SUPREME COURT OF INDIA

New Delhi Television Ltd.

Vs.

Deputy Commissioner of Income Tax

C.A.No.1008 of 2020

(L.Nageswara Rao and Deepak Gupta,JJ.,)

03.04.2020

JUDGMENT

Deepak Gupta,J.,

1. The appellant New Delhi Television Limited (hereinafter referred to as 'the assessee') is an Indian company engaged in running television channels of various kinds. It has various foreign subsidiaries to which we shall refer in detail later on but we are concerned mainly with the subsidiary based in the United Kingdom (UK) named NDTV Network Plc., U.K. (hereinafter referred to as 'NNPLC'). The assessee submitted a return for the financial year 2007- i.e. assessment year 2008-09 on 29.09.2008 declaring a loss. This return was processed under Section 143 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). The case was selected for scrutiny and notice under Section 143(2) of the Act was issued and a notice under Section 142(1) of the Act was also sent to the assessee. Thereafter, the case of the assessee was taken up for consideration and final assessment order was passed on 03.08.2012.

3. We are mainly concerned with that part of the assessment order which relates to the issue of step-up coupon bonds amounting to US$100 million. These bonds were issued in July, 2007 through the Bank of New York for a period of 5 years. The case of the assesee is that NNPLC issued step-up coupon bonds of US$ 100 million which were arranged by Jeffries International and the funds were received by NNPLC through Bank of New York. The assessee had agreed to furnish corporate guarantee for this transaction. These bonds were subscribed to by various entities to whom we shall refer to in detail at a later stage. These bonds were to be redeemed at a premium of 7.5% after the expiry of the period of 5 years. However, these bonds were redeemed in advance at a discounted price of US $74.2 million in November, 2009.

4. The assessing officer held that NNPLC had virtually no financial worth, it had no business of the name and therefore it could not be believed that it could have issued convertible bonds of US$ 100 million, unless the repayment along with interest was secured. This was secured only because of the assessee agreeing to furnish guarantee in this regard. Though the assessee had never actually issued such guarantee, the assessing officer was of the view that the subsidiary of the assessee could not have raised such a huge amount without having this assurance from the assessee. The transaction was of

such a nature that the assessee should be required to maintain an arm's length from its subsidiary, meaning that it should be treated like a guarantee issued by any corporate guarantor in favour of some other corporate entity. The assessing officer did not doubt the validity of the transaction but imposed guarantee fee @ rate of 4.68% by treating it as a business transaction and added Rs. 18.72 crores to the income of the assessee, vide order dated 03.08.2012.

5. On 31.03.2015, the revenue sent a notice to the assessee wherein it was stated that the authority has reason to believe that net income chargeable to tax for the assessment year 2008¬09 had escaped assessment within the meaning of Section 148 of the Act. This notice did not give any reasons. The assessee then asked for reasons and thereafter on 04.08.2015 reasons were supplied. The main reason given was that in the following assessment year i.e. assessment year 2009-10, the assessing officer had proposed a substantial addition of Rs.642 crores to the account of the assessee on account of monies raised by the assessee through its subsidiaries NDTV BV, The Netherlands, NDTV Networks BV, The Netherlands (NNBV), NDTV Networks International Holdings BV, The Netherlands (NNIH) and NNPLC. The assessee had raised its objection before the Dispute Resolution Panel (DRP) which came to the conclusion that all these transactions with the subsidiary companies in Netherlands were sham and bogus transactions and that these transactions were done with a view to get the undisclosed income, for which tax had not been paid, back to India by this circuitous round tripping.

