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

WRIT PETITION NO. 2815 OF 2019

Kalpataru Limited)
91, Kalpataru Synergy,)
Opp. Grant 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

Mr. Percy 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 : 30th SEPTEMBER, 2021**

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

1. Rule. Rule made returnable forthwith.

With the consent of parties taken up for hearing at the admission stage only.

2. Petitioner is challenging the validity of notice dated 27/03/2019 received under Section 148 of the Income Tax Act, 1961 (the Act) together with consequential notices and orders for reopening the assessment for the assessment year 2012-2013. According to petitioner, the impugned notice is without jurisdiction and if the jurisdictional conditions as required to be complied with before initiating reassessment proceedings are not satisfied, the assessment cannot be reopened.

3. Petitioner is a real estate developer. It is petitioner's case that its books are regularly audited under Section 44 AB of the Act and is also assessed to income tax. During the previous year pertaining to the assessment year 2012-13, petitioner declared income from house property, business and profession, capital gains and income from other sources. Petitioner's income from house property after deduction under Section 24 of the Act had resulted into loss of Rs.2,91,39,714/-. Petitioner was eligible for deduction of Rs.139,36,10,974/- under Section 80 IB of the Act. But as available taxable income after set off of losses under Section 71 of the Act was only Rs.78,47,26,016/-, petitioner restricted the claim under Section 80 IB of the Act to taxable business income of Rs.78,47,26,016/-. As per the provisions of Section 71 of the Act, petitioner set off loss from the house property against short term capital gain, income from other sources and business income. The taxable business income, after set off of said losses, is of Rs.78,47,26,016/- on which petitioner has claimed deduction under

section 80 IB (10) of the Act. Petitioner filed its return of income for the assessment year 2012-13 on 30th September, 2012 declaring total income at NIL under the normal provisions of the Act and declared book profit under Section 115 JB of the Act at Rs.86,38,03,184/-.

4. Petitioner's case was selected for scrutiny assessment and Respondent No.1 issued a notice dated 4th August, 2014 under Section 143 (2) of the Act and asked petitioner to file various details as mentioned therein. Petitioner, by its reply dated 13th August, 2014 provided details. Respondent No.1 thereafter issued further notice dated 9th October, 2014 under Section 142 (1) of the Act seeking further details. Those were provided by petitioner vide its letter dated 3rd February, 2015. By a letter dated 16th March, 2015 petitioner further explained the computation of income from house property and permissible deduction under Section 24 of the Act. Respondent No.1 after applying his mind passed the assessment order dated 17th March, 2015 under Section 143 (3) of the Act. Petitioner's income was assessed as NIL and book profit under Section 115 JB of the Act was computed at Rs.86,63,42,457/-.

5. More than four years later Respondent No.1 issued a notice dated 27th March, 2019 under Section 148 of the Act stating that he had reason to believe that petitioner's income chargeable to tax for the assessment year 2012-2013 had escaped assessment within the meaning of

Section 147 of the Act. Petitioner was directed to deliver within 30 days a return in the prescribed form of petitioner's income for assessment year 2012-2013.

6. Petitioner, in reply, addressed a letter dated 29th March, 2019 and requested Respondent No.1 to provide the recorded reasons. Petitioner also filed its return of income which was identical to the return earlier filed on 30th September, 2012.

Respondent No.1 addressed a letter dated 28th May, 2019 forwarding the reasons for re-opening of assessment under Section 147 of the Act. In the reasons it is stated that :

- (a) Petitioner has computed income from house property by claiming 1/5th of the construction interest on notional basis and which has resulted into irregular allowance of construction period notional interest of Rs.3,90,71,980/- ;
- (b) Petitioner has claimed deduction under Section 80 IB of the Act in respect of income from other sources which is judicially held not allowable ;
- (c) Petitioner has wrongly claimed deduction under Section 80 IB of the Act on total income instead of claiming on the business income and has wrongly claimed deduction under Section 80 IB of the Act on capital gain and income from other sources and thus petitioner has failed to disclose true and full material facts before Respondent No.1.

