IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI.

BEFORE SHRI ABY T VARKEY, JUDICIAL MEMBER AND
SHRI M BALAGANESH, ACCOUNTANT MEMBER

ITA No.82/Mum/2011
(Assessment Year : 2001-02)

M/s. General Electric Company,
C/o KPMG, Lodha Excelus,
Apollo Mills Compound, N.M. Joshi Marg,
Mahalaxmi, Mumbai-400011
PAN AAACG5399M ...Appellant.

Vs.

Asst. Director of Income Tax,
(International Taxation)-3(1),
Room No.136, 1st Floor, Scindia House,
N M Road Ballard Estate,
Mumbai-400038. ....Respondent.

ITA No.432/Mum/2011
(Asst. Year 2001-02)

Dy. Commissioner of Income Tax,
International Taxation-3(1),
Mumbai-400 038 ....Appellant.

Vs.

M/s. General Electric Company,
Mahalaxmi, Mumbai. ....Respondent.

Assessee By :	Shri Percy Pardiwala, Ms. Fereshte Sethna, Shri Mrunal Parekh, Shri Abhishek Tilak and Shri Ameya Pany.
Revenue By :	Ms. Surabi Sharma, CIT D.R. Shri Sunil Umap, CIT-D.R.

Date of Hearing :	15.12.2022
Date of Pronouncement :	23.12.2022

O R D E R

Per Shri M. Balaganesh, A.M. :

These cross appeals filed by the assessee and revenue are directed against the order dt.28.10.2010 of the learned Commissioner of Income Tax (Appeals)-10, Mumbai relating to Assessment Year 2001-02 .

2. The assessee has filed revised grounds of appeal which is taken on record. We deem it fit to address the preliminary ground raised by the assessee vide Revised Ground Nos.1 to 5 challenging the validity of reassessment under section147 of Income Tax Act, 1961 (in short 'the Act') framed in the hands of the assessee.

3. For the sake of convenience, the revised grounds 1 to 5 raised by the assessee in this regard are reproduced herein below :

1. On the facts and circumstances of the case CIT(A) erred in upholding the initiation of re-assessment proceedings under Section 148 of the Income-tax Act, 1961 (the "Act").

2. On the facts and circumstances of the case CIT(A) erred in holding that the AO had reason to believe that income chargeable to tax had escaped assessment and was justified in re-opening of such assessment.

3. On the facts and circumstances of the case CIT(A) erred in not appreciating that the material on the basis of which re-assessment proceedings were initiated did not pertain to the Assessee and/or the assessment year in question.

4. On the facts and circumstances of the case CIT(A) erred in not appreciating that the re-assessment proceedings had been initiated on a change of opinion since the original assessment had been completed under Section 143(3) of the Act and no new material in respect of the Assessee in question had come to the knowledge of the AO warranting initiation of proceeding under Section 148 of the Act.

5. On the facts and circumstances of the case and in law, the CIT{A) has erred in assuming existence of business connection/PE for the relevant assessment year based on the material which pertains to subsequent years and pertains to GE Overseas entities in general without any specific mention of the Assessee.

4. General Electric Company is a company incorporated in the United States of America (USA). The assessee filed its return of income for the assessment year under consideration on 29 October 2001 declaring the total income of Rs.3,07,33,0901- as Royalty/Fee for technical services and income from other sources. During the year under consideration, the assessee made equipment! parts supplies on an off-shore basis to Indian customers in the Energy and Aviation Sector. The sales were made outside India and payments were also received outside India. As such, no income accrued or arose in India in

respect of such off-shore supply of equipment parts which was liable to tax under section 5 of the Income Tax Act, 1961 (Act) or deemed to accrue or arise under section 9 of the Act. Further, the assessee being a resident of the USA, was eligible for the benefits of the Double Taxation Avoidance Agreement entered into between India and USA (Tax Treat). It did not have any presence in India so as to constitute a Permanent Establishment within the meaning of Article 5 of the Tax Treat and consequently, was not liable to tax in India in respect of the offshore supplies under the Tax Treaty. The assessment proceedings was completed vide order dated 29 January 2004 under section 143(3) of the Act wherein the returned income was accepted without making any additions / disallowances. A survey was conducted at General Electric International Operations Company Inc's (GEIOC) premises located at AIFACS, 1, Rafi Marg, New Delhi-110001. Thereafter, notice dated 31 March 2008 under section 143 of the Act was issued to the assessee to file return of income by the office of the

