IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 12249 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE M.S.SHAH

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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

GARDEN FINANCE LTD.

Versus

ASSTT.COMMISSIONER OF INCOME TAX

Appearance:

1. Special Civil Application No. 12249 of 2002

MR JP SHAH with MR MANISH J SHAH for Petitioner No. 1

MR BB NAIK for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE M.S.SHAH

Date of decision: 25-26/02/2004

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, the petitioner (hereinafter referred to as "the petitioner" or "the Company") has challenged the notice dated 20.6.2002 (Annexure "E") issued by the Assistant Commissioner of Income-tax, Circle-1(1), Surat under Section 148 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for re-opening the

assessment for the year 1996-97 on the ground that the officer had reason to believe that the petitioner's income chargeable to tax for the assessment year 1996-97 had escaped assessment within the meaning of Section 147 of the Act. The notice was issued after obtaining the necessary satisfaction of the Commissioner of Income-tax-I, Surat.

2. Initially, a Division Bench of this Court issued notice on 20.12.2002 and granted ad-interim stay that no final assessment shall be made. The petition came to be admitted by another Division Bench on 24.3.2003 and status-quo was ordered to be maintained till further orders in respect of the impugned notice. When the petition was heard for final hearing before the third Division Bench (Coram: Hon'ble Mr Justice DH Waghela and Hon'ble Mr Justice DA Mehta), there was a difference of opinion.

3. Hon'ble Mr Justice DH Waghela took the view that in view of the decision of the Supreme Court in GKN Driveshafts (India) Ltd. vs. ITO, 259 ITR 19 (hereinafter referred to as "the GKN case"), the petitioner had an equally efficacious alternative remedy. The petitioner having filed return and having sought reasons for issuing the notice and the reasons having been supplied to the petitioner, the petitioner may file objections to issuance of notice and the Assessing Officer is bound to dispose of the assessee's objections by passing a speaking order dealing with the preliminary objections. If such order of the Assessing Officer on preliminary objections is adverse to the petitioner, the petitioner may challenge such decision, but the petition was not required to be entertained at this stage when the petitioner has already been half-way through the process by filing its return in response to the notice under Section 148 read with Section 147. After recording the aforesaid conclusion and deciding to relegate the petitioner to the original proceedings of re-assessment, the said learned Judge did not enter into any further discussion of the rival submissions regarding the petitioner's objections to the impugned notice lest it should influence the decision of the Assessing Officer, but the said learned Judge did negative the petitioner's contention that there was mere change of opinion of the Assessing Officer with regard to the depreciation allowance because the Assessing Officer had not formed any opinion with regard to the applicable rate of the depreciation allowance in the assessment order for the relevant assessment year. The learned single Judge relied on the decision of this Court in Praful Chunilal

Patel vs. MJ Makwana, 236 ITR 832, to the effect that in cases where an error or mistake is detected, it can never be said that there is a mere change of opinion.

Hon'ble Mr Justice Waghela, therefore, was of the view that the petition be dismissed and Rule be discharged and interim relief be vacated with a clarification that when the process of re-assessment is re-started and preliminary objections to the impugned notice are raised by the petitioner they shall be considered and decided in accordance with law and after affording to the petitioner sufficient opportunity of being heard.

4. But, Hon'ble Mr Justice DA Mehta took the view that in the GKN case (supra) the Supreme Court did not lay down the law that in no case the assessee can move this Court under Article 226 of the Constitution for challenging the re-assessment notice. So what is stated in the GKN case cannot be applied in each and every case as that would virtually tantamount to this Court abdicating its duty cast upon the Court by the Constitutional Bench of the Apex Court in Calcutta Discount Ltd. vs. ITO, (41 ITR 191). In each and every case, the Court will have to decide, whether it should exercise the jurisdiction under Article 226 of the Constitution and entertain a petition or not. Thereafter, Hon'ble Mr Justice Mehta held that the revenue was not able to prima-facie show that there was any omission or failure on the part of the petitioner to disclose fully or truly all relevant particulars necessary for the assessment of the assessment year in question and that this was a fit case requiring this Court to exercise its jurisdiction under Article 226 of the Constitution. Accordingly, Hon'ble Mr Justice Mehta took the view that the impugned notice under Section 148 of the Act be quashed and set aside and all the consequential proceedings be also, as a corollary, quashed and set aside and thus the petition be allowed and Rule be made absolute.

