

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3922 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO
-

ARVIND MILLS LTD

Versus

ASSISTANT COMMISSIONER OF WEALTH TAX

WEB COPY

Appearance:

1. Special Civil Application No. 3922 of 2004
MR SN SOPARKAR, Sr. Advocate with
MR TUSHAR P HEMANI for Petitioner No. 1
MR TANVISH U BHATT for Respondent No. 1
-

CORAM : HON'BLE MR.JUSTICE M.S.SHAH
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 19/08/2004

ORAL JUDGEMENT

Rule. Mr Tanvish U Bhatt, waives service of Rule on behalf of the respondent.

In the facts and circumstances of the case, the petition is taken up for final disposal today.

2. This petition filed under Article 226 of the Constitution challenges notice under Section 17 of the Wealth-tax Act, 1957 (hereinafter referred to as "the Act") dated 26th March 2002 for assessment year 1997-98 and re-assessment order dated 9th February 2004 passed under Section 17 read with Section 16(3) of the Act for assessment year 1997-98.

3. The petitioner, a limited Company, filed its return of net wealth for the assessment year under consideration disclosing net wealth at Rs.29,53,100/- after deducting debt which according to the petitioner had arisen as the amount was paid for acquisition of assets out of cash credit facility enjoyed by the petitioner. After scrutiny of the said return on dates mentioned in the petition, the respondent-Assessing Officer passed an order under Section 16(3) of the Act on 8th March 2000. It is averred in the petition that due to a query raised on 26th November 2001 by A.G. Audit party, the respondent as well as Joint Commissioner of Wealth-tax, Special Range-1, Ahmedabad called for an explanation from the petitioner and the petitioner submitted an explanation. On 19th February 2002, the respondent once again called for further details which were duly supplied. However, on 26th March 2002, the impugned notice under Section 17 of the Act came to be issued and the same was served on the petitioner on 1st April 2002.

3.1 The petitioner raised various objections in law as well as on facts vide letters dated 1st April 2002 and 9th April 2002 requesting the respondent to drop the proceedings as the same were without jurisdiction. In the alternative, it was submitted that the reasons recorded by the respondent may be supplied to the petitioner.

3.2 It appears that the respondent simultaneously was corresponding with A.G. Audit party in relation to the audit objection and vide letter of 3rd February 2003, the petitioner supplied further details to the respondent to furnish to the audit party. As the audit party did not accept the explanation tendered by the respondent, the respondent was compelled to issue notice under Section

16(2) on 11th February 2003 and in response thereto, the petitioner sought a copy of the reasons recorded in view of the decision of the Supreme Court in the case of GKN Driveshafts (India) Ltd. vs. Income-tax Officer, (2003) 259 ITR 19. The petitioner once again wrote on 17th February 2003 contending that the re-assessment had been initiated at the behest of the A.G. Audit party and in light of the decision of jurisdictional High Court in the case of Adani Exports vs. DCIT, 240 ITR 270 it was submitted that the proceedings be dropped. Once again a request was made to supply reasons on 27th January 2004 and accordingly by letter dated 28th January 2004, the respondent communicated the reasons which have been reproduced in paragraph No.3 of the impugned assessment order dated 9th February 2004.

3.3. In the meantime, the respondent had already issued a notice under Section 16(2) of the Act dated 22nd January 2004 calling for certain information detailed therein on merits of the controversy. After receipt of letter dated 28th January 2004 communicating the reasons recorded for initiation of proceedings for re-assessment, the petitioner raised objections on 3rd February 2004. On the same day, i.e. on 3rd February 2004, the respondent issued a final show cause notice which was served on the petitioner on 5th February 2004. In the said letter of 3rd February 2004, the petitioner was called upon to attend the office of the respondent on or before 9th February 2004 at 11-00 AM. The respondent has recorded in the impugned assessment order dated 9th February 2004 that nobody attended on the said day, namely 9th February 2004, and as the assessment was getting barred by limitation on 31st March 2004, the assessment order was framed.

3.4. The petition has been filed in the backdrop of the aforesaid factual scenario.

4. Mr SN Soparkar, learned Senior Advocate appearing with Mr Hemani on behalf of the petitioner submitted that the impugned notice and the consequential impugned re-assessment order are bad in law and are required to be quashed and set aside. It was submitted that the notice issued under Section 17 of the Act is without jurisdiction. The re-assessment order dated 9th February 2004 is also bad in law not only as consequence of such notice which is without jurisdiction but also for the reason that the same is passed ignoring the order of the Apex Court in the case of GKN Driveshaft (supra) as well as the order of this Court dated 3rd March 2004 made in Special Civil Application No.2736 of 2004. It was

submitted that the petitioner had challenged the impugned notice by a writ petition being Special Civil Application No.2736 of 2004 which came to be rejected in light of the directions issued by this Court in its order dated 3rd March 2004. That the respondent had failed to take into consideration the directions issued by this Court and even on this count the impugned notice and the re-assessment order were required to be held to be without jurisdiction.

