

(2011) 02 GUJ CK 0148
In the Gujarat High Court

Case No : Special Civil Application No. 15992 of 2010 (Assessment Year 2003-04)

Aayojan Developers

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision : 02-02-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 34, 34(1)
Income Tax Act, 1961 — Section 139, 139(1), 142(1), 143(3), 147
Income Tax Rules, 1962 — Rule 18BBB

Citation : (2011) 335 ITR 234

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : Manish J. Shah, for the Appellant; M.R. Bhatt and Mauna M. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Harsha Devani, J.—The petition under Article 226 of the Constitution of India challenges the notice dt. 12th March, 2010 issued by the Respondent u/s 148 of the IT Act, 1961 (the Act) reopening the assessment of the Petitioner for asst. yr. 2003-04.

2. The Petitioner, a firm, filed return of income on 29th Nov., 2003 declaring total income at nil. Along with the return, the Petitioner submitted statement of income in which deduction u/s 80-IB of the Act for developing and building residential units at 100 per cent was claimed at Rs. 13,45,211. A note pertaining to details about the project on which deduction u/s 80-IB of the Act was claimed, was also attached to the statement of income. Form 10CCB which is a form of audit report for claiming deduction u/s 80-IB and which is prescribed under Rule 18BBB of the IT Rules, 1962 was also annexed with the return in which total details about the project on which deduction u/s 80-IB(10) of the Act was claimed was submitted. The balance sheet and the P&L a/c of the Petitioner were

also annexed with the return.

3. By a notice dt. 5th July, 2005 u/s 142(1) of the Act, the AO called for details enumerated at Annex. "A" and Annex. "B" to the notice. Annexure "B" to the notice pertained to the projects developed by the Petitioner on which deduction u/s 80-IB(10) of the Act was claimed by the Petitioner. Pursuant to the said notice, the Petitioner submitted all details and after scrutinizing the same, the AO framed assessment u/s 143(3) of the Act on 28th Nov., 2005. Subsequently, by the impugned notice, the assessment for the year 2003-04 is sought to be reopened by the Respondent. Pursuant to the notice, the Petitioner filed its reply requesting the Respondent to treat the return of income filed by the Petitioner u/s 139(1) of the Act as the return filed in response to notice u/s 148 of the Act and also requested the Respondent to furnish a copy of the reasons for reopening the assessment. The gist of the reasons recorded were supplied vide a letter dt. 6th Dec, 2010. Pursuant thereto, the Petitioner filed its objections against reopening of the assessment, which came to be disposed of by an order dt. 6th Dec, 2010, holding that the notice issued u/s 148 of the Act was a valid notice. Being aggrieved, the Petitioner has moved the present petition challenging the impugned notice.

4. Mr. Manish Shah, learned advocate for the Petitioner submitted that the impugned notice which has been issued on 12th March, 2010 in relation to asst. yr. 2003-04, has clearly been issued after the expiry of a period of four years from the end of the relevant assessment year. It was submitted that in a case where Section 147 of the Act has been invoked beyond the period of four years from the end of the relevant assessment year, for the purpose of valid assumption of jurisdiction, two conditions are required to be satisfied; firstly, that there is escapement of income, and secondly, that such income has escaped assessment on account of failure on the part of the Assessee (i) to make a return u/s 139(1) of the Act; or (ii) to file a return in response to a notice u/s 142(1) of the Act or Section 148 of the Act; or (iii) failure on the part of the Assessee to disclose fully and truly all material facts necessary for its assessment.

5. Referring to the reasons recorded, it was submitted that all that is recorded in the reasons is that, "On verification of the details, it is noticed that the Assessee is merely a works contractor and has not undertaken any developing and building housing project approved by the local authority and hence, the claim of the Assessee for deduction u/s 80-IB(10) of the Act is not in accordance with law." It was submitted that in the entire reasons, there is not even a whisper to the effect that income has escaped assessment by reason of failure on the part of the Petitioner to disclose fully and truly all material facts.

