

IN THE ITAT, DELHI BENCH

H.S. SIDHU, J.M. & L.P. SAHU, A.M.

**Aman Sharma v. Asstt. CIT**

**ITA No. 7026/Del/2014**

**26 April, 2018**

Assessee by: Rajesh Arora, CA

Department by: Ravi Kant Gupta, Sr. Departmental Representative

## **ORDER**

**H.S. Sidhu, J.M.**

This appeal by the assessee is directed against the *Order dated 27-10-2014* of the learned Commissioner (Appeals),(Central), Gurgaon pertaining to assessment year 2007-08 on the following grounds :-

1. The learned Commissioner (Appeals) has erred in law and facts of the case in upholding its reopening under section 147 and further upholding the validity of notice under section 148 of the Income Tax Act, 1961 which is beyond jurisdiction, void ab initio and needs to be quashed.
2. The learned Commissioner (Appeals) has erred in ignoring assessee's contention regarding non disposal of objections by the assessing officer which were raised by the assessee during the assessment year against the reopening of case which is highly arbitrary, unjustified and uncalled for.
3. The learned Commissioner (Appeals) has erred in law and facts of the case in upholding the addition under section 2(22)(e) of Rs. 18,00,000 which is highly unjustified, uncalled for and bad in law.
4. The assessee craves the right to add, amend or modify any ground of appeal.

2. The brief facts of the case are that search and seizure operation was carried out at the residential premises of the assessee on 29-4-2008. Notice under section 153A(1)(a) of the Act was issued to the assessee on 31-8-2009. In response to this notice return declaring income of Rs. 65,95,150 was filed on 14-5-2010. Assessment under section 143(3) of the Act was completed on 24-12-2010 at an income of Rs. 65,95,150. Later on it was noticed that M/s. GP and Company (P) Ltd., a company in which assessee is a substantial share holder has raised loan of Rs. 36,00,000 from M/s. SVS Propmart (P) Ltd. The assessee is having more than 20% shareholding in both the companies. Further it is also seen that accumulated profit of payer company are also positive. Moreover the loan has not been advanced in the ordinary course of business. Therefore from the above facts, it is clear that all the conditions laid down in section 2(22)(e) of the Act are clearly applicable in the case of the assessee. However, in this case there are two shareholders Sh. Aman Sharma and Sh. Vipin Sharma who are holding more than 20% share holding in both the companies. Hence, 50% of the loan of Rs. 36,00,000 should be treated as deemed dividend in the hands of the assessee being a substantial shareholder Proceedings under section 147 of the Act were initiated and the case was reopened after obtaining approval from the learned Commissioner (Central), Gurgaon. Notice us. 148 of the Act was issued on 14-3-2013 which was duly served upon the assessee. In response thereto, the assessee stated that return filed on 14-5-2010 may be treated as having been filed in response to the aforesaid notice. Thereafter, a notice under section 143(2) of the Act was also issued and on 27-9-2013 the Authorised Representative of the assessee appeared and filed written submissions. After considering the said written submission, the assessing officer made the addition of Rs. 18 lacs and assessed the income of the assessee at Rs. 83,95,150 vide order dated 30-9-2013 passed under section 147/143(3) of the Act. Against the assessment order, the assessee appealed before the learned Commissioner (Appeals), who vide his impugned order dated 27-10-2014 has dismissed the appeal of the assessee. Aggrieved with the impugned order, the assessee is in appeal before the Tribunal.

3. During the hearing, learned Authorised Representative of the assessee Sh. Rajesh Arora, CA appeared and stated that the assessee's case was reopened by issuing notice under section 148 of the Act on 14-3-2013 (PB-17). It was further stated that assessee filed detailed objections (PB-23-46) against the notice of reassessment under section 147 of the Act and assessing officer without disposing of the objections filed by the assessee, passed the assessment order under section 147 of the Act dated 30-9-2013 thereby making an addition of Rs. 18 lacs on account of deemed dividend under section 2(22)(e) of the Act. He further stated that objections were filed by the assessee against the notice under section 147 of the Act, then the assessing officer is bound to dispose of the said objections by a comprehensive order. For this argument, he placed reliance upon the decision of the Hon'ble Gujarat High Court in the case of *Vishwanath Engineers v. ACIT (2013) 352 ITR 549* wherein the Hon'ble High Court has relied on the judgment of Hon'ble Apex Court in the case of *GKN Driveshafts v. ITO 259 ITR 19*. In view of above, he requested that re-assessment may be quashed.

