IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

INCOME TAX APPEAL NO. 80 OF 2015

The Pr. Commissioner of Income Tax-1
Aaykar Bhavan, Near Holy Cross School,
Cantonment, Aurangabad. ..APPELLANT

VERSUS

M/s. The Jalna District Central Co-op. Bank
Ltd., Jalna. ..RESPONDENT

Mr Alok Sharma, Advocate for appellant;
Mr R.N. Dhorde Senior Advocate i/b Mr V.R. Dhorde, Advocate for respondent

CORAM : PRASANNA B. VARALE
AND
S. M. GAVHANE, JJ.

DATE : 30th July, 2018

ORAL ORDER:

Heard Mr. Alok Sharma, learned Counsel appearing for the appellant and Mr. Dhorde, learned Senior Counsel appearing for the respondent at length.

2. The appellant is challenging the order dated 29th April, 2015, passed by the Income Tax Appellate Tribunal, Pune, Bench 'A', Pune, in ITA Nos. 154 and 155IPN/2014 and prays for confirmation of the order dated 12th December, 2011, passed by the Assistant Commissioner of Income Tax, Circle-1, Aurangabad for the assessment year 2004-2005.

3. The substantial question of law raised by the appellant is,

> "Whether on the facts and in circumstances of the case, the Hon'ble Tribunal was right in law by holding that the order u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961 is illegal and void ab initio even the assessee made a false claim of deductions u/s. 36(1)(viia) for which it is not entitled for and thereby has not disclosed the material facts truly and fully to the AO?"

4. Mr. Sharma, learned Counsel appearing for the appellant vehemently submitted before us that the income tax authority by exercising the powers under Section 147 of the Income Tax Act (for short, 'the Act') was justified in issuing a notice under Section 148 of the Act for reassessment. It was vehemently submitted by Mr. Sharma that the respondent failed to disclose the material facts truly and fully to the Assessment Officer, as such, by seeking necessary approvals from the superior officers and the competent authority, the assessment authority issued notice for reassessment.

5. Mr. Sharma then submitted that the reply was submitted to the notice and finding no favour with the reply and the contentions raised by the respondent, the Assessment Officer, in reassessment order, disallowed the claim of the respondent assessee for amount of Rs.5,51,25,724/- for the assessment year 2004-05.

6. The respondent assessee, being aggrieved by the order passed by the assessment officer in reassessment, preferred an appeal before the Commissioner of Income Tax (Appeals), Aurangabad. The Commissioner also after finding no favour with the respondent assessee, confirmed the order of the assessment officer, whereby additions were made by the Assessment Officer.

7. Being aggrieved by the order of the Assistant Commissioner, the respondent assessee preferred an appeal before the appellate authority i.e. Income Tax Appellate Tribunal. The appellate authority i.e. Income Tax Appellate Tribunal (hereinafter referred to as 'ITAT' for sake of brevity) allowed the appeal in respect of validity of reassessment proceedings, however, dismissed the appeal on the ground of availability of deduction under Section 36(1)(viia) of the Act.

8. Being aggrieved by the order of the ITAT, the appellant is before us.

9. Mr. Sharma, learned Counsel for the appellant, in his detail submissions made an attempt to lay heavy attack on the order of the ITAT on the backdrop of the facts of the matter with the support of the certain judgments on which reliance was placed.

10. Per contra, Mr. Dhorde, learned Senior Counsel appearing for the respondent assessee submitted that the appellate authority committed no error. He vehemently submitted that bare perusal of the material would show that the respondent assessee, at no point of time failed to disclose the material facts, and on the contrary, all the material facts were brought to the notice of assessment officer time and again. He then submitted that the Assessment Officer committed a serious error on two counts, namely, the exercise undertaken by the Assessment Officer of reassessment was much beyond period prescribed in the provisions of the Act, more particularly Section 147. He further submitted that as the exercise of reassessment undertaken was hopelessly barred by limitation, the Assessment Officer could not have proceeded with reassessment and further could not have fixed tax liability with additions on the respondent assessee. He then submitted that the order also suffers on other ground of misconceived notion to the Assessment Officer that the respondent assessee failed to disclose the material facts truly and fully.