5. In view of the above difference of opinion, the said Division Bench passed order dated 3.10.2003 directing the matter to be placed before the learned Chief Justice for passing appropriate orders. The matter is thereupon assigned to me.

6. The facts, relevant to the controversy before me, briefly stated, are as under:-

6.1 The petitioner is a public limited company. On

30.11.1996, the petitioner filed its return of income for the assessment year 1996-97. The relevant accounting period is year ended on 31.3.1996. Along with the return of income, the petitioner had filed a statement of depreciation wherein depreciation @ 40% on the Written Down Value (WDV) of Rs.8,50,00,000/- had been claimed on commercial vehicles. The petitioner had also claimed depreciation on commercial vehicles worth Rs.22,22,540/ 20% because the petitioner had purchased the said commercial vehicles in the second half of the accounting period. On 21.10.1998, the petitioner was served with a letter by the Assessing Officer calling for various details and at Sr. No.19, the said letter required -

"Details of vehicles on which depreciation at the rate of 40% is claimed."

The petitioner replied to the said letter on 22.2.1999. In relation to the aforesaid query, the petitioner stated that the commercial vehicles purchased by the petitioner had been given on lease and the lessee had used the said commercial vehicles for the business of running them on hire. The petitioner also invited the attention of the Assessing Officer to the fact that the provisions of Section 32 of the Act or the relevant Rules did not require that the owner of the commercial vehicles was bound to use the vehicles himself for the business of hire. In support of the aforesaid contention, the petitioner placed reliance upon various decisions of the Tribunal, which have been referred to in the said reply. On 24.3.1999, the Assessing Officer passed the assessment order under Section 143(3) of the Act and though various additions and disallowances were made, in relation to the aforesaid item of depreciation no disallowance was made.

6.2 On 20.6.2002, the notice under Section 148 of the Act came to be issued. On 24.6.2002, the petitioner called upon the Assessing Officer to supply a copy of the reasons recorded. On 20.8.2002, the Assessing Officer communicated to the petitioner that there was no statutory requirement of providing a copy of the reasons recorded before filing of the Return of Income and hence, the petitioner was called upon to furnish the Return of Income in response to the notice issued under Section 148 of the Act. Thereafter, it appears that the petitioner filed the Return on 14.11.2002, returning the same income. On 3.12.2002, the Assessing Officer issued a show cause notice fixing the hearing on 11.12.2002. In the said show cause notice, it was stated that the petitioner was a leasing company and the motor vehicles had been used for leasing out and not for hiring and,

therefore, excess depreciation on commercial vehicles had been allowed to the extent of Rs.1.70 crores because according to the Assessing Officer, the correct rate of depreciation ought to have been 20% and not the higher rate of 40%, as claimed and allowed while framing the assessment under Section 143(3) of the Act.

Along with the affidavit-in-reply, the reasons recorded by the respondent have been placed on record and the relevant portion thereof, reads as under:-

"3. On verification of the depreciation statement attached with the return of income, it is noticed that depreciation of Rs.8.43 crores is inclusive of depreciation of Rs.3.40 crores on motor vehicles (commercial) claimed at the rate of 40% on WDV/Cost of Rs.8.50 crores. As per Rule 5, the rate of depreciation on motor vehicle in the second column of the table in Appendix-I are as under:-

Block of Assets	Depreciation allowance as per percentage of WDV
(1)(1A) Motor cars other than those used in a business of running them on hire, acquired or put to use on or after the first day of April, 1990.	20%
(2)(ii) Motor buses, motor lorries and motor taxis used in a business of running them on hire.	40%

4. The assessee is a leasing company. The assessee company has used the motor vehicles for lease and not for hiring. The assessee company is, therefore, entitled for depreciation at the normal rate of 20% on motor vehicles (commercial) and not at the higher rate of 40% as claimed and allowed while finalizing the assessment. Excess depreciation on motor vehicles (commercial) has been allowed by Rs.1.70 crores while computing taxable income, which has escaped assessment to the extent.

5. I have, therefore, reason to believe that

income to the extent of Rs.1.70 crores has escaped assessment within the meaning of sub-clause (i) of explanation 2 inserted to Section 147 of the I.T. Act. The assessee company has failed to furnish full and true particulars of income."