5. Mr Tanvish U Bhatt, learned Standing Counsel appearing on behalf of the respondent submitted that the respondent had stated on affidavit being affidavit-in-reply dated 30th June 2004 that the notice issued to the petitioner was in accordance with law and was obviously not under any fear or pressure from any higher authorities. It was further submitted that the re-opening was not based on any audit objection as the Assessing Officer had not recorded in the reasons that the action was in pursuance of any audit objection. Inviting attention to paragraph No.9 of the reply affidavit, it was submitted by Mr Bhatt that the impugned order was passed after duly addressing the objections of the petitioner and in consonance with the decision of the Hon'ble Supreme Court in the case of GKN Driveshaft Ltd. and further that the preliminary objections of the petitioner had been disposed of in the reassessment order itself. That the impugned order had been passed in accordance with law and following due procedure as directed by the Hon'ble Court and the same was legal and valid. In paragraph No.11 of the reply affidavit, the respondent states "there is no statutory requirement that the speaking order on the objections should be passed separately and cannot be a part of the re-assessment order".

6. After hearing both the sides, the Court had called upon Mr Bhatt to explain in what circumstances the impugned order came to be made without first disposing of the preliminary objections raised by the petitioner by passing a speaking order as required by the order of the Apex Court in the GKN case (supra) as well as directions given by this Court in its order dated 3rd March 2004 in Special Civil Application No.2736 of 2004. In response, Mr Bhatt has placed on record communication dated 18th August 2004 addressed to him by the ACIT, Circle-1, Ahmedabad wherein it is stated that the clarifications sought for by the learned Standing Counsel had been duly communicated to the respondent and thereafter an extract from letter dated 16th August 2004 of the respondent addressed to the ACIT, Circle-1, Ahmedabad has been

reproduced. It is stated by the respondent that in absence of any section in the Act, under which an order on objections to the re-assessment could be passed, it was addressed in the re-assessment order itself and that has been done under a bonafide belief.

7. In the case of GKN Driveshafts (supra), the Hon'ble Supreme Court has laid down an elaborate procedure as to the manner of dealing with objections raised against a notice under Section 148 of the Income-tax Act, 1961 in the following words:-

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 instance 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."

8. In a subsequent decision in the case of Garden Finance Ltd. vs. ACIT, (2004) 268 ITR 48, the effect of Supreme Court decision in the case of GKN Driveshaft (supra) came up for consideration and by a majority opinion it has been thus laid down by this Court through one of us (Hon'ble Mr Justice M.S. Shah) :-

"What the Supreme Court has now done in the GKN case (2003) 259 ITR 19 is not to whittle down the principle laid down by the Constitution Bench of the Apex Court in Calcutta Discount Co. Ltd. case (1961) 41 ITR 191 but to require the assessee first to lodge preliminary objection before the Assessing Officer who is bound to decide the preliminary objections to issuance of the re-assessment notice by passing a speaking order and, therefore, if such order on the preliminary objections is still against the assessee, the assessee will get an opportunity to challenge the same by filing a writ petition so that he does not have to wait till completion of the re-assessment proceedings which would have

entailed the liability to pay tax and interest on re-assessment and also to go through the gamut of appeal, the second appeal before Income-tax Appellate Tribunal and then reference/tax appeal to the High Court.

Viewed in this light, it appears to me that the rigour of availing of the alternative remedy before the Assessing Officer for objecting to the re-assessment notice under section 148 has been considerably softened by the Apex Court in GKN case (2003) 259 ITR 19 in the year 2003. In my view, therefore, the GKN case (2003) 259 ITR 19 (SC) does not run counter to the Calcutta Discount Co. Ltd. case (1961) 41 ITR 191 (SC) but it merely provides for challenge to the re-assessment notice in two stages, that is,-

- (i) raising preliminary objections before the Assessing Officer and in case of failure before the Assessing Officer,
- (ii) challenging the speaking order of the Assessing Officer under section 148 of the Act."

9. The position in law is thus well settled. After a notice for re-assessment has been issued an assessee is required to file the return and seek reasons for issuance of such notice. The Assessing Officer is then bound to supply the reasons within a reasonable time. On receipt of reasons, the assessee is entitled to file preliminary objections to issuance of notice and the Assessing Officer is under a mandate to dispose of such preliminary objections by passing a speaking order, before proceeding with the assessment in respect of the assessment year for which such notice has been issued.

10. Therefore, the stand of the respondents will have to be tested on application of the aforesaid legal principles. It is apparent from the facts which have come on record that the assessee had been demanding reasons in relation to notice under Section 17 of the Act dated 26th March 2002 but the same came to be supplied to the petitioner only by letter dated 28th January 2004. Immediately thereupon the petitioner raised preliminary objections vide communication dated 3rd February 2004. However, without dealing with and disposing of the said objections by passing a speaking order, the respondent proceeded to pass the impugned re-assessment order on merits of the controversy. Once the Apex Court had

stated that the Assessing Officer was bound to dispose of the objections by passing a speaking order, it was not open to the respondent to contend that in absence of any provision the respondent could not have passed a speaking order. Accordingly, on this limited count, the impugned re-assessment order dated 9th February 2004 is required to be quashed and set aside.