11. Mr. Dhorde, by inviting our attention to the documents placed on record submitted that all the documents which were before the Assessment Officer were clearly showing the status of the respondent assessee. The respondent assessee while submitting the returns made it known to the assessment officer the status of the assessee and then claimed allowance in the tax liability. He then submitted that the respondent assessee put up its

case within frame work of the law and under the provisions of Act and in this situation, the Assessment officer could not have raised ground that though there was due diligence, the facts escaped the attention of the Assessment Officer and it was a case of failure of disclosure of the material facts fully and truly. He then submitted that excuse of law cannot be a ground for the parity, much less to the Assessment Officer who is dealing with an exercise of assessing the returns day in and day out. He then placed reliance on certain judgments in support of his submission and also submitted that the reliance placed on the judgment by learned Counsel Mr Sharma appearing for appellant, is of no help to the appellant as the facts in the present matter are clearly distinguishable and in such a situation, the judgments relied on by Mr Sharma, are not applicable to the present case.

12. On the backdrop of the rival contentions raised by the learned Counsel for the respective parties, we have gone through the material placed on record as well as the judgments. Though Mr Sharma, learned Counsel for appellant vehemently submitted that in view of the facts of the matter and in view of substantial question raised in the appeal, the appeal be admitted and be heard for considering the issue in depth. After admission of the appeal and then after fixing the appeal for final hearing/disposal, we are unable to accept the submission of Mr Sharma, as after going through the material placed on record and after going through the order impugned in the appeal as well as after going through the judgments relied on by the learned

Counsel appearing for respective parties, we are of the clear opinion that the appeal is meritless and deserves to be dismissed at the threshold.

13. Before proceeding further, we may state here that the core issue in the matter is, whether the assessee failed to disclose the material facts truly and fully to the Assessment Officer. The respondent-assessee approached the Assessment Officer. The exercise of assessing of return was undertaken by the Assessment Officer and in the returns, respondent-assessee claimed the allowances. The respondent-assessee is the Jalna District Central Co-operative Bank Ltd., Jalna. The thrust of Mr Sharma was the respondent-assessee though was neither a scheduled Bank nor a non-scheduled Bank and was a Co-operative Bank, as such, was not entitled to for the allowances.

14. Per contra, it was submitted by Mr Dhorde that the respondent-assessee at every point of time i.e. at the time of submitting the returns, filing the reply to reassessment notice, going before the appellate authorities, made it very clear that respondent-assessee is a Co-operative Bank and that at no point, the assessee claimed that it is a scheduled Bank or a non-scheduled Bank.

15. On the backdrop of the above referred core issue, it would be necessary to refer to certain documents. The respondent-assessee has

placed on record its affidavit-in-reply. The documents placed on record by the respondent are not disputed by the appellant. As such, we may safely refer to these documents for assessing the rival contentions. The copy of the return placed on record along with the affidavit-in-reply shows that the return is submitted for assessment of the accounting year 2003-2004 and the assessment year is 2004-2005. In the return, at Sr.No.4, the status clause appears and against the status the assessee in the return refers to its status as "Co-operative Society (AOP)"

(emphasis supplied).

16. In the statement of the account under the head 'Business Income', the assessee refers to bad and doubtful debts deduction under Section36 (1)(viia)(a) and the same reads as "7,96,324.00". Then at clause No.9, it is again stated that deductions under Section 36(1)(viia)(a) on aggregate average advances made by the rural branches and sub-clause (i) of clause 9 reads amount of advances made by rural branches outstanding at the end of the month as "65,195.35 lakhs"

17. It was vehemently submitted by Mr Sharma, learned Counsel for appellant that the benefit under Section 36 (1) (viia) could not have been claimed by the assessee as the assessee is neither a scheduled Bank nor a non-scheduled Bank and by disclosing the material facts truly and fully, the disallowance was claimed.

18. On the return submitted, the Assistant Commissioner of Income Tax, Aurangabad passed order on 30th October, 2006 which was received by the assessee on 3rd November, 2006. The copy of the assessment order is placed on record at Exh.R-II with affidavit-in-reply. It would be useful to refer to the relevant part of the said order, which reads thus:-

"4. On the lines of the above discussion and conclusions arrived, the taxable income of the assessee is computed as under:-

Income as per Return of Income/Loss	*:*	*(-)Rs.4,50,02,689/-*
Add:		
i) Addition as discussed in para-3 above	*:*	*6,83,675/-*
Total	*:*	*(-)Rs.4,43,19,014/-*
Less: Increase in the deduction u/s 36 (1)(vii)	*:*	*(-)Rs. 14,179/-*
Total Income	*:*	*(-)Rs.4,43,33,193/-*
Tax on above Income of Rs.-------------------	*:*	*Rs. Nil*
Net Payable/Refundable	*:*	*Rs. Nil*
		==========

5. Assessed u/s 143(3)(ii) of the Income-tax Act, 1961. Issue Demand Notice and Challan accordingly. Issue penalty notice u/s 271(1)(c) of the I.T. Act, 1961."