6. Attention was invited to the statement of total income submitted by the Petitioner along with its return of income, to point out that in the note attached to the statement, it was specifically stated that the firm had developed and constructed residential units as stated therein and had earned profit of Rs. 37,15,906 which was deductible u/s 80-IB of the Act @ 100 per cent as per law.

Certified copy of the approved plan was also furnished with the IT return for asst. yr. 2001-02. Referring to the notice dt. 5th July, 2005 issued by the ITO u/s 142(1) of the Act and more particularly at Annexure "V" thereto, it is pointed out that the AO had specifically called for the sale deed of land on which project is developed as well as the development agreement for construction of housing project. Drawing the attention of the Court to the assessment order framed u/s 143(3) of the Act, it was pointed out that the AO had specifically referred to the claim of deduction u/s 80-IB(1) of the Act in relation to the work of development and construction of housing project made by the Petitioner. It was submitted that in the circumstances, on the basis of the material on record, the AO had after calling for necessary information, applied his mind to the aspect of claim of deduction u/s 80-IB(1) of the Act and had granted the deduction. In the reasons recorded, there is nothing to indicate that the AO had subsequently come in possession of any tangible material on the basis of which he had formed opinion that income had escaped assessment. Inviting attention to the reasons recorded, it was submitted that the main reason for reopening the assessment seems to be the introduction of Explanation in Section 80-IB(1) of the Act, whereby there is a change in the legal matrix and according to the AO, the deduction u/s 80-IB(10) of the Act is not available to an enterprise which executes housing projects as a works contractor. Therefore, there is no tangible material on the basis of which the AO could have formed an opinion that income has escaped assessment for the assessment year under consideration. According to the learned advocate from the reasons recorded, it is apparent that the assessment is sought to be reopened on a mere change of opinion and that the successor AO, based on the same material to which the AO had applied his mind and granted deduction, is now of the view that the Assessee is not entitled to deduction u/s 80-IB(10) of the Act. The reopening of assessment is, therefore, without any valid basis.

7. It was submitted that in any case, the assessment is sought to be reopened after the expiry of a period of four years and, the reasons recorded do not indicate any failure on the part of the Petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment year in question and as such, the assumption of jurisdiction u/s 147 of the Act after the expiry of a period of four years from the end of the relevant assessment year is not valid.

8. Referring to the affidavits filed by the Respondent in response to the petition, it was submitted that in the first affidavit, the Respondent has stated that the Petitioner had made incorrect claim and as such, had not disclosed fully and truly all material facts necessary for its assessment, whereas, in the subsequent affidavit filed thereafter, the Respondent has sought to improve his case by stating that the Petitioner had stated in the relevant forms that it was a developer and that it was based on the said assertion that the stated deduction came to be allowed. However, it was subsequently noticed that the Petitioner was only a works contractor and not a developer as per the requirements of the stated sections. It was vehemently argued that the AO has to support the challenge to the validity of the proceedings u/s 147 of the Act on the basis of the

reasons recorded by it and cannot supplement the same by bringing any new facts by way of affidavit in reply.

9. Reliance was placed upon the decision of the Calcutta High Court in the case of East Coast Commercial Company Ltd. Vs. Income Tax Officer and Others, for the proposition that the recording of reasons is not an idle formality but a mandatory requirement of the statute casting a duty and an obligation on the ITO to record his reasons for issuing a notice for reassessment.

10. The decision of the Calcutta High Court in the case of EQUITABLE INVESTMENT CO. (P.) LTD. Vs. Income Tax OFFICER, G. WARD, AND OTHERS., was cited for the proposition that if additional reasons are disclosed for reopening the assessment on which the Court might be satisfied as to the validity of the proceedings, that would not validate the proceedings, if the reasons recorded under Clause (iii) of the first proviso to Section 34(1) of the old Act or Section 148(2) of the new Act were not sufficient for the initiation of proceedings or for the grant of sanction by the Board or the CIT, as the case may be.

