IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'C': NEW DELHI

BEFORE SHRI G.D. AGRAWAL, VICE PRESIDENT AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.2202/Del/2010
Assessment Year : 2001-02

M/s Goldtex Furnishing Industries, 1197, Tri Nagar, Delhi – 110 035. PAN : AAAFG3761A.	Vs.	Deputy Commissioner of Income Tax, Circle-25(1), New Delhi.
(Appellant)		(Respondent)

Appellant by : Shri Gaurav Jain, Advocate and Shri Deepesh Jain, CA.
Respondent by : Shri A.K. Saroha, CIT-DR.

Date of hearing : 20.12.2016
Date of pronouncement : 04.01.2017

ORDER

PER G.D. AGRAWAL, VP :-

This appeal by the assessee for the assessment year 2001-02 is directed against the order of learned CIT(A)-XXIV, New Delhi dated 19th March, 2010.

2. Ground Nos.1 to 5 of the assessee's appeal are against the validity of reopening of assessment under Section 147 of the Income-tax Act, 1961.

3. At the time of hearing before us, it is submitted by the learned counsel that the assessment was reopened beyond the period of four years when the original assessment was completed u/s 143(3). He stated that there was no failure on the part of the assessee to disclose all material facts. He stated that the assessee claimed deduction u/s 80IB as well as 80HHC which was allowed by the Assessing Officer

after modifying the quantum of deduction claimed by the assessee. The case was reopened on the ground that while calculating deduction u/s 80HHC, deduction allowed u/s 80IB was not reduced in view of the provisions of Section 80IA(9). Thus, even as per Assessing Officer, escapement of income was on account of non-application of a particular provision of law. There is no mention in the reasons recorded that there was failure on the part of the assessee to disclose fully and truly any material fact. He, therefore, submitted that the reopening of assessment beyond the period of four years was not permissible. In support of this contention, he relied upon the following decisions of Hon'ble Jurisdictional High Court :-

(i) Haryana Acrylic Manufacturing Co. Vs. CIT – [2009] 308 ITR 38 (Delhi).

(ii) CIT Vs. Sonitpur Solvex Ltd. – [2013] 362 ITR 305 (Gauhati).

4. Learned DR, on the other hand, argued at length. He also furnished the written submissions, which read as under :-

"Gr. 1 and 2(The reasons recorded did not point out that there was failure on part Assessee of the assessee to disclose material facts):

1.1 This is ground is liable to be rejected because:

i) The assessee raised objections vide letter dated 21.11.2008. AO disposed off the objections vide letter dated 02.12.2008(# 120/PB). While disposing off the objections, the AO pointed out that plain reading of the reasons recorded would bring out that it is case of the AO that there was failure on part Assessee of the assessee to disclose material facts.

ii) The AO pointed out that assessee had failed to disclose before authorities the material facts. The AO pointed out that the assessee failed to disclose before the AO that he was not eligible for further deduction u/s 80HHC on the same profit in respect of which deduction had already been claimed u/s 80IB. The AO also observed that the assessee

presented wrong information in respect of quantum of claim.

iii) *It is has been recorded in the satisfaction note(#88/PB) that the assessee made deduction of Rs. 18314935/- and actual deduction works out to be 1,11,84,667/- . It has also been pointed out that this difference is mainly because of not reducing the amount of deduction claimed u/s 80IB while claiming calculating deduction under 80HHC. This action of reducing was supposed to done by assessee as there is provisions in section 80IA(9) rws 80IB(13).*

iv) *The fact cannot be ignored that the assessee filed a certificate from the Charted accountant (# 39/PB) to the effect that claim made under 80HHC is correct { which is not in accordance with provisions of section 80IA(9) rws 80IB(13) and hence, certainly incorrect}.*

2.1 In this case it is a material fact as to whether calculation of deductible amount u/s 80HHC has been made considering provisions contained in section 80IA(9) rws 80IB(13) {or not}.

2.2 The provisions contained in section 80IA(9) rws 80IB(13) are integral part of part 'C' of Chapter VI-A which also contains section 80IB. Therefore, once a certificate is filed under signature of a Charted Accountant, the presumption is that calculation of deduction claimed has been made in accordance with provisions of section 80IA(9) rws 80IB(13).