Assistant Director of Income-tax, International Taxation, Range (1) Mumbai (AO) In response to the same, the assessee vide letter dated 29 May 2008 requested the learned AO to treat the return already filed under section 139 of the Act as turn filed in compliance to the said notice. The assessee also made detailed submissions objecting to the reopening. We find that notice under section 148 of the Act was issued on the assessee on 31.3.2008. The assessee filed a reply on 29.5.2008 in response to the notice under section 148 of the Act by stating that the return already filed may be treated as a return filed in response to notice under section 148 of the Act. In the said letter, the assessee had duly sought for reasons recorded by the learned Assessing Officer for reopening the assessment. This letter is enclosed in pages 6 and 7 of Paper Book Vol.1 filed before us. On 20.11.2008, notice under section 142(1) of the Act was issued by the learned Assessing Officer calling for various details. In response to the notice, the assessee filed a reply vide letter dt.26.11.2008 seeking a short

adjournment. In the said letter also the assessee once again reminded the learned Assessing Officer to furnish a copy of the reasons recorded for reopening the assessment. This letter is enclosed in page 43 of Paper Book Vol.I filed before us. Thereafter, the copy of reasons recorded were communicated to the assessee by the learned Assessing Officer on 17.12.2008. The reasons recorded are enclosed in pages 49 to 52 of the Paper Book Vol.1 filed before us. For the sake of convenience, the entire reasons recorded are reproduced herein below :-

> *" REASONS RECORDED FOR ISSUE OF NOTICE U/S 148 OF THE INCOME TAX ACT, 1961 IN THE CASE OF GE COMPANY FOR AY 2001-02.*
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> *The return of income for AY 2001-02 was fed on 29-10-2001 declaring total income at Rs 3,0733,000 The case was selected for scrutiny and the assessment was finalized u/s. 143(3) on a total income of Rs 3,07,35,000 on 20.01.2004.*
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> *2. A Survey u/s 133A of the Income Tax Act, 1961 (Ace) was carried out at the office premises of General Electric International Operation Company Inc India liaison office (GEIOC) located at AIFACS, Rafi Marg, New Delhi 110001 on 02.00 2007 The liaison offices (LO) of GEIOC USA was slanted in India from July 01, 1987. The office was set up to undertake the liaison activities. From the information available it is seen that GEIOC has employed various persons and is sending these employees on assignments to GE entries located worldwide. From this premises, other entities incorporated in India as well as non-resident entities of the GE group are also operating.*

3. During the course of survey, statement of Shri Rupak Shah, who is employed with GE Capital Services, India as Tax Manager but having extended responsibilities of tax matters relating to all companies of GE Group in India was recorded. Statement of Shri Chandan Jain, working with GEIOC who provides interface between GE USA and GE Business in India was also recorded.

4. The GE group is a diversified technology media and financial services company with products and services ranging from aircraft engines, power generation, water processing and security technology to medical imaging, business and consumer financing, media content and advanced materials. GE serves customers in more than 100 countries and employees more than 300,000 people worldwide.

5. GE has been in India since 1902. All of GE's global businesses have a presence in India and the company has become a significant participant in a wide range of key services, technology and manufacturing industries. Employment across India exceeds 12000. Over dollar 1 billion of exports from India support GE's global business operations around the world. It has sourced products, services and intellectual talent from India for its global businesses. It pioneered the concept of software sourcing from India and is one of the largest customers for the IT service industry of India.

6. With a diverse portfolio products and services ranging from aircraft engines, power generation, water processing and security technology to medical imaging, business and consumer financing, electrical and power protection and advanced materials, GE has presence in India. Various operating companies of the group in India are in the field of finance, industries, power systems and infrastructure.

7. On the basis of various facts, information collected during the survey and afterwards, it is clear that various GE group entities are carrying out the business in India. The group has made sales in the energy, transportation, aviation, oil & gas sectors during all these years. The information submitted reveals that the GE group entities have made sales of equipment parts in energy business, transportation business and aviation business. Some of the companies have also rendered services to the customers in India.

