आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ ई मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH MUMBAI

सर्वश्री जी.ई.वीरभद्रप्पा, अध्यक्ष **एवं** श्री विजयपाल राव, न्या.स।

BEFORE SHRI G E VEERABHADRAPPA, PRESIDENT & SHRI VIJAY PAL RAO, JM

आयकर अपील सं./I.T.A. Nos. 3359 to 3361/Mum/2009

(**निर्धारण वर्ष** / Assessment Years :2001-01,01-02 and 2002-03)

Tata International Ltd Block A Shivsagar Estates Dr A B Road, Worli Mumbai 18	**बनाम**/ Vs.	The Dy Commr of Income Tax 7(3), Mumbai
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. :		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

अपीलार्थी ओर से / **Appellant by :**	Sh Dinesh Vyas
प्रत्यर्थी की ओर से/**Respondent by :**	Sh Jay Kumar

सुनवाई की तारीख / **Date of Hearing : 14th June 2012**

घोषणा की तारीख /**Date of Pronouncement : 29th,June 2012**

आदेश / **O R D E R**

PER : विजयपाल राव, न्या.स. / **VIJAY PAL RAO, JM**

These 3 appeals by the assessee are directed against 3 separate orders of Commissioner of Income Tax (Appeals) all dated 27.2.2009 for the assessment years 2000-01, 2001– 02 and 2002 – 03 respectively.

2 The assessee has raised common grounds in these appeals; therefore, the concise grounds raised for the assessment year 2000-01 are reproduced as under:

> *1. The ld Commissioner of Income Tax(Appeals)) erred in upholding the validity of —*
>
> *(i) the reopening, purportedly under Section 147,, the appellant's assessment u/s 1543(3) dated 27th March 2003 an d*
>
> *(ii) the making of the Reassessment Order,*

and in not accepting the several challenges to the reassessment proceedings raised before him (and more specifically referred to in the original grounds of appeal urged before this Hon'ble Tribunal.

2.1. Without prejudice to the above, the [earned Commissioner(Appea(s) erred in upholding the Assessing Officer's disallowance of the aggregate commission of Rs 11,98,505.

2.2. Without prejudice to the above, the learned Commissioner(Appeal(s) erred in upholding the Assessing Officer's invocation of, and reliance upon, the Explanation to Section 37(1) (in disallowing the aggregate commission of Rs 11,98,505).

2.3. Without prejudice to the above, the (earned Commissioner(Appeals) erred in rejecting the Appellant's Ground 2.3 urged before him to the effect that, assuming whilst denying that the Assessing Officer's inference to the effect that the said aggregate commission represented ITF and ASSF was correct in Law, no part of such commission was disallowable for the reason also that all the commission payments having been made exactly in terms of the Appellant's Agency Agreements, such commission was allowable in full, and, therefore, ought to have been so allowed.

3. Without prejudice to the Appellant's submission that the Reassessment is bad in law and illegal and hence liable to be annulled, the learned Commissioner(Appeals) erred in having "partly allowed" the Appellant's Ground 3 urged before him to the effect that the Assessing Officer erred (while recomputing the Total Income) in omitting to give effect to the Appellate Order under Section 250 of the (earned Commissioner(Appeals) dated 2nd January, 2006, made in the Appellant's appeal against the Original Assessment. The Appellant submits that the (earned Commissioner(Appeals) ought to have allowed the said Ground 3 by directing the Assessing Officer to give effect to the said Appellate Order.

4.1. The learned Commissioner (Appeals) erred in upholding the Assessing Officer's charging of interest under Section 234-D amounting to Rs 55,78,316.

4.2. Without prejudice to the generality of Ground 4.1, the (earned Commissioner(Appeals) erred in not following the binding order of the Special Bench of this Hon'ble Tribunal in ITO v Ekta Promoters (P) Ltd 12008] 113 ITD 719 (Del)(SB), which order was not merely cited before the learned Commissioner(Appeals) by the Appellant, but which order the learned Commissioner(Appeals) was aware of, as would be evident from his reference to the Appellant having "relied on some judgments" (in paragraph 4.2 of his Appellate Order)."