6. The assessing officer relies upon the order of the DRP holding that there is reason to believe that funds received by NNPLC were actually the funds of the assessee. It was specified that NNPLC had a capital of only Rs.40 lakhs. It did not have any business activities in the United Kingdom except a postal address. Therefore, it appeared to the assessing officer that it was unnatural for anyone to make such a huge investment of $100 million in a virtually non-functioning company and thereafter get back only 72% of their original investment. According to the assessing officer “The natural inference could be that it was NDTV’s own funds introduced in NNPLC in the grab of the impugned bonds.” The details of the investors are given in this communication giving reasons. Mention has also been made of complaints received from a minority shareholder in which it is alleged that the money introduced in NNPLC was shifted to another subsidiary of the assessee in Mauritius from where it was taken to a subsidiary of the assessee in Mumbai and finally to the assessee. NNPLC itself was placed under liquidation on 28.03.2011. Therefore, the assessing officer was of the opinion that there were reasons to believe that the funds received by NNPLC were the funds of the assessee under a sham transaction and that the amount of Rs.405.09 crores introduced into the books of NNPLC during the financial year 2007-08 corresponding to the assessment year 2008-09 through the transaction involving the step-up coupon convertible bonds pertains to the assessee. The last portion of the communication dt. 04.08.2015 giving reasons to the assessee reads as follows:-

> “7. In view of the above facts and circumstances of the case and considering the findings of the DRP holding the funds received by NNPLC as the funds of the assessee New Delhi Television Limited under sham transactions, there is a reason to believe that the funds amounting to Rs.405.09 crores introduced into the books of NNPLC during the FY 2007-08 in the form of Step Up Coupon Bonds pertain to the assessee New Delhi Television Limited only. I have therefore reason to

believe that the income of the assessee New Delhi Television Limited for AY 2008-09 amounting to at least Rs.405.09 crores has escaped assessment. It is also recorded that the escapement is due to failure on the part of the assessee to disclose fully and truly all facts material for assessment."

7. The assessee filed reply to the notice and reasons given, and claimed that there had been no failure on the part of the assessee to disclose fully and truly all material facts necessary to make an assessment. Assessee also claimed that the proceedings had been initiated on a mere change of opinion and there was no reason to believe. The assessee also claimed that the transaction of step-up bonds was a legal and valid transaction. In addition, it was claimed that the assessing officer had no valid reasons to believe that the income of the assessee had escaped assessment. According to the assessee the assessment officer had accepted the genuineness of the transaction wherein NNPLC, the subsidiary, had issued convertible bonds which had been subscribed by many entities. It was urged that the assessing officer had treated the transaction to be genuine by levying guarantee fees and adding it back to the income of the assessee. In the alternative, it was submitted that the notice had been issued beyond the period of limitation of 4 years. According to the assessee it had not withheld any material facts and, therefore, limitation of 6 years as applicable to the first proviso to Section 147 would not apply.

8. The assessing officer did not accept these objections. The claim of the assessee was disposed of by the assessing officer vide order dated 23.11.2015 wherein the assessing officer held that there was non-disclosure of material facts by the assessee and the notice would be within limitation since NNPLC was a foreign entity and admittedly a subsidiary of the assessee and the income was being derived through this foreign entity. Hence, the case of the assessee would fall within the 2nd proviso of Section 147 of the Act and the extended period of 16 years would be applicable. The objections were accordingly rejected.

9. Aggrieved, the petitioner filed a writ petition in the High Court challenging the notice. The writ petition was dismissed on 10.08.2017. Against this the assessee has filed the present Appeal.

10. We have heard Shri Arvind P. Datar, learned senior counsel for the assessee, Shri Tushar Mehta, learned Solicitor General and Shri Zoheb Hossain, learned counsel appearing for the revenue.

11. In our opinion, the following issues arise for consideration in this case:-

(i) Whether in the facts and circumstances of the case, it can be said that the revenue had a valid reason to believe that undisclosed income had escaped assessment?

(ii) Whether the assessee did not disclose fully and truly all material facts during the course of original assessment which led to the finalisation of the assessment order and undisclosed income escaping detection?

(iii) Whether the notice dated 31.03.2015 along with reasons communicated on 04.08.2015 could be termed to be a notice invoking the provisions of the second proviso to Section 147 of the Act?

12. At the outset we may note that it has been strenuously urged on behalf of the assessee that its assessment was done under scrutiny procedure and a very detailed procedure was followed during the original assessment proceedings and all aspects of the case were noted by the assessing officer. That may be true, but merely the fact that the original assessment is a detailed one, cannot take away the powers of the assessing officer to issue notice under Section 147 of the Act.