6.3 While the Assistant Commissioner of Income-tax, Circle-1(1), Surat had earlier filed affidavit-in-reply dated 19.2.2003 at the admission stage, during pendency of the petition before me, additional affidavit-in-reply dated 10.2.2004 has been filed by Mr NM Darji, Assistant Commissioner of Income-tax, Circle-1(1), Surat stating that the assessee is giving vehicles on hire purchase to various persons all over the State of Gujarat and for that purpose, the assessee is entering into the hire purchase agreement with the hirer. As per the terms and conditions of such agreement, a vehicle shall be registered in the name of the hirer with an endorsement of the assessee's name and further that the parties mutually agree that the hirer shall be entitled to claim any benefits by way of depreciation as also any other eligible allowances with respect to the vehicles which are available to the hirer under the Income-tax Act, 1961 as applicable from time to time. The deponent has also produced a specimen copy of the hire purchase agreement dated 12.2.1997 between the petitioner and Mr Arvind S Thakker (hirer). The deponent has also produced a photostat copy of the registration book dated 2.4.1997 showing "Shri Arvind Thakker" as the registered owner of the vehicle in question with a note that the motor vehicle is subject to a hire purchase agreement with Garden Finance Ltd. (the present petitioner). The registration book is issued by RTO, Bhuj (Kutch). The deponent has accordingly submitted that from the above two documents, it becomes very clear that the hirer is the owner of the vehicle and the hirer is entitled to claim depreciation for the use of the said vehicle under the Income-tax Act and, therefore, the assessee is not entitled to claim depreciation for use of the said vehicle which has been given to the hirer under the terms and conditions of the hire purchase agreement and the assessee has wrongly claimed depreciation for the concerned assessment year and, therefore, the Assessing Officer has right to re-open the assessment under the provisions of the Income-tax Act and the notice issued by the Assessing Officer to re-open the assessment under Sections 147 and 148 of the Act is legal and valid.

7. At the hearing of this petition, Mr JP Shah with Mr Manish J Shah, learned counsel for the petitioner has

submitted as under:-

7.1 The observations made by a Bench of two Hon'ble Judges of the Supreme Court in the GKN case (supra) were made in the facts of that particular case but the said observations do not lay down any inflexible rule nor do they purport to curtail the jurisdiction of the High Court under Article 226 of the Constitution as propounded by the Constitution Bench of the Supreme Court in Calcutta Discount Co. Ltd. vs. ITO, 41 ITR 191.

Strong reliance has also been placed on the decisions in CIT vs. Foramer France, 264 ITR 566, CESC Ltd. vs. Deputy CIT (No.2) 263 ITR 402, Mahalaxmi Motors Ltd. vs. Deputy CIT, 265 ITR 53 (AP), Oil & Natural Gas Corpn. Ltd. vs. Dy. CIT, 133 Taxman 27, Mohinder Singh Malik vs. Chief CIT 183 CTR 237 (P & H), and Ajanta Pharma vs. Asstt. CIT, 186 CTR 521 (Bom.) in support of the submission that even after the GKN case (supra) the Supreme Court and various High Courts have continued to interfere with the re-assessment notices in writ jurisdiction.

7.2 The GKN case was already relied upon by the revenue in their affidavit-in-reply at the admission stage and the same was considered and still the Division Bench thought it fit on 24.3.2003 to admit the matter and to continue the status-quo and, therefore, also the petition may not be thrown out on the ground of alternative remedy which was duly considered at the stage of admission of the petition.

7.3 In the previous assessment year, the facts were similar and the assessee had given on lease certain commercial vehicles and claimed 40% depreciation thereon as being used in business of running them on hire and the same was allowed. Moreover, a re-assessment notice was already issued earlier in October 2001 in respect of commission bad debt and interest which the Assessing Officer added which the Commissioner of Income-tax deleted and the revenue's appeal against the said order is pending before the Tribunal. It is, therefore, submitted that another re-assessment notice for the same year is nothing but harassment.

