Entitlement of assessee of any deduction cannot depend on existence or absence of such entries in the books of accounts.

General Co-Operative Bank Vs. ACIT(Ahmedabad High Court)- While dealing with this objection, main thrust was non-debit of expenses worth Rs.1493672765/- in the Profit and Loss Account and directly having claimed them in the computation of income while filing the return and secondly, heavy reliance is placed while not accepting the contention of the assessee, on the ratio laid down in case of Indo-Aden Salt Mfg. & Trading Co. (P) Ltd. Vs. CIT reported in [1986] 159 ITR 624 (SC) where, of course, there was some material for the assessment which had laid embedded in the evidence, which the Apex Court felt could have been uncovered by the assessee so as to bring to the notice of assessing authority and if there would be omission to disclose the material facts then the jurisdiction to re-open would be attracted. There is no direct address to the issue of bad debts while disposing of objections to the re-opening. As rightly objected, there is a complete absence of material, let alone tangible material to conclude, prima facie even escapement of income on this ground. Again, as held in the case of Kedarnath Jute Mfg. Co. Ltd. vs. Commissioner of Income-tax (supra) entitlement of assessee of any deduction cannot depend on the treatment accorded to such entries by the assessee. And, existence or absence of entries in the books of accounts is not determinative of such claim, but, that is depended on the provision of law that concerns such deduction.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16483 of 2010

GENERAL CO-OPERATIVE BANK – THROUGH LIQUIDATOR

Versus

ASSISTANT COMMISSIONER OF INCOME TAX – CIRCLE – 7

Date : 18/11/2011

JUDGMENT

(Per : HONOURABLE MS JUSTICE SONIA GOKANI)

1. The petitioner, by way of present petition, preferred under Article 226 of the Constitution of India, challenges the notice dated 26.8.2009 issued by the respondent herein under Section 148 of the Income Tax Act, 1961(hereinafter referred to as “the Act”), seeking to reopen petitioner’s assessment for the assessment year 2004-2005.

2. To briefly capsulize the facts of the present petition, the petitioner is a Co-operative Society established under the Gujarat Cooperative Societies Act, 1962. The petitioner filed its return of income for the assessment year 2004-05 on 1.11.2004, declaring loss of Rs.1,49,89,47,392/- under Section 139(1) of the Act along with all requisite statements and documents as well as clarifications. A scrutiny was made under Section 143(2) by issuance of a notice to the petitioner calling upon certain details, which were furnished by the petitioner vide its letter dated 22.9.2006. What is further averred is that the petitioner also replied to certain queries raised by the respondent vide letter dated 27.9.2006. Pursuant to this exercise, an order framing of assessment under Section 143(3) of the Act was passed on 20.10.2006. The respondent did not allow certain contributions made towards Provident Fund received from the employees but not paid in time, which was also challenged before the CIT(Appeals) where the petitioner succeeded and the Revenue appealed against that order before the Income Tax Appellate Tribunal(“ITAT” for short), which concurred with the view of the CIT(Appeals).

3. Subsequently, on 26.8.2009, the petitioner received a notice under Section 148, where the Assessing Officer has sought to reopen the assessment under Section 147 of the Act. Pursuant to the said notice, the petitioner addressed a letter dated 20.4.2010 requesting respondent to treat the original return as return filed in response to the notice under Section 148 of the Act with a further request to furnish the copy of reasons recorded for assuming jurisdiction under Section 148 of the Act. The respondent provided the said copy to the Chartered Accountant of the petitioner on 19.11.2010 giving detailed reasons against which the petitioner filed its objections, which were disposed of by an order dated 13.12.2010.

4. Therefore, the petitioner has approached this Court objecting to the impugned reopening notice given after expiry of 4 years from the end of the relevant assessment year 2004-05,seeking following reliefs:-

"A) this Hon'ble Court be pleased to call for the records of the proceedings, look into them and be pleased to issue a writ of certiorari or any other appropriate writ, order of direction quashing the impugned 148 notice issued on 26.08.2009 and the order disposing the objections at Exhibit-G.

B) this Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction asking the respondent not to proceed further in pursuance of the said notice issued on 26.08.2009 and the order disposing the objections at Exhibit-G.

C) Pending the hearing and final disposal of this application, this Hon'ble Court be pleased to stay further proceedings in pursuance of section 148 notice issued on 26.08.2009.

D) This Hon'ble Court be pleased to grant any further or other relief as this Hon'ble Court deems just and proper in the interest of justice, and

E) This Hon'ble Court be pleased to allow this application with costs against the respondent."