19. The documents placed on record further show that the Assessment Officer submitted a proposal for reassessment to the Assistant Commissioner of Income Tax by way of a communication dated 15th April, 2011. The Assistant Commissioner, in his order dated 18th April, 2011 states as follows

> "On verification of record, it is observed that the assessee has claimed provisions for doubtful debts u/s.36(1)(viia) of Rs.23,42,797/- and on account of 10% of aggregate average advance of Rs.5,91,25,700/-. As per provisions of section 36(1)(viia), the said deductions are allowable only to scheduled Bank and non scheduled bank for A.Y. 05-06. Since you are a co-operative bank the above deduction claimed are not allowable. Hence, I have reason to believe that the income to the extent of Rs.6,14,64,497/- is an escaped income as per explanation (2) clause (c) (iii) & (iv) of section 147 of the I.T. Act, 1961."

20. The notice of reassessment was issued to the assessee on 23rd March, 2011 and the reply submitted by assessee is placed on record at Exh.R-V. It would be useful to refer to the contentions raised in the reply and the same read thus:

> "02. As the assessee bank has filed all the details fully & truly the return of income U/s. 139 & at the time of assessment U/s.143 the notice issued U/s. 148 is itself void & bad in law. The Detailed reasoning for the same is given in Annexure "A"

attached herewith”

“Section 147 of the Income Tax Act, 1961 provides that “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 Sec.139 or in response to notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully & truly all material facts necessary for his assessment for that assessment year. As the assessee bank has disclosed all facts fully & truly in the return of income submitted U/s. 139 & in the income tax scrutiny U/s. 143(3). The proviso to Sec. 147 squarely applied to the facts of this case. The work “or to disclose fully & truly all material facts necessary for his assessment” are conspiciously absent in the reasons recorded under Sec. 148(2) of the Act and therefore, all the subsequent proceedings are illegal being without jurisdiction.

The sanction accorded by Commissioner under Sec.151 is also without jurisdiction under Sec.151 is also without jurisdiction. Difference between reassessment proceeding beyond four years lies in the facts of the disclosure of material facts. Where such material facts have been disclosed, there can be no jurisdiction beyond four years. But where they have been disclosed, the fact that sanction has been accorded for notice cannot justify such notice, since sanction should have been given without application of mind. This envisages the reasons not recorded at all. The sanction obtained under Sec.151 of the Commissioner is also without jurisdiction as he is not the proper authority to accord such sanction.

> The notice u/s. 148 which is sine-qua-non for reassessment itself is bad in law and without jurisdiction.”

21. The copy of the assessment order dated 12th December, 2011, passed by the Assistant Commissioner of Income Tax, Aurangabad is placed on record at Exh R-VI. The Assistant Commissioner in the said order states that the contentions of the assessee are duly considered and found unacceptable and the reasons are assigned. These reasons read thus:

> “(i) The assessee has claimed deduction under section 36(1)(viia) of the Act, without legal provision of the Act. In other word deduction under section under section 36(1)(viia) of the Act on account of bad and doubtful debts was not allowable to the co-operative banks, however the assessee has claimed the same and filed incorrect particulars of his income; even though before assessing officer also the assessee has not disclosed fully and truly all facts of his case, which were necessary for his assessment. In view of above, after recording the reasons, notice under section 148 of the Act, was issued and duly served on the assessee, which is legally correct and is as per law.
>
> (ii) The assessee has failed to disclose fully and truly all material facts of his case, which were necessary for his assessment during the assessment proceedings. It is worth mentioning that the assessee has claimed the deductions which are not available for the assessee as per the Act. The assessee has travelled beyond the provisions of the Act, hence the assessee cannot take plea that he has disclosed fully and truly all material

> facts necessary for this assessment for the relevant assessment year. Hence the assessing officer has rightly issued the notice under section 148 of the Act."