11. The decision of the Bombay High Court in the case of Prashant S. Joshi Vs. The Income Tax Officer and Union of India (UOI), was cited for the proposition that the reasons which are recorded by the AO for reopening the assessment are the only reasons which can be considered when the formation of the belief is impugned. The reasons recorded for reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded. The reasons that are recorded cannot be supplemented by affidavits.

12. It was, accordingly, urged that when the reasons recorded do not indicate any failure on the part of the Petitioner to disclose fully and truly all material facts necessary for its assessment, the Respondent AO cannot be permitted to supplement the reasons recorded by affidavit by devising new grounds not envisaged when the reasons for reopening were recorded. It was submitted that according to the Respondent, the Petitioner had made a wrong claim stating that it was a developer, whereas the Petitioner claimed to be a developer and had, accordingly, filed the return of income along with relevant documents. It was submitted that it is not the case of the Respondent that the formation of belief that income has escaped assessment is based on any material subsequently collected. The very same material which was filed by the Petitioner during the course of assessment has been considered by the AO for the purpose of reopening the assessment. According to the learned advocate the Petitioner is required to disclose all primary facts but not inferential facts. The Petitioner had claimed that it was a developer. As to whether the Petitioner was a developer or a works contractor was a matter of inference, which had to be considered by the AO while framing the assessment. The AO while framing the original assessment after application of mind had allowed the Petitioners claim and permitted deduction. Thus, the assertion on the part of the Respondent that the Petitioner had not disclosed all material facts truly and fully as it had made a wrong claim

is not justified in as much as the Petitioner was not required to disclose inferential facts. It was, accordingly, submitted that the impugned notice does not satisfy the requirements of Section 147 of the Act and the proviso thereto and as such, the assumption of jurisdiction u/s 147 of the Act, is invalid.

13. Next, the learned advocate invited attention to a decision of this High Court in the case of *Sadbhav Engineering Ltd. v. Dy. CIT* in Special Civil Appln. No. 5846 of 2010 and No. 5847 of 2010 dt. 20th July, 2010 to submit that in a more or less identical set of facts, this Court has allowed the petitions, and quashed and set aside the notices u/s 148 of the Act which were subject matter of challenge in the said petitions. It was submitted that the said decision would apply on all fours to the facts of the present case and as such, the controversy involved in the present case stands concluded by the said decision in favour of the Petitioner.

14. Mr. M.R. Bhatt, learned senior advocate, appearing on behalf of the Respondent vehemently opposed the petition. It was submitted that to assume jurisdiction u/s 147 of the Act after the expiry of a period of four years from the end of the relevant assessment year, the AO is required to establish two things; firstly, that there is escapement of income from assessment and secondly, that such escapement is on account of failure on part of the Assessee to disclose fully and truly all material facts. It was submitted that Section 147 of the Act is a machinery section which has to work in the aid of the charging section and as such, while interpreting such a provision that construction should be preferred which makes the machinery workable. Referring to the decision of the Supreme Court in the case of *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, it was pointed out that in the facts of the said case, the Court had observed that if one looks at the report submitted by the AO, it would not be possible to say that the ITO had any non-disclosure of material facts by the Assessee in mind when he assumed jurisdiction. However, the Court had observed that it has to be remembered that in sending a report to the CIT, the ITO might not fully set out what he thought amounted to a non-disclosure, because it is conceivable that the report may not be drawn up carefully and may not contain a reference to all the non-disclosure that operated on his mind. The Court, thereafter, looked into the affidavit sworn in by the same ITO who had started the Section 34 proceedings and observed that it was reasonable to accept that in the said affidavit which was his opportunity to tell the Court what non-disclosure he took into consideration, he would state as clearly as possible the material facts in respect of which there had not been in his view a full and true disclosure. It was, accordingly, submitted that the decision in the case of *Calcutta Discount Co. Ltd. v. ITO* (supra) has been rendered by a Constitutional Bench of the Supreme Court wherein the Court has looked into the affidavit and has recorded that this was the opportunity for the AO to tell the Court what non-disclosure he had taken into consideration. It was submitted that in the circumstances, it is always permissible for the AO to place on record the facts regarding nondisclosure by way of affidavit before the Court. It was further

