**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION NO. 1641 of 2015**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE AKIL KURESHI**

**and**

**HONOURABLE MR.JUSTICE A.J. SHASTRI**

==========

| | | |
|---|---|---|
| 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 ? | |

==========

ELECON ENGINEERING COMPANY LTD....Petitioner(s)

Versus

ASSISTANT COMMISSIONER OF INCOME TAX - ANAND CIRCLE &

1....Respondent(s)

==========

Appearance:

MR RK PATEL, MR BD KARIA WITH MR DARSHAN R PATEL ADVOCATE for the Petitioner(s) No. 1

MR KM PARIKH, ADVOCATE for the Respondent(s) No. 1 - 2

==========

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
**HONOURABLE MR.JUSTICE A.J. SHASTRI**



http://www.itatonline.org

**Date : 30,31/08/2016**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. The petitioner has challenged a notice dated 29.3.2014 by which the respondent no.1 Assessing Officer sought to reopen the assessment of the petitioner for the assessment year 2009-2010.

2. Brief facts are as under. The petitioner is a company registered under the Companies Act and is engaged in manufacturing and other related businesses. For the assessment year 2009-2010, the petitioner had filed the return of income declaring book profit of Rs.8.73 crores (rounded off) for the purpose of section 115JB of the Income Tax Act, 1961 ("the Act" for short) and offered tax at the prescribed rate on such book profit. The Assessing Officer took the return under scrutiny. After detailed examination of various documents, he framed assessment under section 143(3) of the Act on 29.12.2011 assessing the petitioner's gross income at Rs.61.28 crores (rounded off).

3. To reopen such assessment, the Assessing Officer issued impugned notice which, as can be seen, was done within a period of four years from the end of relevant assessment year. In order to do so, he had recorded the following reasons :

WEB COPY


http://www.itatonline.org

"Reasons for issue of notice u/s. 148 of the IT Act, 1961

In this case, the assessment was finalized u/s.143(3) on 29/12/2011 assessing the total income at Rs.61,10,65,280/-.

1. There were information with the department that Shri Ashwin Kumar B Patel, has sold immovable property exceeding Rs. 3O Lakhs & more. As a consequence to the enquiry conducted by ITO Ward-2 Anand, certain information regarding the assessee Elecon Engineering Ltd. has come to his knowledge, The Income Tax Officer, Ward-2. Anand forwarded the said information alongwith documents that during the year under consideration, the assessee had executed "exchange sale agreement" dated 17/11/2008, which shows that the assessee has transferred the land at survey No.159 and 155 having 0.63.93 hector amounting to Rs.65,82,000/- to Shri Ashwinbhai B. Patel. The land being transferred falls under the provision of Section 2(47) of the IT Act and therefore the assessee is liable for capital gain tax. As the assessee has not disclosed any capital gain on such transfer of land, the capital gain arisen on account of such transfer of land requires to be taxed in the hands of the assessee.

2. From the records, it is noticed that the assessee revised its income to Rs.58,03,61,730/- on 29.03.2011 against original income of Rs. 58,97,12,507/-. The reduction of Rs. 71,60,540/- was on account of withdrawal of interest on income tax refund and Rs. 21,90,237/- was on account of depreciation claimed over and above the depreciation claimed in the original return, It is noticed that the interest was received by the assessee in A.Y. 2009-10 whereas withdrawal of interest was made in A.Y. 2010-11. As such, the assessee has wrongly reduced its interest income by Rs.71,60,540/- and is requires to be added to the income of the assessee.


http://www.itatonline.org

It is also noticed that in the revised return, the assessee has claimed excess depreciation of Rs.21,90,237/- out of which an amount of Rs.10,02,618/- (Rs.9,23,898 + 78,720) was on account of capitalization of building renovation expenditure as per assessment for A.Y.2007-O8 and capitalization of building repair expenditure as per assessment order A.Y. 2006-07 respectively. The remaining amount of Rs.ll,87,619 (Rs. 21,90,237 - 10,02,618) was on account of increase in opening WDV of various assets which was at variance from the same being reported by the CA in the 3CD report. Therefore the said excess depreciation of Rs.11.87,619/- was incorrectly claimed by the assessee and requires to be disallowed.

3 From the records for A.Y. 2009-10 it was noticed that the assessee has received total interest of Rs.2,00,59,230/- being interest on income tax refund and assessee has deducted interest u/s.234B of Rs.31,39,972/- from this interest income. It was stated by the assessee that interest paid u/s 234B in earlier assessment years is being adjusted. As income tax payment is not an allowable expenditure, adjustment of interest paid u/s 234B against interest income would tantamount to allowance of deduction for payment of income tax. As Such, its adjustment was required to be disallowed.

