

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

WRIT PETITION NO. 2816 OF 2019

Kalpatatru Plus Sharyans	)	
91, Kalpataru Synergy,	)	
Opp. Grand Hyatt, Santacruz,	)	
Mumbai – 400 055.	)	 Petitioner

V/s.

1. Deputy Commissioner of Income Tax	)	
Central Circle–5(3), having his office	)	
at Air India Building, Nariman Point,	)	
Mumbai – 400021.	)	
	)	
2. Pr. Commissioner of Income Tax,	)	
Mumbai having his office at	)	
Pr. Commissioner of Income Tax 19 th	)	
Floor, Air India Building, Nariman Point,	)	
Mumbai – 400021.	)	
	)	
3. Union of India, through the	)	
Secretary, Department of Revenue,	)	
Ministry of Finance, North Block,	)	
New Delhi – 110001.	)	 Respondents

Mr. P.J. 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 R.I. CHAGLA, J.)

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

2 Rule. Rule made returnable forthwith.

3 Petitioner is engaged in the business of real estate development. Petitioner had filed its annual returns for assessment year 2012-13. As required under section 139 of the Income Tax Act 1961 (the Act), petitioner being a company filed its audited profit and loss account and balance sheet and the auditor's report with the annual returns. The annual returns was filed by the petitioner on 27.09.2012 declaring total income of Rs.6,74,350/- under Section 139 (1) of the Act. Petitioner's case was selected for scrutiny assessment for the assessment year 2012-13. Respondent No.1 issued a notice dated 04.08.2014 under Section 142 (1)/143 (2) of the Act, calling upon the petitioner to furnish the documents mentioned as per the annexure to the notice. The items mentioned in the annexure are the copy of return; audited account; tax audit report, balance sheet; profit and loss account etc.; copy of evidence of payment of tax and brief note on business activity. By its letter dated 13.08.2014, petitioner

submitted all the documents which are called for by respondent No.1 and which included copy of income tax return; computation of taxable total income; audited annual financials as on 31.03.2012 (auditor's report, balance sheet, profit and loss account and notes to accounts); tax audit report in Form 3CB / 3CD; annual tax statement in form 26AS u/s. 203AA of the Act and nature of business activity.

4 Petitioner thereafter received the further notice dated 09.10.2014 under Section 142(1) of the Act calling upon petitioner to provide certain other details, one of which was "details of interest expenses claimed under Section 57 of the Act". These details were provided by the petitioner vide letter dated 24.12.2014. Since further clarification was sought for in course of assessing proceeding by respondent No.1, petitioner by its letter dated 13.03.2015 provided the same.

5 Assessing Officer after making other enquiries and scrutinizing all the details furnished by petitioner and after applying his mind to all issues, passed an assessment order dated 17.03.2015 u/s.143(A) of the Act. Respondent No.1 assessed the petitioner's income at Rs.6,74,353/-.

6 After a period more than four years respondent No.1

issued notice dated 26.03.2019 under Section 148 of the Act stating that whereas *“I have reasons to believe that your income chargeable to Tax for the Assessment Year 2012-13 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961.”*

7 Petitioner addressed a letter dated 29.03.2019 requesting the respondent No.1 to provide it with the recorded reasons. The petitioner without prejudice to its rights and contentions filed its return of income which is identical to the return earlier filed by it on 07.09.2012.

8 Respondent No.1 by its letter dated 28.05.2019 provided the petitioner with the reasons recorded for reopening of the assessment.

9 Respondent No.1 issued notice dated 14.06.2019 under Section 142(1) of the Act calling upon petitioner to provide further details/ information/ documents in order to proceed with the reassessment proceedings. Petitioner responded by its letter dated 19.06.2019 filing its objections to reopening of the assessment. According to petitioner, there was no failure to truly and fully disclose material facts and in any case, it was a mere case of change of opinion and there was no fresh tangible material for initiating

reassessment proceedings. Respondent No.1 passed an order dated 30.09.2019 with reference to the objections raised by the petitioner to the issuance of notice under Section 148 of the Act, which is impugned in this petition. According to Respondent No.1,

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

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

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

those points where the Assessing Officer neither accepts nor rejects such claim;

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

(v) The contention of the assessee that true and full disclosure of material fact with respect to interest income was made during the course of original assessment proceedings is not correct as the assessee was fully aware that it is settled position of law that the interest expenses incurred for the purpose of business cannot be set off against the interest income under the income from other

sources. The disclosure of material facts with respect to the setting off the interest expenses under Section 57 of the Act might be full but it cannot be considered as true. This is failure on the part of the assessee;

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

10 Mr. Pardiwalla, learned Senior Counsel for petitioner has relied upon the judgment dated 14.09.2021 passed by this Division Bench in Writ Petition No.2814 of 2019 in ***Ananta Landmark Pvt. Ltd. vs. Deputy Commissioner of Income Tax Central Circle 5 (3) and others.*** He has submitted that by the said judgment this Division Bench disposed of the Writ Petition No.2814 of 2019 and set aside a similar notice dated 26.03.2019 issued by respondent No.1 u/s.148 of the Act as well as an almost identical order dated 30.09.2019 rejecting the objections of the petitioner to the reopening of the assessment. He has submitted that by the said notice and order, the respondent No.1 had sought to reopen the assessment for the assessment year 2012-13.

