Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.63 OF 2007

Fomento Resorts & Hotels Ltd.,
a Company incorporated under the
provisions of the Companies Act, 1956
and having its registered office at
Cidade de Goa Beach Resort,
Vainguinim Beach, Goa-493 004,
through its Secretary I. B. Muchandi. .... Appellant.

Versus

The Assistant Commissioner of
Income-tax, Central Circle,
Panjim having his address at
Panjim, Goa. .... Respondent.

Mr. Rafiq Dada, Senior Advocate with Mr. Nishant Thakkar, Ms. Jasmin Amalsadvala and Ms. Vinita Palyekar, Advocates for the Appellant.

Ms. Susan Linhares, Standing Counsel for the Respondent.

Coram : M.S. Sonak &
Nutan D. Sardessai, JJ.

Reserved on : 6th August, 2019.
Pronounced on : 30th August, 2019.

JUDGMENT: (Per M.S. SONAK, J.)

Heard Mr. Rafiq Dada, learned Senior Advocate with Mr. N. Thakkar and Ms. V. Palyekar for Appellant and Ms. Susan

Linhares, Standing Counsel for the Respondent.

2. This Appeal was admitted on 20th November, 2007 on the following substantial questions of law :

> *(a) Whether on the facts and in the circumstances of the case, the Income-Tax Appellate Tribunal ought to have held that since the respondent did not furnish to the appellant the reasons recorded for reopening of the assessment for the assessment year 1997-98 and did not comply with the mandatory preconditions laid down by the Hon'ble Supreme Court in GKN Driveshaft vs. ITO 259 ITR page 19, the reassessment order was bad in law as being opposed to the principles of natural justice ?*
>
> *(b) Whether on the facts and in the circumstances of the case the Income-tax Appellate Tribunal was justified in holding that chargeable expenditure had to be computed with reference to the unit of residential accommodation in the hotel and not with reference to the number of persons occupying the said unit of accommodation ?*

3. The brief facts in which the aforesaid substantial questions of law fall for determination, are set out hereafter :

(A) The Appellant filed a return under the provisions of the Expenditure Tax Act, 1987 (said Act), showing chargeable expenditure at rupees Nil on 12.8.1998. The Respondent, by notice dated 13.3.2003, by invoking the provisions in Section 11 of the said Act, sought to reopen the assessment.

(B) On the reverse of the notice dated 13.3.2003, the following endorsement finds place :

> *"Reasons for Reopening :- In view of the Himachal High Court decision in the case of H.P. Tourism Development Corporation (238 ITR 38), the expenditure has escaped assessment."*

(C) The Appellant, vide letter dated 14.4.2003, applied for furnish of reasons recorded for reopening of the assessment and also lodged objections to the assumption of the jurisdiction.

(D) The Appellant, without prejudice also filed their reply on 16.4.2003 in response to the notice under Section 11 of the said Act dated 13.3.2003.

(E) Since the Appellants heard nothing further in the matter, the Appellants by their letter dated 25.3.2004, once again called upon the Assessing Officer to dispose of their objections for reopening of the assessment, prior to commencement of the assessment for the Assessment Year 1997-98.

(F) The Assessing Officer, without making any order disposing of the objections filed by the Appellants, proceeded to make an assessment order dated 26th March, 2004, bringing to charge taxable expenditure of ₹ 10,22,73,987, relying upon the decision of the ***Himachal Pradesh Tourism Development Corporation vs.***

Union of India and ors.[1]. The Assessing Officer, in his order dated 26th March, 2004, sought to dispose of the written objections raised by the Appellants to the reopening of the assessment.

(G) The Appellants, aggrieved by the Assessing Officer's order dated 26th March, 2004, appealed to the Commissioner of Income-tax (Appeals) –VI. In the Appeal, the Appellants specifically urged that the Assessing Officer had breached the mandatory conditions laid down by the Hon'ble Supreme Court in the cases of ***GKN Driveshafts (India) Ltd. vs. Income Tax Officer & ors.***[2] on the issue of reopening of assessment.

(H) The Commissioner (Appeals), vide order dated 30th November, 2004, dismissed the Appeal, holding that the assumption of the jurisdiction by the Assessing Officer under Section 11 of the said Act, was valid.

(I)The Appellants, aggrieved by the Judgment and Order dated 30th November, 2004, preferred an appeal to the Income Tax Appellate Tribunal (ITAT). However, by Judgment and Order dated 4th April, 2005, the ITAT was pleased to dismiss the Appellant's Appeal.

