R.M. AMBERKAR
(Private Secretary)

# IN THE HIGH COURT OF JUDICATURE AT BOMBAY
**O.O.C.J.**

## WRIT PETITION NO. 3588 OF 2018

State Bank of India, Mumbai .. Petitioner

*Versus*

Asst. Commissioner of Income Tax, Circle 2(2)(1), Mumbai & Ors. .. Respondents

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- Mr. Percy Pardiwalla, Sr. Counsel a/w Mr. Nitesh Joshi i/by Atul Jasani for the Petitioner
- Mr. P.C. Chhotaray for Respondent Nos. 1 and 2

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**CORAM : AKIL KURESHI &**
**M.S. SANKLECHA, JJ.**

**DATE : JANUARY 17, 2019.**

**P.C.:**

**1.** Heard learned counsel for the final disposal of the petition.

**2.** Through this petition, the petitioner challenges a notice of reopening of assessment dated 8.6.2017 as an 'Annexure L" to the petition. This challenge arises in following background:-

Petitioner State Bank of India had filed a return of income for the assessment year 2011-12 on 29.11.2011 which was later on revised on 25.2.2013. In such revised return, the petitioner had declared total income of Rs. 2670.12 crores which return was taken in scrutiny by Assessing Officer who passed order under Section 143(3) of the Income Tax Act, 1961 ("the Act" for short) on 19.3.2013 determining the petitioner's total income at Rs.15676.05 crores. To reopen such assessment, the Assessing Officer issued the impugned notice. In order to do so, he had recorded the following reasons :-

> " The Scrutiny assessment u/S. 143(3) of the I.T. Act, 1961 was completed by the DCIT - 2(2), Mumbai on 19.3.2013 assessing the income Rs. 15676,05,70,980/-. In this case, **on verification of the case record, it is noticed that:**
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> 1. From Note No. 27 to return of income that assessee bank had credited Rs. 42.90 crore, being outstanding credit entries in draft payable account outstanding for more than 10 years as on 30.09.2010 in terms of directives of R.B.I. dated 05.10.2010. However, assessee bank did not offer the same to tax. It is evident that when an amount is credited in the books, it is not an unreasonable inference to draw that it is a receipt from business. Accordingly, the aforesaid credit was required to be included in the income while computing overall income for tax purpose. This shows the failure on the part of the assessee to include the aforesaid income in its return and this omission has resulted in the under-assessment of income by Rs. 42.90 crores, which forms one of the basis of the reopening of the present case.

2. Further, it is noticed that assessee bank had offered short term capital gain of Rs. 3,79,19,837/- from non-STT paid venture capital fund and Rs. 89,67,474/- from sale proceed of depreciable assets. **However, it is noted from the return of income filed by the assessee that this short term capital gain totaling to Rs. 4,68,87,311/- was not offered to tax by the assessee. Not disclosing this capital gains in the return of income filed amounts to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment and hence, I have reason to believe that income to the extent of Rs. 46.88 crore, has escaped assessment.**

3. It is further noticed vide note No. 24 to revised return of income for A.Y. 2011-12 claimed reduction in respect of divident received during A.Y. 2009-10 & 2010-11 u/S. 1150(1A)(i) of Rs. 6,46,06,47,635/- and consequently claimed refund of DDT of Rs. 46,91,80,180/- as detailed below.

| Particulars | Amount | |
|---|---|---|
| Total Dividend paid during F.Y. 2010-11 | 12,69,76,52,880 | 12,69,76,52,880 |
| Final Dividend of F.Y. 2009-10 | | |
| Less: | | |
| Dividend Received during the F.Y. 2009-10 and 2010-11 from the subsidiarity deductible under Sec. 1150(1A)(i) | 6,46,06,47,635 | |
| Dividend on account of shares held on record date by / on behalf of NPS deductible u/S. 1150-1A(ii) | 30,78,840 | |
| | | 6,46,37,26,475 |
| Balance | | 6,23,39,26,405 |
| Dividend Distribution Tax payable thereon @ 16.60875% | | 1,03,53,77,252 |
| Dividend Distribution Tax (DDT) paid | 1,50,45,57,432 | 1,50,45,57,432 |
| DDT Refundable | | (46,91,80,180) |