7.4 On merits of the impugned notice, it is submitted that after the petitioner filed return for assessment year 1996-97 along with the statement of depreciation and claimed depreciation at the rate of 40% on Written Down Value of Rs.8.50 crores and on the addition made during the current assessment year for pro-rata depreciation at

the rate of 20% on vehicles purchased at the cost of Rs.22.22 lakhs, the Assessing Officer had called for various details by letter dated 21.10.1998 (Annexure "B") including "details of vehicles on which depreciation at the rate of 40% is claimed". In response to the said letter, the petitioner had by its letter dated 22.2.1999 (Annexure "C") clarified that in the financial year 1994-95 relevant to assessment year 1995-96, the petitioner had purchased and leased commercial vehicles of the value of Rs.11.25 crores and in the financial year 1995-96 relevant to assessment year 1996-97 the assessee had purchased and leased commercial vehicles of the value of Rs.22.22 lakhs, the assessee had claimed depreciation at the rate of 40$ on commercial vehicles and on other vehicles at the rate of 20%. The assessee had specifically stated as under:-

"We have purchased commercial vehicles and the said vehicles were given on lease. The lessee has used the said commercial vehicles for the business of running them on hire. We also draw your kind attention that, there is no requirement in Section 32 or in the rules thereunder that the owner of the commercial vehicles shall use the vehicle himself for the business of hire. We rely on the following decisions:-

1. Shriram Transport Finance Co. Ltd. vs. ACIT 63 ITR 336.

2. Shriram Investments Ltd. vs. ACIT 59 ITD 570.

3. Shriram Transport Finance Co. Ltd. vs. ACIT 63 ITD 336

You are therefore requested allowed the depreciation at the rate of 40% on commercial vehicles."

It is submitted that in view of such disclosure made by the petitioner during the course of the original assessment proceedings under Section 143(3) on 22.2.1999, there is no scope for alleging against the petitioner any failure to disclose fully and truly all material facts.

7.5 In any view of the matter, even on merits of the controversy whether the petitioner was entitled to claim depreciation at the rate of 40%, a large number of High Courts have taken the view that for claiming depreciation at the rate of 40% , it is not necessary that the owner

of the vehicle should himself be engaged in the business of giving vehicles on hire and that it is sufficient that the vehicles are actually used in the business of hire even if such business is run by the lessee or the hire-purchaser of the vehicles.

Strong reliance has been placed in this behalf on the following decisions:-

(i) CIT vs. MGF Ltd., 172 Taxation 550 (Del.)

(ii) CIT vs. AM Construction, 238 ITR 775 (AP)

(iii) ABC India Ltd. vs. CIT, 226 ITR 914 (Guwahati)

(iv) ITC vs. Anupchand & Co., 239 ITR 446 (MP)

(v) CIT vs. Madam & Co., 254 ITR 445 (Mad.)

7.6 As regards reasons mentioned in the additional reply affidavit, the learned counsel for the petitioner have submitted that since such reasons were not part of the impugned notice issued under Section 148, such reasons cannot be looked into and that if at all, the Assessing Officer is of the view that the grounds mentioned in the additional reply affidavit warrant any fresh notice to be issued under Section 148, they may do so but the present impugned notice dated 20.6.2002 at Annexure "E" deserves to be quashed and set aside.

7.7 Any clause in the hire purchase agreement cannot take away the petitioner's right to claim depreciation in accordance with law.

8. On the other hand, Mr BB Naik, learned Standing Counsel for the revenue has opposed the petition and made the following submissions:-

8.1 The decision of the GKN Driveshafts (India) Ltd., 259 ITR 19 has laid down a binding principle and the weight of the said decision as a binding precedent is not to be undermined on the ground that the decision does not give reasons.

Strong reliance has been placed on the decisions in Industrial Finance Corporation of India Ltd. vs. Cannanore Spinning & Weaving Mills Ltd., 2002 (5) SCC 54 and Suganthi Suresh Kumar vs. Jagdeeshan, 2002 (2) SCC 420 in support of the contention that the decision of the

Apex Court is a binding precedent under Article 141 of the Constitution even if no reasons are given or even if a particular argument is not considered.

8.2 The relevant facts in the present case are identical to the facts in the GKN case and, therefore, also the ratio of the decision in GKN case is squarely applicable to the instant case and, therefore, the petition deserves to be dismissed on the ground that the petitioner has an equally efficacious alternative remedy available to him.

Reliance has also been placed on the decision in VXL India Ltd. vs. ITO, 173 ITR 124 (P & H) and the Apex Court order dated 25.3.1988 rejecting the assessee's SLP against the aforesaid decision of the Punjab & Haryana High Court, as reported in 171 ITR (Statutes) 48. Reliance has also been placed on Kureethadam Wines vs. CIT (Appeals), 108 CTR 340 (Ker.) and New Bank of India Ltd., vs. Union of India 136 ITR 679 (Delhi) in support of the above submission.