8. During the course of survey, it was found that various employees of GE overseas group companies are working in India. Some of these employees are on the payroll of GE International Inc. USA(assessed in this charge). These are

- *Dan Nalawade*
- *Riccardo Procaco*
- *William Biair*
- *Ashfaq Nainar*
- *Kenneth Pierson*
- *SameerAggarwal*
- *Prat Kumar*

9. These persons are working for various direct businesses of the GE group in India, which are neither being conducted through a subsidiary or joint venture company. These persons are India Head of different businesses and they are being supported by a team of persons, who are employed by either GE India Industrial Pvt Ltd, or other group concern. From the information available during the survey or afterwards, it is clear that various employees of GE India Industrial Pvt. Lid, are working with the expats so as to constitute a team of the expats looking after the GE businesses.

10. General Electric International Operation Co Inc, India liaison office (GEIOC), has on its payroll more than 50 employees and the designation of such employees is CAs. The assessee has explained that employees are deputed to various GE companies and they work as their employees and such employees remain on the payroll of GEIOC till the same are transferred to other entities. As per the application made to RBI and permission obtained, the liaison office was to act as a communication channel between the head office and the customers in India. However, the company instead of undertaking the permitted activities is employing various persons and providing the services of such persons to the GE group entities worldwide. The company performs all the functions relating to such employees, including their employment, payroll administration, the activities relating to deputation etc. and such activities constitutes business activities being carried out in India. The expenses incurred by such office are reimbursed by the head office without any margin. Independent third parties providing such services will certainly earn profits on the activities. The activities indicate that the GEIOC is carrying out business in India through a Permanent

Establishment (PE) and the income attributable to such PE is taxable in India. The company has not filed return of income for any year.

11. The business of various GE group non-resident companies in India is being conducted by the expatriate employees of GE group (who are employed by GE group company and deputed to India as India Head of the specific business like oil & gas, energy, aviation, transportation etc.), with the support and help of employees drawn from GE Indian entities. Such expatriates are responsible and look after the business of GE group as a whole irrespective of any GE group company making sales in India. The bifurcation of sales by various entities is decided by the GE management, as is evidenced by the Reliance order referred above.

12. These expats and their team has at their disposal a fixed place of business in the form of office premises at AIFACS, 1 Rafi Marg. New Delhi. This office premise is taken on lease by GEIOC from AIFACS (All India Fine Arts and Craft Society) and has been under lease from the period prior to 01.04.2000. The information regarding the employees of GE in India prior to the present expats is not given by the GE group, however, there have been the persons working for such sales throughout the period 01.04.2000 to till date. To summarize, the expats deputed in India for undertaking the marketing activities including price negotiation, supervision, administration, sale functions and after sales activities and the team were continuously carrying out the business of various entities of the GE group, which made sales in India from the above stated office premises in Delhi and other places of businesses in India. Since:

- *A place of business is available at disposal of the GE group entities in India.*
- *The place of business was fixed and the business was carried out through that place of business.*

Some employees of the GE group Indian entities forming part of the sales team were also carrying out the business through other fixed place of business in the form of other offices of the GE group in India.

In view of the above, it is clear that the various GE group entities, being tax residents of different countries had fixed place PE in India as per the provisions of respective tax treaties. The office as well as the premises used as a sales outlet or for receiving or soliciting orders also constitutes the PE as provided in paragraph 2 of Article 5 of respective tax treaties. The activities of the non resident GE group entities being conducted from the fixed place of business referred above are not of the preparatory or auxiliary character.

13. The employees of GE India Industrial Pvt. Ltd. forms the sales teams of the GE entities, such employees alongwith the expats have habitually secured orders in India, wholly or almost wholly for the non-resident GE group entities. The correspondence discussed above also indicates that such employees have also participated in the price negotiations. The various documents in the form of agreements/ purchase orders/ copies of contracts also proves the involvement of the employees of Indian company and expats in the conclusion of contracts on behalf of such non-resident GE group entities, therefore, GE India Industrial Pvt Ltd. also constitutes the agent other than an agent of independent status of the non-resident GE group entities. This results into the creation of the dependent agent PE as per the provisions of the tax treaties and business connection as per the provisions of Explanation 2 to Section 9(1)) of the Income Tax Act, 1961. The activities of the third parties working for the GE group as mentioned above also may constitute agency PE/ business connection of the GE group entities.