pointed out that the Court had with a view to ascertain whether the ITO should have in mind any non-disclosure as a ground for thinking that by reason of such non-disclosure, an under assessment had occurred, apart from what was mentioned in the affidavit, the Court had inquired from the counsel of the AO whether he could suggest any other nondisclosure that might take place. It was, accordingly, submitted that it is always permissible for the learned advocate representing the AO to bring to the notice of the Court the non-disclosure that might have taken place.

15. Referring to the affidavit made by the Respondent, it was submitted that the affidavit only clarifies and elaborates the aspect of facts and it does not give any additional ground, as is sought to be contended on behalf of the Petitioner. It was submitted that the ground for reopening the assessment remains the same, only the aspect of failure is elaborated.

16. The decision of the Supreme Court in the case of Indo-Aden Salt Mfg. and Trading Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay, was cited for the proposition that 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 authority. The Assessee knows all the material and relevant facts, which the assessing authority might not. In respect of the failure to disclose, the omission to disclose may be deliberate or inadvertent which was immaterial. But if there is omission to disclose material facts, then, subject to other conditions, jurisdiction to reopen is attracted. It was submitted that in the facts of the present case, the Petitioner had made an assertion that it was a developer and based on the assertion, the stated deduction came to be allowed. According to the learned Counsel the fact that the Petitioner was only a works contractor and not a developer, was to the exclusive knowledge of the Petitioner and that the Petitioner claimed deduction giving wrong particulars about his status, by claiming to be a developer, though he was only a works contractor. It was submitted that in the circumstances, the Petitioner having failed to disclose fully and truly all material facts necessary for its assessment, the assumption of jurisdiction u/s 147 of the Act is valid.

17. Reliance was also placed upon the decision of the Supreme Court in the case of M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another, wherein the Court has held that one of the purposes of Section 147 appears to be to ensure that a -party cannot get away by willfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be a travesty of justice to allow the Assessee that latitude. It was submitted that the Petitioner having willfully made a false or untrue statement asserting that it is a developer, cannot now be permitted to turnaround and say that it is not open for the AO to do anything about it having accepted the Petitioners assertion that it is a developer. Referring to the decision of the Supreme Court in the case of INCOME TAX OFFICER Vs. SELECTED

DALURBAND COAL CO. (P) LTD., it was submitted that at the stage of issuance of notice, the only question is whether there was relevant material on which a reasonable person could have formed the requisite material. In the facts of the present case, it cannot be said that material before the AO cannot constitute the basis for forming such a belief and as such, the petition being devoid of merits, deserves to be dismissed.

18. Referring to the decisions on which reliance had been placed upon by the Petitioner in support of its contention that an affidavit made by the AO cannot be looked into in support of the reasons recorded, it was submitted that in none of the said decisions, the decision of the Constitutional Bench in the case of Calcutta Discount Co. Ltd. v. ITO (supra) has been considered. That in any case, the said decisions are decisions of different High Courts whereas, the decision in the case of Calcutta Discount Co. Ltd. (supra) is a decision of the Constitutional Bench of the Supreme Court and as such, the said decision of the Supreme Court would prevail over all the decisions of the High Court.

Referring to the decision of the Calcutta High Court in the case of Equitable Investment Co. (P) Ltd. v. ITO and Ors. (supra), on which reliance was placed on behalf of the Petitioner, it was submitted that an additional affidavit clarifying the reasons recorded can be gone into provided that a separate ground is not made out.

