IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2814 OF 2019

Ananta Landmark Pvt. Ltd.)
101, Kalpataru Synergy, Opp. Grand Hyatt,)
Santacruz, Mumbai – 400 055) ….Petitioner

V/s.

1. Deputy Commissioner of Income Tax Central Circle 5 (3), having his office at Air India Building, Nariman Point, Mumbai – 400 021)

2. Pr. Commissioner of Income Tax, Mumbai having his office at 19th Floor, Air India building, Nariman Point, Mumbai – 400 021)

3. Union of India through the Secretary, Department of Revenue, Ministry of Finance, North Block, New Delhi – 110 001) ….Respondents

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Mr. P.D. Pardiwalla, Senior Advocate i/b. Ms. Vasanti B. Patel for petitioner.
Mr. Suresh Kumar for respondents.

CORAM : K.R. SHRIRAM, &
R.I. CHAGLA, JJ
DATED : 14th SEPTEMBER 2021

ORAL JUDGMENT : (PER K.R. SHRIRAM, J.)

1 Since pleadings are completed, we decided to dispose this petition at the admission stage itself.

Rule.

Rule made returnable forthwith.

2 Petitioner had filed its annual returns for Assessment Year 2012-2013. As required under Section 139 of the Income Tax Act, 1961 (the Act), petitioner being a company filed its audited profit and loss account and balance sheet and the auditor's report with the annual returns.

Thereafter, petitioner received a notice dated 5th August 2014 under Section 143 (2) of the Act alongwith notice dated 5th August 2014 under Section 142 (1) of the Act calling upon petitioner to furnish the documents mentioned as per the annexure to the notice. There are four items mentioned in the annexure but what we are concerned with is serial no.2 in the annexure, i.e., audited accounts, 3cd, balance sheet, P & I A/C etc. By its letter dated 14th August 2014, petitioner submitted all the documents asked for and also clarified that tax audit report in Form 3CD for the Assessment Year 2012-2013 was not applicable.

3 Petitioner, thereafter received another notice dated 10th October 2014 under Section 142 (1) of the Act calling upon petitioner to provide certain details, one of which is "details of interest expenses claimed under Section 57 of the Act". These details were provided vide petitioner's letter dated 3rd December 2014. Thereafter,

there was a personal hearing granted and as per the further details sought during the personal hearing, petitioner provided further documents and details by its letter dated 17th December 2014.

4 After considering the details supplied, an assessment order dated 20th February 2015 came to be passed accepting petitioner's explanations and computation of income. Ofcourse in the assessment order certain credit for tax paid in the sum of Rs.42,160/- was not granted and to that extent, a notice of demand under Section 156 of the Act was issued. That amount has been paid by petitioner. More than four years, after the assessment order dated 20th February 2015 came to be passed, petitioner received a notice dated 26th March 2019 under Section 148 of the Act stating "…….. *I have reasons to believe that your income chargeable to tax for the Assessment Year 2012-13 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961*". In response, petitioner, without prejudice to its rights and contentions, sought for the reasons to believe. Respondent, by its letter dated 28th May 2019 provided petitioner the reasons recorded for reopening of the assessment.

5 The short reasons to believe, for ease of reference, is scanned and reproduced hereinbelow :

ANNEXURE

Reason for re-opening of assessment u/s 147 of the I.T.Act, 1961

M/s Ananta Landmarks Pvt. Ltd.
PAN: AABCK6989Q
Asst. Year: 2012-13

1. The assessee is engaged in the business of real estate and development and filed its return of income for AY 2012-13 on 15/09/2012 declaring total income of Rs.6,96,880/-. The assessment in the instant case was completed u/s 143(3) on 20/02/2015 by accepting the returned income.

2. Thereafter, it is noticed that the assessee had availed following secured and unsecured loans as under:

Sr. No.	Lender	Amount
1	SICOM Limited	Rs.1,00,00,00,000/-
2	IL&FS Financial Services Ltd.	Rs. 1,25,00,00,000/-
3	Aditya Birla Finance Limited	Rs.75,00,00,000/-
4	Sunstrene Chemical Agencies Pvt. Ltd.	Rs. 2,20,43,11,842/-
5	Kalpataru Properties Pvt. Ltd.	Rs.10,07,15,217/-

