

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

**SPECIAL CIVIL APPLICATION No. 8467 of 2003**

**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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**VB.INVESTMENTS - Petitioner(s)**

**Versus**

**DY.COMMISSIONER OF INCOME TAX - Respondent(s)**

**Appearance:**

MRS SWATI SOPARKAR for Petitioner(s) : 1,  
MRS MAUNA M BHATT for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**

**and**

**HONOURABLE MS.JUSTICE HARSHA DEVANI**

**Date: 12/06/2012**

**ORAL JUDGMENT**

**(Per: HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. This petition challenges notice dated 27<sup>th</sup> February 2003 issued by the respondent under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') seeking to reopen assessment of the petitioner for the assessment year 1996-97.

2. The petitioner, a partnership firm, filed its return of income for assessment year 1996-97 on 30.8.96 declaring total loss of Rs.3,68,090. The case of the petitioner was selected for scrutiny assessment and the assessment came to be framed at a total loss of Rs.3,68,090/- under section 143(3) of the Act. Subsequently, the impugned notice came to be issued to the petitioner seeking to reopen the assessment for the said assessment year.

3. Mr. M. J. Dawawala, learned advocate for the petitioner, submitted that the assessment year is 1996-97 whereas the impugned notice has been issued on 27<sup>th</sup> February 2003 after the expiry of a period of four years from the end of the relevant assessment year and as such in the absence of any allegation to the effect that there is any failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration, the assumption of jurisdiction on the part of the Assessing Officer under section 147 of the Act is bad in law.

3.1 Referring to the reasons recorded by the Assessing Officer for reopening the assessment, it was submitted that there is nothing whatsoever stated therein to indicate that there was any failure on the part of the petitioner to disclose material facts. It was pointed out that the reason for reopening is that the Assessing Officer wants to scrutinize the assessee's claim for bad debts of Rs.9,59,423/-. Under the circumstances, it is not even the case of the Assessing Officer the any

income chargeable to tax has escaped assessment, but that the Assessing Officer wants to make a fishing inquiry upon scrutiny of the material on record to examine as to whether any income chargeable to tax has escaped assessment.

3.2 Next it was contended that the reopening of assessment is also bad on the count that it is based upon a mere change of opinion inasmuch as during the course of the assessment proceedings under section 143(3) of the Act, the petitioner had submitted detailed written submissions with supporting evidence explaining the loss by embezzlement of funds. The Assessing Officer after due application of mind upon being convinced that the petitioner was entitled to the said claim had given set-off for the loss of Rs.9,59,423/- incurred on account of embezzlement of fund by the Accountant. Thus, the reopening of assessment is clearly based upon a change of opinion inasmuch as there is no new material which has come on record to justify formation of opinion on the part of the Assessing Officer that income chargeable to tax has escaped assessment. Therefore, invocation of powers under section 147 of the Act is without jurisdiction, both on merits as well as on the ground that the same is beyond a period of four years from the end of the relevant assessment year without there being any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment.

4. On the other hand, Ms. Mauna Bhatt, learned Senior Standing Counsel, appearing on behalf of the respondent opposed the petition by placing reliance upon the averments made in the affidavit in reply filed on behalf of the respondents. The attention of the court was drawn to the Form of recording reasons for initiating proceedings under section 147 of the Act, to submit that the Assessing Officer has rightly invoked power under section 147 of the Act for reopening the assessment as the

claim for bad debts on account of embezzlement by the Accountant is not admissible in law in the light of the decisions of the Supreme Court in the case of *Associated Banking Corporation of India Limited v. C.I.T. 56 ITR 1 (SC)*, as well as *C.I.T. v. Navneet Lal Bank Ltd., 56 ITR 707 (SC)*. It was urged that the claim for bad debts having been erroneously allowed by the Assessing Officer at the relevant time on the basis of entries made in the profit and loss account, the Assessing Officer is justified in invoking powers under section 147 of the Act.

5. Before advertent to the merits of the case, it may be germane to notice the legal position in this regard. It is by now well settled by a catena of decisions of the Supreme Court that in view of the proviso to section 147 of the Act, an Assessing Officer acquires jurisdiction to reopen assessment under section 147 of the Act after the expiry of a period of four years from the end of the relevant assessment year only if he has reason to believe that income chargeable to tax has escaped assessment by reason of failure on the part of the assessee to (i) make a return under section 139 or in response to a notice under sub-section (2) section 142 or section 148, or (ii) disclose fully and truly all material facts necessary for his assessment for that assessment year. Before initiating proceedings under section 147 by issuing notice under section 148 of the Act, the Assessing Officer is required to record reasons for reopening the assessment recording satisfaction as regards compliance with provisions of section 147 of the Act.

6. In the facts of the present case undisputedly the impugned notice has been issued after the expiry of a period of four years from the end of the relevant assessment year. Under the circumstances the requirements of the proviso to section 147 of the Act must be satisfied to vest in the Assessing Officer the jurisdiction to reopen the assessment. In the present

case it is not the case of the Assessing Officer that there is any failure on the part of the petitioner to make a return under section 139 or in response to a notice under sub-section (2) section 142 or section 148 of the Act. Hence, for the purpose of assuming jurisdiction to reopen assessment the Assessing Officer is required to be satisfied that income chargeable to tax has escaped assessment by reason of failure on the part of the petitioner to make full and true disclosure of all material fact in respect of the assessment year under consideration and such satisfaction must be reflected in the reasons recorded by him as contemplated under sub-section (2) of section 148 of the Act. It would, therefore, be necessary to advert to the reasons recorded for reopening the assessment.