4. On verification, it is noticed that the assessee has claimed depreciation of Rs.15,47,30,488/- (Rs 13,79,30,488/- being 80% normal depreciation on wind mill + Rs. 3,09,46,098/- being 20% additional depreciation) on the addition of assets in the form or wind turbine generators (WTG) of Rs 15,47,30.488/- prior to 1 Oct 2008. It was also noticed that the investment in assets contained three items viz i. windmill of Rs 13,79,30,488/- (added on 30 Sept 2008). ii. Rs 84,00,000/- of power evacuation facility for 4 nos windmills & Rs.84,00,000/- of power evacuation facility for 4 nos windmills (added on 30


http://www.itatonline.org
HC-NIC Page 4 of 33 Created On Thu Dec 08 11:59:14 IST 2016

Sept 2008). It was further noticed that, there was no opening balance of WTC as on 1st Apr 2008. The assessee also did not purchase any WTG during the year and it manufactured only 2 WTG during the year which too were sold during the year. This indicates that 4 WTG which were claimed to be commissioned in earlier years were not commissioned in those years and assessee commissioned those in this AY 2009-10 on 30 Sept 2008. This is also substantiated from the fact that assessee has claimed expenditure of Rs.84,00,000/- on power evacuation facility for 4 windmills added on 1st Apr 2008 and again claimed expenditure of Rs.84,00,000/- on power evacuation facility for 4 windmills added on 30 Sept. 2008. In view of this no deprecation/ additional deprecation was allowable on claimed expenditure of windmill of Rs.13,79,30,488/- and Rs.84,00,000/- on power evacuation facility for 4 windmills added on 30th Sept 2008. Accordingly, the excess claim of deprecation of Rs.14,63,30,488/- requires to be disallowed.

5. It is noticed that the assessee has claimed addition of Rs.4,68,000/- being Turbo Ventilators on 11 Mar 2009, Rs. 59, 70,769/-being Turbo Ventilators with FRP base sheet on 11 Mar 2011 and Rs.2,34,000/- on 16 July 2008 being wind operating device. The assessee claimed deprecation of Rs 27,62,707/- @ 80% (Rs. 2575507 + 1,87,200) and additional deprecation @ 20% of Rs.6,90,677/-. Since, these machinery have not been included in the list of Appendix I of the Rules in the category of energy saving devices eligible for depreciation @ 80 percent, the claim of depreciation at the rate applicable to energy saving devices is not allowable. Instead, depreciation is allowable at the rate of 15 % as it is plant and machinery. Accordingly the excess claim of depreciation/additional depreciation amounting to Rs.22,44,700/-requires to be disallowed.

6. It is noticed that the assessee has claimed expenditure of Rs.10,32,241/-being payment of notified area tax & the


http://www.itatonline.org

said receipt was issued in the name of M/s. Emtici Hotel Resort. Since the receipt of payment was not issued in the name of assessee, it indicates that it is not owned by assessee but apparently by Emtici Engineering Ltd. (sole distributor of products of the assessee). The claim of said expenditure of Rs.10,32,241/- is not an allowable expenditure as it pertains to the other person. Accordingly, said expenditure of Rs.10,32,241/- requires to be disallowed.

7. The assessee has claimed payment of freight Charges amounting to Rs. 20,34,642/- and made deduction of TDS amounting to Rs. 1153/-. It was noticed that TDS was required to be made at the lower rate of 0.05% on the basis of lower deduction certificate issued by ITO (TDS) Ward 57(1) Kolkata. It was also noticed from the certificate that this lower deduction was applicable only for Rs. 1 lakh in respect of payment to be made by assessee. Therefore on payment of Rs. 19,34,642/- (Rs.20,34,642/- Rs.1,00,000/-) the TDS was required to be made at normal rate. Thus, after giving credit of TDS made by the assessee, it is noticed that assessee had not made TDS in respect of payment of Rs.18,86,230/-. Accordingly claim of expenditure of Rs.18,86,230/- is not an allowable expenditure in view of provisions of section 40(a)(ia) of the IT Act and requires to be disallowed.

WEB COPY

8. On examination, it was found that while computing disallowance u/s14A, the assessee excluded interest payment on term loan, vehicle loan etc. from the total interest payment amount and calculated disallowance of Rs.34.36,054/-. As per provisions of section 14A of the IT Act read with rule 8D(ii) proportionate interest expenditure is to be disallowed in the ratio of average investment to the average total assets. However, there is nothing in rules to exclude interest pertaining to the term loans for computation of disallowance u/s.14A of the IT Act. As per


http://www.itatonline.org

rule 8D of the IT Act, the disallowance u/s. 14A worked out to Rs.67,96,000/- as against disallowance of Rs.34,36,054/- computed by the assessee which resulted in short disallowance of Rs.33,59,946/- which requires to be disallowed.

9. On verification, it is noticed that the assessee has made payment of export commission totalling to Rs.1,91,15,182/- to Non residents (as given below) without making TDS as per the provision of section 195(1) of the Act in view of circular No.786 dated 07/02/2000.

| Name | Amount |
|---|---|
| Elecon Singapore PET Ltd. | 10259763 |
| Elecon Middle East FZCO | 8023870 |
| Elecon Engineerin (Suzhou) Ltd | 831549 |
| total | 19115182 |

Further such expenditure without deduction of TDS was allowed by the department in view of CBDT circular No.23 dated 23/07/1969 and circular No. 786 dated 07/02/2000. These circulars wee withdrawn with immediate effect by CBDT vide circular No.7 dated 22/10/2009 i.e before the date of finalization of the assessment. In these circumstances the assessee was required to make TDS on export commission payment of Rs.1,91,15,182/-. As the assessee has not made any TDS on such payments, the said expenditure requires to be disallowed u/s. 40(a)(ia) of the Act.