The assessee had paid total interest of Rs.75,59,35,292/- on the above said loan. The assessee had also advanced loan amounting to Rs.52,05,73,873/- and had earned interest income of Rs.7,73,87,637/-. Out of total interest paid of Rs.75,79,35,292/-, an amount of Rs.7,66,66,663/- had been claimed as deduction u/s 57 of the IT Act, 1961 and balance amount of Rs.68,12,68,629/- had been debited to Work In Progress(WIP). The claim of deduction u/s 57 of the Act was not correct, The assessee is a builder and had taken above mentioned loan for the sole purpose of carrying out

construction project at Thane. Hence, the interest paid on the said loan is related to assessee's business and accordingly is allowable as deduction u/s 37(1) of the IT Act, 1961. Since there was no business income during the year, the entire interest expenses of Rs.75,59,35,292/- during the pre-construction should have been capitalized to the WIP as against claiming Rs. 7,66,66,663/- as deduction u/s 57 which is not an allowable deduction u/s 57 of the Act.

3. In view of the above, I have reasons to believe that income of Rs.7,66,66,663/- which was chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary and therefore, this case is a fit case for reassessment within the meaning of Section 147 of the I.T.Act, 1961 and the assessment for A.Y 2012-13 needs to be reopened by issue of notice u/s 148 of the I.T.Act.

4. It is kindly requested hereby that since the time period of 4 years have already elapsed from the end of the relevant assessment year and the amount of income escaped exceeds Rs 1 lakh, necessary approval may be accorded for the reopening of the A.Y. 12-13 in the case of the assessee by issuing notice u/s 148 of the IT act as per provision u/s 151(1) of the Act.

(Manoj Tripathi)
Dy commissioner of Income tax
Central Circle 5(3), Mumbai.

Date: 14.03.2019

6 By a letter dated 14th June 2019, respondent gave a notice under Sub Section (1) of Section 142 of the Act calling upon petitioner to furnish further details/information/documents. Petitioner responded by its letter dated 19th June 2019 filing its objections to reopening of the assessment. According to petitioner, there was no failure to truly and fully disclose material facts and in any case, it was a mere change of opinion and there was no fresh tangible material for initiating reassessment proceedings. Respondent no.1 passed an order dated 30th September 2019 with reference to the objections raised by petitioner to the issuance of notice under Section 148 of the Act, which is impugned in this petition. According to respondent no.1,

(i) To confer jurisdiction under Section 147 (a), two conditions were required to be satisfied, firstly the Assessing Officer must have reasons to believe that income, profits or gains chargeable to income tax had escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions had to be satisfied before the Assessing Officer could assume jurisdiction for issue of notice under Section 148 read with Section 147

(a). But under the substituted Section 147 existence of only the first condition suffices. In other words, if the Assessing Officer has reason to believe that income has escaped assessment, that was enough to confer jurisdiction to reopen the assessment;

(ii) Subsequent to the assessment proceedings, it was noticed that the assessee had wrongly claimed the deduction under Section 57 of the Act. Accordingly, the Assessing Officer formed reasons to believe for reopening of the assessment. This issue went unnoticed by the Assessing Officer during the course of original assessment proceedings for Assessment Year 2012-2013 and therefore, the jurisdictional requirement under Section 147 of the Act is fulfilled and reopening under Section 147 of the Act cannot be challenged;

(iii) The Assessing Officer had not made any discussion in respect of those points on which assessment is reopened, thus it can be hardly stated that Assessing Officer had formed an opinion on such points during original assessment proceedings. The Supreme Court and various High Courts have justified the reopening of the assessment where no opinion on certain points was formed by the Assessing Officer during original assessment proceedings and later on the assessment was reopened on those points. Thus, the window of reopening of assessment

will remain open for Assessing Officer on those points where the Assessing Officer neither accepts nor rejects such claim;

(iv) Without prejudice to what is stated above, it is also important to mention that something which is tangible need not be something which is new. Even if the Assessing Officer fails to apply his mind while framing original assessment to the points on which assessment is sought to be reopened, it can be said that the reasons for reopening of the assessment under Section 147 comes within the jurisdiction. If there is an escapement of income in consequence, the jurisdictional requirement of Section 147 would be fulfilled on the formation of a reason to believe that income has escaped assessment;

(v) The contention of the assessee that true and full disclosure of material fact with respect to interest income was made during the course of original assessment proceedings is not correct as the assessee was fully aware that it is settled position of law that the interest expenses incurred for the purpose of business cannot be set off against the interest income under the income from other sources. The disclosure of material facts with respect to the setting off the interest expenses under Section 57 of the Act might be full but it cannot be considered as true. This is failure on the part of the assessee;

(vi) Further, explanation 1 to Section 147 of the Act stipulates that mere production of books of accounts or other documents from which the Assessing Officer could have, with due diligence, inferred material facts, does not amount to full and true disclosure of material facts.

