

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

WRIT PETITION NO.550 OF 2022

Ashraf Alibhai Nathani, Mumbai

...Petitioner

vs.

Assistant Commissioner of Income Tax
Circle-22(1), Mumbai and Others

...Respondents

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PAREKAR

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Mr. Hiro Rai a/w. Mr. Subhash Shetty i/b. Mr. Atul Jasani, for the
Petitioner.

Mr. Akhileshwar Sharma, for the Respondents

**CORAM : K.R. SHRIRAM &
 N. J. JAMADAR, JJ.**

DATE : FEBRUARY 16, 2022

P.C.:

1. On 27th January, 2022 time to file reply was given up to 10th February, 2022. No reply has been filed and therefore we are proceeding to dispose the Petition at this stage itself without waiting for reply.

2. Petitioner along with other members of his family owned shares in a company called Ruby Macons Limited. Petitioner held 766200 shares out of 3331775 equity shares in the company. Petitioner and the other share holders entered into a share purchase agreement dated 19th October, 2012 under which the entire share holding of Petitioner and his family members was acquired by a company MWV Wadco India Private Limited.

Petitioner for his 766200 shares received a consideration of Rs. 1,12,28,53,880/- under the share purchase agreement.

3. A search action under section 132 of the Income Tax Act, 1961 (the Act) was conducted in the premises of Petitioner and his family on 18th June, 2013. Petitioner filed his return of income for A.Y. 2013-2014 on 27th September, 2013 declaring a total income of Rs. 1,21,85,94,510/- including long term capital gains of Rs. 1,11,40,59,040/- arising out of transfer of his share holding in Ruby Macons Limited. The total tax payable therein of Rs. 26,16,22,522/- was also duly paid. The return of income was processed under section 143(1) of the Act, accepting the returned income.

4. Thereafter, pursuant to the search mentioned earlier, a notice dated 7th September, 2015 under section 153A of the Act was issued to Petitioner requiring him to file return of income for A.Y. 2013-2014 being one out of the six assessment years in respect of which he was assessable under the Act. In compliance with the notice, Petitioner, on 13th October, 2015, furnished his return of income declaring the same total income of Rs. 1,21,85,94,510/-.

5. Later the case was selected for scrutiny and a notice under

section 143(2) of the Act dated 2nd November, 2015 and another notice under section 142(1) of the Act dated 6th January, 2016 along with questionnaire was issued to Petitioner. Scrutiny assessment of all the family members was also going on simultaneously for A.Y. 2013-2014. Petitioner furnished all information including furnishing copies of the share purchase agreement, valuation report, audited report etc. The notice also asked for details regarding expenses of Rs. 21,04,027/- claimed while computing capital gains. The details regarding exemption from capital gains claimed under section 54EC in respect of investment in prescribed bonds was also furnished. Thereafter, assessment order dated 19th February, 2016 was passed under section 143(3) read with 153A of the Act accepting the total income returned by Petitioner at Rs. 1,21,85,94,510/-.

6. More than five years later, Petitioner received a notice dated 23rd March, 2021 under section 148 of the Act stating that Respondent No. 1 has reason to believe that income chargeable to tax has escaped assessment for A.Y. 2013-2014. Petitioner was also provided copy of the reasons recorded before the issuance of impugned notice under section 148 of the Act. Petitioner filed his objections vide letter 23rd August, 2021 which came to be rejected

by an order dated 15th December, 2021 which is also impugned in this Petition.

7. According to Mr. Rai appearing for Petitioner since the reopening is proposed more than four years after the expiry of the relevant assessment year and scrutiny assessment under section 143(3) of the Act has been completed, proviso to section 147 of the Act shall apply. Mr. Rai submitted that, therefore, reopening is barred unless Respondent is able to show that there was failure on the part of the assessee to truly and fully disclose the material facts required for assessment and that failure has caused escapement of income. Mr. Rai submitted that reasons recorded does not indicate anywhere that there was failure on the part of the assessee to truly and fully disclose material facts. Mr. Rai also submitted that the entire case for reopening is based on a clear case of change of opinion when it is settled law that change of opinion can not form the basis of assessment. Mr. Rai also submitted that no new tangible material has been disclosed because jurisdictional Assessing Officer relying upon a decision of Punjab & Haryana High Court which was in existence much before passing of the assessment order. Jurisdictional Assessing Officer, who proposes to reopen, as held by the Apex Court in **Gemini Leather Stores vs. Income Tax Officer, B Ward, Agra and Others**¹, could not take recourse to section 147 to

1 ITR 1975 Vol.100 (SC)

remedy the error resulting from his own oversight.

8. Mr. Sharma justified the reopening and reiterated basically what has been stated in the order rejecting the objections.