3 Ground number 1 regarding validity of reopening assessment:

3.1 The original assessment for all 3 years was completed under section 143 (3). Subsequently, as per the CBDT information, the Assessing Officer noted that during the year under consideration the assessee supplied goods to Iraq under the Scheme called 'Oil for Food Programme of the UNO'. The name of the assessee had

appeared at Sl. No. 113 of the Volcker Committee report submitted on 27.10. 2005 wherein it was mentioned that the commission paid was illegal. The Assessing Officer issued a notice under section 148 of the I T Act dated 31.01.2007. In response to the notice, the assessee submitted a letter dated 8.3.2007 and requested to furnish the reasons for issuing the said notice in view of the decision of Hon'ble Supreme Court in case of GKN Drivershafts (India) Ltd vs ITO reported in 259 ITR 19. Thereafter, the Assessing Officer issued a fresh notice under section 148 dated 28.03. 2007 along with a covering letter dated 28.3.2007 stating that the earlier notice dated 31.1.2007 may be treated as cancelled for technical .

3.2 In response to the notice under section 148 dated 28.03.2007, the assessee again demanded the reasons for issuing the said notice vide letter dated 25.04.2007. The Assessing Officer, vide its letter dated 28.6.2007 supplied the reasons (gist of the reasons) for reopening of assessment.

3.3 The assessee was not satisfied with the reasons supplied by the Assessing Officer being the gist of reasons and therefore again requested vide letter dated 25.07.2007 for the supply of the true copy of the reasons actually recorded by the Assessing Officer in terms of section 148 (2).

3.4 The Assessing Officer, vide his letter dated 27.07.2007 reiterated that the reasons for reopening has been supplied vide letter dated 28.06.2007. The assessee, still not satisfied with the response of the Assessing Officer again requested vide its letter dated 13.8.2007 for the supply of the reasons actually recorded. The Assessing Officer proceed with the re-assessment proceedings and passed the assessment order under section 143 (3) read with section 147 of IT Act on 31.12. 2007 whereby disallowed the commission paid by the assessee for the supply of goods to the Iraq under the scheme 'Oil for Food Programme of the UNO'.

4 The assessee challenged the action of the Assessing Officer before the Commissioner of Income Tax (Appeals) and raised the issue of validity of reopened assessment. The main objection of the assessee against the reopening of assessment is on the ground that it was neither provided with the recorded in its entirety nor was given the copies of certain letters relied upon by the Assessing Officer.

4.1 The Commissioner of Income Tax(Appeals) was not impressed with the contentions and the objections raised by the assessee and accordingly, rejected the objections raised against the validity of reopening of assessment.

5 Before us Mr Dinesh Vyas, the ld Sr. Counsel of the assessee has submitted that the entire procedure mandated by law has been violated while reopening of assessment. He has referred the notice under section 148 of the I T Act dated 31.1.2007 and submitted that the said notice was issued after the expiry of 4 years from the end of the relevant assessment year. He has further submitted that the said notice was withdrawn by the Assessing Officer and a fresh notice under section 148 dated 28.3.2007 was issued. The ld Sr counsel has submitted that the Assessing Officer has not mentioned as to why the earlier notice under section 148 was withdrawn and cancelled. He has pointed out that once the notice dated 31.1.2007 was withdrawn, the second notice dated 28.3.2007 is not sustainable in the absence of the reasons recorded by the Assessing Officer.

5.1 He has further contended that even otherwise the case falls under the proviso to section 147 of the I T Act and it is mandatory condition for reopening of assessment that assessee has failed to disclose fully and truly all material facts necessary for assessment. He has referred the reply of the assessee dated 8.3.2007 to the notice under section 148 dated 31.1.2007 and submitted that the assessee had

specifically demanded and requested to furnish the reasons for reopening. The ld Sr counsel referred the entire correspondence between the assessee and the Assessing Officer and submitted that the assessee has repeatedly requested the Assessing Officer to supply the reasons actually recorded by the Assessing Officer in terms of section 148 (2) of the I T Act. The Sr counsel then referred the letter dated 28.6.2007 of the Assessing Officer whereby the gist of the reasons were supplied to the assessee and submitted that the assessee was not supplied full reasons of reopening of the assessment and therefore, despite the repeated requests, the Assessing Officer failed to supply the reasons till the completion of assessment and even till date.