(J) Hence the present Appeal, which came to be admitted on 20th November, 2007 on the aforesaid substantial questions of law.

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1 238 ITR 38

2 259 ITR 19(SC)

4. Mr. Rafiq Dada, learned Senior Advocate for the Appellants, submitted that in case the first substantial question of law is answered in favour of the Appellant and against the Respondent-Revenue, then, there will be no necessity to advert to the second substantial question of law. This position was not seriously disputed by Ms. Linhares, learned Standing Counsel for the Respondent. Even, otherwise, the first substantial question of law relates to assumption of jurisdiction by the Assessing Officer under Section 11 of the said Act. If this question is answered in favour of the Appellant-Assessee and against the Respondent-Revenue, then, it will have to be held that the assumption of jurisdiction by the Assessing Officer under Section 11 of the said Act, was ultra vires the provisions of Section 11 of the said Act. Any decision on the second substantial question of law, in that eventuality, will be quite redundant and unnecessary.

5. Mr. Dada, the learned Senior Advocate for the Appellants submits that the decision of the Supreme Court in ***GKN Driveshafts (India) Ltd***. (supra) is quite clear, inasmuch as it provides that the Assessing Officer is bound to furnish the Assessee, reasons for reopening of the assessment, on demand. Further, the Assessee is entitled to raise objections and the Assessing Officer is

bound to dispose of such objections by passing a speaking order, before he proceed with reopening of the assessment. Mr. Dada submits that this decision was applied by the Respondent to the case of this very Appellants for the Assessment Year 1995-96. Such application was expressly upheld by this Court, as well as by the Hon'ble Apex Court in the case of this very Appellant. Mr. Dada submits that the Assessing Officer, without disposing of the objections raised by the Appellants, could not have proceeded to make the assessment, which has been done in the present case. He submits that such a course of action has been expressly held as impermissible by this Court in the cases of ***Bayer Material Science (P) Ltd. vs. Deputy Commissioner of Income-tax-10(3)***[3], and ***KSS Petron Private Ltd. vs. The Assistant Commissioner of Income Tax Circle 10(2)***[4] . For all these reasons, Mr. Dada submits that the first substantial question of law is required to be answered in favour of the Appellant-Assessee and against the Respondent-Revenue.

6. Mr. Dada adopted the submissions made by him in Tax Appeal No.32/2006 and other connected Appeals, in so far as the second substantial question of law is concerned. However, he submits

[3] 382 ITR 333 (Bom.)

[4] ITXA 224 of 2014

that should the first substantial question of law be answered in favour of the Appellant, then, at least. in this appeal, there is no necessity of adverting to the second substantial question of law.

7. Ms. Linhares, learned Standing Counsel for the Respondent submitted that the decision of the Hon'ble Supreme Court in the case of ***GKN Driveshafts (India) Ltd.*** (supra), as well as the said two decisions relied upon by Mr. Dada relate to the provisions of the Income Tax Act. She submits that in the present case, we are concerned with the provisions of the Expenditure Act. She submits that the rulings cited, therefore, are not applicable or, in any case, are inapplicable with all their vigour. She submits that along with the notice dated 13th March, 2003, the Assessing Officer had furnished reasons to the Assessee and, therefore, there was no question of furnishing any further reasons to the Assessee. She submits that in the assessment order dated 26th March, 2004, the Assessing Officer has dealt with and disposed of the objections raised by the Appellant to the reopening of the assessment. She, therefore, submits that without prejudice to the applicability of the decisions cited by Mr. Dada, there is substantial compliance.

8. Ms. Linhares also adopts the submissions made by her in Tax Appeal No.32/2006 and other connected Appeals, in so far as

the second substantial question of law in this Appeal, is concerned. For these reasons, Ms. Linhares submits that this Appeal is liable to be dismissed.

9. Rival contentions now fall for determination.

10. As noted by us above, should the first substantial question of law be answered in favour of the Appellant-Assessee, and against the Respondent-Revenue, then, there will be no necessity to advert to the second substantial question of law framed by us in our order dated 20th November, 2007.