In view of the above facts & circumstances, I have reason to believe that the income as mentioned above chargeable to tax has escaped assessment within the meaning of sec.147 of the Income tax act, 1961 for the assessment year 2009-10. I therefore issue notice u/s. 148 of the Act for AY 2009-10 to the assessee."


http://www.itatonline.org

4. For the convenience, we may summarise these reasons as under :

(1) The department received the information that one Ashwin Kumar B. Patel sold immovable property to the assessee. The Assessing Officer of Ashwin Kumar B. Patel forwarded this information to the assessee's Assessing Officer, upon which, it was learnt that the assessee had transferred its land to Ashwin Kumar B. Patel for Rs.65.82 lacs (rounded off) but had not offered the gain from such sale to capital gain tax.

(2a) The assessee had revised its income by reducing Rs.71.60 lacs (rounded off) on account of withdrawal of interest. Such interest was received during the period relevant to assessment year 2009-2010 whereas interest was withdrawn during the assessment year 2010-2011. The assessee therefore, wrongly reduced the interest income by Rs.71.60 lacs.

THE HIGH COURT OF GUJARAT WEB COPY

(2b) The assessee had also revised the claim of depreciation of Rs.21.90 lacs (rounded off), out of which Rs.11.87 lacs (rounded off) was on account of increase in opening WDV of various assets which was at variance with the report made by the Chartered Accountant in Form-3CD.

(3) The assessee had received total interest of Rs.2.00 crores (rounded off) on the income tax refund, against which, the assessee had paid interest of Rs.31.39 lacs


http://www.itatonline.org

(rounded off) under section 234B of the Act, which was adjusted against the interest income which was not allowable.

(4) The assessee had claimed depreciation of Rs.15.47 crores(rounded off) on wind turbine generators. The assessee claimed that these were commissioned on 30.9.2008. It was noticed that no power evacuation facility for four windmills was added as on 30.9.2008.

(5) The assessee had claimed depreciation on turbo ventilators as energy saving devices at 80% of the investment. These machines were not included in the list of qualified machinery for higher depreciation and that higher depreciation was therefore, wrongly claimed.

(6) The assessee had claimed expenditure of Rs.10.32 lacs(rounded off) towards payment of notified area tax. It was noticed that receipt for payment was not issued in the name of the assessee, but one M/s. Emtici Hotel Resort. Since the expenditure pertained to some other entity, such claim was not allowable.

(7) The assessee had paid freight charges of Rs.20.34 lacs(rounded off) and deducted tax at source of Rs.1153/- at the rate of 0.05% on the basis of certificate issued by ITO, Calcutta, which was applicable only for payment upto Rs.1 lac. The assessee therefore, had to deduct tax at normal rate for remaining amount of Rs.19.34 lacs (rounded off) which was not done and such expenditure was therefore, to be disallowed under section 40(a)(ia) of


http://www.itatonline.org
HC-NIC Page 9 of 33 Created On Thu Dec 08 11:59:14 IST 2016

the Act.

8) The assessee had earned dividend income which was exempt from payment of tax. The expenditure incurred for earning such income was therefore, to be disallowed in terms of section 14A of the Act. According to the Assessing Officer, such disallowance computed as provided in rule 8D worked out to Rs.67.96 lacs(rounded off) as against Rs.34.36 lacs (rounded off) computed by the Assessing Officer.

9) The assessee had paid export commission of Rs.1.91 crores(rounded off) to non residents without deducting the tax at source. Such expenditure was allowed by the Assessing Officer in the order of assessment relying on CBDT circulars dated 23.7.1969 and 7.2.2000. However, before finalisation of assessment, these circulars were withdrawn by the CBDT by circular dated 22.10.2009. Such payment was therefore, required to be disallowed under section 40(a)(ia) of the Act.

5. The petitioner raised detailed objections vide letter dated 23.9.2014 to the Assessing Officer to the notice of reopening, raising multiple contentions including that these issues were examined by the Assessing Officer during the original assessment. In many cases, it cannot be stated that income chargeable to tax had escaped assessment and further that several reasons were based on incorrect factual premise. These objections were however, rejected by Assessing Officer by order dated 11.12.2014.

THE HIGH COURT OF GUJARAT WEB COPY


http://www.itatonline.org

6. In background of such materials on record, learned counsel Shri R.K. Patel for the petitioner taking us painstakingly through the documents contended that the Assessing Officer during the original assessment had raised multiple queries in writing. All such queries were replied by the Assessing Officer. Examination of these questions and answers would establish that all grounds on which the Assessing Officer now wishes to reopen the assessment were minutely scrutinised by the Assessing Officer.

Counsel submitted that there was no new material available on record which would permit the Assessing Officer to reexamine such issues.

Counsel submitted that some of these grounds were legally also invalid and untenable.

Counsel lastly contended that the entire exercise of reopening is being undertaken at the behest of the audit party. Notice of reopening has not been issued by the Assessing Officer on his own account but was under compulsion by audit party to reopen the assessment. The petitioner's objection in this regard were not dealt with by the Assessing Officer. The specific averments made in the petition have not been denied by the respondents.

Learned counsel placed reliance on the decision of this Court in case of **Gujarat Power Corporation Ltd. v. Assistant Commissioner of Income Tax** reported in (2013) 350 ITR 266 (Guj), to contend that once the Assessing


http://www.itatonline.org

Officer examines certain claim during the assessment proceedings in the order of assessment, but gives no reasons for not disturbing the claim of the Assessing Officer, would not permit the Assessing Officer to reopen the assessment on such ground.

