

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 6318 of 2009****For Approval and Signature:****HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI**

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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, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GALA GYMKHANA PVT LTD - Petitioner(s)**Versus****ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE - 4 -
Respondent(s)**

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Appearance :

MR BANDISH SOPARKAR with MRS SWATI SOPARKAR for Petitioner
MRS MAUNA M BHATT for Respondent

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**and****HONOURABLE MS.JUSTICE HARSHA DEVANI****Date : 27/08/2012****ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. The petitioner has challenged a notice dated 25.7.2008 issued by the Assistant Commissioner of Income Tax by which he sought to reopen the assessment of the petitioner for the assessment year 2004-05. The petition arises in the following factual background.

2. The petitioner is a Private Limited Company and is regularly assessed to tax. For the assessment year 2004-05, the petitioner filed its return of income on 01.11.2004 declaring total loss of Rs.6,11,241. Such return was taken in scrutiny. After raising certain queries and eliciting response from the petitioner, the Assessing Officer framed scrutiny assessment under section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 29.9.2006 in which he assessed the petitioner's loss at Rs.5,47,260/-.

2.1 It was this assessment which was framed after scrutiny that the Assessing Officer desired to reopen for which the impugned notice dated 25.7.2008 came to be issued. This is, thus, a case of reopening of assessment within a period of four years from the end of relevant assessment year.

2.2 At the request of the petitioner, the Assessing Officer supplied his reasons for reopening the assessment. Such reasons read as under :

*"Reg. : Gala Gymkhana (P) Ltd.
A. Y. 2004-05*

The Assessee company is engaged in the business of running of Gymkhana & Club. During the course of

assessment proceedings for A.Y. 2005-06, it was noticed by the Assessing Officer that the Assessee company has received Rs.14,12,000 on account of entrance fee from the members and has taken the amount straight to the capital reserve. The Assessing Officer while discussing the issue elaborately in assessment order treated this as transaction and taxed the entrance fee as sale of membership. The Assessee has received the amount of Rs.5,56,000 in A.Y. 2004-05 under the head membership fee (Schedule A of Balance Sheet) and has treated it as capital receipt not offered for taxation. The same being transaction with the members on account of sale of membership is to be taxed in hands of company, because the members are not the share holders. Therefore, there is reason to believe that an amount of Rs.5,56,000 has escaped assessment for A.Y. 2004-05 as the AO has not given any opinion on the same. The assessment is required to be reopened for the above reasons by issue of notice u/s 148."

2.3 The petitioner raised detailed objections under communication dated 30.12.2008 to such reopening. Primarily, the case of the petitioner was that the reasons recorded do not give jurisdiction to the Assessing Officer to reopen the assessment. The Assessing Officer in the original assessment, had examined the issue on which now the reopening is sought to be made. Such attempt, therefore, would be nothing more than a mere change of opinion.

2.4 The Assessing Officer disposed of such objections by his order dated 15.4.2009. The petitioner, thereupon, filed the present petition challenging the notice of reopening.

3. Appearing for the petitioner, learned counsel Shri Soparkar submitted that the reasons recorded do not give jurisdiction to the Assessing Officer to reopen the assessment. During the course of scrutiny assessment, the Assessing Officer

had raised several queries, one of them pertained to the entrance fees received from the members during the year under consideration. Such query was replied by the petitioner under letter dated 16.6.2006 with which full details were annexed separately. Since such documents were not previously produced on record, counsel was permitted to place a copy thereof on record.

3.1 On the basis of such documents, counsel submitted that the question of the entrance fees received from various members during the year under consideration, was at large before the Assessing Officer during the original assessment. The fact that the petitioner received total entrance fees of Rs.5,56,000/- during the year relevant to the assessment year 2004-05, was pointedly brought to the notice of the Assessing Officer. Despite which, he made no addition on such figure in the final order of assessment. He should, therefore, be deemed to have formed an opinion which in absence of any new material, cannot be permitted to be changed.

3.2 Counsel submitted that even if the original query of the Assessing Officer may not be pertaining to the question of treatment of the entrance fees received from the members during the year, the assessee's reply thereto and the material produced along with such reply, was sufficient for the Assessing Officer to tax such income if he was of the opinion that such receipt was of capital nature. Not having done so, it can be stated that the Assessing Officer formed an opinion that such receipt is not taxable. Counsel relied on the decision of the Apex Court in case of **Commissioner of Income Tax v. (1) Kelvinator of India Ltd. & (2) Eicher Ltd.**, reported in

(2010) 320 ITR 561, to point out that even after the amendment in section 147 of the Act with effect from 1.4.1989, the concept of change of opinion is not given a go-bye.