This is for the same assessment year as in the present case. He has submitted that the impugned order dated 30.09.2019 in *Ananta Landmark Pvt. Ltd.* bears the same date as the impugned order in the present case and was passed by the same Assessing Officer. He has submitted that the reasons given in the impugned order for rejecting the objections raised by the petitioner are the same reasons given in the order dated 30.09.2019 which order was quashed and set aside in *Ananta Landmark Pvt. Ltd.* He has submitted that the findings of this Division Bench in *Ananta Landmark Pvt. Ltd.* will apply in the present case. The impugned notice dated 26.03.2019 and impugned order dated 30.09.2019 in the present case also requires to be quashed and set aside.

11 Mr. Suresh Kumar, learned Counsel appearing for respondents has relied upon the affidavit-in-reply of Shri Ankit Verma, Deputy Commissioner of Income Tax Central Circle-5(3), dated 18.11.2019. He has placed reliance upon the impugned order dated 30.09.2019 and the reasons given in the impugned order for rejecting the objections raised by the petitioner for reopening of assessment by issuance of notice u/s.148 of the Act. However, there is no dispute that the impugned order in the present case is almost identical to the impugned order which had been quashed and set aside in *Ananta*

Landmark Pvt. Ltd. by this Division Bench.

12 We have considered the submissions. It does appear that the impugned notice dated 26.03.2019 is similar and impugned order dated 30.09.2019 is almost identical to the notice and order bearing the same dates which were quashed and set aside in *Ananta Landmark Pvt. Ltd.* by this Division Bench vide judgment dated 14.09.2021. The present case was considered with a batch of cases including *Ananta Landmark Pvt. Ltd.* and upon so considering respondent No.1 had passed virtually identical orders in these cases rejecting the objection to reopening of the assessment under Section 147 of the Act.

13 In *Ananta Landmark Pvt. Ltd.* this Court had held that the petitioner had truly and fully disclosed all material facts 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 in fact 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 reasons for reopening of assessment are also found

in the audited accounts of petitioner. In the reasons for reopening, there was not even a whisper as to what was not disclosed. It was thus held in *Ananta Landmark Pvt. Ltd.* that the Assessing Officer had admitted that all details are fully disclosed. This was 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.

14 In the present case the findings in *Ananta Landmark Pvt. Ltd.* apply. The reasons for reopening of the assessment u/s. 147 of the Act reveal that the audited accounts filed by the petitioner was relied upon by the Assessing Officer to state that “*Hence, interest paid to HDFC bank amounting Rs.11,46,38,381/- was not an allowable deduction u/s.57 of the Act as claimed by assessee against interest income treated as other income.*” There is not a whisper in the present case as to what was not disclosed. Further, the Assessing Officer had admitted that all details were fully disclosed. Thus, the present case 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. Here too 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 u/s.57 of the Act.

15 This Division Bench in *Ananta Landmark Pvt. Ltd.* has considered the various decisions of the Supreme Court as well as this Court in matters concerning reopening of assessment u/s.147 and proviso thereto of the Act. It is clear from the settled law that where a period of four years has been lapsed from the end of the relevant assessment year, the Assessing Officer has to mention what was the tangible material to come to the conclusion that there is escapement of income from assessment and that there has been a failure to disclose fully and truly material facts as per the requirement stipulated in the proviso to Section 147 of the Act, prior to amendment, which is applicable in the present case. 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.

In the reasons for reopening in the present case as well as in the case of *Ananta Landmark Pvt. Ltd.* except stating that income which was chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary, there is nothing else in the reasons.

16 The Supreme Court in *Calcutta Discount Co. Ltd. vs. Income Tax Officer*,¹ has held that there can be no doubt that the duty of disclosing all primary facts relevant to the decision of the question before the assessment authority lies on the assessee. To meet all possible contentions that when some account books or other evidence have been produced, there is no duty to of the assessee to disclose further facts which on due diligence, the Income Tax Officer might have discovered, the legislature has put in explanation to Section 34(1). The duty, however, does not extend beyond the full and truthful disclosure of all primary facts before the assessing authority. He requires no further assistance by way of disclosure. It is for him 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.

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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."

17 In the present case there is no failure on the part of the assessee to truly and fully, disclose all primary facts necessary for the purpose of assessment. It cannot be stated that the condition precedent to the reopening of the assessment beyond the period of four years has been fulfilled. The statement in the reasons for reopening *"I have reasons to believe that income of Rs.11,46,38,381/- which was chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary and, therefore, this is a fit case for*

reassessment within the meaning of Section 147 of the I.T. Act and the assessment for assessment year 2012-13 needs to be reopened u/s.148 of the Act,” 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. The other reason given in the reason for reopening of the assessment is that the assessee had shown 35 constructed units valuing at Rs.14,04,35,511/- as on 31.03.2012. However, no income under the head income from House Property has been offered by the assessee during the year under consideration. This reason is not mentioned in the reasons to believe that the income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts. Thus, this reason too cannot be considering as fulfilling the condition precedent to the reopening of assessment beyond the period of four years as per the applicable proviso to Section 147 of the Act.

18 Consequently, the petition is allowed. The notice dated 26.03.2019 issued by respondent No.1 under Section 148 of the Act seeking to reopen the assessment for the assessment year 2012-13 and the order dated 30.09.2019 are quashed and set aside.

19 Petition is disposed of with no order as to costs.

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(R.I. CHAGLA, J.)

(K.R. SHRIRAM, J.)