IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 3955 of 2014

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SAHKARI KHAND UDYOG MANDAL LTD.....Petitioner(s)

Versus

ASSTT. COMMISSIONER OF INCOME TAX....Respondent(s)

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Appearance:

MR MANISH J SHAH, ADVOCATE for the Petitioner(s) No. 1

MR SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MS JUSTICE SONIA GOKANI

Date : 31/03/2014

ORAL ORDER
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

Heard learned counsel for the parties for final disposal of the petition.

The petitioner is a co-operative society. Petitioner has challenged the notice dated 25.3.2013 seeking to reopen the assessment of the petitioner for the year 2008-09 which was framed after scrutiny. Such notice was thus issued within a period of four years from the end of the relevant assessment year. The department supplied to the petitioner the reasons recorded by the Assessing Officer for issuing such notice. The reasons read as under:

"The Assessee is a co-operative society registered under the Gujarat

Cooperative Society Act, engaged in business of manufacturing and sales of sugar and its byeproducts viz. Bagasse, Press, mud and molasses. The assessee filed its return of income for A.Y.2008-09 on 29.9.2008 declaring total income of Rs.Nil. The assessment was completed in scrutiny manner u/s. 143(3) of the I.T.Act, 1961 on 27.12.2010 determining total income at Rs.Nil.

On verification of record, it is observed that the assessee was allowed to carry forward brought forward unabsorbed depreciation pertaining to different preceding A.Ys. (i.e. A.Y. 2001-01, A.Y. 2006-07 and A.Y. 2007-09). Out of these losses, unabsorbed depreciation losses of Rs.1,19,78,728/- pertaining to A.Y. 2001-01 was not eligible to be carried forward, as eight succeeding A.Y. Completed in A.Y.2008-09.

As per sub-section 3 of section 72 of I Tax Act, 1961, no loss shall be carried forward and set off for more than eight assessment year for which the loss was first computed. As per sub section 2(iii)(b) of section 32 as amended by the Finance (No.2) Act, 1996 with effect from 1st April 1997, if the unabsorbed depreciation allowance cannot be wholly set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment year immediately succeeding the assessment year for which the aforesaid allowance was first computed.

In view of the I.T. Provisions and decision mentioned above, the assessee was entitled to carry forward the unabsorbed losses up to the prescribe time limit i.e. 8 years only i.e. upto A.Y.2008-09. Thus, the brought forward unabsorbed depreciation of Rs.1,19,78,728/- allowed to be carried forward to next year was contrary to the provisions as stated above.

Therefore, I have reason to believe that excess carry forward loss to the above extent is escaped assessment within the meaning of section 147 of the I.T. Act, 1961."

On 7.2.2014, the petitioner filed its objections to the notice for reopening. Such objections were dismissed by the Assessing Officer by an order dated 6.3.2014. Hence this petition.

Learned counsel for the petitioner contended that from the record it emerges that the sole ground on which the Assessing

Officer desires to reopen the assessment is that unabsorbed depreciation could not be carried forward beyond the period of eight years. Assessment year 2008-09 not being the year within such time limit, the assessee could not have claimed unabsorbed depreciation for the said assessment year.

Counsel further submitted that question of allowing the depreciation pertaining to earlier years which had remained unabsorbed was examined by the Assessing Officer during the course of original scrutiny assessment. Any attempt on his part to revisit the issue would be based on mere change of opinion. Counsel alternatively contended that the question of attaching time limit for carrying forward such unabsorbed depreciation has been gone into by this Court in the case of **General Motors India P. Ltd. v. Deputy CIT,** (2013) 354 ITR 244 (Guj.) in which it is held that such carry forward of unabsorbed depreciation and set off would be permissible without reference to any time limit.

On the other hand, learned counsel Shri Sudhir Mehta for the department opposed the petition contending that in the original assessment this question was not examined. Notice has been issued within a period of four years from the end of relevant assessment year. Question of sufficiency of reasons cannot be examined by the court in writ jurisdiction.

From the record, we do not find that the question of permitting set off of unabsorbed depreciation of earlier years beyond eight

years was ever examined by the Assessing Officer in the original scrutiny assessment. Counsel for the petitioner pointed out that against the petitioner's claim of unabsorbed depreciation of Rs.2.29 crores (rounded off) for the assessment year 2000-01, the Assessing Officer in the order of assessment has allowed carry forward of only Rs.1.19 crores (rounded off). Admittedly, there were no queries by the Assessing Officer with respect to carry forward of unabsorbed depreciation beyond eight years and no corresponding representation from the petitioner on this aspect. The element of amount to be carried forward of unabsorbed depreciation for the year 2000-01 had no relevance to this aspect. In our opinion, therefore, this issue on the basis of which the impugned notice is founded was not scrutinized by the Assessing Officer in the original assessment.