5. Learned counsel Mr. M.J.Shah vehemently arguing for the petitioner and assailing the notice, submitted before this Court that it is incumbent upon the Assessing Officer, for reopening assessment for the assessment year 2004-05, to show that there was no full and true disclosure made of all the material facts necessary for the assessment by the petitioner which resulted into income being escaped assessment and for the same being beyond 4 years period from the end of relevant year. The attention has, already been drawn by the learned counsel to the details filed along with return and the notes attached to Form No.3CD, specifically to note No.1(c)(d). Also pressed into service of this Court is a specific note along with the return of income and Form Nos.3CA and 3CD drawing the attention of the order of Assessing Officer and, therefore, further pointed out that the details enumerated are broadly lifted from the statement of income filed by the petitioner and in the reasons disclosed by the respondent, what appears is that from such disclosed material, the respondent is attempting to pick up the details and attempts to reassess which is impermissible in reopening proceedings. According to the learned counsel, as per Section 143(3) of the Act, assessment has been already framed and

the reopening is being done beyond the period of 4 years.Learned counsel for the petitioner has further submitted that the assessment year is 2004-05 and the notice issued under Section 148 is dated 26.8.2009, which is clearly beyond the period of 4 years from the end of the relevant assessment year. It is the say of the counsel for the petitioner that earlier the assessment has been framed under Section 143(3) of the Act and for reopening the assessment after the expiry of a period of 4 years from the end of the relevant year, there are three conditions necessary to be fulfilled. Firstly, the Assessing Officer must have a reason to believe that income chargeable to tax has escaped assessment, secondly, such escapement was on account of the failure on the part of the petitioner to file return under Section 139(1) or Section 143(3) and thirdly petitioner, under section 148 of the Act, failed to disclose fully and truly all material facts necessary for reassessment for that assessment year. As none of the conditions mentioned hereinbefore exists, in the instant case, according to the learned advocate, the proceedings initiated under Section 147 of the Act beyond 4 years from the end of the relevant assessment year, is without jurisdiction.

6. Inviting attention of this Court to the affidavit-in-reply it has been further submitted by the learned counsel that there is no reason worth mentioning to point at any failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment of the concerned year. A specific attention is invited to the explanation to Section 147 of the Act relied upon in the affidavit-in-reply to emphasize that there is nothing on record which would validate initiation of reopening. It is the say of the petitioner that more than what was required for the Assessing Officer to know from the account books and other evidence that has been revealed. While adverting to the content of the order disposing of the objections, stress was laid on the fact that there is nothing to indicate that income has escaped assessment.

7. As against that learned senior counsel Mr.M.R.Bhatt appearing for and on behalf of the respondent has opposed the petition by submitting that the petition filed by the petitioner is premature as the assessment order for the assessment year 2004-05 under Section 143(3) read with Section 147 is still to be passed in the instant case. The petitioner has also an alternative efficacious remedy by way of filing appeal before the Commissioner (Appeals) and also thereafter before the Income Tax Appellate Tribunal. It was strenuously argued that the Assessing Officer had reason to believe that income chargeable to tax had escaped assessment and the reason for

escapement of income in the original assessment was that the assessee had not debited the expenses worth Rs.1,49,35,727/- in the profit and loss account for the assessment year 2004-2005 and directly claimed them in the computation of income while filling the return of the income. Moreover, P & L Account were not signed by the Chartered Accountant though certified by him. It is also argued that notice had been issued within 6 years from the end of the relevant assessment year and, therefore, the Assessing Officer acted well within his jurisdiction as conferred under the provisions under Section 147 read with Section 148 of the Act. It is further argued that no expense can be allowed if it has not been debited in the books of accounts and this fact since was not brought to the notice of the Assessing Officer at the time of original assessment proceedings, the same resulted into escapement of the income giving rise to reopening under Section 147 of the Act. The assumption of jurisdiction had been with the recording of valid reason delineating that non-disclosure of fully and truly all the materials and correct facts by the petitioner would lead to the formation of the opinion that the income chargeable to tax has escaped assessment, which is reflected in the reasons recorded by the Assessing Officer.

8. Learned counsel for the department has also argued that the exercise of reassessment and issuance of the notice rejecting objections raised by the petitioner cannot be termed as mere change of opinion. He emphatically argued that the petitioner's contention is not correct that simply filing the return or placing the material on record during the assessment proceedings would tantamount to disclosing of the material facts. According to the learned counsel there are decisions of this Court and of of the higher Court emphasizing that the duty of the assessee does not get over by merely dumping the papers without necessarily pointing out to the Assessing Officer which will enable him to understand and appreciate the books of accounts and other material evidence placed and presented before him. Thus, it is urged to summarily reject the petition with exemplary cost to the respondent.

