IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 71 OF 2005

Titanor Components Limited,
A Company registered under
the Companies Act, 1956 and
having its registered office at
Plot No.184-185-189, Kundaim
Industrial Estate, Goa. ... Petitioner

versus

1. Assistant Commissioner of
   Income-Tax, Circle 2(1),
   Panaji having his office at
   EDC Complex, Patto,
   Panaji-Goa.

2. Commissioner of Income-Tax,
   Panaji, having his office at
   the EDC Complex, Patto,
   Panaji-Goa.

3. Union of India, through the
   Secretary, Ministry of Finance,
   New Delhi. ... Respondents

Shri A. N. S. Nadkarni, Senior Advocate with Shri S. G. Bhobe, Shri V. Frank and Shri D. Lawande, Advocates for the Petitioner.

Ms. Asha Dessai, Advocate for Respondent Nos.1 and 2.

CORAM : S. A. BOBDE &
F. M. REIS, JJ.

DATE : 9TH JUNE, 2011.

ORAL JUDGMENT(Per S. A. BOBDE, J.)

The Petitioner, an assessee under the Income Tax Act, 1961(Act, for short) has challenged the notice issued to it under Section 147 of the said Act for re-opening assessment beyond period of four years. The Petitioner filed a Return of Income for the assessment year 1997 along with the duly audited Accounts Tax Audit Report, etc. in respect of its income from the manufacturing fabrication and servicing of components. After the assessment, the Petitioner's income for the said year was assessed by an Order under Section 143(3) of the Act on 29-12-1999. An appeal against that was decided on 31-7-2000 by the Commissioner of Income Tax of Appeals.

2. Thereafter, on 18-3-2004 the Respondents issued the impugned notice for re-opening of assessment under Section 147 of the Act. The Petitioner replied to the said notice and demanded reasons for invoking Section 147 of the Income Tax Act. In response to the demand, the Respondents have sought to justify the impugned notice by reasons contained in the letter dated 27-1-2005. The Petitioner has questioned the validity and propriety of the notice and the reasons for the issue of such a notice in this petition.

3. Shri A. N. S. Nadkarni, learned Senior Counsel appearing for the Petitioner submitted that the Revenue is entitled to re-open the assessment after the expiry of four years only in accordance with the conditions prescribed by the proviso to Section 147 of the Act which reads as follows:-

> "**147**. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned(hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):
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> **Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to

make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

[**Provided further** *that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment]*.

Explanation 1.-Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.-For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year

exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but --

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed."

4. According to the learned Counsel, the Revenue is entitled to issue such a notice if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment by reason of the failure

on the part of the assessee (a) to make a return under section 139 or (b) in response to a notice issued under sub-section (1) of Section 142 or Section 148 or (c) to disclose fully and truly all material facts necessary for that assessment year. Since the first two conditions are not pleaded by the Respondents, it is the submission of the Petitioner that the notice is wholly unwarranted and invalid since there is no allegation whatsoever that the Petitioner has failed to disclose all material facts necessary for assessment. This submission can be considered only with reference to the reasons put forth by the Respondents for issuing the notice. The letter dated 27-1-2005, interalia, states that the Assessment Officer has reasons to believe that income has escaped assessment because the Petitioner has wrongly claimed deduction under Section 80IA in respect of income which was not derived from the income of the Petitioner's Unit of Kundaim. Further, that long term capital gains have been wrongly claimed by the assessee which have been wrongly considered for the set off of the Unit of Kundaim which has resulted in escapement of income. Nowhere has the Assessing Officer stated that there is any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Having regard to the purpose of the section, we are of the

view that the power conferred by Section 147 does not provide a fresh opportunity to the Assessing Officer to correct an incorrect assessment made earlier unless the mistake in the assessment so made is the result of a failure of the assessee to fully and truly disclose all material facts necessary for assessment. Indeed, where the assessee has fully disclosed all the material facts, it is not open for the Assessing Officer to re-open the assessment on the ground that there is a mistake in assessment. Moreover, it is necessary for the Assessing Officer to first observe whether there is a failure to disclose fully and truly all material facts necessary for assessment and having observed that there is such a failure to proceed under Section 147. It must follow that where the Assessing Officer does not record such a failure he would not be entitled to proceed under Section 147. As observed earlier, the Assessing Officer has not recorded the failure on the part of the Petitioner to fully and truly disclose all material facts necessary for the assessment year 1997-98. What is recorded is that the Petitioner has wrongly claimed certain deductions which he was not entitled to. There is a well known difference between a wrong claim made by an assessee after disclosing all the true and material facts and a wrong claim made by the assessee by withholding the material

facts fully and truly. It is only in the latter case that the Assessing Officer would be entitled to proceed under Section 147. We are supported in this view by a decision of a Division Bench of this Court in **Hindustan Level Ltd.** v. **R. B. Wadkar, Assistant Commissioner of Income Tax**([2004] 268 ITR 0332) where in a similar case the Division Bench held that reason that there was a failure to disclose fully and truly that all material facts must be read as recorded by the Assessing Officer and it would not be permissible to delete or add to those reasons and that the Assessing Officer must be able to justify the same based on material record. The Division Bench observed as follows:-

> "He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence".

5. We find in the circumstances that the impugned notice is not sustainable and is liable to be quashed and set aside. Accordingly, the Writ Petition is allowed in terms of prayer clauses (a) and (c).

6. Rule made absolute in terms of prayer clauses (a) and (c) which read as follows:-

> (a) That this Hon'ble Court may be pleased to issue a writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, Order or Direction under Article 226 of the Constitution of India,calling for the records of its case insofar as they relate to the impugned notice dated 18th March, 2004, the impugned satisfaction of Respondent No.2 under Section 151 of the Act, if any, and the impugned reassessment proceedings of the Petitioner for assessment year 1997-98 and after going through the same and examining the legality and validity thereof, to quash and cancel the same.
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> (c) That this Hon'ble Court may be pleased to issue a Writ of Prohibition or a Writ in the nature of Prohibition or any other appropriate Writ, Order or Direction under Article 226 of the Constitution of India, permanently restraining and prohibiting Respondent No.1 from taking any action in furtherance, or in pursuance of or in implementation of the impugned notice dated 18th March, 2004, and permanently

prohibiting and restraining Respondent No.1 from reassessing the income of the Petitioner for assessment year 1997-98.

S. A. BOBDE, J.

F. M. REIS, J.