14. It is possible that in respect of various projects relating to rendering of services / supervisory services, such GE group entities will be considered to have the PE as per the other paragraphs of the Article relating to the PE of the respective tax treaties.

15. After having established that various GE group entities were making sales in India with the active involvement of the PE of such entities in India, then considering the provisions of business profit article of the respective tax treaties, the profits of the enterprise are liable to be taxed in India to the extent attributable to the PE. This rule as well as the rules for attribution of such profits are available in the respective tax treaties India has signed with different countries of which such GE group entities are tax resident.

16. Considering the fact that the sales are made to Indian customers on regular basis and such GE group entities are physically present in some form or the other in India and such physical presence has full role in these sales. Therefore, the income accrues or arises to such GE group companies in India. Such income accruing or arising is liable to be taxed in India as per the provisions of Section 5(2) of the Income Tax Act, 1961.

17. The PricewaterhouseCoopers Pvt. Ltd vide letter dated 24.03.2008 has also submitted the list of non-resident GE group companies who have rendered services in India and the payments are made by Indian companies. The payments received by such companies from Indian resident is income accruing or arising or deemed to accrue or arise in India as per the provisions of Section 5(2) rws 9(1) of the Income Tax Act, 1961. Even if services are rendered from outside India, such payments will be income deemed to accrue or arise in India as per the provisions of Section 9(1)(vii) of the Income Tax Act, 1961. Such amounts will also be taxable as fees for technical services or business income depending upon the facts of the case and the respective tax treaty.

18. As per the information gathered during the course of the survey, it is seen that in the case of GE Company which is assessed in this charge, during the FY 2000-01 relevant to AY 2001-02, sales have been made on account of the following

1. *Aviation business of the group*

   GE co has made sales to the tune of Rs.47,679,646 USD on this account which amounts to Rs.221,37,67,963 during the year in question.

2. *Energy business of the group*

   GE Co has made sales of equipment parts amounting to USD 8,989,460 which amounts to Rs.41,73,80,628.

19. In the assessment order for AY 2001-02, finalized u/s 143(3) the assessee company had shown only income on account of Fees for Tech Services of Rs 2.74 crores and interest income of Rs 32 lakhs. This was

accepted by the Assessing Officers and no other additions were made. The assessee has always claimed that it did not have a PE in India.

20. The opinion of the AO to relevant AY 2001-02 for holding that GE Co. has no PE in India was based on the facts and information available with the AO during assessment for relevant AY 2001-02. But, due to finding of new facts and the Information, on the basis of survey conducted u/s 133A of the IT Act by the Team of Delhi International Taxation at the office premises of GEIOC, located at AIFACS, 1, Rafi, Marg, New Delhi 110 001 and report given by the ADIT(IT)-1(2) New Delhi. It is further apparent that the assessee has not disclosed the income on account of energy business and aviation business in the return of income for AY 2001-02. So, based on the new facts and information available, I am of the opinion that assessee has business connection as well as PE in India and income attributed to PE / business connection is taxable in India.

21. On the basis of material collected during or after survey operations and discussed above, I have reason to believe that income chargeable to tax has escaped assessment for AY 2001-02. This belief is formed on the basis of fact that assessee has not furnished return of income although its income earned in India during the previous year was chargeable to income tax. Considering the quantum of sales made, I have reason to believe that income chargeable to tax, which has escaped assessment amounts to or is likely to amount to more than Rs. 1 lakh for the year.

22. In this case, not more than 6 years have elapsed from the end of relevant assessment year (ie AY 2001-02) and income of more than Rs. 1 lakh has escaped assessment, therefore, the Notice u/s 148 rws 147 of the Income Tax Act, 1961 satisfies the time limit for issue of notice as provided in Section 149 of the Income Tax Act, 1961.