2.3 It is not easy to decipher from the calculation of deductible amount u/s 80HHC {submitted by assessee alongwith report in Form No 10CCA (# 40-41 of PB)} whether it is in accordance with provisions of section 80IA(9) rws 80IB(13).

2.4 It is not case of the AO that it actively pointed out that the calculation of deductible amount u/s 80HHC {submitted by assessee in mandatory Form No. 10CCB) has not been made considering provisions in section 80IA(9) rws 80IB(13).Therefore, the provisions of explanation 1 to section 147 are attracted which are reproduced as under:

".....

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."

2.5 Two ratios of judgment of Hon'ble SC in case of Sri Krishna (P.) Ltd. Vs. ITO [1996] 87 Taxman 315 (SC) is squarely applicable which states that

i) the obligation on the assessee to disclose the material facts—or what are called, primary facts—is not a mere disclosure but a disclosure which is full and true. A false disclosure is not a true disclosure. The disclosure must not only be true but must be full— 'fully and truly'. Ii) the enquiry at that stage of the validity of the notice under section 148/ 147 is only to see whether there are reasonable grounds for the ITO to believe and not whether the omission/failure and the escapement of income is established.

The relevant portion is reproduced as under:

*"**9.** In that case, the alleged non-disclosure of material facts fully and truly - to put it in the words of the Court - was the failure of the assessee to disclose 'the true intention behind the sale of the shares'. The assessee had stated during the assessment proceedings that the sale of shares during the relevant assessment years was a casual transaction in the nature of mere change of investment. The ITO found later that those sales were really in the nature of trading transactions. The case of the revenue was that the assessee ought to have stated that they were trading transactions and that his assertion that they were casual transactions, in the nature of change of investment, amounted to 'omission or failure to disclose fully and truly all material facts necessary for his assessment for that year' within the meaning of section 34. This contention of the revenue was rejected holding that the true nature of transaction, being a matter capable of different opinions, is not a material or primary fact but a matter of inference and, hence, it cannot be said that there was an omission or failure of the nature contemplated by section 34 on the part of the assessee. Now, **what needs to be emphasised is that the obligation on the assessee to disclose the material facts - or what are called, primary facts - is not a mere disclosure but a disclosure which is full and true. A false disclosure is not a true disclosure. The disclosure must not only be true but must be full - 'fully and truly'**. A false assertion, or statement, of material fact, therefore, attracts*

*the jurisdiction of the ITO under section 34/ 147. Take this very case : the ITO says that on the basis of investigations and enquiries made during the assessment proceedings relating to the subsequent assessment year, he has come into possession of material, on the basis of which, he has reasons to believe that the assessee had put forward certain bogus and false unsecured hundi loans said to have been taken by him from non-existent persons or his dummies, as the case may be, and that on that account income chargeable to tax has escaped assessment. According to him, this was a false assertion to the knowledge of the assessee. The ITO says that during the assessment relating to subsequent assessment year, similar loans [from some of these very persons] were found to be bogus. On that basis, he seeks to re-open the assessment. It is necessary to remember that we are at the stage of re-opening only. The question is whether, in the above circumstances, the assessee can say, with any justification, that he had fully and truly disclosed the material facts necessary for his assessment for that year. Having created and recorded bogus entries of loans, with what face can the assessee say that he had truly and fully disclosed all material facts necessary for his assessment for that year. True it is that ITO could have investigated the truth of the said assertion - which he actually did in the subsequent assessment year - but that does not relieve the assessee of his obligation, placed upon him by the statute, to disclose fully and truly all material facts. Indubitably, whether a loan, alleged to have been taken by the assessee, is true or false, is a material fact - and not an inference, factual or legal, to be drawn from given facts. In this case, it is shown to us that ten persons [who are alleged to have advanced loans to the assessee in a total sum of Rs. 3,80,000 out of the total hundi loans of Rs. 8,53,298] were established to be bogus persons or mere name-lenders in the assessment proceedings relating to the subsequent assessment year Does it not furnish a reasonable ground for the ITO to believe that on account of the failure - indeed not a mere failure but a positive design to mislead - of the assessee to disclose all material facts, fully and truly, necessary for his assessment for that year, income has escaped assessment ? We are of the firm opinion that it does. **It is necessary to reiterate that we are now at the stage of the validity of the notice under section 148/147. The enquiry at this stage is only to see whether there are reasonable grounds for the ITO to believe and not whether the omission/failure and the escapement of income***

is established. It is necessary to keep this distinction in mind*."(emphasis supplied).*

