REMANDING BACK OF ASSESSMENT:

An Exercise In Futility

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Introduction:

In the recent past the Courts and the Tribunals have remanded back matters where the assessing officer failed to follow the correct procedure laid down by the Supreme Court with respect to reassessment proceedings under Income Tax Act. This article focuses on the relief given by the courts in cases where the procedure has not been followed by the assessing officers and argues that the remanding back such cases is a futile exercise in nature which results in unnecessary cycle of litigation and thus thereby is avoidable.

REASSESSMENT PROCEEDINGS – BACKGROUND AND THE LAW

A reassessment proceeding is an age old and an important provision under Income Tax Act. If an income which otherwise would have been chargeable to tax has due to some reason, has escaped assessment, for particular assessment year, then the proceedings undertaken by the assessing officer against the assessee are defined as reassessment proceedings.

The power to initiate reassessment proceedings has been given to the assessing officer under section 147 of the Income Tax Act, 1961 which deals with "**Income escaping assessment".** In order to make out a case for initiating reassessment proceeding against the assesse, the assessing officer has to comply with the four key essential pre conditions, as laid down in section 147. The four key essentials which makes or break a case for reassessment under section 147 includes:

i. *The reason to believe.*
ii. *Establishment of nexus or live link.*
iii. *Application of mind before recording reasons.*
iv. *Satisfaction of authority required u/s 151 for issuance of notice u/s 148 of the Act.*

If the assessing officer is of the view that there is some income which has escaped assessment then the assessing officer ought to record reason which led to formulation of such a belief. Post recording the recording the reason and explaining the link, the assessing officer shall seek in writing, necessary satisfaction from the authorities as prescribed in and mandated by section 151 of the Act if the reassessment is initiated after four years. After receiving the necessary sanctions under section151 of the Income Tax Act, the assessing officer issues a notice under section 148 of the Act to the assessee thereby initiating reassessment proceeding.

Courts across India, through various judgments, have stated that, ideally, the reason recorded by the assessing officer in order to initiate reassessment proceedings should be provided to the assesse along with the notice under 148 of the Act. However, in practice, the approach adopted by the revenue department is very different. Generally a notice under section 148 of the act, pertaining to opening of reassessment proceedings is sent to the assessee without the reasons recorded by the Assessing officer. Upon the receipt of the notice under section 148 of the act, the assessee can write to the assessing officer and seek a copy of the reasons recorded by the Assessing officer.

OBJECTIONS RAISED BY ASSESSEE

In the landmark judgment in the case of **GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC)** in 2003, the Apex Court laid down a proper procedure/guideline for the revenue and the assessee to be followed while dealing with the initiation of reassessment proceedings. The Apex Court made the observation:

> "*When a notice under section 148 of the Income Tax Act is issued, the proper course of action for the noticee 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."*

Thus as soon as a copy of reasons recorded by the assessing officer has been served upon the assessee, if the assessee is of the opinion that the necessary pre conditions as laid down under section 147 has not been complied with, the assessee can take the liberty to file objections before the assessing officer. Generally, the objections filed by the assessee are based on one or all of the above mentioned four elements. If the assessee chooses to file objections to the reasons recorded, then the assessing officer is bound by law to dispose-off those objections before he could continue with the reassessment proceedings.

Recently, the Hon'ble High Court of Delhi in the case of **Surendra Kumar Jain Vs. PCIT (Central)-III, New Delhi & Anr.(W.P.(C) 593/2019),** relying upon the procedure outlined by the Apex Court in the case of **GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC),** set aside the assessment order which was passed without disposing off the preliminary objections raised by the assessee.

The High Court observed that where in response to a notice issued for initiation of reassessment proceedings u/s 147, the assessee seeks reasons to believe and files objections against those reasons, the assessing officer has to consider those reasons on their merits and has to pass a reasoned order. The court further held that importantly, this has to happen prior to the assessing officer proceeding with the re-assessment proceeding.