4. The assessee filed detailed objections to the reasons recorded vide letter dt.26.12.2008 making both factual and legal submissions before the learned Assessing

Officer. This letter dt.26.12.2008 is enclosed in pages 58 to 102 of the Paper Book Vol.1 filed before us. The objections filed by the assessee were not admittedly disposed of by the learned Assessing Officer by way of a separate speaking order. The gist of various objections raised by the assessee challenging the validity of reopening vide letter dt.26.12.2008 are as under :-

a) The learned Assessing Officer should have reason to believe that income of the assessee had escaped assessment based on some tangible information or material that has come to his knowledge subsequent to the framing of the assessment. The formation of belief that income of the assessee had escaped assessment is the condition precedent for assuming jurisdiction under section147 of the Act.

b) The fulfillment of this condition is not a mere formality but it is mandatory and the failure to fulfill the condition would vitiate the entire reassessment proceedings.

c) The reasons for formation of belief must have rational connection with or relevant bearing on formation of belief. Rational connection postulate that there must be a direct nexus or live link between the material that had come to the notice of the learned Assessing Officer and the formation of his or her belief that there has been escapement of income of the assessee for the relevant assessment year in the hands of the assessee warranting reopening of assessment.

4.1. In the reasons for issuance of notices under Section 148 provided to us, your goodself has alleged that GE overseas entities are taxable in India :

a. Under the Act, as it has a BC in India; and
b. Under the tax treaty, as it has a permanent establishment in India.

The following are the reasons for holding the above.

1. That the GE overseas entities are engaged in various sales activities in India. The businesses of non-resident companies in India are being conducted by the expatriate employees of GE group with the

support of employees drawn from GE Indian entities. The expatriates along with their teams have at their disposal a fixed place of business in India in the form of office premises at AIFACS, 1 Rafi Marg, New Delhi through which they operate and carry on the business of overseas GE entities. This constitutes a fixed place PE.

2. That employee(s) of GEIIPL along with the expatriate heads habitually secure orders and conclude contracts on behalf of such non-resident GE group entities and such employees have also participated in the price negotiations. This results into the creation of a dependent agent PE as per the provisions of the tax treaties and business connection as per the provisions of Explanation 2 to Section 9(1)(i) of the Act.

3. That the business of various overseas GE Companies in India is being conducted by the expatriate employees of GE group.

4. That there is also a possibility that in respect of various projects relating to rendering of services/ supervisory services, such GE group entities will be considered to have a PE under other provisions of the respective tax treaties.

5. That the sales are made to Indian customers on regular basis and such GE group entities are physically present in some form or the other in India, the income accrues or arises to GE overseas companies in India. Such income accruing or arising is liable to be taxed in India as per the provisions of Section 5(2) of the Income Tax Act, 1961.

4.2. In the instant case, there is no rational connection between the information in possession with yourself and the formation of belief that there has been escapement of income. It is submitted that the reasons recorded no where indicate as to what is the information on record which has enabled your Honour to form an opinion that income has escaped assessment. The reasons recorded are general in nature. The references to the business of GE Group in India and other entities have been made without any basis and are totally out of context. The same does not show as to how one can derive inference that income has escaped assessment. Furthermore, the evidence being sought to be used for initiating fresh enquiry against GEC does not pertain to GEC or for the year under consideration. The same is general in nature and the question of determining a PE in India being fact specific needs to be decided on the basis of specific facts. Therefore, the act of issuing notice under section 148 of the Act, without establishing a nexus between material on

record and the belief amounts to conducting fishing enquiries, which action is bad in law.

4.3. In view of the above, the pre-requisites of section 147 remain unsatisfied as the belief entertained by your Honour is not only arbitrary, irrational and based on conjectures, but also assumes existence of the activities carried out by GEC when no material is on record.

4.4. Accordingly, it is submitted that the notices issued under section 148 of the Act to GEC are bad in law and without jurisdiction and hence the reassessment proceedings initiated against GEC may kindly be dropped.