8.3 On merits of the notice for re-opening the assessment for the year 1996-97, it is submitted that apart from the reasons contained in the notice dated 24.2.2002 (Ann.E), the Assistant Commissioner of Income-tax, Surat has found from the hire purchase agreement (Annexure I to the affidavit dated 10.2.2004) which the assessee-Company had entered into and that apart from that clause 9(vi) of the agreement providing that the vehicle shall be registered in the name of the hirer with an endorsement of the Company's name for the purpose of the Motor Vehicles Act. Clause 14 provides that the hirer shall be entitled to claim any benefits by way of depreciation as also any other eligible allowances with respect to the vehicle which may be available to the hirer under the Income-tax Act, 1961 as applicable from time to time. In view of this specific agreement between the petitioner-Company and the hirer, the petitioner is disentitled from claiming any depreciation on such commercial vehicles which are given on hire under the hire purchase agreement, a specimen copy of which is produced with the additional affidavit dated 10.2.2004. It is also submitted that the Assessing Officer is justified in re-opening the assessment in view of the aforesaid clauses of the agreement which were not brought to the notice of the Assessing Officer by the petitioner in the course of the original assessment proceedings. The petitioner-Company, therefore, ought not to have been granted any depreciation as only the hirer was entitled to claim such depreciation under the agreement. Mr Naik

also submitted that the Assessing Officer is also required to ascertain whether double depreciation has been claimed on the same vehicle, one by the petitioner and the other by the hirer, on the strength of the latter's name having been shown as the registered owner of the vehicle in the registration certificate issued by the RTO under the Motor Vehicles Act.

Mr Naik has further submitted that when re-opening of the assessment is justified, no useful purpose would be served by quashing the re-assessment notice dated 20.6.2002 at Annexure "E" and issuing another notice for giving the aforesaid reasons about suppression of clauses 9 and 14 of the hire purchase agreement.

8.4 It is further submitted for the revenue that even otherwise the Assessing Officer has the jurisdiction to consider whether the depreciation at 40% was admissible on the vehicles which the assessee is not plying on hire but which the assessee has given on lease/hire basis to another person who is engaged in the business of running the vehicles on hire. In this behalf, Mr Naik has relied on the decision of the Calcutta High court in Soma Finance & Leasing Co. Ltd. vs. CIT, 244 ITR 440 and the decision of the Rajasthan High Court in CIT vs. Sardar Stones, 215 ITR 350 and the Karnataka High Court in Gowri Shankar Finance Ltd. vs. CIT, 248 ITR 713.

9. At the outset, the Court would like to deal with the preliminary submission urged by Mr Naik that in view of the decision of the Apex Court in GKN Driveshaft case ((2003) 259 ITR 19), the petition challenging the notice under Section 148 is not maintainable. In the said decision, the facts as reported in the ITR were as under:-

On receiving notices under Section 148, the assessee filed the returns. The assessee also received notices under Section 143(2) calling for further information on certain points in connection with the returns. Thereupon the assessee filed writ petition challenging the notices. By judgment reported in 257 ITR 702, the High Court dismissed the writ petitions holding that the petitions were premature and the assessee could raise its objections to the notices by filing reply to the notices before the Assessing Officer. The assessee preferred appeals and the Supreme Court dismissed the appeals and observed that since the reasons for re-opening the assessments under Section 148 had been disclosed, the Assessing Officer had to dispose of the

objections, if filed, by passing a speaking order before proceeding with the re-assessments for the years in question. While passing such order, the Apex Court made the following pertinent observations:-

> "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 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)

The question is whether the Apex Court in the aforesaid decision has laid down an inflexible rule that no writ petition is maintainable against the notice under Section 148 of the Act because the assessee is to file objections before the Assessing Officer who will deal with them and dispose them of by passing a speaking order.

10. At this stage, it is necessary to refer to the decision of the Constitution Bench of the Calcutta Discount Co. Ltd. vs. ITO, (1961) 41 ITR 191 wherein the following principles were laid down:

> "That though the writ of prohibition or certiorari would not issue against an executive authority, the High Courts had power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority, acting without jurisdiction subjected, or was likely to subject, a person to lengthy proceedings and unnecessary harassment, the High Courts would issue appropriate orders or directions to prevent such consequences. The existence of such alternative remedies as appeals and reference to the High court was not, however, always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an

> authority acting without jurisdiction from continuing such action. When the Constitution conferred on the High Courts the power to give relief it becomes the duty of the Courts to give such relief in fit cases and the Courts would be failing to perform their duty if relief were refused without adequate reasons."