9. From the facts on record, what emerges undisputedly is that the assessment already framed under Section 143(3) of the Act is sought to be reopened 4 years after the end of the assessment year 2004-2005. Such reopening under the statute is made permissible if the Assessing Officer has a reason to believe that such escapement of assessment was on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. As in the present case, there is neither a question of assessee having

failed to file the return under Section 139 of the Act nor is there any response to the notice issued under Section 142(1) or under Section 148. The question essentially is whether there was an escapement of income on the account of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The grounds enumerated by the Assessing Officer, while seeking to reopen the assessment, as communicated to the assessee are needed to be reproduced

" Any expenditure can not be allowed unless the same is debited or written off in the books of account. Moreover, during the assessment stage also, no details were called for regarding any of the above items of expenditure.

It is further relevant that the write off of any advances can not be allowed as Bad Debts because the amounts written off had not been offered for tax in the preceding years. Under the circumstances, the quantum of such a proposed write off exceeds all the limits prescribed u/s. 36(1)(vii)(a) also. The most significant aspect in this case is that the amount has not been written off/ debited in the books of account, but has only been claimed in the statement of income.

Thus, the incorrect procedure and omission to scrutinize the records has resulted in an excess assessment of loss to the tune of Rs.1,49,36,72,765/- resulting in potential loss of revenue in the succeeding years."

10. The petitioner while objecting to the notice for reopening, raised several grounds including that it had revealed all necessary facts and with specific emphasis on the fact that there was no new material or tangible material but only the change of opinion on the part of the Assessing Officer which had led to the reopening.

These objections filed against reopening proceedings have been disposed of by a detailed order dated 13.12.2010. It would be worthwhile to reproduce relevant aspects noted in the impugned order to justify the reopening while rejecting the objections of the petitioner, which are as under.

" *The case was reopened mainly on the ground that the assessee had not debited expenses worth Rs.1,49,200 in the profit and loss account for assessment year 2004-05 and has directly claimed them in the computation of income while filing the return of income. Since, it is well established fact that no expenses can be allowed if it has not been*

debited in the books of accounts and the Assessing Officer failed to appreciate this fact at the time of assessment proceedings and finalized the assessment proceedings accordingly (without considering the fact that the expenses mentioned in the satisfaction note have been directly claimed in the return of income without debiting them in the Profit & Loss Account). Therefore, the case has been correctly reopened under Section 147 of the Act to reassess the income for taking this point under consideration.

The assessee has discussed all these points separately i.e. depreciation, notice pay, retrenchment, salary, leave salary, gratuity, loss of sale of stale stationary stock, miscellaneous balance and sales and losses on account of advances in his objection but all these points coverage to one common issue viz " of these expenses were not debited in the P & L Account , directly claimed in the computation of income and hence not to be disallowed", which has been addressed above".

11. What is thus found in these objections justifying the reassessment by way of reopening is harping on the aspect that expenditure not debited in P & L Account cannot be claimed in the return of income directly. Simply filing the return or placing the material on record during the assessment proceedings, according to the Revenue, does not tantamount to disclosing all the material facts. Suffice it to say at this stage that the Assessing Officer has chosen not to uphold any of the objections raised by the petitioner and undisputedly the assessment already framed under Section 143(3) of the Act is sought to be reopened after 4 years. Pressed in the service before us is the judgment of coordinate Bench of this Court passed in the case of I.P.Patel Company vs. Deputy Commissioner of Income-Tax in SCA No. 16261 of 2010 wherein various authorities enunciating the basic principles, with regard to validity of proceedings under Section 147 of the Act, have been discussed and bearing in mind all the legal principles laid down in those authorities as also as discussed hereinabove, present petition is decided with reference to the facts on the record.

12. It is necessary at this stage to minutely peruse the income tax return of the present petitioner filed for the year 2004-05, which contained, in all, 83 documents. The statement of total income is reflected where, under the head of income from business/profession, depreciation claimed is of Rs.29,77,350.89/-. There is a specific note regarding said head of income stating that the assessee is also filing copy of the tax audit report along with the P & L account and,

therefore, it requested the Assessing Officer to treat this as return of income along with notes to Form 3CD as apart from the submission, with this return of income in Form No. 3CA there is certification from the Nanavati Associates Chartered Accountants that subject to the note Nos.1 and 2, the particulars given in this Form No.3CD read with compilation to page Nos.1 to 71 are true and correct. Form No.3CD when is examined at column No.14 it makes a specific reference to page 36 of compilation, which is also produced for perusal of the Court.

