

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 7933/2010

% **Date of Decision : 16th February, 2012.**

SAK INDUSTRIES PVT LTD Petitioner
Through Mr. Ajay Vohra and Ms. Kavita Jha,
Advts.

versus

DEPUTY COMMISSIONER OF INCOME TAX
NEW DELHI Respondent
Through Ms. Rashmi Chopra, sr. standing
counsel

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA,J: (ORAL)

Admit. Rule DB.

2. We have heard counsels for the parties and proceed to pronounce our decision.

3. The petitioner herein is a company and for the assessment year 2003-04, a regular assessment order dated 20.10.2005 after scrutiny under Section 143(3) of the Income Tax Act, 1961 ('Act', for short), was passed.

4. Subsequently, respondent No.1- the Deputy Commissioner of Income Tax, Circle 7(1) issued notice under Section 148 of the Act dated 8.3.2010. In response to the said notice, the petitioner filed computation of income under protest vide letter dated 15.4.2010 and requested respondent No.1 to furnish reasons recorded prior to the issue of notice under Section 148.

5. The respondent No.1, vide letter dated 6.10.2010, furnished the reasons to believe to the petitioner. The reasons recorded are as under:

“The provision for gratuity amounting to Rs.16,59,906/- claimed in the profit and loss account and offered it for tax while computing the income under normal provision of the act. But while computing the income under special provision u/s 115 JB of the IT Act, it was not added back. This provision was required to be added back being an unascertained liability. The mistake has resulted in underassessment of income by Rs.16,59,906 with consequent short levy of tax by Rs.1,72,873 including interest u/s 234B.

The petitioner had credited a capital reserve of Rs.66,64,20,487 as settlement amount in terms of settlement agreement with foreign promoters (Milacron Inc. USA, Widia GmbH and Meturit AG) the amount of Rs.66,64,20,487 accrued to petitioner on discharge of his liabilities on account of dents, dues, bonds, bills, contracts, agreements, promises, damages, executions, claims, demands, etc. The petitioner acknowledged and confirmed that on after the date of settlement

agreement, any of the foreign promotes were entitled at their discretion to carry on the business as they may deem fit, or to transfer and deal with all or any of the shares or assets of the company, or to terminate the operations of the company & or wind up the company. Since the amount had accrued to petitioner in the course of business, it should have been taxable as business income. Omission to do so has resulted in underassessment of income of Rs.66,64,20,487 involving undercharge of tax of Rs.32,38,92,850 including interest.

The petitioner debited 'Provision for diminution in value of investment of mutual funds' amounting to Rs.2,62,30,297 to his profit and loss account and offered it for tax while computing the income under normal provision of the act. But while computing the income under special provisions of the IT Act, it was not added back. The mistake has resulted in underassessment of income by Rs.2,62,30,297 with consequent short levy of tax by Rs.27,31,802 including interest u/s 234B."

6. The petitioner thereafter filed objections vide letter dated 26.10.2010, as stipulated and mandated by the decision of the Supreme Court in ***GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Ors.*** (2003) 259 ITR 19 (SC). In the objections, which go into about 70 typed pages, the petitioner relied upon case law, referred to the factual aspects and submitted that the issues/questions raised were examined by the Assessing Officer in the original assessment proceedings and that no new material/information had come to the possession/knowledge of the

respondent No.1, subsequent to the original assessment. It was stated that this was a case of change of opinion and further that the requirements of the first proviso to Section 147 of the Act were not satisfied. The assessee had made full and true disclosure of material facts at the time of original assessment. With regard to issue No.1, i.e. provision for gratuity, reference was made to the specific material available to the Assessing Officer in original assessment. With regard to settlement, the material available with the Assessing Officer in the original proceedings, including a legal opinion obtained and furnished by the petitioner, was referred to. Similarly, with regard to provision for diminution in value of investment in mutual funds, the documents available with the Assessing Officer at the time of original assessment proceedings were specifically adverted to.

7. These objections filed on 26.10.2010, have been disposed of vide order dated 2.11.2010. This order is impugned before us in the present writ petition. The entire order for the sake of completeness and convenience is being reproduced below:

*“Sub: Assessment proceedings u/s 147 for KS 2003-2004:
Reg*

Kindly refer to the above.

This case has been reopened and notice was issued u/s 148 on 08.3.2010. Subsequently, reasons for reopening of assessment was provided to you on 6.10.2010. In response, vide letter dated 26.10.2010 you have filed your objection citing various case laws against re-opening of the case.

In this regard, it is stated that the objections/submissions filed have been duly considered but not found acceptable as the AO has categorically recorded the reasons in writing by proper application of mind based on information and material available on record.

At the time of recording the reasons, the term “Reason to Believe” is clearly kept in mind. The belief must be held in good faith, it cannot merely be a pretends. The reasons recorded are reasonable/genuine or in other words, it must be based on reasons which are relevant and material/information available in the case of the assessee.

Hence, the objection raised is not acceptable and therefore rejected.”

8. The aforesaid order cannot be sustained. The order is non-speaking and does not deal with the contentions raised by the petitioner. It is a cryptic order, which does not meet the basic requirements of the principles of natural justice. It has to be struck down and set aside.

9. After the petitioner, received the order dated 2.11.2010, they prepared and filed this writ petition, on 24.11.2010. An advance copy of the writ petition was served on the Revenue. The writ petition came up for hearing before this Court on 26.11.2010. On the said date the following order was passed:

“CM No.20472/2010 (exemption)

Allowed, subject to all just exceptions.

Accordingly, the application is disposed of.

W.P.(C) 7933/2010 and CM No.20471/2010

Ms. Rashmi Chopra, learned counsel for the revenue submitted that the Assessing Officer has passed the order of assessment.