In the context of assessment being reopened at the instance of audit party, counsel relied on decision in case of **Cadila Health Care Ltd. v. Assistant Commissioner of Income Tax** reported in 355 ITR 393, to contend that audit objection by itself would not be a tangible material to enable the Assessing Officer to form a belief that income chargeable to tax had escaped assessment. In other words, unless the Assessing Officer has himself formed a belief on the basis of tangible material that income chargeable to tax has escaped assessment, reopening would not be permissible.

7. On the other hand, learned counsel Shri K.M. Parikh for the department would highlight that the notice for reopening has been issued within a period of four years from the end of relevant assessment year. The requirement that income chargeable to tax having escaped assessment, on account of the assessee failing to disclose true and full material facts, therefore, would not apply. The Assessing Officer has recorded detailed reasons demonstrating how the income chargeable to tax has escaped assessment. Even if a particular claim was examined by the Assessing Officer during the scrutiny assessment, if there was failure on part of the assessee to disclose true and full facts which led to a wrong conclusion, reopening of the assessment


http://www.itatonline.org

would be permissible. He contended that the Assessing Officer had independently applied his mind and recorded reasons and not under compulsion of the audit party.

8. Having thus heard learned counsel for the parties and having perused the materials on record, we may split our discussion in two parts. At first stage, we would examine whether on the grounds urged before us by the counsel for the petitioner on the validity of reasons recorded, reopening would be permissible. In the later portion, we would address the question of assessment being reopened at the instance of the audit party.

9. Before undertaking such exercise, we may refer to the decision of this Court in case of **Gujarat Power Corporation Ltd.**(supra), in which in context of reopening of assessment within a period of four years, it was held that during the assessment, if certain claim is not examined by the Assessing Officer, it cannot be stated that he had formed an opinion with respect to such a claim. If therefore, the Assessing Officer has tangible materials on the basis of which he formed a belief that income chargeable to tax has escaped assessment, it would be open for him to do so in exercise of powers under section 147 of the Act. It was held that such tangible materials need not be alien to the record. While saying so, the Court also considered the question of accepting certain claim of the assessee after scrutiny but without recording reasons in the final order of assessment. In this context, it was held and observed as under :


http://www.itatonline.org

"41. The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be re-opened by the same authority. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interest of the revenue, therefore, such special provisions are made under section 147 of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to entire original assessment, of course at the hands of the revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that power to reopening cannot be equated with review.

42. Bearing in mind these conflicting interests, if we revert back to central issue in debate, it can hardly be disputed that once the Assessing Officer notices a certain claim made by the assessee in the return filed, has some doubt about eligibility of such a claim and therefore, raises queries, extracts response from the assessee, thereafter in


http://www.itatonline.org

what manner such claim should be treated in the final order of assessment, is an issue on which the assessee would have no control whatsoever. Whether the Assessing Officer allows such a claim, rejects such a claim or partially allows and partially rejects the claim, are all options available with the Assessing Officer, over which the assessee beyond trying to persuade the Assessing Officer, would have no control whatsoever. Therefore, while framing the assessment, allowing the claim fully or partially, in what manner the assessment order should be framed, is totally beyond the control of the assessee. If the Assessing Officer, therefore, after scrutinizing the claim minutely during the assessment proceedings, does not reject such a claim, but chooses not to give any reasons for such a course of action that he adopts, it can hardly be stated that he did not form an opinion on such a claim. It is not unknown that assessments of larger corporations in the modern day, involve large number of complex claims, voluminous material, numerous exemptions and deductions. If the Assessing Officer is burdened with the responsibility of giving reasons for several claims so made and accepted by him, it would even otherwise cast an unreasonable expectation which within the short frame of time available under law would be too much to expect him to carry. Irrespective of this, in a given case, if the Assessing Officer on his own for reasons best known to him, chooses not to assign reasons for not rejecting the claim of an assessee after thorough scrutiny, it can hardly be stated by the revenue that the Assessing Officer can not be seen to have formed any opinion on such a claim. Such a contention, in our opinion, would be devoid of merits. If a claim made by the assessee in the return is not rejected, it stands allowed. If such a claim is scrutinized by the Assessing Officer during assessment, it means he was convinced about the validity of the claim. His formation of opinion is thus complete. Merely because he chooses not to assign his reasons in the assessment order would not alter this position. It may be a non-reasoned order but not of


http://www.itatonline.org

acceptance of a claim without formation of opinion. Any other view would give arbitrary powers to the Assessing Officer.

43. We are, therefore, of the opinion that in a situation where the Assessing Officer during scrutiny assessment, notices a claim of exemption, deduction or such like made by the assessee, having some prima facie doubt raises queries, asking the assessee to satisfy him with respect to such a claim and thereafter, does not make any addition in the final order of assessment, he can be stated to have formed an opinion whether or not in the final order he gives his reasons for not making the addition."

10. With these general principles in mind, we may refer to the materials on record in connection with each individual ground recorded by the Assessing Officer in his reasons.

Ground (1)

11. Ground No.1 which we may recall was with respect to capital gain not showed by the assessee on transfer of a land to Shri Ashwinbhai B. Patel for a sum of Rs.65.82 lacs. From the reasons it may appear that this aspect was brought to the notice of the Assessing Officer by the Assessing Officer of Shri Ashwinbhai B. Patel. A copy of this letter dated 24.10.2013 is also produced at Annexure-R/1. This letter refers to exchange sale agreement dated 17.11.2008 between Shri Ashwinbhai B. Patel and the assessee and also refers to exchange sale agreement dated 12,3,2009 in which earlier arrangement was cancelled.