5. The learned Assessing Officer without disposing of the objections raised by the assessee for the reasons recorded by way of a separate speaking order, proceeded to frame the reassessment directly under section 143(3) r.w.s. 147 of the Act on 31.12.2008 determining the total income of the assessee at Rs.7,43,38,488/-. In the said reassessment proceedings, the learned Assessing Officer

proceeded to extract the reasons recorded for the reopening of assessment in page 2 paragraph 4 of his order. These reasons extracted when correlated with the actual reasons recorded which are enclosed at pages 49 to 52 of the Paper Book Vol.1 filed before us, go to prove that only the first four paragraphs match with the actual reasons recorded. Thereafter, the learned Assessing Officer goes on to look into materials impounded during survey and used the same as if they were part of the reasons recorded. We find that the learned Assessing Officer had not disposed of the objections raised by the assessee for reopening the assessment even in the reassessment order framed on 31.12.2008.

6. The learned Department Representative before us vehemently relied on the written submissions submitted on 6.11.2019. The main crux of the argument of the learned Department Representative is that since all the group entities of GE operating from the same address at Rafi Marg, New Delhi, 22 group cases were taken up for

assessment at New Delhi while two group cases i.e. General Electric Company and General Electric International Inc are assessed at Mumbai. Further, the documents and material were common found during survey proceedings, a similar approach was undertaken in the assessment proceedings by all the Assessing Officers while passing the assessment order and identical findings were made in all the cases by holding that :-

a) There is a fixed place /agency Permanent Establishment (PE) in India with respect to all the group entities.

b) The attribution of income to PE is decided @ 3.5% of sale. This percentage of attribution was later modified by the appellate forum.

The learned Departmental Representative also placed reliance on the co-ordinate Bench decision of Delhi Tribunal in the case of GE Energy Parts Inc. Vs. ADIT in ITA No.671/Del/2011 dt. 27.01.2017 for the Assessment Year 2001-02 (group concern of the assessee company)

wherein, according to the learned Departmental Representative, the Tribunal had -

(i) Upheld the reopening of assessment under section147 of the Act in the group entities running from common address;

(ii) Confirmed the finding of the learned Assessing Officer that there is a fixed place PE and dependent agency PE and hence taxable in India;

(iii) As against the Assessing Officer applying 3.5% to the amount of sales made in India as attribution of income, confirmed to the extent of 2.6% of the total sales; and

(iv) Deleted interest under section 234B of the Act charged by the Assessing Officer following the decision of Hon'ble Delhi High Court in assessee's own group cases for the Assessment Year 2001-02 to 2006-07.

Accordingly the learned Departmental Representative vehemently pleaded that the decision of the Delhi Tribunal would be squarely applicable to the instant appeals filed

before us. The learned Departmental Representative also drew the attention of the Bench that the Authorised Representative of the assessee on earlier occasion vide letter dt.17.09.2018 had requested for adjournment of these appeals before Mumbai Tribunal on the ground that against the Delhi Tribunal's order, appeal is pending before Hon'ble Delhi High Court and that the said decision would have a bearing on the present appeals before us and requested for adjournment accordingly. Later the learned Department Representative also submitted that the Delhi Tribunal decision referred to supra was duly affirmed by the Hon'ble Delhi High Court vide its order dt.21.12.2018 which is reported in 101 Taxman.com 142.

8. At the outset, it is relevant to address the preliminary point as to whether the aforesaid decision of the Delhi Tribunal (later affirmed by the Hon'ble Delhi High Court) would at all be applicable to the facts of the assessee's case before us on the aspect of validity of reopening the assessment. In the instant case before us,

we find that the assessee has challenged the validity of reassessment on various counts. The Delhi Tribunal had upheld the validity of reassessment after observing that the objections filed by the assessee for reasons recorded were duly disposed off by the learned Assessing Officer by a separate speaking order dt.12.11.2008. This is mentioned in page 4 paragraph 3 of the order of Delhi Tribunal.

9. On perusal of the reasons recorded for reassessment in the instant case which are reproduced herein above, the learned Assessing Officer in para 21 had categorically stated that his formation of belief that income of the assessee had escaped assessment was due to the basic fact that the assessee had not furnished Return of Income for the year under consideration. This is factually incorrect as it is evident from paragraph 1 of the reasons recorded by the learned Assessing Officer which clearly records the fact that the assessee had filed the Return of Income for Assessment Year 2001-02 on 29.10.2001

declaring total income of Rs.3,07,33,066/- and that the assessment was completed under section 143(3) of the Act on 29.01.2004 accepting the Return of Income. Hence it can be safely concluded that reopening is made in the instant case by incorrect assumption of fact that the assessee had not filed the Return of Income. Consequentially the formation of belief based on incorrect assumption of fact also fails.

