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

WRIT PETITION NO. 2727 OF 2013

Nishith Madanlal Desai ….Petitioner

V/s.

Commissioner of Income Tax-11(3)
Mumbai …Respondent

Mr. Firoze B. Andhyarujina, Senior Advocate i/b Mr. Sameer G. Dalal for Petitioner.
Mr. Suresh Kumar for Respondent.

CORAM : K.R. SHRIRAM &
N. J. JAMADAR, JJ.
DATED : 4th FEBRUARY, 2022

P.C. :

1. Petitioner is impugning a notice dated 8th March, 2013 issued under Section 148 of the Income Tax Act, 1961 (the Act) for A.Y. 2006-07 and the order dated 19th September, 2013 rejecting objections of petitioner.

2. Petitioner, an individual had filed his return of income for A.Y. 2006-07 declaring total income of Rs.6,32,09,099/-. The return was processed under Section 143(1) of the Act accepting the returned income. The case was selected for scrutiny and assessment under Section 143(3) of the Act was completed on 10th December, 2018 assessing the total income at Rs.6,32,39,099/-.

3. Subsequently, in March, 2013 petitioner received the impugned notice of re-opening dated 8th March, 2013.

4. We have considered the reasons for re-opening of re-assessment with the assistance of Mr. Andhyarujina and Mr. Suresh Kumar.

5. The notice for re-opening has been issued after expiry of four years from the end of the relevant assessment year and the scrutiny and assessment under Section 143(3) of the Act having been done, the proviso to Section 147 of the Act shall be applicable. As per proviso there is a bar to re-open any assessment after expiry of four years from the end of assessment year unless revenue is able to show that there was failure on the part of the assessee to truly and fully disclose all material facts required for assessment for the relevant assessment year.

Now, let us examine whether the reasons recorded for re-opening disclose any such information not disclosed by petitioner. In our view, there is nothing to indicate that there was non disclosure on the part of petitioner.

6. Mr. Suresh Kumar submitted that petitioner had utilised term loan which he has taken from HDFC Ltd., for investment in debentures and not for housing property and instead of claiming deduction under Section 24(3) of the Act claimed deduction under Section 57 of the Act. Therefore, the interest expense of Rs.58,03,897/- cannot be allowed as a deduction to the assessee either under Section 24(b) or under section 57 of the Act. Mr.Suresh Kumar submitted that by claiming deduction under Section 57 of the Act and not under Section 24(b) of the Act would also amount to non-

disclosure. Mr. Suresh Kumar submitted that 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 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 of the Act. These submissions of Mr. Suresh Kumar cut no ice with us.

7. The Apex Court in ***Calcutta Discount Co. Ltd. V/s. Income Tax Officer*** [1], 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, 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

1 (1961) 41 ITR 191 (SC)

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.

8. All the points raised in the reasons recorded have been considered during the assessment proceeding. In as much as, query was raised regarding the loan taken and utilisation thereof during the assessment proceeding. It is evident from letter dated 5th December, 2008 addressed by petitioner's Chartered Accountants to respondent by which petitioner had forwarded details of Secured Loans alongwith utilisation thereof and balance as per books of accounts as on 31st March, 2006 and details of interest paid as shown under the head Financial Expenses. Of course, with the said letter various other details were also provided. Therefore, there has been query raised and query has been answered. It is

settled law as held in ***Aroni Commercials Ltd. vs. Deputy Commissioner of Income-tax 2(1)***[2] that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not even necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised.

9. Moreover, on proper reading of the reasons for re-opening, it is evident that the Assessing Officer has believed that the income accessible to tax has escaped assessment on verification of the records. The reasons state that *"On verification of the case ………………..". "The case records for AY 2006-07 contain a certificate ……………..", etc.* Therefore, the entire basis is from available records and once a conclusive view has been taken by the Assessing Officer another officer cannot rely on the same documents or information to take a view different from the view already taken. In other words change of opinion is not permissible.

10. Further, the Assessing Officer has relied on the assessment proceedings for A.Y. 2009-10 in which the entire interest paid to HDFC Ltd., on the housing loan was disallowed and that disallowance of of interest paid on housing loan from HDFC Ltd., has been upheld by the learned CIT (A)-2. Mr.Andhyarujina submitted that petitioner had impugned the order of CIT

2 [2014] 44 taxmann.com 304 (Bombay)

(A) before the Income Tax Appellate Tribunal (ITAT) and the ITAT, by an order dated 28th April, 2017 held that petitioner was entitled to the deduction on interest paid on housing loan from HDFC Ltd. It is true that respondent has challenged the said order of ITAT by way of Appeal in this court.

11. Therefore, the Assessment Order of ITAT has attained finality for A.Y. 2009-10. If the ITAT has held that petitioner was entitled to the housing loan deduction and interest paid for housing loan from HDFC Ltd., thereby reversing the findings of the Assessing Officer as well as CIT (A) for A.Y. 2009-10, the entire basis in the reasons for re-opening for A.Y. 2006-07 also has collapsed.

12. In the circumstances, we allow the petition in terms of prayer clause (i) and (ii) which reads as under :

> *(i) call for record and proceedings and issue writ setting aside and quashing the Impugned Notices dated 08.03.2013 being Ex - 'H' issued under section 148 of the Act by the Second Respondent;*
> *(ii) call for record and proceedings and issue writ setting aside and quashing the order passed by the Second Respondent disposing off the objections raised by the Petitioner against the reopening of assessment under section 147 of the Income Tax Act, 1961 dated 19.09.2013, being Ex.'J' hereto;*

13. Petition disposed.

(N. J. JAMADAR, J.) **(K.R. SHRIRAM, J.)**