IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 8343 of 2013

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE BIREN VAISHNAV

==========

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

==========

MEHSANA DISTRICT CENTRAL CO-OP BANK LTD....Petitioner(s)

Versus

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

==========

Appearance:

MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1

==========

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE BIREN VAISHNAV

Date : 19/06/2017

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has filed this petition challenging the notice dated 26.03.2012, issued by the respondent Assessing Officer, seeking to reopen the petitioner's assessment for the assessment year 2007-08.

2. Facts are as under.

3. Petitioner is a cooperative bank. For the assessment year 2007-08, the petitioner had filed return of income, which was taken in scrutiny by the Assessing Officer. He passed the order of assessment on 27.10.2009. To reopen such assessment the Assessing Officer issued the impugned notice. In order to do so, he had recorded following reasons:

> *"…2. During the under consideration, you had sold staff colony admeasuring 8802.00 sq.mt. (free hold land and colony building constructed thereon) for a consideration of Rs.4,01,00,000 and claimed Long Term capital loss at Rs.3,29,91,808/-.*
>
> *3. You have acquired the Capital Asset (Staff colony) for Rs.11 lakh and the same was treated as a* ***single common asset*** *i.e. colony building and the entire cost thereof was fully depreciated. Now for the purpose of transfer, the land & building of the colony was bifurcated*

assigning Nil value to the Building and treating the entire sale consideration of Rs.4,01,00,000/- towards land. Capital ***loss*** *on sale of land was computed at Rs.3,29,91,808/- treating the transaction as LONG TERM CAPITAL GAIN.*

4. In this connection following observation has been pointed out by this office.

(a) The capital asset (Staff colony) had been treated by you as a single common asset i.e. Building and the entire cost of the same was written off as depreciation, as per your books of accounts. An asset hitherto treated as a depreciable asset for income-tax purpose, cannot be given a different treatment for purpose of taxation under the same Act.

(b) The transfer of staff colony, therefore, cannot be treated as a transfer of land, but a transfer of depreciable asset (Bldg.) There is no provisions in the Act, to change the classification of block at the sweet will of the assessee. Hence section 50(1) of the Act (Special provision for computation of capital gains in case of depreciable assets) will attract and the transaction was to be treated as a ***Short Term Capital Gain*** *and not as a Long Term Capital Gain.*

(c) The computation of capital loss was, therefore, irregular. Taxable income would work out to Rs.36,79,145/-.

(d) Further, carry forward of business loss of Rs.1,61,33,000/- and LTCG of Rs.2,64,37,280/- aggregating to Rs.4,25,70,280/- allowed, is required to be withdrawn.

5. *You have also created a Provision for Bad & Doubtful Debt amounting to Rs.1,50,00,000/- which was claimed by you as a deduction. Total income computed before making any deduction under clause (a) of section 36(1)(viiia) and under Chapter VIA works out to (-) Rs.11,15,150/- [(-) 16115150) — 15000000]. Seven and one-half per cent of the same works out to a negative figure and as such, no deduction for any provision for bad and doubtful debt is allowable to you. Thus the deduction of Rs.1,50,00,000/- under section 36(1)(viia) was not correct.* ***You are show caused to why the deduction of Rs.1,50,00,000/- should not disallowed for the year under consideration.***

6. *Further, as per Auditors Certificate in Form 3 CD filed with the return, against column No.17(1)- Provision for payment of gratuity not allowable u/s 40A(7). The auditors have stated that Gratuity provision of Rs.51,95,424/- debited to P & L Account & payment of Rs.83,59,388/- made to LIC were* ***not allowable.*** *However, while computing taxable income, an amount of Rs.51,05,424/- was only disallowed. The omission to disallow Staff Gratuity contribution to LIC resulted is not correct.* ***You are show caused to why the difference of Rs.31,63,964/- should not disallowed for the year under consideration.***"

3. As such I have reason to believe that the income chargeable to tax has escaped assessment in your case for A.Y. 2007-08 within the meaning of section 147 of the I.T. Act. Therefore, your case is considered fit for issuance of notices u/s 148 of the I. T. Act."

7. The petitioner objected to the process of reopening under communication dated 18.02.2013. Without disposing of the objections, the Assessing Officer proceeded to pass the order of reassessment on 22.03.2013, in which, only he had dealt with the petitioner's objections. At that stage this petition was filed.