(emphasis supplied)

It is also true that in CIT vs. Foramer France, 264 ITR 566, the Apex Court dismissed the appeals against the decision of the Allahabad High Court in Foramer vs. CIT, 247 ITR 436 wherein the High Court had quashed the notice under Section 148 on the ground that there was no failure on the part of the assessee to disclose fully and truly all material facts for assessment and that as the notices were without jurisdiction, the assessee could not be relegated to the alternative remedy.

11. On perusal of the aforesaid decisions, it appears to me that prior to the GKN case, the Courts would entertain the petition challenging a notice under Section 148 and permit the assessee to satisfy the Court that there was no failure on the part of the assessee to disclose fully and truly all material facts for assessment. Upon reaching such satisfaction the Court would quash the notice for re-assessment. The question is why did the Court not require the assessee to appear before the Assessing Officer.

Earlier when the Court required the assessee to appear before the Assessing Officer, the Assessing Officer would not pass any separate order dealing with the preliminary objections and much less any speaking order, and the Assessing Officer would deal with all the objections at the time of re-assessment. Hence if the assessee was not permitted to challenge the re-assessment notice under Section 148 at the initial stage, the assessee would thereafter have to challenge the re-assessment itself entailing the cumbersome liability of paying taxes during pendency of the appeal before the Commissioner (Appeals), second appeal before the Income-tax Appellate Tribunal and then reference/tax appeal before the High Court. It was in this context that the Constitution Bench had observed in Calcutta Discount's case ((2003) 41 ITR 191) that where an action of an executive authority, acting without jurisdiction subjected, or was likely to subject, a person to lengthy proceedings and unnecessary harassment, the High Courts would issue appropriate orders or directions to prevent such consequences and, therefore, the existence of such

alternative remedies as appeals and reference to the High court was not always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action and that is why in a fit case it would become the duty of the Courts to give such relief and the Courts would be failing to perform their duty if reliefs were refused without adequate reasons.

12. 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.'s case ((1961) 41 ITR 191) but to require the assessee first to lodge preliminary objections 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, 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 the GKN case in the year 2003. In my view, therefore, the GKN case does not run counter to the Calcutta Discount Co. case 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.

13. May be in a given case, the exercise of the powers under Section 148 may be so arbitrary or malafide that the Court may entertain the petition without requiring the assessee to approach the Assessing Officer but such cases would be few and far between. For instance, in Mohinder Singh Malik vs. CCIT (2003) 183 CTR 237, the Punjab & Haryana High Court was concerned with the challenge to the notice under Section 148 of the Act where the grievance of the petitioner was that the

notice was issued with an ulterior motive and that the Assessing Officer had been demanding illegal gratification from the assessee, failing which the AO was threatening that the assessment would be reopened and that it was because of non-compliance with such demand that the impugned notice came to be issued. It was in the context of such facts that although the Court did not record any positive finding against the Assessing Officer, looking to the reasons recorded and the circumstances in which the notice was issued the Court raised its eyebrows and looked into the merits of the matter and held that the issuance of the notice was not at all justified.

14. I may now deal with the post GKN decisions relied upon by the assessee.

14.1 As regards the decision of the Apex Court in CIT vs. Foramer France, 264 ITR 566, the said decision reads as under:-

> "We have heard learned counsel for the parties and considered the facts of the case. We see no reason to interfere with the decision of the High Court. Accordingly, the civil appeals are dismissed with costs."

The Apex Court confirmed the decision of the Allahabad High Court in Foramer vs. CIT 247 ITR 436 but no reference was made to the GKN case. That was a case where the Allahabad High Court had already quashed the re-assessment notice on the ground that there was no failure on the part of the assessee to disclose fully and truly all material facts for assessment and, therefore, the notices were without jurisdiction. When there was no reference to the GKN case by a Bench of the same strength as the Bench in the GKN case, it cannot be said that the principle laid down in the GKN case does not hold the field.

14.2 So also, the decision in Mahalaxmi Motors Ltd. vs. Deputy CIT, (2004) 265 ITR 53 decided by the Andhra Pradesh High court did not consider the decision in GKN case.