2.6 The reliance is placed on the ratio of Judgment of Hon'ble SC in case of Kantamani Venkata Narayana & Sons v. Addl. ITO, Rajahmundry [1967] 63 ITR 638 in which it has been held that the assessee does not discharge his duty to disclose fully and truly material facts necessary for the assessment for the assessment year in question by merely producing book account or other evidence. He has to bring to the notice of the Assessing Officer particular items in the books of account or portions of documents, which are relevant. Even if it is assumed that, from the documents produced, the Assessing Officer, if he had been circumspect, could have found out the truth, he is not on that account precluded from exercising the power to assess income, which had escaped assessment.

2.7 The reliance is placed on the ratio of Judgment of Hon'ble SC in case of Indo-Aden Salt Mfg. & Trading Co. (P.) Ltd. v. CIT [1986] 159 ITR 624 (SC). In this case, the assets on which the assessee sought to claim depreciation consisted of masonry work as well as earthwork. Depreciation was however allowable on masonry work only. But the Assessing Officer allowed depreciation indiscriminately on earthwork also in the original assessment proceedings. The Assessing Officer sought to reopen the original assessment under section 147(a) to withdraw excess depreciation that had been allowed on the entirety of the assets in the original order of the assessment. Notice issued by the Assessing Officer under section 147/148 was challenged on the ground that there was no failure on the part of the assessee to disclose fully, and truly all material facts necessary for his assessment. The Hon'ble Supreme Court has held that the issue whether there was such non-disclosure of primary facts as had escaped assessment of income was essentially a question of fact. The Hon'ble Court further held that it was well-settled that the obligation of the assessee was to disclose only primary facts and not inferential facts. If some material for the assessment lay embedded in the evidence, which the revenue could have uncovered but did not, then it is the duty of the assessee to bring it to the notice of the Assessing Officer. The assessee knows all the material and relevant facts—the assessing authority might not. In respect of the failure to disclose, the omission to

disclose may be deliberate or inadvertent but that is immaterial.

2.8 The reliance is placed on the order of ITAT Mumbai in case of ACIT Vs. Manubhai Sons & Co. [2007] 18 SOT 297 (MUM.) which in turn rely upon the above stated ratios of judgments of Hon'ble SC in cases of Kantamani Venkata Narayana & Sons v. Addl. ITO, Rajahmundry(supra) and Indo-Aden Salt Mfg. & Trading Co. (P.) Ltd. v. CIT(supra). The relevant portion is reproduced as under:

*"**6.** It may not be out of place to mention here a decision of the Hon'ble Supreme Court in Kantamani Venkata Narayana & Sons v. Addl. ITO, Rajahmundry [1967] 63 ITR 638 in which it has been held that the assessee does not discharge his duty to disclose fully and truly material facts necessary for the assessment for the assessment year in question by merely producing book account or other evidence. He has to bring to the notice of the Assessing Officer particular items in the books of account or portions of documents, which are relevant. Even if it is assumed that, from the documents produced, the Assessing Officer, if he had been circumspect, could have found out the truth, he is not on that account precluded from exercising the power to assess income, which had escaped assessment. Thus, the aforesaid judgment is in authority for the proposition that mere disclosure in the books of account or in other evidence does not necessarily mean that the assessee has disclosed fully and truly all material facts necessary for his assessment for the assessment year in question.*

7. In Indo-Aden Salt Mfg. & Trading Co. (P.) Ltd. v. CIT [1986] 159 ITR 624[2] (SC), the assets on which the assessee sought to claim depreciation consisted of masonry work as well as earthwork. Depreciation was however allowable on masonry work only. But the Assessing Officer allowed depreciation indiscriminately on earthwork also in the original assessment proceedings. The Assessing Officer sought to reopen the original assessment under section 147(a) to withdraw excess depreciation that had been allowed on the entirety of the assets in the original order of the assessment. Notice issued by the Assessing Officer under section 147/148 was challenged on the ground that there was no failure on the part of the assessee to disclose fully, and truly all material facts necessary for his assessment. The Hon'ble Supreme Court has held that the issue whether there was such non-disclosure of primary

facts as had escaped assessment of income was essentially a question of fact. The Hon'ble Court further held that it was well-settled that the obligation of the assessee was to disclose only primary facts and not inferential facts. If some material for the assessment lay embedded in the evidence, which the revenue could have uncovered but did not, then it is the duty of the assessee to bring it to the notice of the Assessing Officer. The assessee knows all the material and relevant facts—the assessing authority might not. In respect of the failure to disclose, the omission to disclose may be deliberate or inadvertent but that is immaterial."