8. From the record, it can be seen that the impugned notice came to issued within a period of four years from the end of relevant assessment year. The Assessing Officer had recorded reasons for issuing such a notice. These reasons contained three separate and independent grounds on which the Assessing Officer believed that income chargeable to tax had escaped assessment.

9. Learned counsel for the petitioner raised a single contention viz. that the Assessing Officer was acting under the insistence of the audit party. He submitted that the Assessing Officer was not convinced about the fact that income chargeable to tax had escaped assessment on the grounds mentioned in the reasons recorded. He was however compelled to reopen

the assessment on account of audit objection which he could not ignore.

10. Since this was the sole ground pressed in service by the petitioner and was primarily based on correct factual aspects, we had summoned the original file from the department. Upon perusal of such file, following aspects emerged.

I. On 16.01.2012, the audit party raised objections with the original order of assessment of the present petitioner. These audit objections contained the very same three grounds which are mentioned by the Assessing Officer in the reasons recorded. The Assessing Officer has merely summarized and comprised the grounds and incorporated them in the reasons recorded. The notice for reopening was issued on 26.03.2012. Subsequently on 24.05.2012, the Assessing Officer had written to the audit department a detailed note why according to him, none of the three grounds are valid and that therefore, the audit objections should be dropped. On 18.02.2013, the petitioner had raised detailed objections to the notice for reopening since by then, the

petitioner had also supplied the reasons. Without disposing of the objections to the petitioner, the Assessing Officer proceeded to pass the order of assessment in which for the first time, he dealt with the objections.

11. In our opinion, the very action of the Assessing Officer to deal with the objections of the petitioner in the final order of reassessment, runs contrary to the judgment of the Supreme Court in case of ***GKN Driveshafts (India) Ltd. v. ITO and Ors.*** reported in ***[2003] 259 ITR 90 (SC).*** However, there is yet another weighty reason why we cannot permit the process of reopening of assessment to stand. Such reason is that apparently, the Assessing Officer was acting under the compulsion of the audit party. As noted, the audit party raised its objections on 16.01.2012. While issuing notice for reopening on 26.03.2012, the Assessing Officer had cited these three very reasons. Subsequently on 24.05.2012, he sent a detailed note to the audit party, justifying why the audit objections should be dropped. It is true that in the present case such resistance from the Assessing Officer came after the notice for reopening.

Nevertheless, if we see entire sequence, it becomes clear that the Assessing Officer was clearly acting under the dictates of the audit party. Even after issuing the notice, he still maintained an opinion that no income chargeable to tax had escaped assessment. If that be so, he ought to have dropped the assessment proceedings, at least at that stage when the petitioner raised the objections which even without such objections, the Assessing Officer was convinced, were valid.

12. In case of ***Jagat Jayantilal Parikh v. Deputy Commissioner of Income-Tax*** reported in ***[2013] 355 ITR 400 (Guj),*** Division Bench of this Court had observed as under:

> *"Under the circumstances, it clearly emerges from the record that the Assessing Officer was of the opinion that no part of the income of the assessee has escaped assessment. In fact, after the audit party brought the relevant aspects to the notice of the AO, she held correspondence with the assessee. Taking into account the assessee's explanation regarding non-requirement of TDS collection and ultimately accepted the explanation concluding that in view of the Board's circular, tax was not required to be deducted at source. No income had therefore escaped assessment. Despite such opinion of the Assessing Officer, when ultimately the impugned notice came to be issued the only conclusion we can reach is that the Assessing*

Officer had acted at the behest of and on the insistence of the audit party. It is well settled that it is only the Assessing Officer whose opinion with respect to the income escaping assessment would be relevant for the purpose of reopening of closed assessment. It is, of course true, as held by the decisions of the Apex Court in the case of P.V.S.Beedies Pvt. Ltd. (supra) and Indian & Eastern Newspaper Society (supra), if the audit party brings certain aspects to the notice of the Assessing Officer and thereupon, the Assessing Officer forms his own belief, it may still be a valid basis for reopening assessment. However, in the other line of judgment noted by us, it has clearly been held that mere opinion of the Audit Party cannot form the basis for the Assessing Officer to reopen the closed assessment that too beyond four years from the end of relevant assessment year."

13. In the result, petition is allowed. Impugned notice for reopening dated 26.03.2012 is set aside. Petition is disposed of.

(AKIL KURESHI, J.)

(BIREN VAISHNAV, J.)

ANKIT