Mr. Ajay Vohra, learned counsel for the petitioner prays for a week’s time to file an application for amendment to challenge the order of assessment.

He is permitted to do so.

Ms. Rashmi Chopra, learned counsel for the revenue shall file the counter affidavit to the amended petition within a week therefrom. Ms. Rashmi Chopra shall also produce the original record relating to the passing of the order of assessment on the next date of hearing.

List the matter on 21st December, 2010.”

10. Pursuant to the said order the petitioner filed an amendment

application. The amendment application was allowed and the petitioner was permitted to challenge and question the reassessment order purportedly dated 19.11.2010 passed by the respondent no.1.

11. We may note the peculiar facts and circumstances of this case and why we have permitted the petitioner to challenge the reassessment order dated 19.11.2010 in this writ petition. These are:

- a. The order disposing of objections in terms of **GKN Driveshafts (India) Ltd.** (supra) was passed on 2.11.2010. The said order is a non-speaking and non-reasoned order.
- b. The petitioner had filed this writ petition on 24.11.2010 challenging the order dated 2.11.2010. Advance copy of the writ petition was served on the Revenue.
- c. In **GKN Driveshafts (India) Ltd.** (supra) it was held by the Supreme Court as under :

“We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under section 148 of the Income-tax Act is issued, the proper course of action for the noticee is to file a 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. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

(emphasis supplied)

It is therefore, clear that when an assessee raises a preliminary objection challenging initiation of reassessment proceedings, the Assessing Officer is under an obligation to dispose of the objections to the issuance of a notice under Section 148 of the Act by passing a speaking order. The order disposing of the objections has to be passed first and then subsequently the assessing officer can proceed with the assessment on merits. This is clear from the above-quoted paragraph and the directions given by the Supreme Court in ***GKN Driveshafts (India) Ltd.*** (supra). The directions record that after passing a speaking order, the Assessing Officer will proceed with the assessment.

- d. Ld. counsel for the Revenue has not disputed and denied that after order dated 2.11.2010 was passed, no further hearing was fixed

and held by the Assessing Officer. Thus, after the order dated 2.11.2010, the Assessing Officer did not proceed with the assessment proceedings and no date was fixed and no hearing was granted to the petitioner.

- e. The limitation for passing of the assessment order was to expire on 31.12.2010. Thus, the Assessing Officer had sufficient time to complete the assessment, even after the order dated 2.11.2010. It is apparent that the Assessing Officer has proceeded in great rush and hurry.
- f. The respondents in the counter affidavit have not stated the date on which the re-assessment order dated 19.11.2010 was posted/served on the petitioner. No proof of dispatch of the reassessment order has been enclosed with the counter affidavit. The petitioner has stated that they received the reassessment order on 26th November, 2010, when the writ petition came up for hearing for the first time. The contention of the petitioner is that the reassessment order dated 19th November, 2010, therefore,

deserves to be quashed as we have quashed and set aside the order dated 2nd November, 2010 disposing of the objections to the reopening of assessment.

12. No doubt, the petitioner assessee had filed an appeal against the reassessment order as it was mandated and required to be filed within the period of limitation. They have, however, withdrawn the said appeal. Looking into the factual background of the present case, we feel that the plea of alternative remedy raised by the Revenue should be and ought to be rejected. Defence of alternative remedy in the present case will result in miscarriage of justice and cause prejudice to the petitioner. Once we have quashed the order dated 2nd November, 2010, for the reasons stated above, the petitioner should not be denied relief on the ground that the respondent No. 1 had proceeded in great haste and hurry to pass the reassessment order. In the present case, therefore, quashing of order dated 2nd November, 2010 would necessarily entail and as a sequitor mandate quashing of the

reassessment order dated 19th November, 2010. Existence of alternative remedy, therefore, cannot be regarded as equally efficacious and adequate. The petitioner has not tried to circumvent the statutory right to appeal or alternative remedy. Challenge to reopening of assessments has been entertained and examined in writ proceedings when existence of jurisdictional precondition is in issue/question. Existence of alternative remedy is not an absolute bar to relief under Article 226 but essentially a rule of policy, convenience and discretion. When there is a violation of principles of natural justice or the procedure required for the decision is not adopted, the writ court can exercise their discretionary jurisdiction of judicial review. In the present case, we are satisfied that there has been miscarriage of justice and the respondent No. 1 has proceeded with the reassessment proceedings with undesirable haste and hurry, in violation of principles of natural justice and contrary to the procedure mandated.

13. In view of the aforesaid circumstances, we also quash the re-assessment order dated 19.11.2010.

14. We are informed that the Assessing Officer, i.e. respondent No.1, has now changed. The Assessing Officer will now pass a fresh order on the objections raised by the petitioner in terms of direction issued by the Supreme Court in **GKN Driveshafts (India) Ltd.** (supra). The petitioner will appear before the Assessing Officer on 5th March, 2012, when a date of hearing will be fixed and an order disposing of the objections will be passed on or before 16th March, 2012. In case of an adverse order, the Assessing Officer shall give 15 days' time to the petitioner to take further steps, in accordance with law, and fix the next date of hearing accordingly. The learned counsel for the petitioner submits that they will not raise any objection with regard to the limitation period and a time period may be fixed for passing the re-assessment order. Keeping in view of the aforesaid facts, it is directed that it will be open to the Assessing Officer to thereafter proceed with the assessment and pass a re-assessment order on or before 15th May, 2012. The assessee must

fully co-operate in the proceedings. The concerned Commissioner will examine the reassessment file in the present case and is at liberty to take appropriate action, if warranted.

15. The writ petition is disposed of. The respondents will pay cost of Rs.10,000/- to the petitioner.

SANJIV KHANNA, J.

R.V.EASWAR, J.

FEBRUARY 16, 2012
Vld/kkb