7 In our view, the order impugned requires to be set aside and we have to hold that the Assessing Officer had no jurisdiction to issue the notice under Section 148 of the Act. For ease of reference, we reproduce Section 147 as it then was prior to amendment :

> *147. Income escaping assessment - 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) :*
>
> *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 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.*

8 It is settled law that where the assessment is sought to be reopened after the expiry of a period of four years from the end of the relevant year, the proviso to Section 147 stipulates a requirement that there must be a failure on the part of the assessee to disclose fully and truly all material facts necessary. Since in the case at hand, the assessment is sought to be reopened after a period of four years, the proviso to Section 147 is applicable.

It is also settled law that the Assessing Officer has no power to review an assessment which has been concluded. If a period of four years has lapsed from the end of the relevant year, the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is an escapement of income from assessment and that there has been a failure to fully and truly disclose material fact. After a period of four years even if the Assessing Officer has some tangible material to come to the conclusion that there is an escapement of income from assessment, he cannot exercise the power to reopen unless he discloses what was the material fact which was not truly and fully disclosed by the assessee. If we consider the reasons for reopening, except stating in paragraph 3 that a sum of Rs.7,66,66,663/- which was chargeable to tax has escaped assessment by reason of failure on the part of the assessee to

disclose fully and truly all material facts necessary, there is nothing else in the reasons. In an unreported judgment of this Court in ***First Source Solutions Limited V/s. The Assistant Commissioner of Income Tax – 12 (2) (1) and Anr.***[1] relied upon by Mr. Pardiwalla, the Court held that a general statement that the escapement of income is by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment is not enough. The Assessing Officer should indicate what was the material fact that was not truly and fully disclosed to him. In the affidavit in reply, it is stated that the reassessment proceedings was based on audit objections. In another unreported judgment of this Court in ***Jainam Investments V/s. Assistant Commissioner of Income Tax, Central Circle – 8 (1) and Ors.***[2] relied upon by Mr. Pardiwalla, it is held that the reasons for reopening an assessment should be that of the Assessing Officer alone who is issuing the notice and he cannot act merely on the dictates of any another person in issuing the notice. In ***Indian and Eastern Newspaper Society V/s. Commissioner of Income Tax, New Delhi***[3], also relied upon by Mr. Pardiwalla, the Court held that in every case, the Income Tax Officer must determine for himself what is the effect and consequence of the law mentioned in the

1. Writ Petition No.2762 of 2019 dated 31.08.2021
2. Writ Petition No.2760 of 2019 dated 24.08.2021
3. 119 ITR 996 (SC)

audit note and whether in consequence of the law which has come to his notice he can reasonably believe that income had escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. Therefore, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax Officer.

9 Mr. Suresh Kumar relied upon a judgment of this Court in ***Crompton Greaves Ltd. V/s. Assistant Commissioner of Income Tax, Circle 6 (2)*** [4] to submit that even if the reason for reopening does not specifically state that there was any failure on the part of petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year, it will not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. We would certainly agree with Mr. Suresh Kumar but as held in *Crompton Greaves Ltd.* (Supra), this is subject to the rider that there must be cogent and clear indication in the reasons supplied, that in fact there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment. If the factum of failure to disclose can be

4. (2015) 55 taxmann.com 59 (Bombay)

culled down from the reasons in support of the notice seeking to reopen assessment, that will certainly not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. The Court held "*However, if from the reasons, no case of failure to disclose is made out, then certainly the assumption of jurisdiction under Sections 147 and 148 of the Act would be ultra vires, being in excess of the jurisdictional restraints imposed by the first proviso to Section 147 of the Act*".