Question No. 1

13. We would like to make it clear that we are not going into the merits of the allegations made against the assessee. At this stage we are only required to decide whether the revenue has sufficient reasons to believe that undisclosed income of the asseessee has escaped assessment and therefore there are grounds to issue notice. Obviously, during the assessment proceedings the assessee will have the right to place material on record to show that the transaction in question was a genuine transaction.

14. It is trite law that an assessing officer can only re-open an assessment if he has 'reason to believe' that undisclosed income has escaped assessment. Mere change of opinion of the assessing officer is not a sufficient to meet the standard of 'reason to believe'. Relevant portion of Section 147 reads as follows:-

> 147. Income escaping assessment.-If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year): Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub¬section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year: Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year: Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could, with due diligence, have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

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

(c) where an assessment has been made, but—

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iu) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

(ca) where a return of income has not been furnished by the assessee or a return of income has been furnished by him and on the basis of information or document received from the prescribed income-tax authority, under sub-section (2) of section 133C, it is noticed by the Assessing Officer that the income of the assessee exceeds the maximum amount not chargeable to tax, or as the case may be, the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.
xxx xxx xxx

15. The case of the assessee is that the transaction of step-up coupon bonds was scrutinised in great detail by the assessing officer before he passed the order of assessment dated 03.08.2012. According to the assessee there is an attempt on behalf of

the revenue to deliberately mix-up the transactions relating to the Netherlands subsidiary with the U.K. subsidiary. According to the assessee the order of the DRP for the assessment year 2009-10 is in two distinct compartments. While the DRP held the Netherlands' transactions of Rs.642 crores to be a sham, the transaction of issuance of US$ 100 million convertible bonds was not questioned. Therefore, according to the assessee there was no fresh material before the assessing officer to have reason to believe that the undisclosed income of the assessee had escaped assessment.

16. On behalf of the assessee it has been urged that once the transaction of step-up coupon bonds has been accepted to be correct, then the revenue cannot re-open the same and doubt the genuiness of the transaction. We are not in agreement with the first part of the submission but we make it clear that we are not commenting on the genuineness of the transaction, which will be considered by the concerned assessing officer.

17. On the other hand, on behalf of the revenue it is submitted that at the stage of issue of show cause notice the revenue only has to establish a tentative and prima facie view. At this stage, this Court is not expected to go into the merits of the case but can only ascertain whether the revenue has prima facie ground to show that it had reasons to believe that income has escaped assessment. It is further submitted that the scope of judicial review in such matters is very limited. It is also submitted that since the revenue discovered fresh tangible material subsequent to the assessment order of 03.08.2012, it cannot be said that the assessing officer did not have reasons to believe that income had escaped assessment.

18. The main issue is whether there was sufficient material before the assessing officer to take a prima facie view that income of the assessee had escaped assessment. The original order of assessment was passed on 03.08.2012. It was thereafter on 31.12.2013 that the DRP in the case of AY 2009-10 raised doubts with regard to the corporate structure of the assessee and its subsidiaries. It was noted in the order of the DRP that certain shares of NNPLC had been acquired by Universal Studios International B.V., Netherlands, indirectly by subscribing to the shares of NNIH. As already noted above it was recorded in the reasons communicated on 04.08.2015 that NNPLC was not having any business activity in London. It had no fixed assets and was not even paying rent. Other than the fact that NNPLC was incorporated in the U.K., it had no other commercial business there. NNPLC had declared a loss of Rs.8.34 crores for the relevant year. It was also noticed from the order of the assessing officer that the assessee is the parent company of NNPLC and it is the dictates of the assessee which are important for running NNPLC.

19. Pursuant to the directions of the DRP, the assessing officer passed the final assessment order for AY 2009-10 on 21.02.2014 which also disclosed similar facts.

20. According to the revenue Tax Evasion Petitions were filed by the minority shareholders of the assessee company on various dates, i.e., 11.03.2014, 25.07.2014, 13.10.2014 and 11.03.2015, which complaints describe in detail the communication between the assessee and the subsidiaries and also allegedly showed evidence of round tripping of the assessee's undisclosed income through a layer of subsidiaries which led to the issuance of the notice in question.