**The assessee bank had declared final dividend of Rs. 126.76 crore during F.Y. 2009-10 and was paid during following year. The assessee had deducted therefore Rs. 646.06 crore u/S. 1150(1A)(i) of the Act in respect of dividend received during F.Y. 2009-10 and 2010-11.**

However, as per express provision cited in preamble assessee was entitled to deduct only dividend received from subsidiaries during the relevant F.Y. 2009-10. Further from schedule-14 to Profit and Loss account and cash flow statement assessee bank had received income by way of dividend from its subsidiaries of Rs. 5,73,48,34,000/- during the relevant F.Y. 2009-10. Accordingly, assessee bank was entitled to the deduction u/S. 1150(1A)(i) of Rs. 573.48 crore as against Rs. 646.06 claimed. Therefore, this omission of excess allowance of deduction u/S. 1150(1A)(i) by Rs. 72,58,13,635/-, a failure on the part of the assessee, is required to be disallowed by reopening the case.

In view of the above, for the failure on the part of the assessee, I have reason to believe that the assessee's income to the tune of Rs. 162.36 crore has escaped assessment for A.Y. 2011-12 within the meaning of Section 147 of the I.T. Act and the same is required to be brought to tax as well as any other income chargeable to tax which may be found to have escaped assessment as per the explanation 3 to Section 147 of the Income Tax Act, 1961."

**3.** The petitioner raised objections to the notice of reopening under a communication dated 21.8.2017. Such objections were, however, rejected by the Assessing Officer by order dated 16.11.2017. Hence, this petition.

**4.** Taking us through the reasons recorded by the Assessing Officer, learned counsel for the petitioner raised following contentions:-

i. Notice of reopening of assessment was issued beyond the period of four years from the end of relevant assessment year. There was no failure on the part of the assessee to disclose truly and fully all material facts. The Assessing Officer has proceeded on materials already on record which was available during the original assessment. The notice of reopening, therefore, is without jurisdiction.

ii. With respect to the ground of capital gain not being offered to tax, the learned counsel took us through the return and the accompanying documents and the order of the assessment passed by the Assessing Officer to contend that there was not only true and full disclosure but capital gain was also officered to tax and which the Assessing Officer had also taxed.

iii. Learned counsel lastly contended on the question of distribution of dividend, no income chargeable to tax can be stated to have escaped assessment.

**5.** On the other hand, learned counsel for the Revenue opposed the petition contending that :-

i. There was failure on the part of the assessee to disclose true and full material facts. Mere production before the Assessing Officer all account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount of disclosure within the meaning of the first proviso to Section 147.

ii. The assessee has claimed wrong deduction referring to R.B.I. directives. The amount was taken to the Profit & Loss account but such amount was not offered to tax on income.

iii. Whether the assessee had offered short term capital gain to tax or not and whether the same was actually taxed or not are disputed questions which the Assessing Officer should be allowed to examine.

iv. On the issue of distribution of dividend also, the petitioner's stand is incorrect and there is clear case of escapement of income chargeable to tax.