4. On the contrary, the learned Sr. Departmental Representative, Sh. Ravi Kant Gupta, relied upon the orders of the authorities below and objected to the above argument of learned Authorised Representative of the assessee. He stated that assessing officer had issued notice under section 148 of the Act on 14-3-2013 which was duly served upon the assessee. The assessee vide letter dated 15-4-2013 has stated that return filed on 14-5-2010 may be treated as having been filed in response aforesaid notice. He further stated that on 27-9-2013 the Authorised Representative of the assessee appeared and filed written submission which were duly examined and were not acceptable to the assessing officer on the reasons given at page no. 4 of the assessment order, hence, he rightly made the addition of Rs. 18 lacs. He further stated that learned Commissioner (Appeals) has rightly observed that the assessee relied upon the Apex Court Decision in the case of *GKN Driveshafts (India) Ltd. v. ITO* (supra) to content that assessing officer did not dispose the objections raised by the assessee to the issuance of notice by way of speaking order. However, it has been held in the case of *ITO v. Smt. Gurinder Kaur (2006) 102 ITD 189 (Del)* the Tribunal held that non- communication of reasons is not fatal in the light of the decision of the Apex Court in *S Narayanappa v. CIT (1967) 36 ITR 219 (SC)*. He further stated that this case rendered by a Bench of three judges which was not brought to the notice of Supreme Court in the case of *GKN Driveshaft (India) Ltd.* the issue of notice under section 148 was therefore rightly held to be valid, which needs not interference.

5. We have heard both the parties and perused the records especially the orders of the authorities below. We find that the case of the assessee was reopened under section 147/148 of the Income Tax Act, 1961 wherein the addition of Rs. 18,00,000 was made on account of deemed dividend under section 2(22)(e) of the Act. The assessee has filed an appeal before the learned Commissioner (Appeals), who upheld the addition of Rs. 18,00,000. We further note that in this case a search dated 1-6-2006 was carried out in the case of the assessee by virtue of which its cases were covered under section 153A of the Act in respect of assessment year 2001-02 to 2007-08. Another search operations dated 29-4-2008 took place in the premises-of "Spaze Group" including the residential premises of the assessee, due to which its pending assessments proceedings under section 153A of the Act in respect of assessment year 2003-04 to assessment year 2007-08 abated by operation of the 2nd proviso to section 153A of the Act. Consequent thereto, the return of income for assessment year 2007-08 was filed by the assessee on 14-5-2010 at an income of Rs. 65,95,150-in response to notice dated 31-8-2009 issued, under section 153A of the Act. The assessment under section 153A(I)(b) of the Act was completed vide order dated 24-12-2010 at returned income of Rs. 65,95,150, thereby making no additions in the said assessment

5.1 Further, the case of the assessee reopened by issuing notice under section 148 of the Act on 14-3-2013 (P.B.17) In the reasons of reopening (P.B.18) the assessing officer has recorded that M/s G.P. & Company (P) Ltd. has raised a loan of Rs. 36,00,000 from M/s. SVS Propmart (P) Ltd., in which the assessee and his brother Sh. Aman Sharma are having more than 20% shareholding in the companies. The assessing officer stated that Sh. Aman Sharma and Sh. Vipin Sharma (assessee) are holding more than 20% shareholding in both the companies, hence, Rs. 18,00,000 (being 50% of the loan of Rs. 36,00,000) should be treated as deemed dividend in the hands of the appellant being a substantial shareholder. Thereafter, the assessment under section 147 of the Act was completed at an assessed income of Rs. 83,95,150, thereby making an addition of Rs. 18,00,000 on account of deemed dividend under section 2(22)(e) of the Act. In respect to the above addition, the appellant filed an appeal before the first appellate authority wherein the said addition was upheld by the learned Commissioner (Appeals) vide order dated 27-10-2014. On being aggrieved by the order of learned Commissioner (Appeals), the assessee company preferred an appeal before the Tribunal on the following grounds and argued the ground no. 2 regarding non-disposal of objections by the assessing officer which were raised by the assessee during the assessment year against the reopening of case which is highly arbitrary, unjustified and uncalled for. With regard to this ground, we find that the case of the assessee was reopened by issuing notice under section 148 of the Act on 14-3-2013 (PB-17) and in response to the same, the assessee has filed detailed objections (PB-23-46) against the notice of reassessment under section 147 of the Act and assessing officer without disposing of the objections filed by the assessee, passed the assessment order under