7. This was followed by a notice dated 14th June, 2019 issued under Section 142 (1) of the Act by which Respondent No.1 sought further details. By its letter dated 20th June, 2019, petitioner furnished its objections to the proposed reassessment. Petitioner pointed out that (a) it had provided for all details, reassessment proceedings were based on change of opinion and hence jurisdictional conditions are not complied with and (b) reassessment is based on reappraisal of the same material facts and therefore, there cannot be any failure to fully and truly disclose of the material facts.

8. Respondent No.1 passed an order dated 30th September, 2019 rejecting petitioner's objections. According to Respondent No.1 :

(a) As per the amended provisions of Section 147 with effect from 01/04/1989 irrespective of the fact that there is full and true disclosure made by the assessee if there is reason to believe that income has escaped assessment reopening is justified ;

(b) Further at the stage of issuance of notice the only question that arises is whether on the basis of material, prima facie there is reason to believe that income has escaped assessment. It was noticed that petitioner has wrongly claimed construction period interest which led to double deduction and further had wrongly claimed deduction under

Section 80 IB of the Act against “capital gains and income from other sources” ;

(c) Respondent No.1 has not denied the fact that all material facts/information were on record but according to Respondent No.1 they were not relevant if later on it is noticed that claim made by the assessee is wrong ;

(d) If in the original assessment proceedings some of the material facts were not perused in detail, petitioner cannot take advantage of it ;

(e) The issue of tangible material and change of opinion is not relevant at the stage of issuance of the notice ;

(f) As per Explanation 1 to Section 147 of the Act furnishing of basic documents did not amount to complete disclosure ;

(g) The Assessing Officer not having discussed the issue raised under reassessment proceedings in the assessment order, it can be said that the reassessment proceedings were validly initiated ;

(h) The reasons for formation of belief of escaping of income were formed in good faith and that was sufficient for initiating reassessment proceedings.

9. Mr. Pardiwalla submitted that ;
- (a) Existence of a valid reason to believe is sine qua non to the exercise of jurisdiction under Section 147 of the Act.
 - (b) There are many decisions where it is held that the expression “reason to believe” postulates a bonafide belief that income has escaped assessment and there must exist objective reasons for that belief and the recorded reasons did not constitute reasons to believe that the income has escaped assessment.
 - (c) Scrutiny assessments cannot be reopened beyond four years unless there is tangible material and there is fault on the part of assessee to disclose fully and truly all material facts necessary for its assessment for that assessment year. Simply saying that there was a fault to disclose fully and truly all material facts is not enough. The reasons to believe has to specifically disclose what are these materials which were not fully and truly disclosed.
 - (d) No fresh or tangible material on record has been disclosed for initiating reassessment.
 - (e) Reassessment cannot be reopened on a mere change of opinion etc.

10. Mr. Suresh Kumar submitted that mere production of documents is not a ground to dispute the re-opening of the assessment. It would also not amount to disclosure in respect of the escaped assessment. As per Explanation 1 to Section 147 of the Act even in case where petitioner had produced the document showing the income which was not assessed earlier is also a ground for re-opening of the assessed return. Therefore, petitioner cannot state that it had already produced the documents alongwith returns and hence the Assessing Officer cannot reopen the assessment which had attained finality. Mr. Suresh Kumar submits that even if any mistake went unnoticed by the Assessing Officer during the course of original assessment proceedings, the assessee cannot take this ground to object the re-opening. Mr. Suresh Kumar's submissions were basically reiteration of the views stated in the order disposing the objections raised by petitioner and the averments in the affidavit in reply of one Mr. Ankit Verma affirmed on 19th November, 2019.

11. 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.

12. If one considers the reasons, the Assessing Officer only states that from the record it is noticed that petitioner has computed income from house property by claiming 1/5th of the construction interest on notional basis and which has resulted into irregular allowance of construction period notional interest of Rs.3,90,71,980/-. Secondly, it is stated that it is noticed that petitioner has claimed deduction under Section 80 IB of the Act in respect of income from other sources which is as judicially held not allowable. Thirdly, it is stated that it is noticed that petitioner has wrongly claimed deduction under Section 80 IB of the Act on total income instead of claiming on the business income and has wrongly claimed deduction under Section 80 IB of the Act on capital gain and income from other sources and thus petitioner has failed to disclose true and full material facts before

Respondent No.1. There is nothing else in the reasons. 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.