In support of these contentions, the learned counsel for the Revenue relied on following decisions:-

1. **CIT Vs. M/s. T.V. Sundaram Iyengar & Sons.[1];**
2. **S.D.F. Industrial P Ltd Vs. Ass. CIT[2];**
3. **Dr. Amin's Path. Laboratory Vs. P.N. Prasad[3]**
4. **Honda Siel Power Products Ltd Vs. Dy. CIT(Delhi)[4]**
5. **Raymond Woollen Mills Ltd Vs. Income Tax Officer & Ors.[5]**
6. **Asst. CIT Vs. Rajesh Jhaveri Stock Brokers P. Ltd[6]**

**6.** Having heard learned counsel for the parties and having perused the documents on record, we may recall that

1 222 ITR 344
2 339 ITR 595
3 252 ITR 673
4 340 ITR 53
5 236 ITR 34
6 291 ITR 500

the impugned notice has been issued beyond the period of four years from the end of relevant assessment year in a case in which original assessment was made after scrutiny. The mandatory requirement of income chargeable to tax having escaped assessment due to failure on the part of the assessee to disclose truly and fully all material facts, therefore would apply. Since the days of the decision of Supreme Court in the case of **Calcutta Discount Co. Ltd Vs. I.T.O.[7],** it is well settled that the responsibility of the assessee is to make true and full disclosure of primary facts. What inference in law should be made on the basis of such facts is within the jurisdiction of the Assessing Officer. Following observations in case of Calcutta Discount Co. Ltd. (supra), may be noted:-

> " 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

7 41 ITR 191

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 the 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 those 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.

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-fax 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."

In this context, we may peruse the reasons recorded by the Assessing Officer. These reasons cite three independent and distinct elements of income chargeable to tax having escaped assessment. These are as follows:-

i. Of an amount of Rs. 42.90 crores which is an amount which was outstanding credit entries which had remained outstanding for more than 10 years as on 30.9.2010. In terms of directives of R.B.I. dated 05.10.2010, the bank did not offer the same to tax.

ii. A sum of Rs. 3.79 crores (rounded off) was assessee's short term capital gain and further a sum of Rs. 89.67 lacs which accrued on account of non-STT paid venture capital fund and Rs. 89,67,474/- from sale proceed of depreciable assets. According to the Assessing Officer, the total of two i.e 4.68 crores (rounded off) which is short term capital gain of the assessee was not offered to tax.

ii. The assessee had claimed reduction in respect of dividend received of Rs. 6.46 crores and consequently claimed refund of DDT of Rs. 46.91 crores. According to the Assessing

> Officer, the bank had declared final dividend of Rs. 126.76 crores during the financial year 2009.10 which was paid during the following financial year. According to him, the assessee was entitled to deduct only dividend received from subsidiaries during the relevant financial year 2009-10.

**7.** In the context of these three grounds sought to be pressed in service by the Assessing Officer, the reasons recorded eloquently establish that the Assessing Officer was proceeding on the material already on record. Apart from there being no allegations even in the reasons recorded that there was any failure on the part of the assessee to disclose true and full material fats, in fact, at every important stage, the Assessing Officer has referred to and relied upon the material on record. There is not a single item, no document and no material which did not form part of the original assessment proceedings on the basis of which the Assessing Officer has formed a belief that the income chargeable to tax has escaped assessment. In clear terms, the mandatory requirement flown from first proviso to Section 147 of the Act is not established. The beginning portion of the reasons itself which is in the nature of preamble referred that, "In this case, on verification of the case record, it is noticed that ......". Thus, entire reasons proceed on verification of the case records. Even, with respect to each individual ground raised by the Assessing Officer, he has referred to the documents, material and information already on record during the assessment proceedings.

**8.** We have also perused the documents which form part of the original assessment proceedings and find that the assessee had made all necessary disclosures. We notice that in the computation of income along with return filed, the assessee had shown amount of outstanding debit / credit interest in inter-branch account transferred to Profit & Loss A/c as per R.B.I. instructions a sum of Rs. 42.90 crores. Along with this entry, the assessee had referred to a note No. 32. This note No. 32 reads as under:-

> "32. An amount of Rs. 42.90 crores was credited to Profit and Loss Account in accordance with RBI Letter No. DBOD.BP. No. 5562/21.04.18/2010-11 dated 05.10.2010, being outstanding credit entries in draft payable account which were 10 years or more old as on 30th September, 2010. The same has not been offered to tax, in accordance with the Delhi ITAT decision in the case of Punjab National Bank Vs. Addl. CIT (ITA Nos. 2014 & 2873 / Del /2007)."

