

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

**SPECIAL CIVIL APPLICATION NO. 19708 of 2016**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE M.R. SHAH**

**sd/-**

**and**

**HONOURABLE MR.JUSTICE B.N. KARIA**

**sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	<b>NO</b>
2	To be referred to the Reporter or not ?	<b>NO</b>
3	Whether their Lordships wish to see the fair copy of the judgment ?	<b>NO</b>
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	<b>NO</b>

SABARKANTHA DISTRICT CENTRAL CO-OPERATIVE BANK  
LIMITED....Petitioner(s)

Versus

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

Appearance:

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

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

**CORAM: HONOURABLE MR.JUSTICE M.R. SHAH**

and

**HONOURABLE MR.JUSTICE B.N. KARIA**

**Date : 13/12/2016**

**ORAL JUDGMENT**

**(PER : HONOURABLE MR.JUSTICE M.R. SHAH)**

1.0. Rule. Ms. Mauna Bhatt, learned advocate waives service of notice of Rule on behalf of the respondent. In the facts and circumstances of the case and with the consent of the learned advocates for the respective parties, the petition is taken up for final hearing today.

2.0. By way of this petition under Article 226 of the Constitution

of India, the petitioner has prayed for an appropriate writ, direction and order to quash and set aside the impugned notice under Section 148 of the Income Tax Act (Annexure D), by which, the Assessing Officer has sought to reopen the assessment for AY 2009-10 beyond the period of four years.

3.0. The facts leading to the present petition in nutshell are as under:

3.1. That the assessee is a Cooperative Bank registered under the Gujarat Cooperative Societies Act. The assessee filed return of income for AY 2009-10. Thereafter, revised return of income was filed. That along with return of income / revised return of income, the assessee produced the balance sheet and profit and loss account, during the course of regular assessment. The Assessing Officer issued notice under Section 143(2) of the Act and notice under Section 142(1) of the Act along with detailed questionnaire. The said notices were complied with by the assessee as recorded in the scrutiny assessment order. That thereafter, the Assessing Officer passed an order under Section 143(3) of the Act dated 13.09.2011.

3.2. That thereafter beyond the period of four years, the Assessing Officer has issued the impugned notice under Section 148 of the Act, by which, the Assessing Officer has sought to reopen the assessment for AY 2009-10. At the request of assessee, the Assessing Officer supplied the reasons recorded to reopen the assessment which reads as under:

*“In this case, the assessee has filed its return of income on 21.09.2009 showing total income of Rs. 1,05,28,860/- and thereafter filed revised return of income on 06.10.2009 declaring income at Rs.*

95,17,730/- and assessment u/s 143(3) was completed on 13.09.2011 making dis-allowance of Rs. 50,000/- u/s 80P(2)(c)(ii) of the Income Tax Act.

2. On perusal of the records, it is noticed that the assessee bank has debited Rs. 20,93,398/- to Profit and Loss Account on account of provision for overdue interest and this is merely a provision and therefore it should be disallowed. In addition to the above, it is also noticed from Profit and Loss Account that the assessee has made provisions of Rs. 1,87,98,000/- for Government Securities Premium Ret of Amortization, and provisions of Rs. 1,17,91,812/- for Government Securities Premium Amortization and simultaneously claimed Investment Depreciation of 29,02,076/- on same securities. When premium paid is being written off, again the same security cannot be revalued again on the same date to claim loss on revaluation because under any circumstances, bank will get principal amount on its maturity. Both the benefits cannot be claimed simultaneously i.e. writing off premium and claiming notional loss also on revaluations on year end.

3. In view of the above, I have reason to believe that income chargeable to tax more than Rs. 1 lakh has escaped assessment for the year under consideration.”

3.3. After receiving the reasons recorded to reopen the assessment for AY 2009-10, the assessee submitted detailed objections against reopening of the assessment. That by communication / letter dated 13.10.2016, the objections filed by the assessee have been disposed of. The Assessing Officer has not agreed with the objections raised by the assessee. Hence, the assessee has preferred present Special Civil Application under Article 226 of the Constitution of India.

4.0. Shri J.P. Shah, learned counsel appearing on behalf of the assessee has vehemently submitted that the *impugned* Notice under Section 148 of the Act is bad in law and beyond the scope and ambit of

Section 147 of the I.T Act.

4.1. It is vehemently submitted by Shri Shah, learned counsel appearing on behalf of the petitioner that as such, in the reasons recorded, there is no allegation that there was any failure on the part of the assessee in not disclosing true and correct facts. It is submitted that therefore, the assumption of jurisdiction by the Assessing Officer to invoke Section 147 of the I.T Act is bad in law.