10 Coming to the ground no.(i) for rejection that for issuing notice to reopen assessment, the Assessing Officer must only be satisfied that he had reasons to believe that income, profits and gains chargeable to income tax has escaped assessment and the second condition that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment is not required, Mr. Suresh Kumar in fairness agreed that that view of the Assessing Officer was incorrect. Mr. Suresh Kumar, as an Officer of the Court, agreed that both these are preconditions which are required to be fulfilled when assessment is sought to be reopened after four years. A Division Bench of this Court in ***Sesa Goa Limited V/s. Joint Commissioner of Income Tax and Ors.***[5] relied upon by

5. (2007) 294 ITR 101 (Bom)

Mr. Pardiwalla, has held :

> *"The power to reopen an assessment is not unbridled or unrestricted. The power is subject to the proviso embodied in the section itself. The proviso prescribes restrictions on the power of reopening the assessment by limiting the time period to four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of failure on the part of the assessee …… to disclose fully and truly all material facts necessary for the assessment of the income for that assessment year". …….. Section 147 of the Act is the source of power of the Assessing Officer for reopening of the assessment. Section 148 contains procedural restrictions for issuance of a notice for exercise of the power of reopening of an assessment conferred under Section 147. Section 149 prescribes the time limit for issuance of a notice under Section 148. In our opinion, the conditions laid down under Section 147 of the Act for the purposes of reopening the assessment must be satisfied before the notice can be issued. The conditions laid down in Section 147 are the jurisdictional facts necessary for the purpose of exercise of the power under Section 147. The jurisdictional facts prescribed under Section 147 must exist before a notice under Section 148 can be issued. …… In other words, if the basic jurisdictional facts required for reopening of an assessment under Section 147 of the Act do not exist it would not be competent for the Assessing Officer to issue a notice under Section 148. Even where the jurisdictional facts prescribed under Section 147 exist and all conditions laid down under Section 147 and the proviso thereto are satisfied, the notice under Section 148 can be issued only after the Assessing Officer has recorded his reasons for doing so under Sub-section (2) of Section 148 and has further obtained the necessary sanction for issuance of the notice as required under Section 151 of the Act. ….. The restriction ……. of a period of four years, ……*
>
> *In the present case, the reasons which have been recorded by the Assessing Officer for reopening of the assessment do not disclose that the assessee had failed to disclose fully and truly all material facts necessary for the purpose of assessment. No doubt in the last paragraph of the reasons, the first respondent has stated:*
>
> > *I am satisfied that due to furnishing the false particulars of the income by way of incorrect certificate which means failure on the part of the assessee to disclose fully and truly all material facts*

> *required for the assessment, income of Rs. 6,10,10,272 had escaped assessment.*
>
> *The said statement is clearly made only as an attempt to take the case out of the restriction imposed by the proviso to Section 147 of the Act.*

(emphasis supplied)

11 As regards ground no.(ii) that it is subsequent to the assessment proceedings it was noticed that the assessee had wrongly claimed the deduction under Section 57 of the Act and that it went unnoticed by the Assessing Officer during the course of original assessment proceedings and hence, the jurisdictional requirement under Section 147 of the Act has been fulfilled, that is not the case made out in the reasons to believe. As held in *First Source Solutions Limited* (Supra), the reasons for reopening an assessment has to be tested/examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the said Act seeking to reopen an assessment. These reasons cannot be improved upon and/or supplemented much less substituted by affidavit and/or oral submissions.

12 As regards ground no.(iii) that the Assessing Officer had not made any discussion in respect of those points on which assessment is reopened and hence, he has not formed any opinion and thus, the

window of reopening of assessment will remain open for Assessing Officer on those points, these are also not the grounds in the reason for reopening. The entire case of respondent while issuing reason for reopening is 'failure to disclose truly and fully material facts'.

13 As regards ground nos.(iv) to (vi) that the disclosure of material facts with respect to the setting off of the interest expenses under Section 57 of the Act might be full but it cannot be considered as true and hence, it is failure on the part of the assessee, mere production of books of accounts or other documents are not enough in view of explanation 1 to Section 147 etc., these can be dealt with together. The Apex Court in ***Calcutta Discount Co. Ltd. V/s. Income Tax Officer*** [6], relied upon by Mr. Pardiwalla, has held that there can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income Tax Officer might have discovered, the Legislature has put in the Explanation to Section 34 (1). The duty, however, does not extend beyond the full and truthful disclosure of all

6. (1961) 41 ITR 191 (SC)

primary facts. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else- far less the assessee to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences - whether of facts or law - he would draw from the primary facts. If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn? It may be pointed out that the Explanation to the sub- section has nothing to do with "inferences" and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty

on the assessee to disclose "inferences" to draw the proper inferences being the duty imposed on the Income Tax Officer. Therefore, it can be concluded that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this.