5.2 The ld Sr counsel has referred and relied upon the decision of Hon'ble jurisdictional High Court in case of Commissioner of Income-tax v. Videsh Sanchar Nigam Ltd. reported in 340 ITR 66 and submitted that supply of reasons after the completion of assessment has no effect and the exercise is futility. Since the reasons are not furnished, the reassessment order is bad in law. Thus the ld Sr counsel has submitted that gist of reasons is no substitute of reasons recorded by the Assessing Officer and therefore, in the absence of supply of reasons recorded by the Assessing Officer to the assessee, the reassessment is bad in law. In support of his contention, the ld Sr counsel has relied upon the decision of Hyderabad Bench of the Tribunal in case of Jasti Rama Rao vs ITO reported in130 TTJ 66 (unreported).

5.3 Apart from this, the ld Sr counsel has also contended that despite the request of the assessee, the sanction of the Commissioner was not supplied and the sanction of the Commissioner should not be mechanical; but a due application of mind should reflect from the same. The ld Sr. counsel has also cited a series of decisions of Hon'ble High Courts as well as this Tribunal on the point that the reasons have to be

recorded before issue of notice under section 148 and if the are not supplied, it can be presumed that reasons were not recorded prior to issue of notice under section 148.

5.5 Alternatively, the ld Sr counsel has submitted that even in the reasons recorded, there is no allegation that the income has escaped assessment due to assessee's failure to make full and true disclosure of all material facts necessary for the assessment and as such, the absence such allegations renders the reassessment proceedings invalid. He has reiterated that reasons recorded cannot be improved upon subsequently.

5.6 The ld Sr counsel for the assessee has also raised an objection against recording of reasons by one officer and issuing notice under section 148 by other. In support of his contention, he has relied upon the decision of Hon'ble Gujarat High Court in case of Hynoup Food and Oil Industries Ltd. v. Assistant Commissioner of Income-tax reported in 307 ITR 115.

5.7 On the other hand the ld DR has submitted that the Assessing Officer has duly recorded the reasons prior to issue of notice under section 148. He has filed a copy of reasons recorded on 31.01.2007 for reopening of the assessment and submitted that in the gist of reasons supplied to the assessee, nothing material has been left. He has further submitted that it is to be seen that what material part of regions was left or any deviation from the reasons original recorded and those supplied to the assessee. The ld DR has further submitted that the assessments have been reopened on the basis of information received from the CBDT.

5.8 The ld DR has referred the decision of Hon'ble Supreme Court in case of GKN Driveshaft (India) Ltd vs ITO(supra) wherein the Hon'ble Apex Court has held that

the Assessing Officer is bound to furnish reasons within a reasonable time and after receipt of the reasons, the assessee is entitled to file objection of issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. Thus the ld DR has submitted that when the substantial reasons were furnished by the Assessing Officer, than the assessee cannot challenge the reopening of assessment on the ground of non-furnishing of reasons. He has further submitted that if prima facie some material is there on the basis of which the Assessing Officer could form an opinion that the income assessable to tax has escaped assessment, than the reopening is justified. In the case in hand, the Assessing Officer received the information through CBDT about the Volcker Committees report and came to know that the commission was illegally paid by the assessee, than the income assessable to tax has escaped assessment to the extent the deduction allowed in the original assessment on account of commission paid by the assessee. In support of his contention, he has relied upon the decision of Hon'ble Supreme Court in the case of Raymond Woollen Mills Ltd. v. Income-tax Officer, reported in 236 ITR 34. He has further contended that the reopening is valid, even based on internal audit and therefore, the reopening on the basis of information received from CBDT is valid. He has relied upon the decision of the Hon'ble Supreme Court in the case of CIT vs P V S Beedies P Ltd reported in reported in 103 Taxmann 294. He has also relied upon the orders of the authorities below.

5.10 In rebuttal, the ld Sr counsel for the assessee has submitted that there is no failure on the part of the assessee to furnish the true and correct facts necessary for assessment. The Assessing Officer is bound to furnish the reasons actually recorded and not the gist of the reasons. Therefore, in the absence of furnishing the reasons recorded by the Assessing Officer, the reassessment is illegal and not sustainable.