During the assessment, in his letter dated 30.6.2011,


http://www.itatonline.org

in this respect, the Assessing Officer had raised the following query :

"22. As per the copy of ITS details report dated 15/04/2011 enclosed herewith, you have purchased units of mutual funds of Rs.119000000/- + Rs109500000/-, purchased immovable property of Rs.5072600/-, sold immovable property for Rs.66340600/- during the P.Y. relevant to AY under consideration. You are requested to get verified the sources of investment in mutual fund and the immovable property transactions from your regular books of accounts else adverse inference will be taken in the matter."

This query was replied by the Assessing Officer under his letter dated 2.12.2011 as under :

"Reply to point No.22
Sale and purchase of immovable property:
During the year we have made two different agreements for mutual exchange of land. Both these agreements are registered on 17-11-2008 with the office of sub registrar, Anand vide registration number 8192 and 9194. Subsequently, both these agreements for mutual exchange of land have been cancelled on 12-03-2009 and registered with the office of sub registrar, Anand vide registration number 1667 and 1669. As such there was no legal and valid transfer during the year and therefore cognizance of this transfer is not required. It is therefore, submitted that we have not made any transaction for sale of land on this count during the year. We enclose herewith copies of all above agreements. Kindly refer to Annexure-37."

The copies of the agreements mentioned in this reply were also produced. Thus during the original assessment


http://www.itatonline.org

itself, the Assessing Officer had desired to know from the assessee the details of all transactions of immovable properties. In fact, in the queries itself, the Assessing Officer pointed out that the assessee had purchased immovable property of Rs.50.72 lacs and sold such property for Rs.66.34 lacs. It was in response to such a query that the assessee replied pointing out that two different agreements of mutual exchange of land were executed on 17.11.2008. Subsequently, both these agreements were cancelled by a deed dated 12.3.2009 which was also registered. Thus there was no legal or valid transfer of the land during the year under consideration and therefore, the assessee had not made any transaction of sale of land. It was after such scrutiny that the Assessing Officer framed assessment wherein no demand of capital gain tax was raised. If the view of the Assessing Officer was that once the land was sold through a exchange deed, the assessee was liable to pay capital gain, irrespective of the subsequent cancellation of the deed, he ought to have taxed such income in the order of assessment. The fact that the assessee had executed such documents and not offered any income of capital gain to tax was thus within the knowledge of the Assessing Officer. Without there being anything additional, such issue cannot be reexamined in exercise of powers of reassessment. As noted, the letter dated 24.10.2003 of the Assessing Officer of Shri Ashwin B. Patel may prima facie, give an impression that such facts were being brought to the notice of the present Assessing Officer for the first time, but as noted, the queries raised by the Assessing Officer during the original assessment and the replies of the


http://www.itatonline.org

petitioner would show that all these details were very much part of the record.

Ground (2a)

12. Ground (2a) pertains to reduction of Rs.71.60 lacs on account of withdrawal of interest. According to the Assessing Officer, such interest was paid during the assessment year 2009-2010 and was withdrawn in the later year i.e assessment year 2010-2011. His objection therefore, appears to be that the assessee could not have reduced such income from computation of the income for assessment year 2009-2010. For the said assessment year therefore, amount of Rs.71.60 lacs is required to be added.

We have perused the queries raised by the Assessing Officer with respect to revised returns and two claims included therein namely, of reduction of interest income and the additional depreciation claimed by the assessee. As would be apparent, while we discuss the question of additional depreciation in ground (2b), the Assessing Officer had not inquired into the nature of reduction of interest of Rs.71.60 lacs. It may be that such interest though paid during the assessment year 2009-2010 was later on withdrawn. Withdrawal of the interest happened during the assessment year 2010-2011. The Assessing Officer therefore, would be prima facie, correct in questioning the assessee in reducing such interest for the assessment year in question namely, 2009-2010. Computation of income being specific to the period pertaining to the previous year relevant to the assessment year under consideration, a legal question would arise


http://www.itatonline.org
HC-NIC Page 19 of 33 Created On Thu Dec 08 11:59:14 IST 2016

whether for a later withdrawal of interest, the assessee could have claimed effect thereof during the earlier year. Being at a stage where the assessment is yet to be framed, we would not give our conclusive opinion on this aspect. Suffice it to say, this issue was not examined by the Assessing Officer in the original assessment.

Ground (2b)

13. Ground (2b) pertains to higher depreciation of Rs.11.87 lacs made by the assessee. According to the Assessing Officer, in the revised return, out of additional depreciation of Rs.21.90 lacs, Rs.11.87 which was on account of increase in opening WDV did not match the figures contained in the report of the Chartered Accountant. In this context, we may notice that in the letter dated 30.6.2011, the Assessing Officer had raised the following queries :

"12. Details of addition in the fixed assets with copies of a/c. and copies of purchase bill/invoice of above Rs.1000000/- Please furnish the evidences of putting the assets into use in respect of the new/additional fixed assets added in the month of March, 2008 and having the addition value of Rs.5000000/- and above and other new/ additional fixed assets having the addition value of Rs.1 crore and above.