Thus the law with regards to initiation of reassessment proceedings has been laid down and has been upheld by courts across India. However in the case of **SABH Infrastructure Ltd. v. Assistant Commissioner of Income tax [2017] 398 ITR 198 (Delhi), the Hon'ble** High Court of Delhi made a key observation and noted that despite

the law being settled with regards to procedure to be followed in reassessment proceedings the same errors are repeated by the concerned Revenue authorities in various cases. Thus in this background the Hon'ble High Court laid down the following guidelines which were to be followed in matter pertaining to reassessment proceedings :-

(i) *while communicating the reasons for reopening the assessment, the copy of the standard form used by the AO for obtaining the approval of the Superior Officer should itself be provided to the Assessee. This would contain the comment or endorsement of the Superior Officer with his name, designation and date. In other words, merely stating the reasons in a letter addressed by the AO to the Assessee is to be avoided;*

(ii) *the reasons to believe ought to spell out all the reasons and grounds available with the AO for re-opening the assessment especially in those cases where the first proviso to Section 147 is attracted. The reasons to believe ought to also paraphrase any investigation report which may form the basis of the reasons and any enquiry conducted by the AO on the same and if so, the conclusions thereof;*

(iii) *where the reasons make a reference to another document, whether as a letter or report, such document and/ or relevant portions of such report should be enclosed along with the reasons;*

(iv) *the exercise of considering the Assessee's objections to the reopening of assessment is not a mechanical ritual. It is a quasijudicial function. The order disposing of the objections should deal with each objection and give proper reasons for the conclusion. No attempt should be made to add to the reasons for reopening of the assessment beyond what has already been disclosed.*

REMEDIES AVAILABLE TO ASSESSEE

Though the judgment by the Hon'ble Apex Court in the GKN Driveshaft was landmark, it was silent on with respect to the effect of non compliance of the procedure by the assessing officer i.e. the question as to what shall happen to a case where procedure is not being followed while dealing with the preliminary objections.

In such a scenario, courts on being approached in a case where the assessing officer passes a speaking order without disposing off the preliminary objections raised by the assessee has provided relief to the assessee by doing either of the following two things: -

(i) Either the courts in some cases have set aside the speaking order passed by the Assessing Officer and remand back the matter to the assessing officer for fresh disposal of objections raised by the assessee;

(ii) or in other cases have declare the reassessment proceedings as void ab initio by quashing the issuance of notice u/s 148 for initiation of reassessment proceedings.

THE PROBLEM WITH REMANDING BACK

As seen above the relief that is generally granted in the cases filed by assessee questioning the initiation of reassessment proceedings are not standardized. In this regards a key observation was made by the Hon'ble Rajasthan High Court in the case of **M/s K.C. Mercantile (Presently Known As Genus Innovation Limited) vs. DCIT Circle, Circle-2, Jaipur in Income Tax Appeal No. 292/ 2016**. It noted that Court has to make sure that where the assessing officer has clearly ignored the procedure laid down by the Supreme Court, then by taking the law in true spirit the Tribunal ought not to have remitted back the matter for fresh reassessment and remanding back of the matter will open a second inning in his own for no fault of the assessee.

Further in the case of **KSS Petron Private Ltd,** the court has observed that :

> *"If the AO does not follow the law laid down in GKN Driveshafts 259 ITR 19, the reopening proceedings have to be quashed. There is no reason to restore the issue to the AO to pass a further/fresh order because it would give a licence to the AO 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 AO for fresh adjudication after following the due procedure. This would lead to unnecessary harassment of the assessee by reviving stale/ old matters."

The two kind of relief granted by various courts in matters where the procedure has not been followed by the assessing officer while initiating reassessment proceedings are not at equal footing. Despite several judgments upholding and settling down the law regarding the procedure that is to be adopted by the assessing officer in case of reassessment proceedings, the procedure is not followed and large number of cases land up before the Courts questioning the conduct of the assessing officer. In such a scenario, remanding back a matter for reconsideration gives a second chance to the assessing officer who has failed to uphold the law of the land in letter and in spirit. This causes unnecessary hardship to the assessee and further results into prolonged litigation and harassment for no fault of its own. Furthermore, remanding back a case rarely changes the outcome and the cases land up before the court again. Thus the only effective remedy that should be given in case where the assessing officer has failed to follow the procedure is to declare the whole proceedings void ab inito. Such approach will not only save time and resources for both the assessee and the revenue but will also ensure that the assessing officer ensures that proper procedure is followed while initiating reassessment proceedings as no second opportunity will be given to him to rectify his error.