19. In rejoinder. Mr. Manish Shah, learned advocate appearing on behalf of the Petitioner submitted that it is nowhere stated in the reasons recorded that primary facts have not been disclosed by the Petitioner. Referring to the decision of the Calcutta High Court in the case of East Coast Commercial Co. Ltd. v. ITO and Ors. (supra), it was pointed out that in the said decision, the observations of the decision of the Constitutional Bench in the case of Calcutta Discount Co. Ltd. v. ITO (supra) had been considered by the Division Bench and had distinguished the same. It was submitted that in any case, apart from the fact that an affidavit bringing out new grounds cannot be considered for the purpose of examining the validity of assumption of jurisdiction u/s 147 of the Act, even in the affidavit except for stating that the Petitioner had made an assertion that it is a developer which according to the AO is a wrong assertion, nothing has been stated as to what is the nature of the non-disclosure made by the Petitioner.

20. Various other decisions of the Supreme Court as well as High Courts have been cited by the learned advocates for the respective parties, however, with a view to avoid prolix, the same are not referred to hereinabove. Reference has been made to the relevant decisions in the body of the judgment.

21. In the background of the aforesaid facts and contentions, the principal issue that arises for consideration is as to whether the; AO has assumed valid jurisdiction u/s 147 of the Act by issuing the impugned notice u/s 148 of the Act. Another issue that arises for consideration is as to whether it is permissible for the Court to look beyond the reasons recorded by the AO and consider the new

grounds stated in the affidavit in reply filed by the AO in support of the reasons recorded by him for the purpose of reopening the assessment.

22. There is no dispute that for the assessment year under consideration, viz. 2003-04, the period of four years expires on 31st March, 2008 whereas the impugned notice u/s 148 of the Act has been issued on 12th March, 2010, which is clearly after the expiry of a period of four years from the end of the relevant assessment year. u/s 147 of the Act, if any income has escaped assessment, the AO is empowered to bring to tax the income which has escaped assessment if the AO records the requisite reasons as provided u/s 148(2) of the Act. However, the proviso to Section 147 stipulates that in case where the assessment is framed u/s 143(3) of the Act and a period of four years from the end of the relevant assessment year has expired, unless and until the income chargeable to tax has escaped assessment by virtue of failure on the part of the Assessee to: (i) file return u/s 139(1); or (ii) to respond to notice issued u/s 142(1) of the Act or Section 148 of the Act; or (iii) to disclose fully and truly all material facts necessary for assessment of the relevant assessment year, no action can be taken by the AO. In the present case admittedly, the first two contingencies do not exist.

23. The only question that would then survive would be whether there was any failure on the part of the Petitioner-Assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration. In this regard, it may be pertinent to refer to the reasons recorded by the AO, which read as follows:

The Assessee has filed the return of income for asst. yr. 2003-04 on 20th Nov., 2003 showing total income of Rs. nil after claiming deduction of Rs. 13,45,211 u/s 80-IB(10) of the IT Act. In this case, assessment u/s 143(3) of the IT Act was passed on 28th Nov., 2005. However, on verification of the details, it is noticed that the Assessee is merely a works contractor and not undertaken any developing and building housing project approved by the local authority and hence, the claim of the Assessee for deduction u/s 80-IB(10) of the IT Act, is not in accordance with law. Finance Act, 2009 has amended the Section 80-IB(10) by way of inserting the Explanation with retrospective effect from 1st April, 2001. After the introduction of Explanation in the section there is a change in legal matrix, and the deduction u/s 80-IB(10) is not available to an enterprise which execute the housing project as a works contractor. In view of the above, I have every reason to believe that due to illegitimate claim of the deduction of Rs. 13,45,211 made and allowed to the Assessee u/s 80-IB(10) of the IT Act, the income chargeable to tax has escaped assessment within the meaning of Section 147 of the IT Act.