21. Whether the facts which came to the knowledge of the assessment officer after the assessment proceedings for the relevant year were completed, could be taken into consideration for coming to the conclusion that there were reasons to believe that income had escaped assessment is the question that requires to be answered. Though a number of judgments have been cited in this behalf, we shall make reference to only a few. In *Claggett Brachi Co. Ltd., London vs. Commissioner of Income Tax, Andhra Pradesh*[1], this Court held as follows:-

> "7. Two points have been urged before us by learned counsel for the assessee. It is contended that the Income Tax Officer has no jurisdiction to take proceedings under Sections 147 and 148 of the Income Tax Act because the conditions prerequisite for making the reassessments were not satisfied. The re-assessments were made with reference to clause (b) of Section 147 of the Act, and apparently the Income Tax Officer proceeded on the basis that in consequence of information in his possession he had reason to believe that income chargeable to tax had escaped assessment for the two assessment years. From the material before us it appears that the Income Tax Officer came to realise that income had escaped assessment for the two assessment years when he was in the process of making assessment for a subsequent assessment year. While making that assessment he came to know from the documents pertaining to that assessment that the overhead expenses related to the entire business including the business as commission agents and were not confined to the business of purchase and sale. It is true, as the High Court has observed, that this information could have been acquired by the Income Tax Officer if he had exercised due diligence at the time of the original assessment itself. It does not appear, however, that the attention of the Income Tax Officer was directed by anything before him to the fact that the overhead expenses related to the entire business. The information derived by the Income Tax Officer evidently came into his possession when taking assessment proceedings for the subsequent year. In the circumstances, it cannot be doubted that the case falls within the terms of clause (b) of Section 147 of the Act, and that, therefore, the High Court is right in holding against the assessee."

In M/s *Phool Chand Bajrang Lal and Another vs. Income Tax Officer and Another*[2] , this Court held as follows:-

> "19...Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the same facts and material which was available with the ITO at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the "true" and "full" facts in the case and the ITO would have the jurisdiction to reopen the concluded assessment in such a case. It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original

assessment proceedings would not take away his jurisdiction to act under Section 147 of the Act, on receipt of the information subsequently. The subsequent information on the basis of which the ITO acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or non-specific."

In *Ess Kay Engineering Co.(P) Ltd. vs. Commissioner of Income Tax, Amritsar*[3], this Court held as follows:-

> "This is a case of reopening. We have perused the documents. We find there was material on the basis of which the Income Tax Officer could proceed to reopen the case. It is not a case of mere change of opinion. We are not inclined to interfere with the decision of the High Court merely because the case of the assessee was accepted as correct in the original assessment for this assessment year. It does not preclude the Income Tax Officer from reopening the assessment of an earlier year on the basis of his findings of fact made on the basis of fresh materials in course of assessment of the next assessment year. The appeal is dismissed. No order as to costs."

22. A perusal of the aforesaid judgments clearly shows that subsequent facts which come to the knowledge of the assessing officer can be taken into account to decide whether the assessment proceedings should be re-opened or not. Information which comes to the notice of the assessing officer during proceedings for subsequent assessment years can definitely form tangible material to invoke powers vested with the assessing officer under Section 147 of the Act.

23. The material disclosed in the assessment proceedings for the subsequent years as well as the material placed on record by the minority shareholders form the basis for taking action under Section 147 of the Act. At the stage of issuance of notice, the assessing officer is to only form a prima facie view. In our opinion the material disclosed in assessment proceedings for subsequent years was sufficient to form such a view. We accordingly hold that there were reasons to believe that income had escaped assessment in this case. Question No.1 is answered accordingly. Question No.2

24. Coming to the second question as to whether there was failure on the part of the assesee to make a full and true disclosure of all the relevant facts. The case of the assessee is that it had disclosed all facts which were required to be disclosed.

25. The revenue has placed reliance on certain complaints made by the minority shareholders and it is alleged that those complaints reveal that the assessee was indulging in round- tripping of its funds. According to the revenue the material disclosed in these complaints clearly shows that the assessee is guilty of creating a network of shell companies with a view to transfer its un-taxed income in India to entities abroad and then bring it back to India thereby avoiding taxation. We make it clear that we are not going into this aspect of the matter because those complaints have not seen light of the day either before the High Court or this Court and, therefore, it would be unfair to the assessee if we rely upon such material which the assessee has not been confronted with.