The ld Sr counsel has also advanced the argument on the merits of the case and on the point that the Volcker Committees report is only an investigation and not a judicial finding. It cannot be said that the assessee has committed any illegality on the basis of the committee report until and unless it is established that the act of the assessee is against some statute. He has further submitted that nothing has been brought on record to show that the payment of commission is against any existing low in force. Both the ld Sr counsel as well as the ld DR have referred certain decisions of this Tribunal on the merits of the issue of addition on the basis of Volcker Committee report.

6 We have considered the rival contentions as well as relevant material on record. We have also carefully perused the various decisions relied upon by the parties. Though the arguments from both sides were also addressed on the merits of the issue; however, at this stage, we confined ourselves to the issue of validity of reopened assessment.

6.1 As we have noted above that initially the Assessing Officer issued a notice under section 148 dated 31.1.2007. The said notice was cancelled/withdrawn and a fresh notice under section 148 was issued on 28/03/2007. The assessing officer has given the reasons of treating the said notice dated 31/01/2007 as cancelled for technical reasons and fresh notice was issued to rectify the procedural lacuna in the earlier notice dated 31/01/2007. Though nothing has been elaborated either in the communication dated 28/03/2007 or in the reassessment order as what was the technical reason and a procedural lacuna in the earlier notice however, it appears from the record that the earlier notice dated 31/01/2007 was issued prior to the approval of the Commissioner of income tax dated 26/03/2007 and therefore, the earlier notice was cancelled and treated as withdrawn. The Assessing Officer, than

obtained the approval of the Commissioner of Income Tax on 26/03/2007 and thereafter issued the fresh notice dated 28/03 2007 on the basis of which the Assessing Officer, proceeded with the reassessment proceedings. Thus, after the fresh notice 28/03/2007, the notice dated 31/01/2007 becomes *non-est*, immaterial and irrelevant for reassessment proceedings and therefore, has no consequence whatsoever with regard to the validity of reassessment.

6.2 The main objection of the assessee against the reassessment is non-supply of the reasons recorded by the Assessing Officer for reopening of assessment. There is no doubt that the Assessing Officer recorded the reasons on 31/01/2007 for reopening of the assessment and accordingly issued a notice under section 148. The regions as recorded by the Assessing Officer are as under:

> *"This case appears in the list of companies who had supplied goods to Ira under the scheme of "Oil for Food Programme of the UNO". The name of the assessee company appears at Sr. No. 113 of the Voicker Committee Report submitted on 27/10/2005 wherein the mention of illegal commission under the heads of AASF & Inland Transportation fees amounting to US 370780 & 399361 respectively had been paid.*
>
> *Details were called from M/s. Tata International Ltd and from the details submitted it is seen that these payments have been made during the period relevant to A.Y. 2000-01 to 2002-03. Hence, it is clear that based on the additional information of the Voicker Committee, the commission payment has been made by the assessee.*
>
> *As per the information gathered, it can be seen that commission o Rs.9,82,542/-,, Rs.1.27,42,120/- and Rs.t,06,09,979/- for A.Y. 2000-01. 2001-02 and 2002-03 respectively has been paid. The payment of kicks backs/bribe is prohibited by law and therefore, squarely thus within the ambit explanation to section 37(1) of the I.T. Act, 1961 and requires to be disallowed. Therefore, I have reasons to believe that income to that extent has escaped assessment. As such the assessment needs to be reopened u/s 147 of the 1.T. Act, 1961 to tax the escaped income. The case is fit for issue oft notice uis.148 of the 1.T. Act, 1961.*
>
> *Notice u/s.J48 of the 1.T. Act is issued to the assessee for A.Y. 2C00 01, 2001-02 & 2002-03."*

6.3 In response to the fresh notice under section 148 dated 28/03/2007 the assessee vide its letter dated 25/04/2007 specifically requested the Assessing Officer to furnish the reasons for issuing the notice under section 148. The averments made in paragraph 3 of the said letter are as under:

> *"We also take this opportunity to renew our request to you to furnish to us the reason(s) for issue by you of your said notice under section 148 dated 31st Jan 2007 and of the fresh notice, in accordance with the procedure laid down by the Supreme Court in GKN Driveshafts (India) Ltd v ITO (2003)259 ITR 19(SC)."*