13. Please justify your claim of additional deprecation with cogent & sufficient evidences."

In response to such query, the assessee under letter dated 2.12.2011 replied as under :


http://www.itatonline.org

"8. Cognizance of revised return for the year.
We have filed revised return for the year on 29-03-2011. We have submitted a copy of computation of income with full details for the revised return filed. We have also submitted detailed note (Note No.9) stating reasons for filing revised return. In such notes we have also given details of changes made to total income while filing revised return. We enclose herewith a copy of complete set submitted with your kind office on 18-04-2011. Kindly refer to Annexure-39."

The query raised by the Assessing Officer thus was with respect to the addition made by the assessee to the fixed assets and to justify the claim of additional depreciation concerning the same. The entire focus of the Assessing Officer was on assessee's claim of depreciation on newly acquired assets. It had no relation to the interest income of Rs.71.60 lacs sought to be reduced by the Assessing Officer from the computation of income. This extension of discussion was made in connection with previous issue where we have already concluded that with respect to interest income, the Assessing Officer had made no scrutiny.

Having said that, insofar as ground (2b) is concerned, we have no hesitation in coming to the conclusion that entire claim of depreciation in whatever form presented by the assessee was under examination. The assessee had replied to such a question in detail giving sufficient materials. If the Assessing Officer was not satisfied he could have either raised further query or disallowed the claim in toto. Not having done that same cannot be reexamined in exercise of powers of reassessment.


http://www.itatonline.org
HC-NIC Page 21 of 33 Created On Thu Dec 08 11:59:14 IST 2016

Ground (3)

14. As per ground (3), the assessee had received total interest of Rs.2.00 crores against which it had paid interest to the department to the tune of Rs.31.39 lacs which could not have been adjusted against the interest income. In this respect counsel for the petitioner pointed out that though such adjustment was claimed in the return, the Assessing Officer disallowed the same. He took us through the order of assessment and pointed out that such amount of Rs.31.39 lacs was not allowed to be reduced from the interest income. Learned counsel for the Revenue was unable to controvert this aspect. This ground thus was based on inaccurate factual premise.

Ground (4)

15. Ground no.(4) pertains to depreciation of windmill. The assessee had claimed such depreciation for a total investment of 15.47 crores. The Assessing Officer was of the opinion that four wind turbine generators were not commissioned on 30.9.2008. The depreciation relatable to such investment was not allowable.

THE HIGH COURT OF GUJARAT
WEB COPY

Under letter dated 30.6.2011, the Assessing Officer, as noted, in para 12 and 13 called for full details of fixed assets above Rs.10 lacs acquired during the year under consideration and also to justify the claim of additional depreciation on such investment. With respect to wind mills, the assessee in reply dated 11.7.2011 had contended as under :


http://www.itatonline.org

"5. Reply to your point No.13:

Claim for additional deprecation.

Claim for additional deprecation is made under section 32(1)(iia) on the eligible additions during the year. Such claim is made on various items falling within the block of plant and machinery. Details of assets on which additional deprecation is claimed are as per the attached list of assets.

a. Plant and Machinery
b. Energy Saving Device.
c. Wind Turbine Generators-Windmills.
Justification for claim of additional deprecation is as under.

xxx

b. Energy Saving Device.

Energy saving device is covered under the item (3)(8)(ix) under the heading of machinery and plant. As provided in section 32(1)(iia) additional deprecation is allowed in case of machinery and plant. It is submitted that it is fulfilling all the conditions narrated in section 32(1)(iia) and therefore it is eligible for additional deprecation.

Xxx

Considering the above it is submitted that the wind turbine generators are eligible for additional deprecation. It can be seen that there is no such condition that the particular machinery or plant is required to be used in manufacture or production of the item which is being manufactured by the assessee. What is required is that the assessee must be engaged in manufacture or production of any article or thing. It is therefore submitted that the additional

WEB COPY


http://www.itatonline.org

deprecation claimed on wind turbine generators is allowable."

It was after such detailed scrutiny the Assessing Officer had accepted the claim. From the above materials, it can be seen that the assessee had pointed out the factum of installation and commission of wind power turbines and the details regarding why the depreciation and additional depreciation was available on such investment. This issue was also therefore, thoroughly scrutinised.

Ground (5)

16. Ground (5) pertains to depreciation at a higher rate on the energy saving device. According to the Assessing Officer, turbo ventilators installed by the assessee did not qualify as energy saving device eligible for higher depreciation. In this respect also, we may refer to the queries at page 12 and 13 in the letter dated 30.6.2011 of the Assessing Officer which included the investment of fixed assets and justification for higher depreciation. In the context of energy saving device, the assessee had in reply dated 11.7.2011 along with a detailed justification for depreciation on wind turbine generators brought full facts of the energy saving device to the notice of Assessing Officer and further contended as under :

"b. Energy Saving Device.

Energy saving device is covered under the item (3)(8)(ix) under the heading of machinery and plant. As provided in section 32(1)(iia) additional deprecation is allowed in case


http://www.itatonline.org

of machinery and plant. It is submitted that it is fulfilling all the conditions narrated in section 32(1)(iia) and therefore it is eligible for additional deprecation."

Thus it was after a minute scrutiny that Assessing Officer did not disturb the income of higher depreciation on this investment. Reopening on such basis would not permissible.

Ground (6)

17. Ground (6) pertains to expenditure of Rs.10.32 lacs towards notified area tax. It is not in dispute that such tax was paid by the assessee but the receipt was issued in favour of M/s. Emtici Hotel Resort. The Assessing Officer was therefore, of the opinion that such expenditure could not have been claimed by the assessee.