26. Even before the assessment order was passed on 03.08.2012, the assessing officer was aware of the entities which had subscribed to the convertible bonds. This is apparent from the communication dated 08.04.2011. The case of the revenue is that the assessee did not disclose the amount subscribed by each of the entities and furthermore the management structure of these companies. We are not in agreement with this submission of the revenue. It is apparent from the records of the case that the revenue was aware of the entities which subscribed to the convertible bonds. It has been urged that these are bogus companies, but we are not concerned with that at this stage. The issue before us is whether the revenue can take the benefit of the extended period of limitation of 6 years for initiating proceedings under the first proviso Section 147 of the Act. This can only be done if the revenue can show that the assessee had failed to disclose fully and truly all material facts necessary for its assessment. The assessee, in our view had disclosed all the facts it was bound to disclose. If the revenue wanted to investigate the matter further at that stage it could have easily directed the assessee to furnish more facts.

27. The High Court held that there was no "true and fair disclosure" in view of the law laid down by this Court in Phool Chand's case (supra), and the judgment of the Delhi High Court in *Honda Siel Power Products Limited vs. Deputy Commissioner Income-Tax and Another*[4]. We have already referred to the judgment in Phool Chand's case (supra), wherein it was held that where the transaction of a particular assessment year is found to be a bogus transaction, the disclosures made could not be said to be all "true" and "full". Relying upon the said judgment the High Court held that merely because the transaction of convertible bonds was disclosed at the time of original assessment does not mean that there is true and full disclosure of facts.

28. We are unable to agree with this reasoning given by the High Court. The assessee as mentioned above made a disclosure about having agreed to stand guarantee for the transaction by NNPLC and it had also disclosed the factum of the issuance of convertible bonds and their redemption. The income, if any, arose because of the redemption at a discounted price. This was an event which took place subsequent to the assessment year in question though it may be income for the assessment year. As we have observed above, all relevant facts were duly within the knowledge of the assessing officer. The assessing officer knew who were the entities who had subscribed to other convertible bonds and in other proceedings relating to the subsidiaries the same assessing officer had knowledge of addresses and the consideration paid by each of the bondholders as is apparent from assessment orders dated 03.08.2012 passed in the cases of M/s. NDTV Labs Ltd. and M/s. NDTV Lifestyle Ltd. Therefore, in our opinion there was full and true disclosure of all material facts necessary for its assessment by the assessee.

29. The fact that step-up coupon bonds for US$ 100 million were issued by NNPLC was disclosed; who were the entities which subscribed to the bonds was disclosed; and the fact that the bonds were discounted at a lower rate was also disclosed before the assessment was finalised. This transaction was accepted by the assessing officer and it was clearly held that the assessee was only liable to receive a guarantee fees on the same which was added to its income. Without saying anything further on merits of the transaction we are of the view that it cannot be said that the assessee had withheld any material information from the revenue.

30. According to the revenue the assessee to avoid detection of the actual source of funds of its subsidiaries did not disclose the details of the subsidiaries in its final accounts, balance sheets, and profit and loss account for the relevant period as was mandatory under the provisions of the Indian Companies Act, 1956. It is not disputed that the assessee had obtained an exemption from the competent authority under the Companies Act, 1956 from providing such details in its final accounts, balance sheets, etc. As such it cannot be said that the assessee was bound to disclose this to the Assessing Officer. The Assessing Officer before finalising the assessment of 03.08.2012 had never asked the assessee to furnish the details.

31. The revenue now has come up with the plea that certain documents were not supplied but according to us all these documents cannot be said to be documents which the assessee was bound to disclose at the time of assessment. The main ground raised by the revenue is that the assessee did not disclose as to who had subscribed what amount and what was its relationship with the assessee. As far as the first part is concerned it does not appear to be correct. There is material on record to show that on 08.04.2011 NNPLC had sent a communication to the Deputy Director of Income Tax (Investigation), wherein it had not only disclosed the names of all the bond holders but also their addresses; number of bonds along with the total consideration received. This chart forms part of the assessment orders dated 03.08.2012 in the case of M/s. NDTV Labs Ltd. and M/s. NDTV Lifestyle Ltd. The said two assessment orders were passed by the same officer who had passed the assessment order in the case of the assessee on the same date itself. Therefore, the entire material was available with the revenue.