3.1 The case law in of Calcutta Discount company [1961] 41 ITR 191 does not help the cause of the assessee because issue at hand in that case was that AO alleged that assessee failed to disclose its 'true intension behind sales of shares'. The Hon'ble SC held that finding 'intension' is a matter of 'inference' which could be different for different people. Therefore, it is duty of the AO to draw inference from primary facts.

3.2 The Hon'ble SC observed that from primary facts more inferences than one could be drawn, therefore, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. The Hon'ble SC wondered as to how could an assessee be charged with failure to communicate an inference, which he might or might not have drawn. In this back ground, the Hon'ble SC held that Explanation 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 relevant portion of the judgment is reproduced as under,

".....

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-tax Officer.*
>
> *We have, therefore, come to the conclusion that while the duty of the assessee is to disclose fully and truly all relevant facts, it does not extend beyond this.*
>
> *The position, therefore, is that if there is in fact some reasonable grounds for thinking that there had been non-disclosure as regards any primary fact, which could have a material bearing on the question of "under-assessment", that would be efficient to give jurisdiction to -the Income-tax Officer to issue the notices under section 34. Whether these grounds were adequate or not or 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.“(emphasis supplied).*
>
> *3.3 It may be seen that the ratio of Calcutta Discount company(supra) clearly supports the cause of revenue.”*

5. We have carefully considered the submissions of both the sides and have perused the material placed before us. The undisputed facts of the case are that the assessment year under consideration is 2001-02. Original assessment was completed u/s 143(3). Assessment was sought to be reopened by issuing notice u/s 148 on 28th March, 2008. Thus, admittedly, the assessment was sought to be reopened beyond the period of four years in a case where the original assessment was completed u/s 143(3). On these facts, the proviso to Section 147 would be applicable, as per which, unless there is failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, the assessment cannot be reopened. Let us examine the reasons recorded so as to ascertain whether as per Assessing Officer, there was any failure on the part of the assessee to disclose fully and truly all material facts. The copy of reasons recorded is placed at page 88 of the assessee’s paper book, which reads as under :-

"Reasons for taking action u/s 147/148 in the case of M/s Goldtex Furnishing Industries for A.Y. 2001-02

Assessment in this case was completed u/s 143(3) on 31.3.2003. Deduction u/s 80IB was allowed at Rs.93,31,872 as against assessee's claim of Rs.97,43,578/-. Deduction u/s 80HHC was allowed at Rs.1,82,08,386/- against assessee's claim of Rs.1,83,14,935/-.

It is seen that while calculating deduction u/s 80HHC the amount of deduction u/s 80IB was not reduced from the profit of export business in view of the provisions of section 80IA(9) which provides that where as amount of profits and gains of an industrial undertaking is claimed and allowed as deduction u/s 80IB, the profits to that extent should not qualify for deduction for any assessment year under any other provisions of Chapter VI A and in no case shall exceed the profit of Industrial undertaking.

In view of the above facts the deduction u/s 80HHC works out to Rs.11184667 as against claim of deduction made by the assessee at Rs.18314935/- and deduction allowed by the A.O. at Rs.18208386 while completing the assessment by way of excess deduction of Rs.7130268/- allowed to the assessee u/s 80HHC, has escaped assessment for A.Y. 2001-02. It is therefore necessary to take action u/s 147/148 in this case to the said assessment year.

Sd/-
(Aseem Sharma)
Assistant Commissioner of Income Tax
Circle 25(1), New Delhi."

