

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 2502 OF 2015

M/s. Bayer Material Science Pvt Ltd

..Petitioner

Vs.

The Deputy Commissioner of Income

Tax-10(3) and Others

..Respondents

Mr. Nishant Thakkar a/w Ms. Megha Sharma i/b PDS Legal, for the Petitioner.

Mr. Anil Singh, Additional Solicitor General a/w Mr. Suresh Kumar, for the Respondents.

CORAM :- **M.S.SANKLECHA &
B.P.COLABAWALLA, JJ.**
DATE :- **JANUARY 27, 2016.**

P. C.:

Rule. Respondents waive service. By consent of parties, Rule is made returnable forthwith and heard finally.

2. This Petition under Article 226 of the Constitution of India challenges;

(a) The Notice dated 6th February, 2013 issued under Section 148 of the Income Tax Act, 1961(the "Act") seeking to reopen the Assessment for Assessment Year 2007-2008; and

(b) The draft Assessment order dated 30th March, 2015 consequent to the reopening notice dated 6th February 2013 for the Assessment year 2007-2008.

3. For the Assessment year 2007-2008, the Petitioner had filed a return of income declaring total income of Rs.12.77 Crores. The same was accepted by issuing intimation under Section 143(1) of the Act.

4. Thereafter, on 6th February, 2013 the impugned notice was issued seeking to reopen the Assessment for Assessment Year 2007-2008. On 15th March, 2013 itself, the Petitioner filed its revised return of income and sought reasons recorded in support of the impugned notice. The Respondents did not furnish the reasons recorded, in spite of the Petitioner's repeated communications such as letters dated 15th March, 2013 and 12th September, 2013 seeking the reasons recorded for issuing the impugned notice. However, the Assessing

Officer furnished the reasons recorded for issuing the impugned notice to the Petitioner only on 19th March, 2015.

5. On 25th March, 2015 the Petitioner filed its objections to the reasons recorded as communicated on 19th March 2015 for issuing the impugned notice dated 6th February, 2013. The Assessing Officer without disposing of the Petitioner's objections passed a draft Assessment order dated 30th March, 2015.

6. This passing of the draft Assessment order on 30th March, 2015 was in the face of the decision of the Supreme Court in *GKN Driveshafts (India)Ltd v/s Income Tax Officer and Others reported in 259 ITR 19(SC)*, wherein it has been laid down that whenever a reopening notice is issued under Section 148 of the Act, the Assessing Officer was to make available to the assessee, on request, a copy of the reasons recorded while issuing the notice for reopening the Assessment. The assessee is then entitled to file its objection to the grounds in support of the reopening notice and the Assessing Officer is required to dispose of the assessee's objection to the reasons recorded by

a speaking order. It is only if the Assessing Officer rejects the objection that he can proceed with the Assessment proceedings of the reopened Assessments.

7. In the present case, as the issue involves the provisions with regard to transfer pricing cases, the period of limitation to dispose of an Assessment consequent to reopening notice as provided in 4th proviso to sub-section(2) of Section 153 of the Act is two years from the end of the financial year in which the reopening notice was served. In this case, the impugned reopening notice was issued on 6th February, 2013 and the reasons in support were supplied only on 19th March, 2015. This when the Revenue was aware at all times that the period to pass an order of reassessment on the impugned reopening notice dated 6th February 2013 would expire on 31st March, 2015. However, there is no reason forthcoming on the part of the Revenue to satisfactorily explain the delay. The only reason made out in the affidavit dated 3rd September, 2015 by the Assessing Officer was that the issue was pending before the Transfer Pricing Officer (TPO) and it was only after the TPO had passed his order on transfer pricing

were the reasons for reopening provided to the Petitioner. We are unable to understand how the TPO could at all exercise jurisdiction and enter upon enquiry on the reopening notice before the same is upheld by an order of the Assessing Officer passed on objections. Besides the recording of reasons for issuing the reopening notice is to be on the basis of the Assessing Officer's reasons. The TPO's reasons on merits much after the issue of the reopening notice does not have any bearing on serving the reasons recorded upon the party whose assessment is being sought to be reopened.

8. One more peculiar fact to note is that in the affidavit dated 10th July 2015 filed by one Prabhakar Ranjan on behalf of the Revenue it is stated that the Assessing Officer was under a bonafide impression that the TPO would pass an order in favour of the assessee. In fact, if that be so, we are unable to understand how the assessing officer could have any reason to believe that income chargeable to tax has escaped assessment. Be that as it may, this petition was adjourned from time to time to enable the Revenue to file the necessary affidavits explaining their contention.

9. In fact, on 23rd December 2015 the Revenue again sought time. At that stage, we indicated that in view of the gross facts of this case, the Principal Commissioner of Income Tax would take serious note of the above and after examining the facts, if necessary, take appropriate remedial action to ensure that an assessee is not made to suffer for no fault on its part. This is particularly so as almost the entire period of two years from the end of the financial year in which the notice is issued was consumed by the Assessing Officer in failing to give reasons recorded in support of the impugned notice. Nevertheless, the Assessing Officer proceeds to pass a draft Assessment order without dealing with the objections filed by the Petitioner. We could have on that date or even earlier passed an order setting aside the draft assessment order dated 30th March 2015 as it was passed without disposing of the objections. Thus, clearly without jurisdiction. However, we were of the view that although this appears to be a gross case of harassing an Assessee, the Principal Commissioner would take note and adopt remedial action / proceedings.

10. Today, when the matter reached hearing, the learned Additional Solicitor General informs us that on 22nd January, 2016 the Principal Commissioner of Income Tax had passed an order under Section 264 of the Act by which he set aside the draft Assessment order dated 30th March 2015 and thereafter restored the matter to the Assessing Officer for passing order after deciding the objections filed by the Petitioner. However, after hearing the Petitioner for some time, the learned Additional Solicitor General on instructions states that the order dated 22nd January, 2016 passed by the Principal Commissioner of Income Tax is being withdrawn. In these circumstances, there is no occasion to examine the validity of the order dated 22nd January, 2016 passed by the Principal Commissioner of Income Tax under Section 264 of the Act.

11. In the present facts, we find that the draft Assessment order was passed on 30th March, 2015 without having disposed of the Petitioner's objections to the reasons recorded in support of the impugned notice. The reasons were supplied to the Petitioner only on 19th March, 2015 and the Petitioner had filed the objections to the same on 25th March,

2015. 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 30th March, 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. Accordingly, we set aside the draft Assessment order dated 30th March, 2015. We are not dealing the validity of the reasons in support of the impugned notice in the present facts as the time limit to pass the Assessment order as provided under 4th Proviso to sub-section(2) of Section 153 of the Act has already expired when the petition was filed.

12. Rule is made absolute in the aforesaid terms, with no order as to costs.

(B. P. COLABAWALLA, J.)

(M. S. SANKLECHA, J.)