However, we find much force in the alternative contention of the petitioner, namely, that the issue itself has been decided by this Court in favour of the assessee. In similar circumstances in the case of General Motors India P. Ltd. (surpa), this Court held and observed as under:

> "30. The last question which arises for consideration is that whether the unabsorbed depreciation pertaining to A.Y. 1997-98 could be allowed to be carried forward and set off after a period of eight years or it would be governed by Section 32 as amended by Finance Act 2001? The reason given by the Assessing Officer under section 147 is that Section 32(2) of the Act was amended by Finance Act No.2 of 1996 w.e.f. A.Y. 1997-98 and the unabsorbed depreciation for the A.Y. 1997-98 could be carried forward up to the maximum period of 8 years from the year in which it was first computed. According to the Assessing Officer, 8 years expired in the A.Y. 2005-06 and only

till then, the assessee was eligible to claim unabsorbed depreciation of A.Y. 1997-98 for being carried forward and set off against the income for the A.Y. 2005-06. But the assessee was not entitled for unabsorbed depreciation of Rs.43,60,22,158/- for A.Y. 1997-98, which was not eligible for being carried forward and set off against the income for the A.Y. 2006-07.

31. Prior to the Finance Act No.2 of 1996 the unabsorbed depreciation for any year was allowed to be carry forward indefinitely and by a deeming fiction became allowance of the immediately succeeding year. The Finance Act No.2 of 1996 restricted the carry forward of unabsorbed depreciation and set-off to a limit of 8 years, from the A.Y.1997-98. Circular No.762 dated 18.2.1998 issued by the Central Board of Direct Taxes (CBDT) in the form of Explanatory Notes categorically provided, that the unabsorbed depreciation allowance for any previous year to which full effect cannot be given in that previous year shall be carried forward and added to the depreciation allowance of the next year and be deemed to be part thereof.

32. So, the unabsorbed depreciation allowance of A.Y. 1996-97 would be added to the allowance of A.Y. 1997-98 and the limitation of 8 years for the carry-forward and set-off of such unabsorbed depreciation would start from A.Y. 1997-98.

33. We may now examine the provisions of section 32(2) of the Act before its amendment by Finance Act 2001. The section prior to its amendment by Finance Act, 2001, read as under:-

> "Where in the assessment of the assessee full effect cannot be given to any allowance under clause (ii) of sub-section (1) in any previous year owning to there being no profits or gains chargeable for that previous year or owing to the profits or gains being less than the allowance, then, the allowance or the part of allowance to which effect has not been given (hereinafter referred to as unabsorbed depreciation allowance), as the case may be,-
>
> (i) shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;
>
> (ii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i), the amount not so set off shall be set off from the income under any other head, if any, assessable for that assessment year;
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> (iii) if the unabsorbed depreciation allowance cannot be wholly set off under clause (i) and Clause (ii), the amount of allowance not so set off shall be carried forward to the

following assessment year and—

(a) it shall be set off against the profits and gains, if any, of any business or profession carried on by him and assessable for that assessment year;

(b) if the unabsorbed depreciation allowance cannot be wholly so set off, the amount of unabsorbed depreciation allowance not so set off shall be carried forward to the following assessment year not being more than eight assessment years immediately succeeding the assessment year for which the aforesaid allowance was first computed:

Provided that the time limit of eight assessment years specified in sub-clause (b) shall not apply in case of a company for the assessment year beginning with the assessment year relevant to the previous year in which the said company has become a sick industrial company under sub-section (1) of section 17 of the Sick Industrial Company (Special Provisions) Act, 1985 (1 of 1986) and ending with the assessment year relevant to the previous year in which the entire net worth of such company becomes equal to or exceeds the accumulated losses.

Explanation.- For the purposes of this clause, "net worth" shall have the meaning assigned to it in clause (ga) of sub-section (1) of section 3 of the Sick Industrial Companies (Special Provisions) Act, 1985."