section 147 of the Act dated 30-9-2013 thereby making an addition of Rs. 18 acs on account of deemed dividend under section 2(22)(e) of the Act. We note that it is settled law that in case the objections were filed by the assessee against the notice under section 147 of the Act, then the assessing officer is bound to dispose of the said objections by a comprehensive order, but in this case the assessing officer has not done this, which is against the mandate of the decision of the Hon'ble Gujarat High Court in the case of *Vishwanath Engineers v. ACIT (2013) 352 ITR 549* wherein, the Hon'ble High Court has relied on the judgment of Hon ble Apex Court in the case of *GKN Driveshafts v. ITO 259 ITR 19* We find that the Apex Court in the case of *GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19/(2002) 125* has observed as under :--

“19. Apart from the aforesaid fact, in case of *GKN Driveshafts (India) Ltd.*(supra), the Supreme Court has clearly laid down the law that the assessing officer is bound to disclose the reason of reassessment within reasonable time and on receipt of the reasons, the assessee is entitled to raise objection and if any such objection is filed, the same must be disposed of by a speaking order before proceeding to reassess in terms of the notice earlier given.

20. In the case before us, in spite of repeated reminders by the assessee even pointing out the above law laid down by the Supreme Court, the assessing officer failed to dispose of the said objections and instead of that, straightaway passed the order of reassessment.

21. Thus, we find that the assessing officer acted without jurisdiction in initiating the proceedings for reassessment in spite of non-existence of the required conditions specified under the Act and even did not care to follow the norms laid down by the Supreme Court in the above decision by not disposing of the objections before passing the order of reassessment.”

**5.2** In view of the binding decision of the Hon'ble Supreme Court, as aforesaid, the re-assessment cannot be sustained. As observed herein above though the detailed objections were raised against reopening of the assessment, the assessing officer did not dispose of the same till the conclusion of re-assessment proceedings and passed order under section 147 of the Act.

**5.3** In the instant case learned Commissioner (Appeals) at para 2 of page no.9 of the order has made an attempt to distinguish the decision of Hon'ble Supreme Court in the case of *GKN Driveshafts (India) Ltd.* by placing reliance on the decision of *ITO v. Smt. Gurinder Kaur (2006) 102 ITD 189 (Del ITAT)* in which it was held that non-communication of reasons is not fatal. However, learned Commissioner (Appeals) has been misled by the said decision since the said judgment is not applicable to the present facts of the case. The assessee has not contested the non-communication of reasons by the assessing officer but has challenged the action of assessing officer in not disposing off objections of the assessee which is mandated by the Hon'ble Supreme Court decision in the case of *GKN Driveshafts (India) Ltd.*

**5.4** Keeping in view of the facts and circumstances of the case as explained above and respectfully following the precedent, as aforesaid, we are of the considered view that assessing officer is under a mandate to dispose of such objections before proceeding with the assessment by passing a speaking order, which has not been done by him, therefore, the reassessment under section 147 cannot be sustained and hence, we quash the reassessment order and allow the ground no. 2 raised by the assessee. Since we have already quashed the reassessment order, there is no need to adjudicate the other grounds on merits being academic.

**6.** In result, the appeal filed by assessee is allowed