22. Then a copy of income tax return submitted through the Accountant is placed on record at Exh.R-1 along with the affidavit-in-reply, which states that it is in Form No.2D. It would be useful for our purposes to refer to the certain clauses of this Form, which is titled as "INCOME TAX RETURN FORM FOR NON-CORPORATE ASSESSEE OTHER THAN CLAIMING EXEMPTIONS UNDER SECTION 11". It is stated at Sr. No.6 of the said Form which reads "CO-OPERATIVE SOCIETIES".

23. Perusal of all above referred documents show that right from submitting the return under the prescribed form, till the reply submitted to the reassessment notice and then reply before the appellate authorities, clearly show that the status of the respondent-assessee was mentioned everywhere as "Co-operative Society".

24. It will be also useful to refer to the order of the Assistant Commissioner of Income Tax, dated 18th April, 2011. On perusal of the complete text of the said order, nowhere the Assistant Commissioner of Income Tax states that he is of the opinion that there was a failure to disclose the material facts fully and truly but he only states that on

verification of the record, the assessee has claimed provision for doubtful debts under Section 36(1)(viia) of Rs.23,42,797/- and on account of 10% aggregate advance of Rs.5,91,25,700/-. As per the provisions of Section 36(1)(viia)of the Act, the said deductions are allowable only to scheduled Bank and non scheduled bank for the accounting year 2005-2006. These assessment lies on the backdrop of the provisions of Sections 147 and 148 of the Act.

25. Mr Dhorde, learned Counsel for respondent was justified in submitting that the competent authority like the Assistant Commissioner was to approve the sanction for reassessment on satisfying himself that such an exercise is necessary under Sections 147 and 148 of the Act. He was also justified in submitting that merely reproducing the opinion of the Assessment Officer was of no consequence. The Assistant Commissioner ought to have recorded his reasons and failure to record such reasons and merely putting a seal on the proposal of the Assessment Officer is not the compliance of Section 147 of the Act.

26. On the backdrop of these facts, it would be useful to refer to the observations of the ITAT. The ITAT firstly considered the submission that the exercise undertaken by the Assessment Officer was beyond stipulated period and as such, the Assessment Officer committed a serious error in issuing notice. The ITAT observed thus:

"12. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the CIT(A) and the Paper Book fled on behalf of the assessee. We have also considered the various decisions cited before us. The only dispute to be decided in the impugned appeal is regarding the validity of the notice issued u/s. 148 after a period of 4 years from the end of the relevant assessment year where assessments have been completed u/s. 143(3). Admittedly, the assessee has filed the original return of income for A.Y. 2004-05 on 0/-1-2004 and the assessment u/s. 143(3) has been completed on 30/-10-2006. Similarly, for A.Y. 2005-06 the original return was filed on 29-10-2006 and the assessment u/s. 143(3) was completed on 06/12/2007. The notice issued u/s. 148 for A.Y. 2004-05 is dated 23-03-2011 and for A.Y. 2005-06 is dated 15-03-2011. <u>In both the assessment years the status of the assessee has been mentioned by the AO as cooperative society.</u> Further, in both the assessment years the claim of deduction u/s. 36(1)(viia) has been allowed by the AO. We find from the notice issued u/s.148 that there was no allegation by the AO regarding any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Therefore, under the facts and circumstances the question arises as to whether the notice u/s. 148 after expiry of 4 years is valid when there is no allegation by the AO that there is failure to disclose fully and truly all material facts necessary for assessment."

(emphasis supplied)

27. Learned Tribunal then further observed thus:

> “17. Since the assessment in the instant case has been reopened after a period of 4 years from the end of the relevant assessment year and since there is no allegation in the notice issued u/s. 148 of the Act that there was any failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of assessment, therefore, in view of the decisions cited above the reassessment proceedings initiated by the AO in our opinion are void ab initio.”

28. It will be necessary to refer to the relevant provisions of the Act, which read thus:

<u>Section 147. [Income escaping assessment.</u>

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 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 nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:]

[Provided [also] that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters 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 ;

[(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;]

(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;]

Section 148. Issue of notice where income has escaped assessment.-

(1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year

corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed, and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139:

Provided that in a case—

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, re-assessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

Provided further that in a case—

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

Provided further that in a case—

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

Explanation.—For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.”