6.4 In pursuant to the said request of the assessee the Assessing Officer has supplied the gist of the reasons of reopening vide letter dated 28/06/2007 as under:

> *"Vide the above referred letter wherein we have requested that the reasons for Issue of the said notice dated 28.03.2007 be furnished in accordance with the procedure laid down in the case of GKN Driveshafts (I) Ltd. Vs. ITO [2003] 259 ITR 19 (SC). The gist of the reason for reopening is as under*
>
> > *"During the year under consideration, the assessee company has supplied \ goods to Iraq under the scheme 'Oil for Food Programme of the UNO'. The name of the assessee company appears at Sr.No. 113 of the Voicker Committee Report submitted on 27.10.2005 wherein mention of the illegal commission under the head 'AASF' and 'Inland Transportation Fees' had been paid. Therefore, I have reasons to believe that income to that extent has escaped assessment,"*

6.5 Since only the gist of the reasons were supplied, the assessee was not satisfied with the reasons as supplied by the Assessing Officer and requested vide its letter dated 25/07/2007 and demanded the true copy of reasons actually recorded by the Assessing Officer in terms of section 148 (2) of the Income Tax Act instead of the gist of reasons for reopening reproduced in the letter dated 28/0 6/2007.

6.6 In response to the assessee's letter dated 25/07/2007, the Assessing Officer vide its letter dated 27/07/2007 reiterated that the reasons for reopening were supplied vide letter dated 28/06/2007. Since the request of the assessee for furnishing the reasons actually recorded by the Assessing Officer was not given

heed; therefore, the assessee again demanded the reasons as recorded by the Assessing Officer for reopening of the assessment vide its letter dated 13/08 2007. Despite repeated requests and demand of the assessee the Assessing Officer was adamant on his stand for not supply of the reasons actually recorded for reopening of the assessment and insisted upon that the same have been supplied to the assessee vide letter dated 28/06/2007.

7 As held by the Hon'ble Supreme Court in case of GKN Driveshafts (India) Ltd (supra) that the Assessing Officer is bound to furnish reasons within a reasonable time so that the assessee could file objection to the issuance of the notice and the Assessing Officer, accordingly, bound to dispose of the same by passing a speaking order. Thus, the supply of reasons is to facilitate the assessee to present its defence and objection against the reopening of the assessment.

7.1 Even otherwise as per the rule of natural Justice, the assessee is entitled to know the reasons on the basis of which the Assessing Officer has believed and formed an opinion that the income assessable to tax has escaped assessment. It is not understandable as to why the Assessing Officer was so reluctant and hesitant to furnish the reasons actually recorded for reopening of assessment. We see no reason and rather justifiable reasons for depriving the assessee of the reasons actually recorded by the Assessing Officer for reopening of the assessment.

8 In the case of CIT vs Videsh Sanchar Nigam Ltd, the Hon'ble jurisdictional High Court has confirmed the order of this Tribunal whereby the reassessment was held as invalid because the reasons recorded for reopening of the assessment were not furnished despite repeated requests and furnished only after completion of assessment. The Hon'ble High Court has observed in para to as under:

"2 The fining of fact recorded by the Income Tax Appellate Tribunal is that in the present case the reasons recorded for reopening of the assessment through repeatedly asked by the assessee were furnished only after completion of the assessment. The Tribunal following the judgment of this Court in the case of CIT vs Fomento Resorts & Hotels Ltd, Income Tax Appeal no.71 of 2006 decided on 27th November 2006 has held that though the reopening of the assessment is within three years from the end of relevant assessment year, since the reasons recorded for reopening of the assessment were not furnished to the assessee till the completion of assessment, the reassessment order cannot be upheld. Moreover, Special leave Petition filed by the revenue against the decision of this Court in the case of Fomento Resorts & Hotels Ltd has been dismissed by the Apex Court vide order dated 16th July 2007."