The relevant portion of *Calcutta Discount Co. Ltd.* (Supra) reads as under :

> *Before we proceed to consider the materials on record to see whether the appellant has succeeded ,in showing that the Income-tax Officer could have no reason, on the materials before him, to believe that there had been any omission to disclose material facts, as mentioned in the section, it is necessary to examine the precise scope of disclosure which the section demands. The words used are " omission or failure to disclose fully and truly all material facts necessary for his assessment for that year ". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his Possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise-the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.*
>
> *There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a*

possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above., In view of the Explanation, it will not be open to the assessee to say, for example-" I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose: My duty is done with disclosing these account-books and the documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, amount to " omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them-including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

Does the duty however extend beyond the full and truthful disclosure of all primary facts ? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else-far less the assessee--to tell the assessing authority what inferences-whether of facts or law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences-whether of facts or law-he would draw from the primary facts.

If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?

It may be pointed out that the Explanation to the sub- section has nothing to do with " inferences " and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose " inferences "-to draw the proper inferences being the duty imposed on the Income-fax Officer.

We have therefore come to the Conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this.

The position, therefore, is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "under assessments that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notice under Section 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non disclosure of material facts would not be open for the court's investigation. In other words, all that is necessary to give this special jurisdiction is that the Income-tax officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts.

.....

Both the conditions, (i) the Income-tax Officer having reason to believe that there has been under assessment and (ii) his having reason to believe that such under assessment has resulted from nondisclosure of material facts, must co-exist before the Income-tax Officer has jurisdiction to start proceedings after the expiry of 4 years. The argument that the Court ought not to investigate the existence of one of these conditions, viz., that the Income-tax Officer has reason to believe that under assessment has resulted from non-disclosure of material facts, cannot therefore be accepted.

(emphasis supplied)

14 In Commissioner of ***Income Tax V/s. Bhanji Lavji*** [7], relied upon by Mr. Pardiwalla, the Apex Court has held as under :

> *In our judgment, the High Court was right in holding that the Tribunal misconceived the nature of the proceedings and the duty imposed upon the assessee by Section 34(1) (a). It is not for the assessee to satisfy the Income-tax Officer that there was no concealment with regard to any question; it is for the Income-tax Officer, if that issue is raised, to establish that the assessee had failed to disclose fully and truly certain facts material to the assessment of income which had escaped assessment. Failure to disclose how the delivery of ghee was given at Porbandar was wholly irrelevant, and failure to furnish particulars in that behalf cannot assist the case of the Department. Observation relating to the failure to disclose the price of ghee supplied is not strictly accurate, for, it was disclosed by the assessee's representative that the cheques were delivered for payment of the dues for ghee supplied at Porbandar and that "they were subsequently transferred to Porbandar". It was again no duty of the assessee to disclose to or instruct the Income-tax Officer that there were "profits embedded in the receipt" of the money at Bombay. Section 34(1) (a) does not cast any duty upon the assessee to instruct the Income-tax Officer on questions of law. The assessee had disclosed that ghee was delivered at Porbandar by him and the price in respect of those supplied was received in Bombay which was subsequently transferred to Porbandar. We are unable to accept the view of the Tribunal that the "question of receipt of sale proceeds in British India was thus by-passed". The assessee's representative had expressly stated that the assessee had maintained a Bank account in British India in which "for recovering from merchants dues in respect of the goods delivered at Porbandar" were credited. The assessee also produced the Bank Pass Books. The finding that "the question of receipt of sale proceeds was by-passed" cannot be accepted as correct. The statement that the cheques were "subsequently transferred to Porbandar" only means that the amounts realized by encashment of the cheques were sent to Porbandar, and not that the cheques were sent to Porbandar. We do not think that any more detailed disclosure was necessary to comply with the requirements that the assessee had fully and truly disclosed all the material facts necessary for the purpose of assessment.*

7. (1971) 79 ITR 582 (SC)

> *The Income-tax Officer may, if he is satisfied, that on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment, income has escaped assessment, he may assess or re-assess the income. But when the primary facts necessary for assessment are fully and truly disclosed, he is not entitled on change of opinion to commence proceedings for reassessment. The Income-tax Officer was apprised of all the primary facts necessary for assessment, and he proceeded to "drop the assessment proceedings". He may have raised a wrong legal inference from the facts, disclosed but on that account he was not competent to commence re-assessment proceedings under Section 34(1) (a) for the two assessment years.*
>
> (emphasis supplied)

Section 34 of the Indian Income Tax Act, 1922 corresponds to Section 147 of the Act then in force.