It gives entire detail as to how the depreciation has been claimed bifurcating the same under the heads of building,furniture, computer, vehicle and under each head the amount reflected is deducted with the percentage mentioned against column and the final figure arrived at is of Rs.29,77,35,089/-. The objection, as repeatedly made out in the pleadings as also while making submissions before this Court by the learned counsel for the respondent and also while rejecting the objections raised by the petitioner is with regard to the incorrect procedure and omission to clarify certain deduction in the statement of income when the same did not find place in the P & L account.

There is sufficient explanation that comes forth from the petitioner stating that, as per the general principles, after the liquidation, it is the practice that the liquidator does not prepare Profit & Loss Account because liquidation process realizes existing assets of creditors and if there is surplus after distribution to creditors, payment is being made to equity holders in entirety. It is emphasized that even the Companies Act has not prescribed receipt and payment account under Section 462 of the Companies Act and the stipulation as to preparation of Profit and Loss Accounts and balance sheet identical to Section 211 of the Companies Act is not existing. With no specific requirement under the Gujarat Co-operatives Societies Act to prepare accounts for cooperative societies under liquidation, only the memorandum of Profit & Loss and balance sheet was prepared so that the appreciation of commercial result becomes feasible and all these details were reflected as per Form No. 3CD.

13. We are of the firm opinion that on close perusal of all the documents and the reasons recorded go to establish that not only non-disclosure cannot be attributed to the assessee but all the facts necessary for framing the assessment with respect to the said issue were apparently before the Assessing Officer when it examined the return of the assessee for scrutiny assessment for the year under consideration.

14. The submission of the learned counsel for the respondent that mere production of material without any factual assistance and also submitting that the disclosure was not in its true spirit, can not be upheld for the reason that not only deductions in the statement of income have been in detail but they have also been specifically pointed by way of an appended note and Form 3CD.

15. Counsel for the petitioner urged that all requisite documents and materials were already submitted to the Authority. In support of his contention, reliance is placed on the decision of this Court given in case of Mihir Textiles Ltd. vs. Joint Commissioner of Income Tax in Special Civil Application No.5825 of 2000 (Coram: K.A. Puj & Rajesh H. Shukla, JJ.)

"15. It is admittedly stated that audited books of accounts like profit and loss balance sheet along with the notice were submitted and what was necessary was the bifurcative details with all classification and nature of expenditure and receipts, which could have been called for by the Assessing Officer, and therefore, without calling for such record, when there is a specific disclosure in the form of note regarding transfer of an undertaking, specifically stated that the petitioner cannot be said to be guilty of not making full and true disclosure as sought to be canvassed. Reliance placed by Mr. Bhatt on the observations of the Hon'ble Apex Court in case of ***Indo-Aden Salt MFG. & Trading Co. P. Ltd. v. Commissioner of Income Tax, Bombay (supra)****, is also misconceived as the facts were totally different. In that case what was sought to be claimed was the depreciation on the masonry work, salt work and the depreciation for the salt work is higher than the masonry work which was sought to be added to the same for getting the benefit of higher depreciation and in that context, the observations have been made that if some material for the assessment lay embedded in the evidence which the Revenue could have uncovered but did not, then it is the duty of the assessee to bring it to the notice of the assessing authority. In the facts of the case that is not so as there was no evidence required with regard to the disclosure made for transfer of an undertaking and if any clarification was required, thereof with regard to any bifurcation or classification, the Assessing Officer could have called for the said clarification once the assessee had made the declaration. Therefore, in the facts of this case, it cannot be said that after such disclosure the Assessing Authority may not have noticed the necessary material and relevant facts. Further, it cannot be said that there was no disclosure of primary facts which has caused the escapement of the income."*

16. Counsel also relied on the decision of Kedarnath Jute Mfg. Co. Ltd. vs. Commissioner of Income-tax reported in [1971] 082 ITR 0363 on this very aspect where the Apex Court was considering contention that the assessee had failed to discharge its duty of debiting the liability in its books of accounts which would bar him from claiming deduction under Section 10(1) and Section 10(2)(xv), the Apex Court did not accept such contention of Solicitor General in the following manner:-

" The main contention of the learned Solicitor-General is that the assessee failed to debit the liability in its books of accounts and, therefore, it was debarred from claiming the same as deduction either under section 10(1) or under Section 10(2) (xv) of the Act. We are wholly unable to appreciate the suggestion that if an assessee under some misapprehension or mistake fails to make an entry in the books of account and although, under the law, a deduction must be allowed by the Income-tax Officer, the assessee will lose the right of claiming or will be debarred from being allowed that deduction. Whether the assessee is entitled to a particular deduction or not will depend on the provision of law relating thereto and not on the view which the assessee might take of his rights nor can the existence or absence of entries in the books of account be decisive or conclusive in the matter. The assessee who was maintaining accounts on the mercantile system was fully justified in claiming deduction of the sum of Rs.1,49,776 being the amount of sales tax which it was liable under the law to pay during the relevant accounting year. It may be added that the liability remained intact even after the assessee had taken appeals to higher authorities or courts which failed. The appeal is consequently allowed and the judgment of the High Court is set aside. The question which was referred is answered in favour of the assessee and against the revenue. The assessee will be entitled to costs in this court and in the High Court."