11. In this case, the Assessing Officer, vide notice dated 13th March, 2003, sought to reopen the assessment by invoking the provisions of Section 11 of the said Act. At the reverse of this notice, the Assessing Office, had stated the reason for reopening. Accordingly, it cannot be said that no reasons were furnished to the Appellant for reopening of the assessment or that there is breach of the law laid down by the Hon'ble Apex Court in ***GKN Driveshafts (India) Ltd.*** (supra), at least, in so far as requirement of furnishing of the reasons for reopening of the assessment is concerned. To that extent, therefore, we are unable to agree with the contention of Mr. Dada that this is a matter where the Assessing Officer failed to

furnish the reasons for reopening of assessment whilst invoking the provisions of Section 11 of the said Act.

12. Hon'ble Supreme Court in ***GKN Driveshafts (India) Ltd.*** (supra) has, however, further held that once reasons are furnished, the Assessee is entitled to lodge his objections and the Assessing Officer is duty bound to dispose of such objections, by passing a speaking order.

13. In the present case, the Appellants did lodge their objections vide letter dated 14th April, 2003. By a further letter dated 25th March, 2004, the Appellants requested the Assessing Officer to dispose of such objections by passing a speaking order before proceeding with the reassessment in respect of the Assessment Year 1997-98. However, the Assessing Officer, without proceeding to dispose of the objections raised by the Appellants by passing a speaking order, straight away proceeded to make the assessment order dated 26th March, 2004, bringing to charge taxable expenditure on ₹10,22,73,987/-. The assessment order dated 26th March, 2004, no doubt, deals with the objections raised by the Appellant and purports to dispose of the same. Ms. Linhares contends that this is a sufficient compliance with the procedure set out in ***GKN Driveshafts (India)***

Ltd. (supra), assuming that the same is at all applicable to the proceedings under the said Act. Mr. Dada, however, submits that such disposal in the assessment order itself does not constitute the compliance with the mandatory conditions prescribed by the Hon'ble Supreme Court in ***GKN Driveshafts (India) Ltd.*** (supra). In support, as noted earlier, Mr. Dada relies upon ***Bayer Material Science (P) Ltd.*** (supra) and ***KSS Petron Private Ltd.*** (supra) .

14. The contention of Ms. Linhares that the decisions relied upon by Mr. Dada relate to the provisions of the Income Tax Act and, therefore, are not applicable to the proceedings under the Expenditure Tax Act, cannot be accepted. In the first place, the provisions relating to reopening of assessment are almost pari materia. Secondly, in so far as Assessment Year 1995-96 is concerned, the Respondent applied the very same ruling in ***GKN Driveshafts (India) Ltd.*** (supra) to hold that the notice of reopening of assessment was ultra vires Section 11 of the said Act. This view, in the specific context of the said Act and incidentally in the specific context of this very Appellant, was upheld not only by this Court, but also by the Hon'ble Supreme Court. This was in ETA No.1 and 5/PANJ/01 decided by the Tribunal on 4.4.2006.

15. The aforesaid decision of the ITAT was appealed by the Respondent vide Tax Appeal No.71/2006. This appeal was dismissed by this Court vide order dated 27th November, 2006, which reads thus :

> *" Heard the learned Counsel on behalf of the parties.*
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> *This appeal is filed against the Order dated 4-4-2006 of the ITAT wherein in para 7 the learned ITAT has come to the conclusion that the Assessing Officer is required to give reasons, when asked for by the Assessee. Giving of reasons has got to be considered as implicit in Section 11 of the Expenditure Tax Act, 1987. It is now well settled that giving reasons in support of an order is part of complying with the principles of natural justice.*
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> *In the light of that, no fault could be found with the order of the learned ITAT and as such no substantial question of law arises as well.*
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> *Appeal dismissed."*

16. The Respondent, instituted a Special Leave to Appeal (Civil) No.5711/2007 which was, however, dismissed by the Hon'ble Apex Court vide order dated 16/7/2007, by observing that there were no merits.

17. Accordingly, for the aforesaid reasons, we are unable to accept Ms. Linhares's contention based upon the any alleged variance between the provisions of the said Act and the provisions of the Income Tax Act, in so far as applicability of the principles in ***GKN***

Driveshafts (India) Ltd. (supra) is concerned.

18. The moot question is, therefore, the disposal of the objections by the Assessing Officer in his assessment order dated 26th March, 2004 constitutes sufficient compliance with the procedure prescribed by the Hon'ble Supreme Court in the case of ***GKN Driveshafts (India) Ltd.*** (supra) or, whether it was necessary for the Assessing Officer to have first disposed of the Appellant's objections by passing a speaking order and only upon communication of the same to the Appellants, proceeded to reopen the assessment for the Assessment Year 1997-98.