15 In ***Gemini Leather Stores V/s. Income Tax Officer*** [8], also relied upon by Mr. Pardiwalla, the assessee had not even disclosed the transactions evidenced by the drafts which the Income Tax Officer discovered. After discovery, the Income Tax Officer gave the partners of the firm opportunity to explain the drafts. The firm had utilised certain drafts for making purchases and those amounts were not recorded in the disclosed account of the firm. Despite that, the Court held that the assessment cannot be reopened by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts as the

8. (1975) 100 ITR 1 (SC)

Income Tax Officer had material facts before him when he made the original assessment. The Court held that he cannot take recourse to reopen to remedy the error resulting from his own oversight. The relevant portions in this judgment of the Apex Court reads as under :

> *"……. In the case before us the assessee did not disclose the transactions evidenced by the drafts which the Income-Tax Officer discovered. After this discovery the Income-tax Officer had in his possession all the primary facts, and it was for him to make necessary enquiries and draw proper inferences as to whether the amounts invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. This the Income-tax officer did not do. It was plainly a case of oversight, and it cannot be said that the income chargeable to tax for the relevant assessment year had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts. The Income tax officer had all the material facts before him when he made the original assessment. He cannot now take recourse to Section 147 (a) to remedy the error resulting from his own oversight."*

16 Whether it is a disclosure or not within the meaning of Section 147 of the Act would depend on the facts and circumstances of each case and nature of document and circumstances in which it is produced. The duty of the assessee is to fully and truly disclose all primary facts necessary for the purpose of assessment. It is not part of his duty to point out what legal inference should be drawn from the facts disclosed. It is for the Income Tax Officer to draw a proper reference. In

the case at hand, petitioner had filed its annual returns alongwith computation of taxable income alongwith MAT (minimum alternate tax) calculation as per provisions of Section 115JB, audited annual financials including auditor's report, balance sheet, profit and loss account and notes to accounts, annual tax statement in Form 26AS under Section 203AA of the Act in response to the notices received under Section 142 (1) and 143 (2) of the Act. Petitioner also explained how the borrowing costs that are attributable to the acquisition or construction of assets have been provided for, what are the short term borrowings and from whom have been provided for. Petitioner also gave details of interest expenses claimed under Section 57 of the Act in response to further notice dated 10th October 2014 under Section 142 (1) of the Act, attended personal hearings and explained and gave further details as called for in the personal hearing vide its letter dated 17th December 2014 and after considering all that, the assessment order dated 20th February 2015 was passed accepting the return of income filed by the assessee.

The Assessing Officer had in his possession all primary facts, and it was for him to make necessary enquiries and draw proper inference as to whether from the interest paid of Rs.75,79,35,292/- an

amount of Rs.7,66,66,663/- has to be allowed as deduction under Section 57 of the Act or the entire interest expenses of Rs.75,79,35,292/- should have been capitalized to the work in progress against claiming Rs.7,66,66,663/- as deduction under Section 57 of the Act. The Assessing Officer had had all materials facts before him when he made the original assessment. When the primary facts necessary for assessment are fully and truly disclosed, the Assessing Officer is not entitled on change of opinion to commence proceedings for reassessment. Even if the Assessing Officer, who passed the assessment order, may have raised too many legal inferences from the facts disclosed, on that account the Assessing Officer, who has decided to reopen assessment, is not competent to reopen assessment proceedings. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to reopen the assessment based on the very same material with a view to take another view.

As noted earlier, petitioner has filed the annual returns with the required documents as provided for under Section 139 of the Act. As held by the Calcutta High Court in ***Income Tax Officer V/s. Calcutta Chromotype (P.) Ltd.***[9] relied upon by Mr. Pardiwalla, there was nothing

9. (1974) 97 ITR 55 (Calcutta)

more to disclose and a person cannot be said to have omitted or failed to disclose something when, of such thing, he had no knowledge. One cannot be expected to disclose a thing or said to have failed to disclose it unless it is a matter which he knows or knows of. In this case, except for a general statement in the reasons for reopening, the Assessing Officer has not disclosed what was the material fact that petitioner had failed to disclose.