6. From the above, it is evident that the Assessing Officer has nowhere mentioned that there was any failure on the part of the assessee to disclose fully and truly all material facts. The Assessing Officer has mentioned the facts and figure relating to deduction u/s 80HHC and 80IB claimed by the assessee and allowed by the Assessing Officer in the order u/s 143(3). Thereafter, the Assessing Officer has mentioned "It is seen that while calculating deduction u/s 80HHC the amount of deduction u/s 80IB was not reduced from the profit of export

business in view of the provisions of section 80IA(9)". Thus, the alleged escapement of income was on account of non-application of a certain provision of law by the assessee as well as Assessing Officer. However, non-application of certain provision of law cannot be equated with the failure on the part of the assessee to disclose fully and truly all material facts. Moreover, in the reasons recorded, the Assessing Officer has not mentioned that there was any failure on the part of the assessee to disclose fully and truly all material facts. Learned DR tried to justify the action of the Assessing Officer on the ground that in the order dated 2nd December, 2008 passed by the Assessing Officer rejecting the assessee's objection against the reopening of assessment, he has clearly mentioned that there was failure on the part of the assessee to disclose fully and truly all material facts. He, therefore, stated that the reasons recorded should be read along with Assessing Officer's order wherein the assessee's objection has been rejected. We find that the identical situation was considered by Hon'ble Jurisdictional High Court in the case of Haryana Acrylic Manufacturing Co. (supra). In the said case also, there was no mention in the reasons recorded that there was failure on the part of the assessee to disclose fully and truly all material facts but, in the counter-affidavit filed before Hon'ble Jurisdictional High Court, such assertion was made. Hon'ble Jurisdictional High Court did not accept the Revenue's contention and held that the notice issued u/s 148 based on the reasons recorded supplied to the petitioner cannot be sustained. The finding of their Lordships reads as under :-

> *"Held, allowing the petition, (i) that the reasons recorded did not indicate the failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment year 1998-99. While in the reasons supplied to the petitioner there was no mention of the allegation that there was a failure on the part of the assessee to disclose fully and truly all material facts, in the reasons shown in the said form to the counter-affidavit there was a specific allegation that there was a failure on*

the part of the assessee to disclose fully and truly all material facts relating to accommodation entries raised from one of the companies to the extent of Rs.5 lakhs. Thus, one of the conditions precedent for removing the bar against taking action after the said four year period remained unfulfilled. Consequently, the notice under section 148 based on the recorded reasons supplied to the petitioner as well as the consequent order were without jurisdiction as no action under section 147 could be taken beyond the four year period."

7. That the ratio of the above decision of Hon'ble Jurisdictional High Court would be squarely applicable to the facts under appeal before us.

8. Similar view is reiterated by their Lordships of Hon'ble Jurisdictional High Court in the case of Sonitpur Solvex Ltd. (supra), wherein it was held as under :-

"Held, dismissing the appeal, that the assessee had disclosed, very clearly and thoroughly, that its transport subsidy reserve was, as on March 31, 1996, Rs.35,00,330 and that by March 31, 1997, this amount had risen to Rs.59,70,889. The Revenue could not say that the assessee did not disclose all such material facts, which were necessary for making a valid and effective assessment of income for the purpose of realization of tax. The reason assigned by the Assessing Officer showed that the information regarding transport subsidy was available in the audited accounts and statements furnished by the assessee to the Assessing Officer along with the assessee's return. These details being available before the Assessing Officer, the Assessing Officer could not say that there was omission or failure on the part of the assessee to make the 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 its assessment, for that assessment year."

9. Respectfully following the above two decisions of Hon'ble Jurisdictional High Court, we hold that the reopening of assessment beyond the period of four years from the end of the relevant assessment year was not justified because – (i) there was no failure on

the part of the assessee to disclose fully and truly all material facts and (ii) there was no whisper in the reasons recorded that there was any failure on the part of the assessee to disclose all material facts.

10. In view of the above, respectfully following the above two decisions of Hon'ble Jurisdictional High Court, we quash the notice issued u/s 148 of the Act.

11. Since the notice issued u/s 148 is quashed, the assessment order passed in pursuance to such notice is also quashed. Once the assessment order itself has been quashed, the other grounds raised by the assessee in its appeal do not require any adjudication on merits.

12. In the result, the appeal of the assessee is allowed.

Decision pronounced in the open Court on 04.01.2017.

Sd/-	Sd/-
(CHANDRA MOHAN GARG)	**(G.D. AGRAWAL)**
JUDICIAL MEMBER	**VICE PRESIDENT**

VK.

Copy forwarded to: -

1. Appellant : **M/s Goldtex Furnishing Industries, 1197, Tri Nagar, Delhi – 110 035.**
2. Respondent : **Deputy Commissioner of Income Tax, Circle-25(1), New Delhi.**
3. CIT
4. CIT(A)
5. DR, ITAT

Assistant Registrar