14.3. The decision of the Bombay High Court in Ajanta Pharma Ltd. vs. Assistant CIT, 186 CTR 521 heavily relied upon by the assessee has not considered the aspects highlighted in paras 11 to 13 above while interpreting the decision of the Apex Court in the GKN

case. Even in the said decision, the Bombay High Court has made the following pertinent observations in para 15 of the judgment:-

> "(w)hen certain facts are to be ascertained or various other materials are to begone through to arrive at a finding about the absence of jurisdiction, in which case, certainly, the assessee will have to approach the AO. It is so because, the jurisdiction under Article 226 of the Constitution of India being an extraordinary jurisdiction cannot be allowed to be availed as a matter of course. In order to decide an issue of jurisdiction, findings of the authority on the factual aspect may be necessary. In that case, certainly primarily the assessee will have to approach the AO."

14.4 In Caprihans India Ltd. vs. Tarun Seem, Dy. CIT, 185 CTR 157 the Bombay High Court, after referring to the GKN case, in the peculiar facts and circumstances of the case, undertook the inquiry whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The Court also found that the reasons did not disclose a finding that the petitioner had failed to disclose fully and truly all material facts necessary in the matter and the Court found ex-facie that Assessing Officer had sought to re-open the assessment on certain erroneous assumptions.

15. The upshot of the above discussion is that while the GKN case does not purport to divest the Court of its constitutional power to issue a writ of prohibition or any other appropriate writ in a fit case to restrain the Assessing authority from proceeding with the notice under Section 148, the GKN case does lay down that ordinarily the procedure to be followed would be as indicated in the GKN case, that is, after receiving reasons, the assessee shall lodge his preliminary objections before the Assessing Officer against the notice for re-assessment and the Assessing Officer will decide the objections by a speaking order so that an aggrieved assessee can challenge the order in a writ petition.

16. As regards the submission of the learned counsel for the petitioner that the Division Bench had admitted the petition after considering the reply affidavit urging the alternative plea under the GKN case, it needs to be noted that the order of admission of a petition cannot be

treated as concluding the controversy between the parties. All that the order of admission does is to admit the petition to final hearing because the Court has found a prima-facie case for examination. It cannot, therefore, preclude the Court hearing the matter finally from deciding the issue, which goes to the root of the matter. In any case, the Division Bench did not have the occasion to consider the additional affidavit dated 10.2.2004 of the Commissioner of Income-tax, which is referred to in para 6.3 hereinabove and discussed in the paragraphs that follow.

17. As regards the contention of the learned counsel for the petitioner that only the reasons recorded in the notice are required to be considered and not any subsequent reasons given in the additional affidavit, while ordinarily the Court would consider the challenge to the notice for re-assessment on the basis of the reasons recorded, the following aspects cannot be overlooked - that the Court would not issue a futile writ, quashing the impugned notice only for permitting issuance of another notice when the reasons disclosed in the additional affidavit are alternative and, therefore, interconnected with the reasons initially communicated by the Assessing Officer. The additional reasons as contained in affidavit dated 10.2.2004 are on the basis of the document namely the hire purchase agreement which was produced by the assessee in the original assessment proceedings. The two clauses in the said agreement now relied upon by the revenue are as under:-

"9. The Hirer agrees:-

... .'

(vi) that the Company shall be the lawful owner of the Vehicle and the Vehicle shall be registered in the name of the Hirer with an endorsement of the Company's name for the sake of convenience and for the limited purpose of the Motor Vehicles Act.

14. The parties hereto mutually agree that the Hirer shall be entitled to claim any benefits by way of depreciation as also any other eligible allowances with respect of the Vehicle which may be available to the Hirer under the Income Tax Act, 1961 as applicable from time to

time."

The record of the assessment proceedings does not indicate that the assessee had brought the aforesaid clauses to the notice of the Assessing Officer during the course of the assessment proceedings.

18. In Indo-Aden Salt Mfg. & Trading Co. P. Ltd. vs. CIT, (1986) 159 ITR 624, the Apex Court has held that the mere fact that the Assessing Officer could have in the original assessment proceedings found out the correct position by further probing did not exonerate the assessee from the duty to make a full and true disclosure of material facts. It is true that the obligation of the assessee is to disclose only primary facts and not inferential facts. If some material for the assessment lay embedded in the evidence which the revenue could have uncovered but did not, then it is the duty of the assessee to bring it to the notice of the assessing authority. The assessee knows all the material and relevant facts - the assessing authority might not. In respect of the failure to disclose, the omission to disclose may be deliberate or inadvertent. That is immaterial. But if there is omission to disclose material facts, then, subject to other conditions, jurisdiction to reopen is attracted.