17. As discussed hereinabove, the assessee has already placed entire material in terms of books of accounts, return of the assessment year 2004-05, notes attached to Form No.3CD and 3CA etc. It had also claimed the expenses worth Rs.1,49,35,727/- in the computation of income while filing the return. And, P & L Account of petitioners were also certified by the Chartered Accountant for the year ended on 31.3.2004 and thus, without calling for further record, Assessing officer had in its possession all requisite materials and therefore, it is simply not possible to accept contention of Revenue that the petitioner failed to disclose truly and fully the facts leading to escapement of income.

18. This, of course, is not to suggest that the assessee is not required to discharge its part of obligation or that it can merely pile up or dump the materials without availing assistance to enable the Assessing Officer to understand and appreciate the same. But, as each case would be essentially evaluated on the basis of factual data, in the matter on hand, no such infirmity is found to uphold the contention of Revenue that the petitioner failed to disclose fully and truly all material facts leading to escapement of income. In light of this discussion, issuance of notice appears to be mere change of opinion.

19. Yet another ground raised is of writing off of advances as bad debt without offering the same in the preceding years. And quantum of such a write off exceeding the limits prescribed under Section 36(1)(viia).

20. In objection raised by the petitioner, it has been urged that in the satisfaction note, it is admitted that such a claim of deduction is not scrutinized which indicates that during re-assessment, tangible materials would be collected to crystallize escapement and if such claim of deduction would have been scrutinized against the touch-stone of tangible materials in re-assessment, there would have been reduction in losses and carry forward losses, resulting into potential gains of revenue. Objection, therefore, suggested that the said satisfaction note did not disclose any tangible materials for arriving at prima facie evidence of escapement of income and had there been such prima facie evidence there would be crystallized inference of escapement of income which is missing. It is also pleaded in the alternative that incomes of the bank which has gone in liquidation in the year 2005 are being assessed u/s. 28 to 44 of the I.T. Act. There is no condition of write off with respect to any expenditure except bad debts u/s. 36(1)(vii) of the I.T. Act.

21. While dealing with this objection, main thrust was non-debit of expenses worth Rs.1493672765/- in the Profit and Loss Account and directly having claimed them in the computation of income while filing the return and secondly, heavy reliance is placed while not accepting the contention of the assessee, on the ratio laid down in case of Indo-Aden Salt Mfg. & Trading Co. (P) Ltd. Vs. CIT reported in [1986] 159 ITR 624 (SC) where, of course, there was some material for the assessment which had laid embedded in the evidence, which the Apex Court felt could have been uncovered by the assessee so as to bring to the notice of assessing authority and if there would be omission to disclose the material facts then the jurisdiction to re-open would be attracted.

There is no direct address to the issue of bad debts while disposing of objections to the re-opening. As rightly objected, there is a complete absence of material, let alone tangible material to conclude, prima facie even escapement of income on this ground.

22. Again, as held in the case of Kedarnath Jute Mfg. Co. Ltd. vs. Commissioner of Income-tax (supra) entitlement of assessee of any deduction cannot depend on the treatment accorded to such entries by the assessee. And, existence or absence of entries in the books of accounts is not determinative of such claim, but, that is depended on the provision of law that concerns such deduction.

23. Plea with regard to availability of alternative efficacious remedy in terms of appeal before CIT(Appeals) and the Tribunal thereafter needs no sustenance in as much as the purported exercise of invoking jurisdiction for the purpose of reassessment itself, when is found bad in law, this surely is a potent ground to negate this plea of alternative remedy. Moreover, when the notice for reopening the assessment when is found to have been issued without any valid and sustainable reasons, petitioner assessee can not be subjected to the ordeals of reassessment with long drawn process of such exercise in spite of its having fulfilled all its legal obligations as detailed hereinabove.

24. In the aforementioned premise, our opinion is strongly favouring the petitioner necessitating allowance of its prayer of quashing and setting aside the impugned notice dated 26.8.2009 issued in exercise of powers under Section Section 148 of the Act. Rule is made absolute to the extent above with no order as to costs.