34. The aforesaid provision was introduced by Finance (No.2) Act, 1996 and further amended by the Finance Act, 2000. The provision introduced by Finance (No.2) Act was clarified by the Finance Minister to be applicable with prospective effect.

35. Section 32 (2) of the Act was amended by Finance Act, 2001 and the provision so amended reads as under :-

"Where, in the assessment of the assessee, full effect cannot be given to any allowance under sub-section (1) in any previous year, owing to there being no profits or gains chargeable for that previous year, or owing to the profits or gains chargeable for that previous year, owing to the profits or gains chargeable being less than the allowance, then, subject to the provisions of sub-section (2) of section 72 and sub-section (3) of section 73, the allowance or the part of the allowance to which effect has not been given, as the case may be, shall be added to the amount of the allowance for depreciation for the following previous year and deemed to be part of that allowance, or if there is no such allowance for that previous year, be deemed to be allowance of that previous year, and so on for the succeeding previous years."

36. The purpose of this amendment has been clarified by

Central Board of Direct Taxes in the Circular No.14 of 2001. The relevant portion of the said Circular reads as under :-

> "Modification of provisions relating to depreciation
>
> 30.1 Under the existing provisions of section 32 of the Income-tax Act, carry forward and set off of unabsorbed depreciation is allowed for 8 assessment years.
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> 30.2 With a view to enable the industry to conserve sufficient funds to replace plant and machinery, specially in an era where obsolescence takes place so often, the Act has dispensed with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The Act has also clarified that in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory.
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> 30.3 Under the existing provisions, no deduction for depreciation is allowed on any motor car manufactured outside India unless it is used (i) in the business of running it on hire for tourists, or (ii) outside in the assessee's business or profession in another country.
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> 30.4 The Act has allowed depreciation allowance on all imported motor cars acquired on or after 1st April, 2001.
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> 30.5 These amendments will take effect from the 1st April, 2002, and will, accordingly, apply in relation to the assessment year 2002-03 and subsequent years."

37. The CBDT Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001 and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out in A.Y. 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect.However, it does not contain any such provision. Hence keeping in view the purpose of amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language

of the section without leaning to the side of assessee or the revenue. But if the legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the section, the benefit accruing to the assessee cannot be denied. However, Circular No.14 of 2001 had clarified that under Section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under Section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by Finance Act, 2001 would allow the unabsorbed depreciation allowance available in the A.Y. 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the A.Y. 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

38. Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st day of April 2002 (A.Y. 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No.14 of 2001 clarified that the restriction of 8 years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from A.Y.1997- 98 upto the A.Y.2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever."

In the said case also, the Court was examining the validity of reopening. Of course, such notice was issued beyond the period of four years from the end of the relevant assessment year. Nevertheless, when the ground on which present notice is founded is held to be invalid in law, in our opinion, the very foundation for issuance of notice would not survive.

In the result, the impugned notice is quashed.

Before closing, we would touch one aspect of the matter of general implication.

Prior to the decision of the Supreme Court in the case of **GKN Driveshafts (India) Ltd v. ITO,** 259 ITR 19, the assessees were not supplied with the reasons recorded by the Assessing Officer for reopening the assessment. The Supreme court in the case of GKN Driveshafts (India) Ltd. (supra), issued certain directions giving rights to the assessees to demand the reasons and raise objections to the proposal of the Assessing Officer to reopen the assessment which the Assessing Officer would have to consider and dispose of. The Supreme Court held and observed 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."

In large number of cases pertaining to reopening of assessments, we have noticed that different stages of the assessees demanding reasons recorded by the Assessing Officer, supplying of such reasons, the assessees raising objections and the Assessing Officer disposing of such objections, consume considerable time. In many cases, the last stage of disposing of the objections raised by the assessee is reached only a few weeks, and in some cases even days, before the assessment would be time-barred. This situation is quite unsatisfactory, both from the point of the assessee as well as the department. In the last minute rush, the Assessing Officer frames assessment in a most hurried manner. In the process, important and valid grounds raised by the assessee are often times lost sight of. Additions are thus made which could have been avoided forcing the assessee to prefer appeal which could have been avoided, further creating needless strain on the system. On the other hand, some times additions were made without full and proper scrutiny. The additions which should have otherwise stood the test of appellate scrutiny fail the test.