24. On a plain reading of the aforesaid reasons, it appears to be the case of the AO that upon verification of the details he has noticed that the Assessee is merely a works contractor and has not undertaken any developing and building housing project approved by the local authority and as such the claim made by

the Assessee for deduction u/s 80-IB(10) of the Act is not in accordance with law. The basis for formation of the belief that income has escaped assessment appears to be the Explanation to Sub-section (1) of Section 80-IB which has been inserted by the Finance Act, 2009 which clarifies that the said provision shall not apply to any undertaking which executes the housing project as a works contract awarded by any person (including the Central Government or the State Government). However, there is not even a whisper as to any failure on the part of the Petitioner to disclose fully and truly all material facts. All that is stated is that due to illegitimate claim of deduction of Rs. 13,45,211 made and allowed to the Assessee u/s 80-IB(10) of the Act, the AO has reason to believe that income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act. The reasons indicate that the aforesaid view has been taken by the AO upon verification of the details submitted by the Assessee. In the entire reasons recorded, there is nothing to suggest that there is any failure on the part of the Petitioner to disclose fully and truly all material facts. However, to supplement the reasons recorded, the Respondent has filed two affidavits in reply. In the first affidavit in reply, it is alleged that the Petitioner was a works contractor and though was not eligible for deductions, he made incorrect claim and as such, had not disclosed fully and truly all material facts necessary for its assessment. In the second affidavit, which has been filed to supplement what is stated in the first affidavit, it is stated that in the relevant forms, the Petitioner has stated that it is a developer and it is based on the said assertion that the deduction u/s 80-IB(10) of the Act came to be allowed. It was subsequently noticed that the Petitioner was only a works contractor and not a developer as per the requirement of the said section. That the Petitioner despite knowing the fact that he was only a works contractor, made claim in the capacity as developer and as such, the Petitioner has failed to disclose fully and truly all necessary facts which are material necessary for its assessment.

25. Since the facts regarding non-disclosure (if at all it can be stated that there is a non-disclosure), have come on record by way of affidavit only and are not reflected in the reasons recorded, the contention raised on behalf of the Petitioner that the averments made in the affidavits cannot be considered for the purpose of deciding the validity of initiation of proceedings u/s 147 of the Act and that it is the only the reasons recorded, which can be looked into requires to be examined.

26. In this regard it may be germane to refer to various decisions of the Supreme Court, wherein while examining the validity of reopening of assessment, the Court has taken into consideration affidavits filed by the AO.

(i) In *Calcutta Discount Co. Ltd. v. ITO* (supra) the Supreme Court had made the following observations:

It has to be remembered, however, that in sending a report to the CIT, the ITO might not fully set out what he thought amounted to a non-disclosure, because it is conceivable that the report may not be drawn up carefully and may not contain

a reference to all the non-disclosures that operated on his mind. We have, however, on the record an affidavit sworn by the same ITO who started the Section 34 proceedings. It is reasonable to expect that in this affidavit which was his opportunity to tell the Court what non-disclosure he took into consideration he would state as clearly as possible the material facts in respect of which there had not been in his view a full and true disclosure....

To ascertain whether the ITO could have had in mind any non-disclosure as a ground for thinking that by reason of such non-disclosure an under assessment had occurred--apart from what was mentioned in the affidavit--we enquired from the Respondents counsel whether he could suggest any other non-disclosure that might have taken place. Mr. Sastri suggested two. One is that the sales had not been disclosed; the other that the memorandum and articles of association of the company had not been shown. This suggestion is against the record and we have no hesitation in repelling it.

(ii) In the case of Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry, which was a case of reopening of assessment u/s 34(1) of the Indian IT Act, 1922 where the existence of the belief of the ITO under the said section was challenged, the Supreme Court observed as follows:

It is clear from the affidavits filed in the Court of first instance that the ITO had received information relying upon which he had reason to believe that the Assessee had not disclosed fully and truly all material facts necessary for the assessment and in consequence of non-disclosure of that information, income chargeable to tax had escaped assessment.

The averments made by the ITO in his affidavit which have been accepted by the Court of first instance prima facie establish that the ITO had reason to believe that by reason of the omission or failure on the part of the Assessee to disclose fully and truly all material facts necessary for his assessment, income chargeable to income tax has escaped.