32. A number of decisions have been cited as to what is meant by true and full disclosure. It is not necessary to multiply decisions, as law in this regard has been succinctly laid down by a Constitution Bench of this Court in *Calcutta Discount Co. Ltd. vs. Income-tax Officer, Companies District I, Calcutta and Another*[5], wherein it was held as follows :-

> "(8)...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.

(9) There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income- tax 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, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them — including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

(10) Does the duty however extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else — far less the assessee — to tell the assessing authority what inferences — whether of facts or law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences — whether of facts or law — he would draw from the primary facts.

(11) 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?"

A careful analysis of this judgment indicates that the Constitution Bench held that it is the duty of the assessee to disclose full and truly all material facts which it termed as primary facts. Non-disclosure of other facts which may be termed as secondary facts is not necessary. In light of the above law, we shall deal with the facts of the present case.

33. In our view the assessee disclosed all the primary facts necessary for assessment of its case to the assessing officer. What the revenue urges is that the assessee did not make a

full and true disclosure of certain other facts. We are of the view that the assessee had disclosed all primary facts before the assessing officer and it was not required to give any further assistance to the assessing officer by disclosure of other facts. It was for the assessing officer at this stage to decide what inference should be drawn from the facts of the case. In the present case the assessing officer on the basis of the facts disclosed to him did not doubt the genuiness of the transaction set up by the assessee. This the assessing officer could have done even at that stage on the basis of the facts which he already knew. The other facts relied upon by the revenue are the proceedings before the DRP and facts subsequent to the assessment order, and we have already dealt with the same while deciding Issue No.1. However, that cannot lead to the conclusion that there is non-disclosure of true and material facts by the assessee.

34. It is interesting to note that whereas before this Court the revenue is strenuously urging that the assessee is guilty of non-disclosure of material facts, before the High Court the case of the revenue was just opposite. We may quote a portion of the counter-affidavit filed by the revenue in response to the writ petition filed by the assessee before the High Court which reads as follows:-

> "...It is evident from these facts that second proviso to Section 147 is clearly attracted in this case and first proviso to Section 147 is not applicable to facts of this case, i.e. in this case, the only requirement to reopen assessment U/s 147 was that the AO has reason to believe that any income chargeable to tax has escaped assessment. The second condition that the income should have escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts necessary for making assessment is not relevant to decide issue before the Hon'ble Court" This submission has been repeated a number of times in the counter-affidavit. Therefore, in our opinion the revenue cannot now turn around and urge that the assessee is guilty of non-disclosure of facts. We are also of the view that the revenue could not be permitted to blow hot and cold at the same time.

35. We are clearly of the view that the revenue in view of its counter-affidavit before the High Court that it was not relying upon the non-disclosure of facts by the assessee could not have been permitted to orally urge the same. Even otherwise we find that the assessee had fully and truly disclosed all material facts necessary for its assessment and, therefore, the revenue cannot take benefit of the extended period of limitation of 6 years. We answer Question No.2 accordingly.

Question No.3

36. It is urged before this Court by the revenue that in terms of second proviso to Section 147 of the Act read with Section 149(1) (c) of the Act, the limitation period would be 16 years since the assessee has derived income from a foreign entity. We may make specific reference to the second proviso and explanation 2(d) which reads as follows:-

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

xxx xxx xxx

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—
xxx xxx xxx

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.
xxx xxx xxx

37. On behalf of the assessee it has been urged that no income was derived from the foreign entity and a loan cannot be termed to be an asset or an income and it is submitted that the notice cannot be said to have been issued under the second proviso.

38. In this regard we may make reference to the notice dated 31.03.2015. The notice is conspicuously silent with regard to the second proviso. It does not rely upon the second proviso and basically relies on the provision of Section 148 of the Act. The reasons communicated to the assessee on 04.08.2015 mention 'reason to believe' and non-disclosure of material facts by the assessee. There is no case set up in relation to the second proviso either in the notice or even in the reasons supplied on 04.08.2015 with regard to the notice. It is only while rejecting the objections of the assessee that reference has been made to the second proviso in the order of disposal of objections dated 23.11.2015.

