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

**SPECIAL CIVIL APPLICATION NO. 24746 of 2006**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE AKIL KURESHI**

**and**

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

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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 or any order made thereunder ? | |

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N.K.PROTEINS LTD.....Petitioner(s)

Versus

INCOME TAX OFFICER (OSD)....Respondent(s)

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Appearance:

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

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

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

**Date : 20/09/2016**

**ORAL JUDGMENT**

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

1. The petitioner challenges the notice

dated 16.1.2006 issued by the respondent-Assessing Officer reopening the petitioner's assessment for the assessment year 2001-02.

2. The brief facts are as under:

2.1 The petitioner is a company registered under the Companies Act. For the assessing year 2001-02, the petitioner had filed the return of income on 31.10.2001 declaring total income of Rs.7.23 crores (rounded off). Said return was taken in scrutiny by the Assessing Officer who framed assessment under Section 143(3) of the Act on 30.3.2004 accepting the declaration of income made by the petitioner in the return. One of the main claims of the petitioner under such return was deduction under Section 80IB of the Act of Rs.3.20 crores (rounded off) which was also accepted. To reopen the said assessment, the Assessing Officer issued impugned notice within a period of four years from the reign of the relevant assessment year. To do so, he had recorded following reasons:

> "In this case return of income for A.Y.2001-02 was filed on 31.10.2001 declaring therein total incom eof Rs.7,23,97,858/-, which was finalized u/s.143(3) on 30.03.2004 on a total income as declared in the return of income.
> 2. On perusal of the case records it is noticed that the assessee company has been allowed deduction of Rs.3,20,68,759/-

u/s.80IB @ 30% on gross total income of Rs.10,68,95,864/-. While computing such income, other income of Rs.2,13,60,088/- was considered (though it is not permissible under the Act) which consists of following:

| Sr.No. | Particulars | Rupees |
|---|---|---|
| 1 | Misc.Income | 84,22,473 |
| 2 | Dividend Income | 2,90,800 |
| 3 | Insurance recovered | 62,39,855 |
| 4 | Interest income from others/bank | 16,05,662 |
| 5 | Office rent income | 3,00,000 |
| 6 | Bad debt recovered | 1,20,000 |
| 7 | Insurance claim received | 1,39,573 |
| 8 | Profit on sale of shares | 29,55,000 |
| 9 | Hire charges | 6,78,562 |
| 10 | Soda settlement | 2,13,60,088 |

Out of such other income, dividend Rs.2,90,800/-, Office rent income Rs.3,00,000/- and hire charges of Rs.29,55,000/- relating to Rs.35,45,800/- only were excluded from profit and remaining income of Rs.1,78,44,288/- (2,13,60,088 – Rs.35,45,800) was included for considering gross total income of Rs.10,68,95,864/-. Other income in toto should have been deducted while computing gross total income for working out benefit u/s.80IB. This has been resulted into excess allowing deduction of Rs.53,44,286/- (30% of Rs.1,78,44,288/-) u/s.80IB.

3. The Company has granted interest free loans of Rs.104 lacs to the companies under the same management. The loanee companies' net worth was negative and there was no stipulation of repayment. The auditors' of the company was not able to express their opinion on recoverability of the said loan.

As the company had obtained interest bearing loan and given interest free loan to the company under the same management, interest of Rs.18,72,000/- paid on borrowed money at the prevailing rate of interest at 18% on 104 lacs was required to be disallowed u/s.136(10(iii) of the Act.
4. In view of the above fact, I have reasons to believe that there is an escapement of income within the meaning of Section 147(C) of the Income-Tax Act, 1961. Issue notice u/s.148 of the I.T.Act."

2.2 The petitioner raised the objections to the notice for reopening of the assessment under letter dated 27.2.2006. Such objections were however rejected by an order dated 14.11.2006. Hence, this petition.

2.3. Taking us through the material on the record, learned counsel for the petitioner made submissions based on two grounds – one is regarding excess deduction of 80IB of the Act and the second is regarding disallowance of interest paid by the assessee. Counsel submitted that both the issues were examined during the assessment. Such issues cannot be reopened even within four years within the reign of the relevant assessment year. He further submitted that the entire action was initiated under the insistence of the audit party and therefore also the notice was invalid.

3. Ms.Bhatt for the department opposed the petition contending that none of the issues were

examined during the original assessment. No opinion was formed by the Assessing Officer. On the basis of the original files which were made available for our perusal at the time of hearing of the petition, she contended that on the question of excess deduction under Section 80IB of the Act, the Assessing Officer had agreed with the suggestion of the audit party. Merely because this issue was brought to his notice by the audit party would not mean that he could not reopen the assessment.

4. As noted, the reasons for reopening of the assessment are based on two grounds - first is according to the Assessing Officer, the company was allowed deduction under Section 80IB of the Act of Rs.3.20 crores at 30% of its gross total income of Rs.10.68 crores. According to him, the income from other sources totalling to Rs.2.13 crores which was not eligible for such deduction was included. Such income included the dividend income, insurance cover, interest from bank and others, rental income etc. The second ground was that the company had granted interest free loan of Rs.104 lacs to the companies under the same management and the company had obtained interest bearing loan. The interest of Rs.18.72 lacs therefore had to be disallowed.