4. On the other hand, learned counsel Ms. Mauna Bhatt for the Department submitted that the assessment previously framed is sought to be reopened within the period of four years from the end of the relevant assessment year. Merely because certain material was on record, therefore, would not prevent the Assessing Officer from reopening the assessment unless it is pointed out that he had in the original assessment, formed any opinion with respect to such an issue. Counsel further submitted that the assessee's letter dated 16.6.2008 did not contain the annexure which is produced by the petitioner before this Court. She produced the original file pertaining to the assessee to demonstrate this aspect. She, therefore, submitted that such details may not be looked into for deciding the present petition.

4.1 Counsel further submitted that in the present case, the Assessing Officer had never examined the taxability of the amounts received by the petitioner from its members towards entrance fees. That being the position, reopening of the assessment within a period of four years should be permitted. Counsel relied on a recent decision of the Division Bench of this Court in case of **Gujarat Power Corporation Ltd. v. Assistant Commissioner of Income Tax** dated 30.7.2012 in Special Civil Application No.29792 of 2007.

5. Having, thus, heard the learned counsel for the parties and having perused the documents on record, we may recall

that the present is a case where assessment is sought to be reopened within a period of four years from the end of relevant assessment year. In that view of the matter, the additional requirement that the income chargeable to tax has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts, would not have to be satisfied. The main question is whether during the original assessment, the Assessing Officer examined the taxability of the receipt and formed an opinion, with or without assigning reasons, with respect to the same.

6. In this context, we may have a closer look at the reasons recorded. The Assessing Officer desires to reopen the assessment on the ground that the assessee received a total sum of Rs.5,56,000/- during the accounting year relevant to the assessment year 2004-05 by way of entrance fees from the members which amount has been taken by the assessee to the capital reserve. While framing assessment for the assessment year 2005-06, the Assessing Officer elaborately discussed the issue and taxed such a transaction treating the entrance fees as sale of membership. He was, therefore, of the opinion that similar treatment ought to have been accorded for the assessment year 2004-05. He, therefore, recorded that he had reason to believe that the amount of Rs.5,56,000/- had escaped assessment for the assessment year 2004-05 as the Assessing Officer has not given any opinion on the same.

7. With this reason in mind, we may peruse the relevant query on which the petitioner has placed much reliance. The Assessing Officer in the original assessment had under a written communication called for several details from the

petitioner, one of them being, *"3. Complete detail of members with IT particulars of members from whom entrance fee were received during the year."*

7.1 In response to such a query, the petitioner replied as under:

"3. Details of members including name, address & telephone numbers from whom the membership fees is received is herewith enclosed. During the year under consideration, we have received Rs.5,56,000/- by way of membership entrance fees."

7.2 Along with such letter dated 16.6.2006, the petitioner placed certain documents before the Assessing Officer. Upon perusal of the original file of assessment, we find that the annexure which has been produced by the petitioner before us along with the said letter dated 16.6.2006, was not filed before the Assessing Officer. The assessee had, however, supplied the names, membership numbers and the telephone numbers and addresses of the members from whom the entrance fees were collected during the year under consideration.

8. From such exchange of information between the Assessing Officer and the assessee, we need to gather whether the question of taxability of a receipt of Rs.5,56,000/- from the members by the petitioner was under consideration by the Assessing Officer. In the question, the Assessing Officer had asked for complete details of members from whom entrance fees were received during the year, along with income tax particulars of such members. From this question, it cannot be

stated that the Assessing Officer desired to examine the taxability of the entrance fees received from such members. The question of treating such entrance fees either as capital receipt or revenue receipt, therefore, was not part of such a query and therefore, the angle of taxability of such a receipt being a receipt of revenue in nature, cannot be stated to be a part of the query raised by the Assessing Officer. It is true that in response to such a question, the assessee in addition to supplying the names, addresses, telephone numbers of some of the members from whom such entrance fees were received, also additionally stated that during the year under consideration, the petitioner had received a sum of Rs.5,56,000/- by way of membership entrance fees. However, such additional statement, cannot change the nature of the Assessing Officer's query. If the inquiry of the Assessing Officer was not with respect to the question of taxability of such a receipt, his action of not taxing such amount without assigning reasons, cannot be seen as an act on his part of having formed an opinion with respect to non-taxability of such an amount.

9. Under the circumstances, we are unable to concur with the submissions of the learned counsel for the petitioner that in the facts of the case, the Assessing Officer must be seen to have formed an opinion with respect to taxability of receipt of Rs.5,56,000/- towards entrance fees. When the notice has been issued by the Assessing Officer within a period of four years from the end of relevant assessment year, and when we find that the Assessing Officer had not formed any opinion in the original assessment with respect to taxability of the amount in question, such notice cannot be stated to be without jurisdiction or invalid.

10. In the result, the petition fails and is dismissed. Notice discharged. Interim relief stands vacated.

[AKIL KURESHI, J.]

[HARSHA DEVANI, J.]

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