13. In this regard, it will be useful to reproduce paragraph nos.10, 13 to 17 of the recent judgment of this court in **Ananta Landmark Pvt. Ltd. Vs. Deputy Commissioner of Income Tax Central Circle 5 (3) and Ors.**¹

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., [(2007) 294 ITR 101 (Bom)]** relied upon by 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

¹ WP NO. 2814 of 2019 dated 14th September, 2021 (Unreported).

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)

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, [(1961) 41 ITR 191 (SC)]** 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 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-tax 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**, [(1971) 79 ITR 582 (SC)] 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.

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, [(1975) 100 ITR 1 (SC)]* 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 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. [(1974) 97 ITR 55 (Calcutta)]** relied upon by Mr.Pardiwalla, there was nothing 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**, [(2010) 192 Taxman 137 (Bombay)] 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 re-open 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 re-opening 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 open to the Assessing Officer to re-open 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 re-opening of an assessment beyond a period of four years has been fulfilled.*

14. Therefore, though it is correct that explanation 1 to Section 147 of the Act says mere production of books of accounts or other documents are not enough, and the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee, this duty does not extend beyond the full and truthful disclosure of all 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?

15. As held in *Ananta Landmark Pvt. Ltd. (supra)*, Explanation 1 to Section 147 of the Act 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, the duty of the Assessee is to disclose fully and truly all primary relevant facts and it does not extend beyond this.

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 has also explained how it had computed income from house property after deducting interest for construction period of Rs.3,90,71,980/- and why 1/5th of construction period interest was deductible. Petitioner has also given its justification of eligible claim under Section 80 IB (10) of the Act for Rs.139,36,10,974/- and also submitted duly certified Audit Report and Architect certificate together with detailed profitability workings under Section 80 IB (10) of the Act vide its letter dated 3rd February, 2015.

17. The Assessing Officer had in his possession all primary facts and it was for him to make necessary inquiries and draw proper inference as to whether the interest of Rs.3,90,71,980/- was allowable as a deduction. Based on the primary facts and after necessary inquiries the Assessing Officer was also satisfied that petitioner had complied with all the justification specified in Section 80 IB (10) of the Act and was duly entitled/eligible for deduction in respect of the profits from eligible house purchase. 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 re-open assessment, is not competent to re-open assessment proceedings. Where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to re-open the assessment based on the very same material with a view to take another view. Petitioner has filed the annual returns with the required documents as provided for under Section 139 of the Act. There was nothing 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 re-opening, the Assessing Officer has not disclosed what was the material fact that petitioner had failed to disclose.

18. 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.

19. In the reasons for reopening, the Assessing Officer has infact relied upon the audited report accounts to say that the claim of petitioner of 1/5th of the construction period interest was double deduction or that it has resulted in irregular allowance of construction period interest of Rs.3,90,71,980/- or that petitioner was not entitled for deduction under Section 80 IB of the Act. In the reasons for re-opening, there is not even a whisper as to what was not 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 re-opened on account of change of opinion of the Assessing Officer about the manner of computation of the deduction.

20. The notice to re-open the assessment was found entirely on the assessment records. The entire basis for re-opening the assessment is the disclosure which has been made by the assessee in the course of the assessment proceedings. It is settled law that where on consideration of material on record, one view is conclusively taken by the Assessing Officer, it would not be open to the Assessing Officer to re-open the assessment based on the very same material with a view to take another view. Petitioner had during the course of the assessment proceedings made a complete disclosure of material facts. The Assessing Officer had called for disclosure on which a specific disclosure on the issue in question was made. In such a case, it cannot be stated that condition precedent to the re-opening 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 above 1 Lakh 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*” 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.

21. Consequently, the petition is allowed. The notice dated 27th 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.

22. Petition disposed with no order as to costs.

(R.I. CHAGLA J.)

(K.R. SHRIRAM, J.)