4.2. It is further submitted by Shri Shah, learned counsel for the petitioner that even otherwise in the scrutiny assessment assessee did furnish all necessary material/information/particulars asked by the Assessing Officer, which were necessary for the assessment and thereafter having satisfied the Assessment Officer framed the scrutiny assessment. It is submitted that therefore, it cannot be said that there was any failure on the part of the assessee in not disclosing true and correct facts necessary for assessment. It is submitted that therefore, the impugned notice for reopening the assessment for 2009-10 cannot be sustained and same deserves to be quashed and set aside. In support of his above submission, Shri Shah, learned counsel for the petitioner has heavily relied upon the decision of the Hon'ble Supreme Court in the case of **CIT vs. Kelvinator of India Limited**, reported in [2010] 320 ITR 561 (SC).

5.0. Ms. Bhatt, learned counsel for the revenue has tried to justify to the notice and reopening of the AY for 2009-10 issued under Section 148 of the Act.

5.1. It is submitted that as it was noticed that the assessee Bank has debited Rs. 20,93,398/-to profit and loss account on account of

provision for overdue interest and it was merely a provision and therefore, it ought to have been disallowed. The Assessing Officer is justified in reopening the assessment.

5.2. It is further submitted that it was also noticed by the Assessing Officer that the assessee made provisions of Rs. 1,87,98,000/- for Government Securities Premium Ret. of amortization and provisions of Rs. 1,17,91,812/- for Government Securities Premium Amortization and Simultaneously claimed Investment Depreciation of Rs. 29,02,076/- on same securities and therefore, when the premium paid was being written off, again the same security could not have been revalued again on the same date to claim loss on revaluation and therefore, when it has been noticed that both the benefits cannot be claimed simultaneously i.e. writing of premium and claiming notional loss also on revaluation on year end and it has been found that income chargeable to tax more than Rs. 1 lakhs as escaped assessment for the year under consideration, the Assessing Officer is justified in issuing the impugned notice and reopening the assessment.

Making above submissions, it is requested to dismiss the present petition.

6.0. Heard learned advocates appearing for the respective parties at length.

6.1. At the outset, it is required to be noted that the assessment for AY 2009-2010 is sought to be reopen by the *impugned* Notice under Section 148 of the Act, beyond the period of four years. Therefore, conditions precedent to invoke *jurisdiction* under Section 147 of the Act are required to be satisfied. It cannot be disputed that to assume *jurisdiction* under Section 147 of the Act and to reopen the assessment

beyond the period of four years, one of the condition precedent is that there must be a failure on the part of the assessee in disclosing true and correct facts necessary for the assessment. Therefore, unless and until the aforesaid condition is satisfied, there cannot be any reopening of assessment beyond the period of four years. Even there is a direct decision of the Apex Court on this issue, rendered in case of **Kelvinator of India Limited** [Supra].

6.2. In the present case, the reasons recorded to reopen the assessment for AY 2009-2010, which is beyond the period of four years, are reproduced herein above.

6.3. From the reasons recorded, it appears that there is no allegation whatsoever that there was any failure on the part of the assessee in disclosing true and correct facts necessary for assessment. From the reasons recorded, it appears that according to the AO though the assessee was not entitled to both the benefits simultaneously i.e. writing of premium and claiming notional loss also on revaluation of year end and still such benefit have been granted by the AO. Therefore, it is not a case that there was any failure on the part of the assessee in not disclosing true and correct facts. As observed herein above, even there are no allegation in the notice as well as the reasons recorded that there was any failure on the part of the assessee in not disclosing true and correct facts necessary for assessment. In that view of the matter the condition precedent to assume jurisdiction under Section 147 of the Act to reopen the assessment beyond the period of four years, more particularly, contained in proviso to Section 147 of the Act are not satisfied. Under the circumstances and considering the decision of Apex Court in case of **Kelvinator of India Limited** [Supra], the *impugned* Notice under Section 148 of the Act to reopen the assessment for AY

2009-2010, issued beyond four years, cannot be sustained and the same deserves to be *quashed* and set-aside on the aforesaid ground alone.

7.0. In view of the above and for the reasons stated above, present petition succeeds. The impugned notice to reopen assessment for AY 2009-10 and reassessment proceeding for AY 2009-10 are hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No costs.

sd/-

(M.R. SHAH, J.)

sd/-

(B.N. KARIA, J.)

Kaushik