31.08.2016

In this respect in letter dated 30.6.2011, the Assessing Officer had raised the following queries :

"As per Annexure-G(1) and G(2) (regarding payment of liability u/s 43B) to balance sheet, it is mentioned that various liabilities prima facie attracting provisions of section 43B have been paid on or before the due date of filing of return u/s.139(1) of the Act. Please furnish the evidence for verification of this aspect."

Thus the Assessing Officer desired to get full information from the assessee regarding the payments which would be covered under section 43B of the Act, which was made before the due date of filing of the returns. In reply to such a query, the assessee under the said letter


http://www.itatonline.org

dated 11.7.2011 conveyed as under :

"Reply to your point No.9:
Proofs for payment of liabilities attracting provisions of section 438.
As reported in Annexure-G(1) of Tax Audit Report payment have been made during the financial year and Annexure-G(2) of Tax Audit Report payment of some of the liabilities have been made before due date of filing of return u/s.139(1) of the Act. We submit herewith proofs for payment of such liabilities. Kindly refer to Annexure-18."

Thus the fact that the assessee had made such payment before the due date of filing the returns and the Assessing Officer during the assessment proceedings scrutinised such issue are not in dispute. That being the position it would not be open for the Assessing Officer to revisit such a claim in reassessment.

Ground (7)

18. Ground (7) pertains to short deduction of tax at source on freight charges of Rs.20.34 lacs. According to the Assessing Officer, deduction at lower rate of 0.05% was limited upto payment of Rs. 1 lac. Remaining amount of Rs.19.34 lacs would invite higher rate of deduction.

In this respect in the letter dated 30.6.2011, the Assessing Officer had required the following information :

"6. In respect of the following expenses please furnish party wise details along with full name and complete addresses. PAN & TDS deducted and/or paid, (as may be applicable to the relevant exp.)


http://www.itatonline.org

xxx
h. Packing, forwarding & Distribution exp. Of above Rs.1000000/-."

In response to such a question, the assessee in the reply dated 11.7.2011 conveyed as under :

"Reply to your point No.6(h)
Details of Packing, forwarding & Distribution expo
We enclose herewith details of packing forwarding& Distribution expenses. Kindly refer to Annexure-15."

We may further notice that in the order of assessment, the Assessing Officer had made a detailed discussion on the payment made to clearing and forwarding agent without TDS and whenever necessary, Assessing Officer made disallowance. Thus the entire issue was examined by the Assessing Officer during the scrutiny assessment.

Ground (8)

19. Ground (8) pertains to disallowance of interest expenditure under section 14A of the Act read with Rule 8D of the Income Tax Rules. According to the Assessing Officer, such disallowance was short by Rs.33.59 lacs. In this respect, the Assessing Officer in his letter dated 30.6.2011 had required the following information from the assessee :

"20. Details of income claimed exempt with nature and expenditure incurred for earning such income. Please furnish the working of disallowance of expenditure in respect of exempt income in terms of provisions of section


http://www.itatonline.org

14A of the Act rwr 8D."

The assessee replied to such query in the letter dated 11.7.2011 as under :

"8. Reply to your point no.20
Income claimed exempt and expenditure incurred thereon. During the year an amount of Rs.71,77,309/- is earned on account of dividend. This income is claimed as exempt u/s.10(34). As shown in detailed calculation and reported in Tax Audit Report, an amount of Rs.34,36,054/- has been disallowed under rule 8D while filing return of income."

Thus this issue also was pointedly in focus before the Assessing Officer during the scrutiny assessment.

Ground (9)

20. Ground (9) pertains to non deduction of tax on export commission of Rs.1.19 crores paid by the assessee. The Assessing Officer noted that such expenditure was allowed without deduction of tax in view of the earlier circulars of CBDT dated 23.7.1969 and 7.2.2000. These circulars are however, withdrawn with immediate effect under circular dated 22.10.2009. In letter dated 30.6.2011, the Assessing Officer required the following details from the assessee :

"6. In respect of the following expenses please furnish party wise details along with full name and complete addresses. PAN & TDS deducted and/or paid (as may be applicable to the relevant exp.)"

In response to such a question in the letter dated


http://www.itatonline.org

11.7.2011, the assessee made the following disclosures :

"2. Reply to your point No.6(i)

Details of commission & Brokerage Expenses.

We enclose herewith details of Commission & Brokerage Expenses. Kindly refer to Annexure-7

Details of commission paid to non resident or outside India is also submitted with the above details. It is submitted that the commission paid to a non resident outside India is not liable to TDS in view of provisions of the Act r.w.s. Circular No.786 dated 07-02-2000. A copy of the said circular is attached herewith marked Annexure-8."

Thus the assessee had while disclosing that foreign commission was paid to non residents, no TDS was deducted in view of circular dated 7.2.2000. The assessee produced copy of such circular. It was after such inquiry that Assessing Officer made no disallowance, as can be seen from the reasons recorded on account of such circular of the CBDT. It is doubtful whether later circular of CBDT could have been pressed in service to fasten the liability on account of non deduction of tax while making payment which was being done at a time when later circular was not in existence. Quite apart from this legal question, undisputedly, the Assessing Officer was aware about such payments, as was pointed out by the assessee, that no TDS was deducted and the reason why the same was done.