In Zohar Siraj Lokhandwala vs. MG Kamat, (1994) 210 ITR 956, the Bombay High Court has held that even where the assessee states primary facts in the assessment proceedings, it is the assessee's duty to disclose all of them including particular entries in account books and particular portions of documents. Mere production of facts or documents before the Assessing Officer is not enough if some material for the assessment lies embedded in that evidence which the Assessing Officer can uncover but did not. That was a case where the assessee had produced the trust deed and the assignment deed under which the assessee had received Rs.45 lakhs. After completion of the assessment, the Assessing Officer discovered from a perusal of the trust deed as well as the deed of assignment that the assessee had wrongly claimed exemption from levy of capital gain tax. When the Income-tax Officer issued a notice for re-assessment, the assessee filed a writ petition challenging the notice and contending that the trust deed and the assignment deed were already on record before the Income-tax Officer in the original assessment proceedings. In this set of facts also, the Bombay High Court held that mere production of a trust deed or assignment deed by itself did not amount to a true and full disclosure of material

facts necessary for the purpose of assessment, because the relevant clauses of those documents were not brought to the notice of the Assessing Officer in the original assessment proceedings.

19. In the facts of the present case mere production of the hire purchase agreement did not exonerate the assessee from the liability to point out the aforesaid clauses of the hire purchase agreement under which the vehicles were to be registered in the name of the hirers and the agreement also provided that it was the hirer which would be entitled to the benefit of depreciation and other allowances under the Income-tax Act.

20. The submission of Mr Shah for the assessee that the assessee by providing for clause 14 in the agreement could not have changed the provisions of the Income-tax Act regarding depreciation is not required to be considered at this stage because as observed by the Apex Court, "it is necessary to reiterate that we are now at the stage of the validity of the notice under Section 148/147. The enquiry at this stage is only to see whether there are reasonable grounds for the Income-tax Officer to believe and not whether the omission/failure and the escapement of income is established. It is necessary to keep this distinction in mind" (vide Sri Krishna Pvt. Ltd. vs. ITO, (1996) 221 ITR 538).

Moreover the above submission of the assessee proceeds on the factual assumption that none of the hirers have taken depreciation on the vehicles in question for which there is no assertion from the petitioner on oath. Hence, it is for the Assessing Officer to consider such factual aspects. If the hirers have not taken depreciation, then only it would be open to the petitioners to urge before the Assessing Officer that 40% depreciation was rightly allowed to them, notwithstanding the fact that the petitioner-Company itself is not engaged in the business of running the vehicles on hire.

21. As regards reliance placed by the learned counsel for the petitioner on various decisions in respect of the question whether depreciation is admissible at the rate of 40% when the owner himself does not carry on the business of giving the vehicles on hire but such business is carried on by the lessee or the hirer of the vehicles, as indicated above - this question would arise only if it is held that notwithstanding clauses 9 and 14 of the Hire Purchase Agreement, the assessee is entitled to claim depreciation and that the hirers had not claimed

depreciation.

In ITO vs. Biju Patnaik, (1991) 188 ITR 247, the Apex Court has sounded the note of caution that at the stage of notice under Section 147/148 of the Act, the Court is not to go into the merits of the controversy whether the particular income is taxable.

22. In view of the above discussion, this petition is dismissed with a clarification that if the assessee lodges its preliminary objections before the Assessing Officer with reference to the impugned notice under Section 148 and also in relation to the reasons as disclosed in the additional affidavit dated 10.2.2004, the Assessing Officer shall consider and decide the preliminary objections by passing a speaking order. In case the order is adverse to the assessee, the assessee shall be at liberty to challenge such order on the preliminary objections by filing a writ petition and the Assessing Officer shall not proceed with the re-assessment proceedings for a period of one month from the date of despatch of the order to the petitioner by RPAD.

Subject to the aforesaid observations and direction, the petition is dismissed. Rule is discharged with no order as to costs.

(M.S. SHAH, J.)

zgs/-