29. Mr Sharma, learned Counsel for the appellant has placed heavy reliance on the judgment of the Hon'ble the Apex Court, in the matter of **Income Tax Officer Ward No.16 (2) Vs. M/s TechSpan India Private Limited & anr.**, reported in **(2018) TaxCorp (DT) 71542 (SC),** to submit that the Assessment Officer committed no error in undertaking the exercise of reassessment as the income escaped from the assessment due to failure of the respondent-assessee in disclosing the material facts fully and truly. He firstly referred to the facts of the matter which are disclosed in clause (d) of paragraph No.2 of the said judgment which reads thus:

> "(d) Further, on 10.02.2005, a Notice was served upon the Respondent by the Revenue for re-opening the assessment under Section 148 on the ground that the deduction under Section 10A of the IT Act has been allowed in excess and the income escaped assessment works out to Rs.57,36,811/- in the original assessment. The Respondent filed a detailed reply objecting to the reassessment. However, by order dated 17.08.2005, the objections were rejected and reassessment was approved by the Revenue."

30. Then Mr Sharma invited our attention to the point framed for consideration and same reads thus:

> "4. The only point for consideration before this Court is whether the re-opening of the completed assessment is justified in the present facts and circumstances of the case? Rival contentions:-"

31. Our attention was also invited by Mr Sharma to paragraph Nos.12 and 13 of the said judgment, which read thus:

> “12) Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings.
>
> 13) The fact in controversy in this case is with regard to the deduction under Section 10A of the IT Act which was allegedly allowed in excess. The show cause notice dated 10.02.2005 reflects the ground for re-assessment in the present case, that 10 is, the deduction allowed in excess under Section 10A and, therefore, the income has escaped assessment to the tune of Rs. 57,36,811. In the order in question dated 17.08.2005, the reason purportedly given for rejecting the objections was that the assessee was not maintaining any separate books of accounts for the two categories, i.e., software development and human resource development, on which it has declared income

> separately. However, a bare perusal of notice dated 09.03.2004 which was issued in the original assessment proceedings under Section 143 makes it clear that the point on which the re-assessment proceedings were initiated, was well considered in the original proceedings. In fact, the very basis of issuing the show cause notice dated 09.03.2004 was that the assessee was not maintaining any separate books of account for the said two categories and the details filed do not reveal proportional allocation of common expenses be made to these categories. Even the said show cause notice suggested how proportional allocation should be done. All these things leads to an unavoidable conclusion that the question as to how and to what extent deduction should be allowed under 11 Section 10A of the IT Act was well considered in the original assessment proceedings itself. Hence, initiation of the re-assessment proceedings under Section 147 by issuing a notice under Section 148 merely because of the fact that now the Assessing Officer is of the view that the deduction under Section 10A was allowed in excess, was based on nothing but a change of opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings."

32. In the matter of Income Tax Officer Vs. TechSpan India Private Ltd. (cited supra), notice under Section 148 was issued to assessee and the same was subject matter of challenge before the High Court in writ petition. The High Court allowed the writ petition. Being aggrieved by the order of High Court, the Revenue preferred an appeal before the Hon'ble the Apex Court.

33. There cannot be any dispute on the proposition of law reflected in the judgment insofar as the powers being vested with the authorities and the exercise by the authorities under Sections 147 and 148 of the Act, but insofar as the factual aspects referred to above by us, we are of the opinion that the judgment is not of any help to the appellant for the reason that the material placed on record and referred by us, clearly shows that at every point of time the assessee disclosed its status as "Co-operative Society" and claimed the allowance. On this backdrop, the exercise undertaken by the Assessment Officer on the ground that there was failure to disclose the material facts truly and fully and the assessee was not entitled to claim disallowances on that ground, is unsustainable.

34. Then Mr Sharma, learned Counsel for the appellant placed reliance on the judgment of the Hon'ble the Apex Court, in the matter of **Sri Krishna Private Ltd. Etc. Vs. I.T.O. Calcutta and ors.,** reported in **(1996) AIR (SCW) 2926**. He invited our attention to the observations of the Hon'ble the Apex Court and then referred to the decision of the Constitution Bench in the matter of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District I, Calcutta & anr., reported in AIR 1961 Supreme Court 372 and the same reads thus:

> “6. ….. As we shall emphasise hereinafter, every disclosure is not and cannot be treated to be true and full disclosure. A disclosure may be a false one or true one. It may be full disclosure or it may not be. A partial disclosure may very often be misleading one. What is required is a full and true disclosure of all material facts necessary for making assessment for that year. This calls for an examination of the decisions of this Court analysing and elucidating Sections 147 and 148 of the act.
>
> 7. The first and foremost is the decision of the Constitution Bench Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District-I, Calcutta & Anr. [(1961) 41 I.T.R. 191. The case arose under Section 34 of the Income Tax Act [as amended in 1951]. In material particulars, the provisions in Section 34 were similar to those in Section 147. ….....”