10. It is pertinent to note that the assessment in this case has been originally framed under section 143(3) of the Act on 29.01.2004. Admittedly, the notice under section 148 of the Act dt.31.3.2008 is issued beyond the period of four years from the end of the relevant assessment year. Hence the proviso to section 147 of the Act would come into operation, which mandates the learned Assessing Officer to clearly mention in the reasons recorded itself as to whether there was any failure on the part of the assessee to disclose true and full material facts that are relevant and material for the purpose of assessment. This aspect

of assessee's failure to disclose true and full material facts is conspicuously absent in the reasons recorded. There is absolutely no whisper in the reasons recorded regarding the failure on the assessee part. Hence it can be safely concluded that the learned Assessing Officer had not complied with the proviso to section 147 of the Act. Similar matter came up for adjudication before the Hon'ble Jurisdictional High Court in the case of Hindustan Lever Ltd. Vs. R.B.Wadkar reported in 268 ITR 332 wherein it was held as under:-

> ***20.*** *The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.*

11. Moreover we find from the reasons recorded by the learned Assessing Officer which are reproduced herein above, the learned Assessing Officer had only resorted to make very doubtful and vague observations. The name of the assessee is not mentioned in the said reasons. It merely talks about the activities carried on by the GE group. Further as stated earlier, it is a fact on record that the learned Assessing Officer had not disposed of the objections filed by the assessee for the reasons recorded by way of a separate speaking order. The same is not done even in the assessment order framed on 31.12.2008. We find that the Hon'ble Supreme Court in the case of GKN Driveshafts Ltd reported in 259 ITR 19 had categorically mentioned that if an assessee files the return in response to notice under section 148 of the Act and seeks for furnishing of reasons recorded from the learned Assessing Officer, the learned Assessing Officer is bound to furnish the said reasons to the assessee (which has been complied with in the instant case by the learned Assessing Officer only on 17.12.2008) and thereafter, if the assessee desires

to file objections to the said reasons, he may do so and in that event, the learned Assessing Officer is bound to dispose of those objections by a separate speaking order before proceeding with the reassessment proceedings. The learned Assessing Officer in the instant case had violated the directions given by the Hon'ble Supreme Court in the aforesaid decision. Now whether the reassessment framed without disposing off the objections for reasons recorded would become fatal to the reassessment was the subject matter of consideration by the Hon'ble Jurisdictional High Court in the case of KSS Petron Pvt. Ltd. Vs. ACIT in Income Tax Appeal No.224 of 2014 dt.3.10.2016. The question raised before the Hon'ble Jurisdictional High Court is as under :-

> *"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 reopening Notice dated 28th March,2008.?"*
>
> *"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. 9 In fact, to ensure that reopening notices are disposed of, expeditiously the parliament itself has provided in Section 153(2) of the Act a period of limitation within which the Assessing Officer must pass an order on the notice of reopening i.e. within one year from the end of the financial year in which the notice was issued. In fact, Section 153 (2A) of the Act as in force at the relevant time itself provides that an order of fresh Assessment, consequent to the order of Tribunal under Section 254 of the Act, would have to be passed within one year from the end of the financial year in which the order under Section 254 of the Act, was passed by the Tribunal and received by the Commissioner of Income Tax. The Director of the appellant has filed an affidavit dated 19th September, 2006. In the affidavit, it is stated that consequent to the impugned order of the Tribunal dated 14th August, 2013, the Assessing Officer has not passed any order of reassessment. Time was granted on the last occasion to enable the Respondent to respond to the affidavit dated 19th September, 2006 of the Director of the AppellantCompany. The Respondent is unable to dispute the facts stated in the affidavit dated 19th Sept., 2016 filed by the Director of the AppellantCompany. The time to pass a order on the notice dated 28th March, 2008, even consequent to the impugned order of the Tribunal, has lapsed.