(iii) In Sowdagar Ahmed Khan (Deceased) (By his Legal representatives) Vs. Income Tax Officer, Nellore, which again was a case of reopening of assessment u/s 34(1)(a) of the Indian IT Act, 1922, one of the contentions raised was that there was no material before the ITO on which he could form his "belief that any income had escaped assessment by reason of the omission or failure on the part of the Assessee to disclose fully or truly any material facts and thus, the pre-requisite to issue of notice u/s 34(1)(a) being not fulfilled, the ITO had no jurisdiction to issue the notice. The Supreme Court after considering the counter affidavit filed in the High Court by the ITO controverting the allegations of the Assessee that all material facts were fully and truly disclosed at the original assessment stage and ascertaining that the Assessee had failed to disclose the existence of the bank account in the name of his father-in-law, benami for the benefit of the Assessee and to disclose fully and truly the basic facts in respect of the sources of the alleged cash credits, was of the opinion that there was some

material before the ITO on which he formed the prima facie belief that the Assessee had omitted to disclose fully and truly all material facts and in consequence of such non-disclosure, income had escaped assessment.

(iv) In *Madhya Pradesh Industries Ltd. Vs. The Income Tax Officer, Nagpur*, which again was a case of reopening of assessment u/s 34(1)(a) of the Indian IT Act, 1922, the Court had observed as follows:

In those cases, the company in its writ petitions had repudiated the assertion of the ITO that he had reason to believe that due to the omission or failure on the part of the company to give material facts, some income had escaped assessment. Under those circumstances, one would have expected the officer who issued the notices u/s 34(1)(a) to file an affidavit setting out the circumstances under which he formed the necessary belief. We were told that one Mr. Pandey had issued the notices in question. That officer had not filed any affidavit in these proceedings. The proceedings recorded by him before issuing the notices have not been produced nor his report to the CIT or even the CIT's sanction has not been produced. Hence, it is not possible to hold that the ITO had any reason to form the belief in question or the reasons before him were relevant for the purpose.

(v) In *Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta*, the Supreme Court after considering the affidavit filed by the ITO was not satisfied on the affidavit that the ITO had reason to believe that a part of the income of the Respondent had escaped assessment by reason of its failure to make true and full disclosure of the material facts.

27. In the case of *East Coast Commercial Co. Ltd. v. ITO and Ors.* (supra), on behalf of the Assessee, it was urged that the Court could not rely or act upon any new or fresh allegation made by the ITO in his affidavit filed in Court to uphold a proceeding for the reopening of an assessment, whereas on the other hand, it was contended on behalf of the Respondents that the recorded reasons might be cryptic: or might not contain all the reasons for the reopening and further reasons could, therefore, be disclosed in the affidavit and the Court could rely thereon to judge whether the reopening of the assessment was proper or not. The Calcutta High Court considered the above-referred observations made by the Supreme Court in the case of *Calcutta Discount Co. Ltd. v. ITO* (supra) as well as all the above decisions relating to the reopening of the assessment, and observed that it appears that whenever the Supreme Court relied on the affidavit filed by the ITO before the Court, there was no controversy that the reasons given by the ITO in such affidavit were not in conformity with or were contrary to the reasons recorded by him for reopening the assessment, and it further appears that although in those cases where the recorded reasons were not produced before the Court below or before the Supreme Court, yet neither the Court nor the Assessee asked for production of the recorded reasons. The Court held that it is true that Section 148(2) of the IT Act does not say that the ITO shall record all the reasons which he has in mind for reopening the assessment