35. Again we state that there cannot be any dispute on the proposition of law reflected in paragraph No.6 but for clearly distinguishing the facts, we are of the opinion that the judgment is of no help to Mr Sharma, learned Counsel for the appellant.

36. Mr Sharma then relied on the judgment dated 26th April, 2018 of the Division Bench of this Court in a bunch of the petitions (Ajeet Seeds Pvt. Ltd, Aurangabad Vs. The Union of India and other matters). A reference is made to the observations in the matters of Shri Krishna Private Ltd, Calcutta Discount Company Ltd. (referred supra) and Phool Chand Bajrang Lal. &

anr. Vs. Income Tax Officer & anr., reported in (1993) 203 ITR 456 (SC). Mr Sharma heavily relied on paragraph No.17 of the judgment of the High Court of Delhi, in the matter of Sc Johnson Products Private Ltd. Vs. Assistant Commissioner of Income Tax, Circle-22(2), New Delhi and same reads :

> “17. It is therefore clear that if the rationale for re-opening is purely factual, unless fresh facts or material having a "live link" with the issue, that can lead to inference of concealment of material facts cannot be gone into; the earlier assessment order becomes conclusive. However, if the AO comes across material subsequently, such as fresh facts, or materials which pertain to a previous assessment or assessment orders (as in the present case) where it is felt that returns were "dressed up" or improper claims were made, that escaped inquiry, reassessment is warranted. In such cases, the materials can also include subsequent years' assessments, which receive scrutiny during the course of whose proceedings the AO has occasion to see if the same, or same pattern of returns or claims were made. If so, the notice of reassessment would be justified.”

37. We are of the opinion that even accepting these observations in paragraph No.17 in toto, the judgment would not be applicable to the

present case. The Division Bench of the High Court of Delhi made it clear that "if the AO comes across material subsequently, such as fresh facts, or material which pertain to a previous assessment or assessment orders where it is felt that returns were dressed up and improper claims made, that escaped inquiry, reassessment is warranted."

38. On the backdrop of these observations, if the aspects in the present matter are seen, what emerges from the perusal of material is, there was no material which came to the knowledge of the Assessment Officer subsequently, which was not in the previous assessment. At all times, the status of the assessee was made known to the Assessment Officer being a Co-operative Society. It was not the case where the returns were dressed up and these facts escaped the attention of the Assessment Officer, as such, reassessment was warranted. Thus, we have no hesitation to state that even applying the ratio laid by the Division Bench of Delhi High Court in the judgment in the matter of SC Johnson Products Private Limited Vs. Assistant Commissioner of Income Tax, Circle (referred supra), no justifiable reason can be assigned for reassessment exercise undertaken by the Assessment Officer applying the provision of the Section 147 of the Act.

39. It will be necessary for us to refer to oftenly quoted judgment of the Constitution Bench in the matter of Calcutta Discount Company Limited

(supra). Mr Sharma placed heavy reliance on the observations reflected in paragraph Nos.10 and 16 of the said judgment, which read thus:

> “10. 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 32 250 what inferences-whether of facts or law-he would draw from the primary facts.
>
> 16. Clearly it is the duty of the assessee who wants the court to hold that jurisdiction was lacking, to establish that the Income-tax Officer had no material at all before him for believing that there had been such 251 non disclosure. To establish this the company has relied on the statements in the assessment orders for the three years in question and on the statement of Kanakendra Narayan Banerjee in the report made by him to the Commissioner of Income-tax for the purpose of obtaining sanction to initiate proceedings tinder s. 34 and also on his statement in the affidavit on oath in reply to the writ petition. The report is in these words:-

> " Profit of Rs. 5,48,002 on sale of shares and securities escaped assessment altogether.
>
> At the time of the original assessment the then I.T.O. merely accepted the company's version that the sale of shares were casual transactions and were in the nature of mere change of investments. Now the results of the company's trading from year to year show that the company has really been systematically carrying out a trade in the sale of investments. As such the company had failed to disclose the true intention behind the sale of the shares and as such s. 34(1)(a) may be attracted."