8.1 Thus the reasons are required to furnish within a reasonable period of time so that the assessee can raise the objections at the preliminary stage of proceedings. If the reasons are not supplied during the assessment proceedings, than furnishing the reasons subsequent to the assessment proceedings would achieve no purpose and tantamount to deprive and deny the assessee of its right to raise the objections against the validity of notice issued under section 148.

8.2 Thus reassessment completed without furnishing the reasons actually recorded by the A.O. for reopening of assessment is not sustainable in law because the A.O. is duty bound to supply the same within reasonable time as held by the Hon'ble Supreme Court in case of GKN Driveshafts (India) Ltd (supra). The subsequent supply of the reasons would not make good of the illegality suffered by the reopening of assessment. A similar view has been taken by this Tribunal in case of *Fomento Resorts & Hotels Ltd* vs JCIT and decided a similar issue in para 7 as under:

"7 We have considered the submissions made by both the sides, perused the orders of the authorities below and material on record. It is an admitted fact that the assessee has not filed return of expenditure tax in the normal course. The Assessing Officer issued notice purportedly u/s 11 but inadvertently on the notice, u/s 8 was mentioned in lieu of sec. 11. In this regard, we are in agreement with the findings of the ld Commissioner of Income Tax(Appeals) that this mistake was covered by the provisions of see. 292B of the Income Tax Act, therefore, we do not find any merit in the contentions of the assessee in this regard. As far as the issuance of notice u/s 11 is concerned, the preliminary condition of not filing of return is satisfied. Therefore, in such a

situation, notice can be issued, provided the same is not barred by limitation. However, after issue of notice, if the assessee asks for furnishing of reasons for issuance of such notice, the Assessing Officer is bound to furnish such reasons. The adherence to this procedure is a necessity because at the preliminary stage itself, if the proceedings can be completed if the Assessing Officer gets satisfied with the explanations given by the assessee. it is an undisputed fact that the Assessing Officer, in the present case has not supplied reasons to the assessee, therefore, the notice issued by the Assessing Officer is bad in law and consequently the assessment made in pursuance of such notice is liable to be quashed. In this view of the matter, we cancel the impugned assessment. We order accordingly."

9 The order of this Tribunal was upheld by the Hon'ble jurisdictional High Court as mentioned in the decision in the case of Videsh Sanchar Nigam Ltd (Supra). Even the SLP filed by the revenue against the decision of Hon'ble jurisdictional High Court has also been dismissed by the Hon'ble Supreme Court vide order dated 16 July 2007. Thus, it is settled proposition as laid down by the Hon'ble Supreme Court as well as Hon'ble High Court that the reasons as recorded by the Assessing Officer are required to be furnished to the assessee and the reasons recorded cannot be improved upon or amended by any correspondence, letters etc. It is an undisputed fact that the reasons actually recorded by the Assessing Officer were not furnished to the assessee till 14.06.20012 despite repeated requests and demands and therefore, the gist of reasons as furnished vide letter dated 28th June 2007 cannot be treated as reasons actually recorded by the Assessing Officer as per section 148 (2) and as mandated by the Hon'ble Supreme Court in case of GKN Driveshafts (India) Ltd (supra). Thus, the Assessing Officer has failed to furnish the reasons recorded for reopening of the assessment within the reasonable time and rather prior to the completion of assessment, than the reassessment order passed without supply of reasons as recorded for reopening of the assessment, is invalid and cannot sustain. Accordingly, we set aside the reassessments for all 3 years under consideration being invalid.

10 Since we have quashed the reassessment being invalid; therefore, we do not propose to go into the merits of the issue raised in these appeals.

11 In the result the appeals filed by the assessee are allowed.
परिणामतः निर्धारिती की अपीलें स्वीकृत की जाती है

Order pronounced in the open court on 29.6.2012 .
आदेश की धोषणा खुले न्यायालय में दिनांकः 29.6.2012 को की गई ।

Sd/-	Sd/-
(जी.ई.वीरभद्रप्पा, /**G.E. VEERBHADRAPPA**)	(विजयपाल राव /**VIJAY PAL RAO**)
अध्यक्ष/ President)	न्यायिक सदस्य / Judicial Member

मुंबई Mumbai; दिनांक Dated 29 /06/2012
Raj@

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1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

/TRUE COPY/
BY ORDER

Dy /AR, ITAT, Mumba