39. The High Court relied upon the judgment in *Mohinder Singh Gill & Anr. vs. The Chief Election Commissioner, New Delhi & Ors*[6]. and came to the conclusion that the revenue cannot rely upon the second proviso because the notice was silent in this regard. However, the High Court held that the assessee was guilty of non-disclosure of material facts. We have already held that in our view the assessee was not guilty of non¬disclosure of material facts. The revenue has not challenged the judgment of the High Court in so far as this finding against it is concerned but the revenue is entitled to defend the petition even on a ground which may have been decided against it by the High Court.

40. On behalf of the revenue it is urged that mere non-naming of the second proviso in the notice does not help the assessee. It has been urged that even if the source of power to issue notice has been wrongly mentioned, but all relevant facts were mentioned, then the notice can be said to be a notice under the provision which empowers the revenue to issue such notice. There can be no quarrel with this proposition of law. However, the noticee or the assesee should not be prejudiced or be takenby surprise. The uncontroverted fact is that in the notice dated 31.03.2015 there is no mention of any foreign entity. There is only mention of the Section 148. Even after the assessee specifically asked for reasons, the revenue only relied upon facts to show that there was reason to believe that income has escaped assessment and this escapement was due to the non-disclosure of material facts. There is nothing in the reasons to indicate that the revenue was intending to apply the extended period of 16 years. It is only after the assessee filed its reply to the reasons given, that in the order of rejection for the first time reference was made to the second proviso by the revenue.

41. In our view this is not a fair or proper procedure. If not in the first notice, at least at the time of furnishing the reasons the assessee should have been informed that the revenue relied upon the second proviso. The assessee must be put to notice of all the provisions on which the revenue relies upon. At the risk of repetition, we reiterate that we are not going into the merits of the case but in case the revenue had issued a notice to the assessee stating that it relies upon the second proviso, the assessee would have had a chance to show that it was not deriving any income from any foreign asset or financial interest in any foreign entity, or that the asset did not belong to it or any other ground which may be available. The assessee cannot be deprived of this chance while replying to the notice.

42. Therefore, even if we do not fall back on the reason given by the High Court that the revenue cannot take a fresh ground, we are clearly of the view that the notice and reasons given thereafter do not conform to the principles of natural justice and the assessee did not get a proper and adequate opportunity to reply to the allegations which are now being relied upon by the revenue.

43. If the revenue is to rely upon the second proviso and wanted to urge that the limitation of 16 years would apply, then in our opinion in the notice or at least in the reasons in support of the notice, the assessee should have been put to notice that the revenue relies upon the second proviso. The assessee could not be taken by surprise at the stage of rejection of its objections or at the stage of proceedings before the High Court that the notice is to be treated as a notice invoking provisions of the second proviso of Section 147 of the Act. Accordingly, we answer the third question by holding that the notice issued to the assessee and the supporting reasons did not invoke provisions of the second proviso of Section 147 of the Act and therefore at this stage the revenue cannot be permitted to take benefit of the second proviso.

Conclusion

44. We accordingly allow the appeal by holding that the notice issued to the assessee shows sufficient reasons to believe on the part of the assessing officer to reopen the assessment but since the revenue has failed to show non-disclosure of facts the notice having been issued after a period of 4 years is required to be quashed. Having held so, we make it clear that we have not expressed any opinion on whether on facts of this case the revenue could take benefit of the second proviso or not. Therefore, the revenue may issue fresh notice taking benefit of the second proviso if otherwise permissible under law. We make it clear that both the parties shall be at liberty to raise all contentions with regard to the validity of such notice. All pending application(s) shall stand(s) disposed of.

Judgment Referred.

[1]*(1989) Supp.2 SCC 0182*
[2]*(1993) 4 SCC 0077*
[3]*(2001) 10 SCC 0189*
[4]*(2012) 340 ITR 0053 (Del)*
[5]*AIR 1961 SC 0372*
[6]*(1978) 2 SCR 0272*