40. It will be again necessary to state certain facts. The judgment of the Hon'ble the Apex Court in the matter of Calcutta Discount Company Limited is delivered by the Constitution Bench consisting of five Hon'ble Judges of the Hon'ble the Apex Court.

41. The Assistant Commissioner of Income Tax, in the assessment order, which is heavily relied on by Mr Sharma refers to the Apex Court's Judgment, which reads thus:

> “(iv) Further, the honourable Justice Hidayatullah as a learned Chief Justice then was observed in Calcutta Discount Company's case reported in (1961) 41 ITR 191 (SC) that, mere production of evidences before the Assessing Officer was not enough, there may be omission or failure to make a true and full disclosure, if some material for the assessment lay embedded in the evidence which the Revenue could not

uncovered but did not, then it is the duty of the Assessee to bring it to the notice of the Assessing Authority. The assessee knows all the material and relevant facts the assessing authority, might not. In respect of the failure to disclose, the omission to disclose may be deliberate or inadvertent, that was immaterial, but if, there is omission to disclose material facts, then, subject to the other conditions, jurisdiction to reopen is attracted. It is also held in the aforesaid judgment, that if there are some primary facts from which the reasonable belief could not be formed that, there was some non disclosure of failure to disclose fully and truly all the material facts, the Assessing Officer has jurisdiction to reopen the assessment."

42. Mr Sharma, learned Counsel heavily relied on the judgment of the Calcutta Discount Co. Limited.

43. The Assistant Commissioner refers to the observations which are a part of minority view taken by Justice Hidaytullah and Justice Shah and it will not be out of place to state that the minority view was authored by Justice Hidaytullah and the majority view was authored by Justice Das Gupta speaking for himself Justice S.K. Das and Justice Rajgopala Ayyangar. Paragraph Nos.9 and 10 of the said judgment read thus:

"9. 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 249 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.

10. 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 32 250 what inferences-whether of facts or law-he would draw from the primary facts."

44. Though Mr Sharma placed heavy reliance on paragraph No.10 referred to above, we again state that even though there can not be any dispute insofar the principle laid down by the Hon'ble the Apex Court in the matter of Calcutta Discount Company Ltd., in the present matter the respondent-assessee never hidden his status or claimed that it is a scheduled Bank or non-scheduled Bank but at all times, the respondent-assessee made it known to the Assessment Officer its status as Co-operative Society.

45. Mr Sharma, learned Counsel for the appellant though made an attempt to submit that claiming disallowances itself was failure to disclose the material facts truly and fully, we can not accept the submission of Mr Sharma that such claim was made by the assessee. The assessee made it known to the Assessment Officer by way of sufficient material, which was before the Assessment Officer that the status of the respondent-assessee was

of a Co-operative Society. The Assessment Officer is a officer who is fully aware of the provisions of the Act and if any changes made in the Act insofar as the deductions, etc. are concerned. On the backdrop of the facts of the matter, the Assessment Officer could not have raised this ground that even though the exercise of reassessment was undertaken after much belated period i.e. the period beyond the prescribed time frame, the exercise was undertaken because the assessee failed to disclose the material facts fully and truly and this fact escaped the attention by the Assessment Officer.

46. What reveals from the material placed on record is, in case of escaping the attention of the Assessment Officer even though the Assessment Officer was diligent and because of such “dressed up” returns (the words as are used by the Division Bench of High Court of Delhi in the matter of Sc Johnson Products Private Ltd. Vs. Assistant Commissioner of Income Tax) because of material escaping the attention of the Assessment Officer. When every material was before the Assessment Officer showing the status of the assessee as a Co-operative Society, the Assessment Officer at the very first assessment itself, could have rejected the claim of the assessee, but the Assessment Officer failed to do so and after much lapse of time, issued notice of reassessment that too, without there being a proper approval of the superior competent authority regarding its independent reason on assessment of the proposal for reassessment and then issuing notice for reassessment after lapse of the period prescribed under the

provisions of the Act and confirmed by the Commissioner, was clearly unsustainable. The ITAT committed no error.

47. Considering all these facts, we are of the opinion that the appellant has failed to raise any substantial ground in the appeal. The appeal, thus being wholly meritless, deserves to be dismissed and same is accordingly dismissed at the threshold.

(S. M. GAVHANE, J.) **(PRASANNA B. VARALE, J.)**

sjk