9. To confer jurisdiction under section 147 of the Act, two conditions are required to be satisfied. First the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax had escaped assessment and secondly, he himself also has reason to believe that such escapement occurred by reasons of either omission or failure on the part of assessee to disclose fully or truly all material facts necessary for his assessment of that year. When more than four years have expired from the end of relevant assessment year and there has been an assessment completed under section 143(3) of the Act, both these conditions have to be satisfied before the Assessing Officer could assume jurisdiction to issue of notice under section 148 read with 147 of the Act.

10. We have considered the reasons recorded for reopening with the assistance of Mr. Rai and Mr. Sharma. We are satisfied that there is nothing disclosed in the reasons recorded as to what was not disclosed by Petitioner during the relevant assessment

proceeding. The entire basis for reopening is that Petitioner sold his share holding in Ruby Macons Limited to MWV Wadco India Private Limited and declared the gains made from the sale as capital gains and paid tax accordingly. But according to jurisdictional Assessing Officer, as held by Punjab & Haryana High Court, in the case of **Sumeet Taneja vs. CIT**² such type of sale, purchase agreement of shares is a business transaction and therefore the profit arising to share holders is not capital gains but a business income. Hence there has been an escapement of tax being 10% of the business income, i.e., difference between long term capital gains and the rate applicable to assessee considering the quantum of income of the assessee. Since it is to be treated as a business income, even the exemption claimed under section 54EC of the Act, Rs. 50 lacs under the head capital gains, also has to be rejected and to that extent there is an escapement of income to the extent of an additional income of Rs. 50 lacs.

11. Mr. Sharma relied upon a judgment of this Court in **Crompton Greaves Ltd. V/s. Assistant Commissioner of Income Tax, Circle 6 (2)**³ to submit that even if the reason for reopening does not specifically state that there was any failure on the part of petitioner

2 ITA No. 293 of 2012 Dt.22.08.2013

3 (2015) 55 taxmann.com 59 (Bombay)

to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year, it will not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. We would certainly agree with Mr. Sharma but as held in **Crompton Greaves Ltd.** (Supra), this is subject to the rider that there must be cogent and clear indication in the reasons supplied, that in fact there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment. If the factum of failure to disclose can be culled out from the reasons in support of the notice seeking to reopen assessment, that will certainly not be fatal to the assumption of jurisdiction under Sections 147 and 148 of the Act. The Court held *“However, if from the reasons, no case of failure to disclose is made out, then certainly the assumption of jurisdiction under Sections 147 and 148 of the Act would be ultra vires, being in excess of the jurisdictional restraints imposed by the first proviso to Section 147 of the Act”*.

12. One thing is very clear from the reasons recorded that there is nothing to indicate that there was non disclosure by the assessee of any material facts. Since the reasons do not indicate the failure on the part of assessee to disclose fully and truly all material facts, on this ground alone, the impugned notice dated 23rd March, 2021

has to be quashed and set aside.

13. Moreover, the Assessing Officer has issued notice before passing assessment order to which Petitioner has responded providing all documents including the share purchase agreement and the Assessing Officer has passed the assessment order accepting the returned income. Therefore, this issue has also been discussed and considered by the Assessing Officer before passing assessment order. To reopen an assessment based on the same material to take a different view, is not permissible as held time and again by various Courts.

14. In the order dated 15th December, 2021 order disposing the objections which is impugned in the Petition, the jurisdictional Assessing Officer states, in the original assessment, the Assessing Officer has missed to take into consideration law laid down by the Punjab & Haryana High Court and there was nothing to show that this decision was brought to his notice. As held in **Calcutta Discount Co. Ltd. vs. Income Tax Officer**⁴ there can be no doubt that duty of disclosing of primary facts relevant to the decision of the question before the assessing authority lies on the assessee. The duty, however, does not extend beyond the full and true disclosure of all

4 (1961) 41 ITR 191 (SC)

primary facts. Once, the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inference of facts can be reasonably drawn and what legal inference ultimately to be drawn. It is not for somebody else to tell the assessing authority the inferences whether of facts or law should be drawn. The relevant portion of the **Calcutta Discount Co.** (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)

15. Moreover, as held in **Gemini Leather Stores** (supra), even for a moment, we accept that the Assessing Officer has missed to take note of the law laid down by the Punjab & Haryana Court, still that cannot be a reason to take recourse to reopen to remedy the error resulting from this oversight. Relevant portion of **Gemini Leather Stores** (supra) 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. In the circumstances, we have no hesitation in holding that the impugned notice dated 23rd March, 2021 requires to be quashed and set aside.

17. Petition disposed accordingly in terms of prayer clause (a) which reads as under:

(a) That this Court be pleased to issue a writ of certiorari or any other writ, order or direction under Article 226 of the Constitution of India calling for the records of the case leading to the issue of the impugned notice and passing of the impugned order and after going through the same and examining the question of legality thereof quash, cancel and set aside the impugned notice (Exhibit G) dated 23rd March, 2021 and impugned order (Exhibit M) dated 15th December, 2021.

18. No order as to costs.

(N. J. JAMADAR, J.)

(K. R. SHRIRAM, J.)