In clear terms, therefore, the assessee had furnished the necessarily details before the Assessing Officer of the said amount having been shown in Profit & Loss A/c but not offering it to tax. If during the original assessment proceedings, the Assessing Officer desired to inquire further into such claim of the assessee, nothing prevented him from doing so. At any rate, he cannot do so in the assessment proceedings which are sought to be commenced beyond the period of four years from the end of relevant assessment year.

**9.** With respect to the second ground raised by the Assessing Officer, we notice that the same suffers from factual error and non application of mind on his part. In the return itself, the assessee had showed short term capital gain of Rs. 3.79 crores and further gain of Rs. 89.67 lacks total of which came to Rs. 4.68 crores which was duly offered to tax. The Assessing Officer had in the order of assessment actually erroneously taxed a sum of Rs. 44.68 crores which was clearly an error. The assessee brought this error to the notice of the Assessing Officer by filing an application for rectification. Such rectification application was allowed by him by an order dated 9.5.2013 by making following observations:-

> v. **Amount of capital gains wrongly considered** :- Assessee has submitted that the short term capital gains as per the revised return of income of the Bank is Rs. 4,68,37,311/-, however, it was wrongly considered as Rs. 44,68,87,311/- in the assessment order u/S. 143(3). On verification of the record the contention of the assessee was found to be correct. Accordingly, the amount of total income of the Bank is reduced by Rs. 40,00,00,000/-.

In fact in the reasons recorded, the Assessing Officer had made contradictory statements. In the first part, he has recorded that the assessee had offered such sum to tax on short term capital gain. In the later part, he contradicts himself by saying that the assessee had not offered it to tax. The Assessing Officer now cannot contend that this issue is debatable or is a factual aspect. The material on record would clearly suggest that on this ground, he had proceeded on erroneous footing.

**10.** With respect to the third ground raised by him also, we find that the Assessing Officer has proceeded solely on the basis of material already on record clearly debarring his jurisdiction for issuing notice of reassessment beyond the period of four years from the end of relevant assessment year. In that view of the matter, it is not necessary for us to decide the contention of the assessee's counsel that such income was not taxable at all.

**11.** We may now refer to the judgments cited by Mr. Chhotaray for respondents. In the case of M/s. T.V. Sundaram Iyengar & Sons (supra), the Supreme Court had considered an entirely different issue which has no connection with question of reopening of assessment.

**12.** In the case of Raymond Woollen Mills Ltd (supra) and Rajesh Jhaveri Stock Brokers P. Ltd (supra), the Supreme Court held and observed that at the stage of reopening of assessment, the Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment and such reason to believe would be prima facie and not a requirement that additions would invariably made in the assessment. In the present case, we are not concerned with this aspect at all.

**13.** In case of S.D.F. Industrial P Ltd (supra), the Division Bench of this Court did not lay down any ratio which can be applied in the present petition. In fact, the Court left the question of true and full disclosures to be judged in the appellate proceedings.

**14.** In the case of Dr. Amin's Path. Laboratory (supra), again the Court did not lay down a ratio which runs contrary to our approach in the present petition. There may stray observations which the Revenue may want to highlight, nevertheless, such observations cannot be read in isolation and in any case, contrary to well laid down principles through series of judgments of the Supreme Court starting from Calcutta Discount Co Ltd (supra) and later on in case of **CIT Vs. Kelvinator of India Ltd**[8]**.**

**15.** In case of Honda Siel Power Products Ltd (supra), the Division Bench of Delhi High Court on facts found lack of true and full disclosure on the part of the assessee and therefore, permitted reopening of assessment beyond four years.

8 320 ITR 561

**16.** In the result, impugned notice is quashed. Petition disposed of accordingly.

**[ M.S. SANKLECHA, J. ]** **[ AKIL KURESHI, J ]**