17 We are satisfied that petitioner had truly and fully disclosed all material facts necessary for the purpose of assessment. Not only material facts were disclosed by petitioner truly and fully but they were carefully scrutinized and figures of income as well as deduction were reworked carefully by the Assessing Officer. In the reasons for reopening, the Assessing Officer has infact relied upon the audited accounts to say that the claim of deduction under Section 57 of the Act was not correct, the figures mentioned in the reason for reopening of assessment are also found in the audited accounts of petitioner. In the reasons for reopening, there is not even a whisper as to what was not disclosed. In the order rejecting the objections, the Assessing Officer admits that all details were fully disclosed. In our view, this is not a case

where the assessment is sought to be reopened on the reasonable belief that income had escaped assessment on account of failure of the assessee to disclose truly and fully all material facts that were necessary for computation of income but this is a case wherein the assessment is sought to be reopened on account of change of opinion of the Assessing Officer about the manner of computation of the deduction under Section 57 of the Act. In a similar case where the notice to reopen the assessment was founded entirely on the assessment records and the entire basis for reopening the assessment was the disclosure which has been made by the assessee in the course of the assessment proceedings and where no material to which a reference was to be found, a Division Bench of this Court in ***3i Infotech Limited V/s. Assistant Commissioner of Income Tax***[10] relied upon by Mr. Pardiwalla, in paragraph 12 held :

> *12. The record before the Court, to which a reference has been made earlier, is clearly reflective of the position that during the course of the assessment proceedings the assessee had made a full and true disclosure of all material facts in relation to the assessment. As a matter of fact, it would be necessary to note that the notice to reopen the assessment on the first issue is founded entirely on the assessment records. There is no new material to which a reference is to be found and the entire basis for reopening the assessment is the disclosure which has been made by the assessee in the course of the assessment proceedings. In Cartini India Limited V/s. Additional Commissioner of Income Tax [(2009) 314 ITR 275 (Bom.)], a Division Bench of this Court has observed that where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be*

10. (2010) 192 Taxman 137 (Bombay)

> *open to the Assessing Officer to reopen the assessment based on the very same material with a view to take another view. The principal which has been enunciated in Cartini must apply to the facts of a case such as the present. The assessee had during the course of the assessment proceedings made a complete disclosure of material facts. The Assessing Officer had called for a disclosure on which a specific disclosure on the issue in question was made. In such a case, it cannot be postulated that the condition precedent to the reopening of an assessment beyond a period of four years has been fulfilled.*

18 It will be proper in the circumstances to quote a paragraph from the judgment of the Apex Court in ***Parashuram Pottery Works Co. Ltd. V/s. Income Tax Officer*** [11] (cited by Mr. Pardiwalla), and it reads as under :

> *It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that state issues should not be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. So far as income-tax assessment orders are concerned, they cannot be reopened on the scope of income escaping assessment under Section 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As already mentioned, 'this cannot be said in the present case. The appeal is consequently allowed; the judgment of the High Court is set aside and the impugned notices are quashed. The parties in the circumstances shall bear their own costs throughout.*

11. (1977) 106 ITR 1 (SC)

19 As already mentioned, it cannot be said in the present case that there was an omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. It cannot be stated that the condition precedent to the reopening of an assessment beyond a period of four years has been fulfilled. The statement in the reasons for reopening "*I have reasons to believe that income of Rs.7,66,66,663/- which was chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all facts necessary .....*" is clearly made only as an attempt to take the case out of the restrictions imposed by the proviso to Section 147 of the Act. As observed in *Parashuram Pottery Works Co. Ltd.* (Supra), it would be in the interest of citizens of India or we should say, civilization that those who are entrusted with the task of calculating and realising the price that we pay for the civilization should familiarise themselves with the relevant provisions and become well versed with the law on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue.

20 Consequently, the petition is allowed. The notice dated 26th March 2019 issued by respondent no.1 under Section 148 of the Act

seeking to reopen the assessment for the Assessment Year 2012-2013 and the order dated 30th September 2019 are quashed and set aside.

21 Petition disposed with no order as to costs.

(R.I. CHAGLA J.) (K.R. SHRIRAM, J.)