19. Virtually, an identical issue arose in the cases of ***Bayer Material Science (P) Ltd.*** (supra) and ***KSS Petron Private Ltd.*** (supra) before the Division Benches of our High Court at Bombay.

20 . In ***Bayer Material Science (P) Ltd.*** (supra), by a notice dated 6/2/2013, the Revenue sought to reopen the assessment in the year 2007-08. The Assessee filed a revised return of income and sought for reasons recorded in support of the notice dated 6.2.2013. The reasons were furnished only on 19.3.2015. The Assessee lodged objections to the reasons on 25th March, 2015. The Assessing Officer, without disposing of the Petitioner's objections, made a draft

assessment order dated 30th March, 2015, since this was a matter involving transfer pricing. In such circumstances, the Division Bench of this Court, set aside the assessment order by observing that the Court was unable to understand how the Assessing Officer could, at all, exercise the jurisdiction and enter upon an inquiry on the reopening notice before disposing of the objections on the reasons furnished to the Assessee. This Court held that the proceedings initiated by the Transfer Pricing Officer (TPO), on the basis of such a draft assessment order, were without jurisdiction and quashed the same.

21. Similarly, in the case of ***KSS Petron Private Ltd.*** (supra), this Court was concerned with the following substantial question of law :

> " *Whether on the facts and circumstances of the case and in law, the Tribunal was justified in restoring the issue to the Assessing Officer after having quashed/set aside the order dated 14th December, 2009 passed by the Assessing Officer without having disposed of the objections filed by the appellant to the reasons recorded in support of the re-opening Notice dated 28th March, 2008 ?"*

22. In the aforesaid case, the Assessing Officer had purported to dispose of the objections to the reasons in the assessment order, consequent upon reopening of the assessment. This Court, however,

held that the proceedings for reopening of assessment prior to disposing of the Asessee's objections by passing a speaking order, was an exercise in excess of jurisdiction.

23. ***KSS Petron Private Ltd.*** *(supra), this is what the Division Bench has observed at paragraphs 7 and 8 of the Judgment :*

> *"7. On further Appeal, the Tribunal passed the impugned order. By the impugned order it held that the Assessing Officer was not justified in finalizing the Assessment, without having first disposed of the objections of the appellant. This impugned order holds the Assessing Officer is obliged to do in terms of the Apex Court's decision in* ***GKN Driveshafts (India) Ltd., v/s. ITO 259 ITR 19.*** *In the aforesaid circumstances, the order of the CIT(A) and the Assessing Officer were quashed and set aside. However, after having set aside the orders, it restored the Assessment to the Assessing Officer to pass fresh order after disposing of the objections to reopening notice dated 28th March, 2008, in accordance with law.*
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> *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."

24. According to us, the rulings in ***Bayer Material Science (P) Ltd.*** (supra) and ***KSS Petron Private Ltd.*** (supra) afford a complete answer to the contentions raised by Ms. Linhares in defence of the impugned order.

25. Since, in the present case, the Assessing Officer has purported to assume the jurisdiction for reopening of the assessment, without having first disposed of the Assessee's objections to the reasons by passing a speaking order, following the law laid down in ***GKN Driveshafts (India) Ltd.*** (supra), ***Bayer Material Science (P) Ltd.*** (supra) and ***KSS Petron Private Ltd.*** (supra), we are constrained to hold that such assumption of jurisdiction by the Assessing Officer was ultra vires Section 11 of the said Act. The first substantial question of law will, accordingly, have to be answered in favour of the Appellant and against the Respondent-Revenue.

26. As noted earlier, in view of the aforesaid, there is no necessity to advert to the second substantial question of law, at least, in so far as this Appeal is concerned. The Appeal is, therefore, allowed and the impugned orders dated 26th March, 2004 made by the

Assessing Officer, 30th November, 2004 made by the Commissioner (Appeals) and 12th January, 2007 made by the ITAT are set aside on the ground of want of compliance with jurisdictional parameters by the Assessing Officer, and without going into the second substantial question of law framed in this Appeal. Accordingly, we clarify that the second substantial question of law, raised in this Appeal, is not to be treated as decided in this Appeal, one way or the other.

27. The Appeal is allowed in the aforesaid terms. There shall be no order as to costs.

Nutan D. Sardessai, J. ***M.S. Sonak, J.***