11 Therefore, on the above facts and law, the substantial question of law is answered in the negative i.e. in favour of the AppellantAssessee and against the RespondentRevenue."

12. In the instant case before us, the assessee had sought for the reasons recorded way back on 29.05.2008 and again on 26.11.2008. The learned Assessing Officer for reasons best known to him

decided to provide the reasons recorded to the assessee only on 17.12.2008. The objections to the same were filed by the assessee immediately after the receipt of the said reasons recorded. If the learned Assessing Officer had consciously delayed the communication of the reasons recorded for reopening to the assessee, then he cannot cry over non-availability of time for disposing the objections filed by a separate speaking order. In the instant case as stated supra, the learned Assessing Officer had not even bothered to dispose of the objections even in the reassessment order framed on 31.12.2008. Hence it can be safely concluded that the objections filed by the assessee for reopening the assessment were never disposed of by the learned Assessing Officer in the instant case.

13. Similar matter also came up before the Hon'ble Jurisdictional High Court in the case of Bayer Material Sciences (P) Ltd Vs. DCIT reported in 382 ITR 333 wherein

the relevant operative portion of the order is reproduced hereunder :

> *" 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."*

14. Yet another similar matter came up before the Hon'ble Jurisdictional High Court in the case of Fomento Resorts and Hotels Limited Vs. ACIT in Tax Appeal No.63 of 2007 dt.30.08.2019. This decision was rendered in the context of provisions of Expenditure Tax Act, 1987. The Tribunal which has passed this order under this Act is Income Tax Appellate Tribunal. Hence the ratio laid down in this decision would be applicable for the present proceedings

and to the present facts also. The relevant operative portion of the decision is reproduced hereunder :

" 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 Sciences Pvt. Ltd……

21. Similarly in the case of KSS Petron Pvt. Ltd……

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 Pvt. Ltd., this is what the Division Bench has observed in paragraphs 7 & 8 of the judgment;

7……

8……

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."

15. The learned Departmental Representative on the hearing held on 7.12.2022 sought time to produce the assessment records and also stated that the learned Assessing Officer would be present on the next date of hearing. Accordingly, the case was adjourned to 15.12.2022 at the request of learned Departmental Representative. On 15.12.2022 the learned CIT DR who argued the case originally on 7.12.2022 was not present in the Court and the Assessing Officer also as promised by learned Department Representative was not present in the Court. The assessment folder as promised was also not submitted as promised by the learned Departmental Representative. Since it was the learned CIT DR who originally sought time to produce the assessment records and the same were never sought by the Bench, the Bench took this appeal as heard as no clarification was required

for the Bench to dispose of the appeal. In any case, all the facts that are relevant for adjudication of the challenge to reopening the assessment, are already on record in the form of assessee's Paper Book and detailed written submissions of the learned Departmental Representative which has already been considered hereinbove.

16. In view of the aforesaid detailed observations, we hold that the reasons recorded for reopening of the assessment suffers from various factual and legal infirmities. In view of our observations and respectfully following the various judicial precedents relied upon hereinabove, we have no hesitation to hold that the learned Assessing Officer had invalidly assumed his jurisdiction for reopening the assessment under section 147 of the Act in the instant case. Accordingly, the reopening is hereby quashed. Hence the revised grounds 1 to 5 raised by the assessee are allowed.

17. Since the reopening of assessment is quashed on the legal ground, the other grounds raised by the assessee

on merits need not be gone into. No opinion is hereby given by us on the said grounds raised on merits and they are left open.

18. In the result, the appeal of the assessee for Assessment Year 2001-02 is allowed and the appeal of revenue for A.Y. 2001-02 is dismissed.

Order pronounced in the open court on 23rd Dec., 2022.

Sd/-	Sd/-
(ABY T VARKEY)	**(M. BALAGANESH)**
Judicial Member	Accountant Member

Mumbai, Dt. 23.12.2022.

* Reddy gp

Copy to :

1.	The Assessee
2.	Respondent
3.	C I T
4.	CIT(Appeals)
5.	DR, ITAT, Mumbai.
6.	Guard File.

By Order

Sr. Pvt. Secretary, ITAT, Hyderabad.