We may refer to relevant dates from some of the cases which prompted us to make the above observations:

Special Civil Application No.	Date of notice under section 148 of the Act	Date when the petitioner asked for reasons recorded	Reasons supplied by the Assessing Officer	Objection raised by the petitioner	Objection disposed of by the Assessing Officer
3955/14	25/02/13	Not available	Not available	07/02/14	06/03/14
3289/14	26/03/13	08/04/14	24/10/13	16/12/13	17/03/14
3707 & 3708/14	23/08/12	21/09/12	12/10/12	06/05/13	17/02/14
4107/14	04/10/12	09/11/12	Not available	21/01/14	07/03/14
3679/14	28/03/13	25/04/13	18/09/13	20/11/13	30/12/13
3275/14	25/03/13	04/04/13	19/09/13	26/09/13	10/02/14
4074/14	07/03/13	18/03/13	25/03/13	24/12/13	03/03/14
3496/14	22/03/13	06/04/13	29/08/13	01/01/14	29/01/14
4708/14	10/02/13	24/01/13	Not available	28/01/13	26/03/13

It can thus be seen that there are four important stages once the Assessing Officer issues notice for reopening of the assessment. Such stages are: (i) the assessee if he so wishes, may demand the reasons recorded by the Assessing Officer after filing return in response to notice under section 148 of the Act, (ii) the Assessing Officer supplying such reasons to the assessee, (iii) the assessee raising objections to the notice for reopening and (iv) the Assessing Officer disposing of the objections raised by the assessee.

In various cases referred to above, at different stages, unduly long time is consumed either by the assessee or by the Assessing Officer. Cases referred above are only few out of many cases where similar situation has arisen. It is not necessary to refer to all such cases since we have referred to some cases which would represent

the cross-section. Stages (i) and (iii) mentioned above are in the hands of the assessee while stages (ii) and (iv) are in the hands of the Assessing Officer. With a view to streamlining this procedure, and to ensure, as far as possible, the Assessing Officer is not faced with the unenviable task of completing the assessment proceedings in a few days left before the same became time barred, we would like to give certain directions of general implication which, we would expect, are followed by all concerned. While doing so, we are conscious that these stages are provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) and we would be giving directions only to the extent the said judgment already does not provide for. We have noticed that considerably long time is consumed sometimes by the assessee demanding the reasons recorded by the Assessing Officer and sometimes the Assessing Officer complying with such a request of the assessee. It is an accepted proposition that the reasons recorded by the Assessing Officer are not confidential and the assessee whose assessment is being reopened has a right to know such reasons. We therefore thought that these two stages can be substantially eliminated by giving suitable directions. The further stage is of the assessee raising objections which often times is done after much delay and the last stage comes where the Assessing Officer deals with such objections. This is yet another problem area where unduly long time is consumed by the Assessing Officer. Under the circumstances, following directions are issued:

(1)Once the Assessing Officer serves to an assessee a notice of

reopening of assessment under section 148 of the Income Tax Act, 1961, and within the time permitted in such notice, the assessee files his return of income in response to such notice, the Assessing Officer shall supply the reasons recorded by him for issuing such notice within 30 days of the filing of the return by the assessee without waiting for the assessee to demand such reasons.

(2) Once the assessee receives such reasons, he would be expected to raise his objections, if he so desires, within 60 days of receipt of such reasons.

(3) If objections are received by the Assessing Officer from the assessee within the time permitted hereinabove, the Assessing Officer would dispose of the objections, as far as possible, within four months of date of receipt of the objections filed by the assessee.

(4) This is being done in order to ensure that sufficient time is available with the Assessing Officer to frame the assessment after carrying out proper scrutiny. The requirement and the time-frame for supplying the reasons without being demanded by the assessee would be applicable only if the assessee files his return of income within the period permitted in the notice for reopening. Likewise the time frame for the Assessing Officer to dispose of the objections would apply only if the assessee raises objections within the time provided

hereinabove. This, however, would not mean that if in either case, the assessee misses the time limit, the procedure provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd (supra) would not apply. It only means that the time frame provided hereinabove would not apply in such cases.

(5) In the communication supplying the reasons recorded by the Assessing Officer, he shall intimate to the assessee that he is expected to raise the objections within 60 days of receipt of the reasons and shall reproduce the directions contained in sub-para 1 to 4 hereinabove giving reference to this judgment of the High Court.

(6) The Chief Commissioner of Income Tax and Cadre Controlling Authority of the Gujarat State, shall issue a circular to all the Assessing Officers for scrupulously carrying out the directions contained in this judgment.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

(vjn)