21. The culmination of above discussion would be that all issues except ground (2a) recorded by the Assessing Officer in the reasons, there was detail scrutiny during the


http://www.itatonline.org

original assessment. On such issues, therefore, reopening even within a period of four years would not be permissible. However, as is well settled, even if one ground succeeds, as in the present case, reopening would have to be permitted. It is in this context, the question of notice of reopening having been issued by the Assessing Officer at the behest of the audit party assumes significance. The law on the point laid down by the Supreme Court in judgement in case of **Commissioner of Income-tax v. P.V.S. Beedies Pvt. Ltd.** reported in (1999) 237 ITR 13 and in case of **Indian and Eastern Newspaper Society v. Commissioner of Income-tax** reported in (1979) 119 ITR 996 is well settled. We also have the decision of this Court in case of **Adani Exports v. Deputy Commissioner of Income Tax** reported in (1999) 240 ITR 224(Guj) on this issue. In case of **Indian and Eastern Newspaper Society** (supra), the Supreme observed that the opinion of the audit party on a point of law could not be regarded as information enabling the Assessing Officer to initiate reassessment proceedings. This aspect was elaborated by Division Bench judgement of this Court in case of **Adani Exports** (supra) observing that it is the satisfaction of the Assessing Officer for the purpose of reopening which is subjective in nature but when the reasons recorded show a nexus between the formation of belief and the escapement of income, a further enquiry about the adequacy or sufficient of the material to such a belief is not open to be scrutinised. However, the decision of the Supreme Court would indicate that though audit objection may serve as an information, the basis on which the ITO can act, ultimate action must depend directly and solely on the formation of belief by ITO on his own, where


http://www.itatonline.org

such information passed on to him by the audit party that income has escaped assessment. In the said case, it was held that Assessing Officer had acted at the behest of audit party and that notice for reopening was therefore, bad in law.

22. In case of **P.V.S. Beedies Pvt. Ltd.**(supra), the Supreme Court held and observed as under :

"We are of the view that both the Tribunal and the High Court were in error in holding that the information given by internal audit party could not be treated as information within the meaning of Section 147(b) of the Income Tax Act. The audit party has merely pointed out a fact which has been overlooked by the Income Tax Officer in the assessment. The fact that the recognition granted to this charitable trust had expired on 22-9-1992 was not noticed by the Income Tax Officer. This is not a case of information on a question of law. The dispute as to whether reopening is permissible after audit party expresses an opinion on a question of law is now being considered by a larger Bench of this Court. There can be no dispute that the audit party is entitled to point out a factual error or omission in the assessment. Reopening of the case on the basis of a factual error pointed out by the audit party is permissible under law. In view of that we hold that reopening of the case under Section147(b) in the facts of this case was on the basis of factual information given by the internal audit party and was valid in law. The judgment under appeal is set aside to this extent."

23. Thus there is clear distinction between a situation where the Assessing Officer acts on an information supplied by the audit party and issues a notice for reopening the assessment. In some cases, we have also


http://www.itatonline.org

noticed that the Assessing Officer is himself convinced that the audit objection do not form valid reasons to form a belief that income chargeable to tax has escaped assessment. He nevertheless, issues a notice for reopening clearly indicating compulsion to do so. In such cases, decision in case of **Indian and Eastern Newspaper Society** (supra) and **Adani Exports** (supra) would squarely apply. However, situations may also arise where the audit party merely brings to the notice of Assessing Officer, a certain element having relation to the income of the assessee. If the Assessing Officer on the basis of such information forms an independent belief that income chargeable to tax has escaped assessment, there is nothing preventing him from exercising power of reassessment, as was held by the Supreme Court in case of **P.V.S. Beedies Pvt. Ltd.**(supra) and also noted in judgement in case of **Adani Exports** (supra). It would therefore, be necessary for us to ascertain in which category the present case would fall. The petitioner has been contending from the outset that the entire exercise was undertaken by the Assessing Officer at the instance of audit party. The denials on these aspects by the Assessing Officer while rejecting the objections and in the reply to this petition were rather muted. Instead of therefore, relying on the pleadings, we had called for the original files to satisfy ourselves. We notice that the audit party had raised several objections to the assessment carried out in case of the assessee and these objections were brought to the notice of the Assessing Officer. The file shows that this was followed by the reasons recorded by the Assessing Officer for issuing the notice. If we compare the audit objections and the reasons recorded, we find that


http://www.itatonline.org

the Assessing Officer has included all objections pointed out by the audit party but has also included one more ground namely, of the escaped capital gain on sale of land by the petitioner to Shri Ashwin Kumar B. Patel. This ground was not part of the audit objection. In our opinion, this would indicate that the Assessing Officer had independently applied his mind and formed a belief that on the grounds mentioned by the audit party in its objection letter and additional ground which is recorded in the reasons, the income chargeable to tax in case of assessee had escaped assessment. We may recall the issue of capital gain tax on sale of land was referred in the letter dated 24.10.2003 by the Assessing Officer of Shri Ashwin Kumar B. Patel. In our opinion therefore, on this ground also, petition must fail.

24. In the result, petition is dismissed.

**(AKIL KURESHI, J.)**

**(A.J. SHASTRI, J.)**

raghu

सत्यमेव जयते
THE HIGH COURT OF GUJARAT
WEB COPY


http://www.itatonline.org