raised an objection in writing regarding the failure by the AO to follow the prescribed procedure.

25. The Court is also of the view that no comparison can be drawn with a situation where in the course of the assessment proceedings an opportunity to examine a witness is denied. That was the situation in ***Income Tax Officer v. M. Pirai Choodi*** (*supra*). There the Supreme Court was of the view that if there was a failure by the AO to provide the Assessee an

opportunity of cross-examination of a witness, the Assessee could have gone in appeal. In that case it was found that "the Assessee had failed to avail statutory remedy." Here there is no failure by the Assessee to raise objections at every stage of proceedings.

26. The decision in ***CIT v. P.C. Chemicals*** (*supra*) is also not of help to the Revenue. Those appeals of the Revenue were dismissed by this Court.

27. The decisions of Bombay High Court in ***CIT v. Trend Electronics*** (*supra*) and ***CIT v. Videsh Sanchar Nigam Limited Manu/MH/1805/2011*** support the case of the Assessee. In the last mentioned decision, the Bombay High Court held as under:

> "It is axiomatic that power to reopen a completed assessment under the Act is an exceptional power and whenever revenue seeks to exercise such power, they must strictly comply with the prerequisite conditions viz., reopening of reasons to indicate that the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment which would warrant the reopening of an assessment. These recorded reasons as laid down by the Apex Court must be furnished to the Assessee when sought for so as to enable the Assessee to object to the same before the Assessing Officer. Thus, in the absence of reasons being furnished, when sought for would make an order passed on reassessment bad in law. The recording of reasons (which has been done in this case) and furnishing of the same has to be strictly complied with as it is a jurisdictional issue. This requirement is very salutary as it not any ensures reopening notices are not lightly issued. Besides in case the same have been issued on some misunderstanding/misconception, the Assessee is given an opportunity to point out that the reasons to believe as recorded in the reasons do not warrant reopening before the reassessment proceedings are commenced. The Assessing Officer disposes of these objections and if satisfied with the objections, then the impugned reopening notice under Section 148 of the Act is dropped/withdrawn otherwise it

is proceeded with further. In issues such as this, i.e., where jurisdictional issue is involved the same must be strictly complied with by the authority concerned and no question of knowledge being attributed on the basis of implication can arise. We also do not appreciate the stand of the Revenue, that the Respondent-Assessee had asked for reasons recorded only once and therefore, seeking to justify non-furnishing of reasons. We expect the state to act more responsibly."

Conclusion

28. The Court respectfully concurs with the above view of the Bombay High Court and holds that in the present case the ITAT was right in coming to the conclusion that on account of failure by the AO to furnish reasons for reopening of the assessment under Section 148 of the Act to the Assessee, the reassessment proceedings stood vitiated in law.

29. No substantial question of law arises for consideration in these appeals. They are accordingly dismissed.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 29, 2017
Rm