5. In this context, if we peruse the order of assessment, major claim of the petitioner was deduction under Section 80IB of the Act on income of Rs.10.43 crores. In this context, the Assessing Officer in the order of assessment observed as under:

> "xxxxx
> 3. The assessee company is engaged in the refining and filtering of edible oils. The accounts are audited and report u/s.44AB is filed. The assessee company has done bare trade in groundnut oil and Palmolein. Some of the purchases made to honour prior commitments is verified. The trading activity has resulted in a loss of Rs.61,14,620/-. The manufacturing activity has shown a profit of Rs.11,04,41,664/-. The accounts and the details filed are verified. Shri Dinal Shah, CA appearing for the assessee company pleaded that section 80AB clearly states that the incomes of specific nature are to be taken uniquely and individually to compute the various deductions available under Chapter VIA. He pleaded that the profit from manufacturing activity has been worked out after excluding all other incomes and loss. The matter is verified from records.
> 4. After discussion, the total income of the assessee company is determined as under...."

6. It can thus be seen that the claim of deduction under Section 80IB of the Act was examined by the Assessing Officer. The matter was verified from the records and only thereafter the claim was accepted as it is. It may be that in the process, the Assessing Officer committed an

error in allowing deduction with respect to several amounts which may not be eligible for such deduction. The erroneous decision of the Assessing Officer is widely different from non-consideration of an issue at the time of assessment. It therefore cannot be stated that this issue was not scrutinized by the Assessing Officer during the original assessment.

7. With respect to the second issue of disallowance of interest expenditure, we do not find any direct proof that the issue was examined during the assessment. There is nothing in the order of assessment suggesting that it was so done. Even in the letter of objection by the petitioner after being supplied the copies of the reasons recorded, it was contended as under:

> "xxxx Secondly, as regards interest free loan, the company could not charge interest since the amount is doubtful of recovery. The auditors also gave a suitable note in the report. The learned AO considered the note of the auditor's report at the time of assessment and he did not disallow the interest since interest cannot be charged on doubtful advances since it is not said to have accrued. Therefore, to hold now a contrary view is nothing but a change of opinion, which is not permissible and the assessment cannot be reopened only as a result of change of opinion. It was also discussed that the interest free loans has been given out of owned funds and not out of borrowings."

8. Thus, according to the assessee, the Assessing Officer considered the note of the auditors report at the time of assessment but did not disallow the interest. However, there is nothing on record to establish this. Counsel for the petitioner, however, referred to a letter dated 4.12.2003 written by the petitioner to the Assessing Officer furnishing certain details for the assessment year 2001-02, one of them being details of interest paid. Without any further background as to in which context the information was being asked for and being supplied, it would not be possible to hold that the question of al1owancibility or otherwise of the interest expenditure was examined by the Assessing Officer. In this context, however, we find that the Assessing Officer had opposed the suggestion of the audit party and clearly indicated that he does not point a valid one. The original files revealed that the audit party had raised two objections-one regarding the excess claim of deduction under Section 80IB of the Act and the other the present one of not disallowing the interest expenditure. In a letter dated 29.7.2005, one Deepshikha Sharma, the then Assessment Commissioner of Income Tax noted the two audit objections with respect to the interest expenditure. She clearly indicated that the objection is not acceptable. Since a loan was

given to revive a sick company and also formed only 10% of a reserve fund of Rs.2594 lacs, such loan did not have any direct nexus with the loan taken by the assessee company. Thus, she not only opposed the audit party suggestion but she gave her brief reasons for the same. In this letter, we do not find any communication whether she accepted the first objection of 80IB of the Act. However, in absence of any suggestion to the contrary, we may accept that she was not opposed to the stand adopted by the audit party. We may notice that a subsequent letter was written by Additional Commissioner of Income Tax to CIT, Central on 10.8.2005 in which he conveyed that Assessing Officer has accepted first objection of excess deduction under Section 80IB of the Act to oppose the second one of interest expenditure.

9. It can thus be seen that on the vital issue of disallowance of interest expenditure, the Assessing Officer was not convinced about the audit objection. She gave her brief but precise reasons for her stand. In the case of *Indian and Eastern Newspaper Society V/s Commissioner of Income-Tax, New Delhi, reported in 119 ITR 996,* the Supreme Court held that the opinion of the audit party on a point of law cannot be regarded as information enabling the income tax officer to initiate reassessment proceedings. In the same

judgment, however, it was clarified that the audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of ITO to it. In case of *Commissioner of Income-Tax V/s P.V.S.Beedies Pvt.Ltd., reported in 237 ITR 13*, it was found that the audit party had merely pointed out the fact which was overlooked by the income tax officer in the assessment. It was observed that there is no dispute that the audit party is entitled to point out a factual error or omission in the assessment. Reopening the case on the basis of factual error pointed out by the audit party is permissible under the law.

10. The present case falls in the former category where the audit party not only brought a certain issue to the notice of the Assessing Officer but compelled her to issue notice of reopening despite her clear opinion that the issue was not valid and that there has been no escapement of income on the grounds so urged by the audit party.

11. For such reasons, impugned notice dated 16.1.2006 is set aside. The petition is allowed and disposed off. Rule is made absolute.

**(AKIL KURESHI, J.)**

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

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