11. However, even if the stand of the respondent that he was under a bonafide belief that in absence of a statutory provision he could not pass any such order and hence the respondent did not pass a separate speaking order disposing of the preliminary objections is accepted at its face value, as can be seen from the impugned re-assessment order dated 9th February 2004, even while passing the re-assessment order the respondent has failed to deal with the preliminary objections raised by the petitioner.

12. In the impugned re-assessment order, paragraph No.3 reproduces the reasons recorded and communicated to the petitioner by letter dated 28th January 2004. Paragraph No.4 reproduces a portion of the computation which accompanied the return of wealth and formed part of the statement of wealth filed on 24th April 2002. Paragraph No.5 reproduces notice dated 22nd January 2004 issued under Section 16 of the Act.

Thereafter, in paragraph No.6 this is what is stated by the respondent:-

"Then in her letter dated 03.02.04, Ms. Aparna Parelkar again objected the initiation of wealth escaping assessment proceeding. It is important to mention here that the assessee has been provided the reasons for reopening the case, still instead of complying the notices by properly attending the office of the undersigned the assessee filed its submissions in the tapal and only objected the same. However, in response to the questionnaire dated 22.01.04, the following submission was made along with the objection in a letter dated 03.02.04 :..."

Subsequent paragraphs deal with the merits of the controversy and it is not possible to find a single sentence wherein it can be said that the respondent has passed a speaking order dealing with the preliminary objections raised by the petitioner. As can be seen from the aforesaid extracted portion of paragraph No.6, the respondent merely states that in letter dated 3rd

February 2004 filed on behalf of the petitioner, the petitioner has merely objected to the re-assessment proceedings and thereafter proceeds to discuss the merits of the dispute by reproducing the portion of petitioner's submissions which commences with the phrase, 'without prejudice'.

In the circumstances, the averment in the affidavit-in-reply that "the preliminary objections of the petitioner have been disposed of in the re-assessment order itself" is not borne out from the facts and a bare reading of the impugned re-assessment order.

13. There is one more aspect of the matter. The order dated 3rd March, 2004 made by this Court in the earlier petition filed by the present petitioner namely Special Civil Application No. 2736 of 2004 directed the respondent to dispose of the objections filed by the petitioner by passing a speaking order as per the aforesaid decision of the Hon'ble Supreme Court. It is further laid down in the said order that it is only after the Assessing Officer passes a speaking order deciding the petitioner's preliminary objections against the notice for re-assessment that any cause of action would arise for the petitioner. This order was served on the respondent on 4th March 2004 and immediately on 5th March 2004, the petitioner was served with a copy of the impugned re-assessment order dated 9th February 2004. The petitioner thereupon preferred a rectification application under Section 35 of the Act requesting the respondent to withdraw the impugned re-assessment order dated 9th February 2004, but, as averred in the petition, till the date of filing of the petition, the respondent has neither called the petitioner for hearing on the application dated 10th March 2004 nor withdrawn the impugned re-assessment order. In the affidavit in reply, the aforesaid averments are dealt with only by reiterating that the objections have been disposed of in the re-assessment order itself. The aforesaid conduct of the respondent alongwith the facts stated hereinbefore clearly points out that the stand of the respondent appears to be that once a notice for re-assessment has been made, the respondent is bound to frame an order of re-assessment regardless of the fact as to whether such an order can be supported or not, in law or on facts.

14. In the result, the impugned re-assessment order dated 9th February 2004 made under Section 17 read with Section 16(3) of the Act is hereby quashed and set aside. The respondent is directed to abide by the directions issued by this Court in its order dated 3rd March 2004 in

Special Civil Application No.2736 of 2004, more particularly, paragraph Nos.4 and 5 which are reproduced hereunder for the sake of convenience :-

4. The above principle laid down in respect of the notice for re-assessment under the Income-tax Act would apply with full force to the notice for re-assessment under Section 17 of the WT Act as well. The petitioner-Company had already filed its return in response to the impugned notice and requested for furnishing reasons, which request has been acceded to only very recently and the petitioner has thereafter submitted its objections on 19.2.2004. The Assessing Officer is, therefore, now required to dispose of the objections by passing a speaking order as per the aforesaid decision of the Hon'ble Supreme Court.

5. The Assessing Officer is accordingly required to decide the preliminary objections lodged by the petitioner to the notice for re-assessment and pass a speaking order. Until such speaking order is passed, obviously the Assessing Officer cannot undertake re-assessment. Hence, it is only after the Assessing Officer passes a speaking order deciding the petitioner's preliminary objections against the notice for re-assessment that any cause of action would arise for the petitioner."

15. In the result, the petition is allowed to the aforesaid extent. In the view that is taken, it is necessary to clarify that the merits of the controversy have not been taken into consideration.

Rule made absolute.

The respondent shall pay the costs to the petitioner quantified at Rs.2500/- only.

(M.S. SHAH, J.)

(D.A. MEHTA, J.)

zgs/-