7. The record of the case indicates that the petitioner had by a letter dated 11.04.2003 requested the Assessing Officer to furnish a copy of the reasons recorded for reopening the assessment, pursuant to which the Assessing Officer had by a letter dated 29.05.2003 informed the petitioner that the reason for reopening the assessment is to scrutinise the assessee's claim for the bad debts of Rs.9,59,423/- which had been claimed by it on account of embezzlement of funds by the accountant during the F.Y. 1993-94. This in sum and substance are the reasons communicated to the petitioner. However, along with the affidavit-in-reply filed by the respondent a copy of the "From for recording reasons for initiating proceedings under section 147 of the Act for obtaining the approval of the Commissioner of Income-tax" has been annexed which according to the learned counsel for the respondent contains detailed reasons. In the said form against the column "Reasons for the belief that income has escaped assessment" it has been stated thus: "*While finalizing the regular asstt. for A.Y. 1996-97 u/s 143(3), the A.O. allowed assessee's claim for bad debts of Rs.9,59,423/- on the basis of entries passed in the*

*Profit & Loss A/c which was not allowable looking to the decision of the Supreme Court in the case of Associated Banking Corporation of India Limited v. C.I.T. 56 ITR 1 (SC)1 and C.I.T. v. Navneet Lal Bank Ltd., 56 ITR 707 (SC). The real fact was that the Assessee derived the Loss of Rs.9,59,423/- due to embezzlement made by Shri Bharat K. Shah an accountant of the firm in the financial year 1993-94. The assessee observed that there was no possibility of any recovery out of the said amount of Rs.9,59,423/- and accordingly written off the said amount as bad debts in the A.Y. 1996-97. As the claim was erroneously allowed by A.O. there was an under Assessment of income of Rs.9,59,423/- requiring reassessment within the meaning of section 147 of the I.T. Act.”*

8. From the reasons communicated to the petitioner it is apparent that all that is stated is that the Assessing Officer wants to scrutinise the petitioner's claim for bad debt of Rs.9,59,423/- on account of embezzlement of funds by the accountant. Even if the detailed reasons are seen, it is evident that it is the case of the Assessing Officer that the claim of the petitioner which was not in consonance with the above referred decisions of the Supreme Court had been wrongly allowed by then Assessing Officer at the relevant time. In the entire reasons recorded there is not even a whisper as regards any failure on the part of the petitioner to make full and true disclosure of all material facts as contemplated under the proviso to section 147 of the Act. Under the circumstances the conditions precedent for assumption of jurisdiction under section 147 of the Act beyond a period of four years from the end of the relevant assessment year are clearly not satisfied.

9. Another aspect of the matter is that as noticed earlier the sole reason for reopening the assessment is to scrutinize the assessee's claim of bad debts. In this regard a perusal of the record of the case shows

that during the course of assessment proceedings, the petitioner had made detailed submissions in respect of its claim for set-off of the loss in respect of bad debt on account of embezzlement of funds by the accountant during the financial year 1993-94. The Assessing Officer after considering the submissions had accepted the same and had allowed the set-off of loss of Rs.9,59,423/- incurred on account on embezzlement of funds. Thus, it is apparent that all necessary particulars had been furnished by the petitioner during the course of assessment under section 143(3) of the Act. Besides, as is apparent on a plain reading of the reasons as furnished to the petitioner, the Assessing Officer want to reopen the assessment to scrutinise the petitioner's claim for bad debts of Rs.9,59,423/- . As noted hereinabove, assessment can be reopened under section 147 of the Act, if the Assessing Officer is of the belief that income chargeable to tax has escaped assessment and not to carry out a fishing inquiry to ascertain as to whether or not income chargeable to tax has escaped assessment. The learned counsel for the petitioner is, therefore, justified in contending that even on merits the reopening of assessment is not valid.

10. Insofar as the applicability or otherwise of the decisions of the Supreme Court on which reliance has been placed by the Assessing Officer for the purpose of reopening the assessment, firstly the said decisions are old decision of the year 1965 and as such are deemed to have been within the knowledge of the Assessing Officer at the time when the original assessment came to be framed, and secondly, in the light of the fact that the conditions precedent for exercise of powers under section 147 of the Act after the expiry of a period of four years from the end of the relevant assessment year have not been satisfied, it is not necessary to enter into any discussion in respect thereof. Even if the submission of the Assessing Officer that the claim for bad debts had been

erroneously allowed were to be accepted, even then in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts the reopening of assessment under section 147 of the Act is without jurisdiction. Consequently, the impugned notice issued under section 148 of the Act cannot be sustained.

11. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 27<sup>th</sup> February 2003 issued by the respondent seeking to reopen the assessment of the petitioner for the assessment year 1996-97 is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

(Akil Kureshi, J.)

(Harsha Devani, J.)

(vjn)