or for formation of his belief that income of the Assessee had escaped assessment or has been under-assessed on account of the Assessee not having made full and true disclosure of his income, but the section does not also say that the ITO would record only some of the reasons and keep others up his sleeves to be disclosed before the Court if his action is ever challenged in a Court of law. The recording of reasons is not an idle formality, but it is a mandatory requirement of the statute casting a duty and obligation on the ITO to record his reasons for issuing a notice for reopening an assessment and the CBDT or the CIT, as the case may be, being satisfied that it is a fit case for issue of such notice solely on the basis of the said reasons recorded, accords its sanction to the issue of such notice. The Court noted that the observations made by the Supreme Court in the case of Calcutta Discount Co. (supra) were made with regard to the report of the ITO to the CIT and not with regard to the recorded reasons. The Court further observed that the IT Act does not provide that for the issue of a notice u/s 34 of the old Act or Section 148 of the new Act, satisfaction of the Court was necessary, but such satisfaction under the statute had to be that of the Board or of the CIT, as the case may be. Thus, if any additional reasons were disclosed by the ITO in his affidavit before the Court in support of his action for reopening the assessment on which the Court might be satisfied as to the validity of the proceedings, that would not validate the proceedings, if the reasons recorded under Clause (iii) of the first proviso to Section 34(1) of the old Act or Section 148(2) of the new Act were not sufficient for initiation of the proceedings or for the grant of the sanction by the Board or the CIT, as the case may be. The ITO, however, in his affidavit filed in the Court could explain or elaborate or clarify the reasons recorded by him, but could not thereby introduce new grounds or new reasons or new materials which were not to be found in the recorded reasons either expressly or by implication.

28. The above-referred decision appears to be the lead decision on this issue and came to be followed by the Calcutta High Court in its subsequent decision in the case of Equitable Investment Co. (P) Ltd. v. ITO and Ors. (supra) as well as by other High Courts in several cases.

29. The Bombay High Court in the case of Prashaht S. Joshi v. ITO and Anr. (supra), has held thus:

Section 147 provides that if the AO 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 163, 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 the section. The first proviso to Section 147 has no application in the facts of this case. The basic postulate which underlies Section 147 is the formation of the belief by the AO that any income chargeable to tax has escaped assessment for any assessment year. The AO must have reason to believe that such is the case before he proceeds to issue a notice u/s 147. The reasons which are recorded by

the AO for reopening an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. The requirement of recording reasons is a check against arbitrary exercise of power. For it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment is to be decided. The reasons recorded while reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well settled that the question as to whether there was reason to believe, within the meaning of Section 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the AO. The reasons which are recorded cannot be supplemented by affidavits. The imposition of that requirement ensures against an arbitrary exercise of powers u/s 148.

30. The Gauhati High Court in the case of Commissioner of Income Tax Vs. Shiv Shakti Flour Mills P. Ltd., has followed the decision of the Bombay High Court in the case of Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income Tax and Others (No. 1), for holding that the relevant materials must appear from the order by which the AO has decided to proceed with the assessment or reassessment u/s 147 of the Act. The satisfaction of the AO cannot be supplemented by the Revenue by filing an affidavit subsequently in as much as the AO only on formation of reason to believe on the basis of the materials placed before him that there is escapement of income, can proceed to take action u/s 147 of the Act. Such an order must be construed objectively on the basis of reasons given in the order itself and cannot be construed in the light of the explanation subsequently given by the AO.

31. Thus, though there are several decisions of the Supreme Court wherein the Court has looked into the counter affidavit filed by the AO for the purpose of ascertaining the circumstances under which he formed the necessary belief, however, as rightly observed by the Calcutta High Court in the case of East Coast Commercial Co. Ltd. v. ITO and Ors. (supra) it appears that whenever the Supreme Court relied on the affidavit filed by the ITO before the Court, there was no controversy that the reasons given by the ITO in such affidavit were not in conformity with or were contrary to the reasons recorded by him for reopening the assessment, and it further appears that although in those cases where the recorded reasons were not produced before the Court below or before the Supreme Court, yet neither the Court nor the Assessee asked for production of the recorded reasons.

32. In the aforesaid background, it may be pertinent to refer to certain statutory provisions. Section 147 of the Act lays down that if the AO 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 the section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned. The proviso to Section 147 of the Act lays down that where an assessment under Sub-section (3) of Section 143 or Section 147 has been made for the relevant assessment year, no action shall be taken u/s 147 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 u/s 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. Thus, the power to reopen assessment or reassessment u/s 147 is subject to the provisions of Sections 148 to 153 of the Act and in case the provision is sought to be invoked after a period of four years from the end of the relevant assessment year, the requirements of the proviso thereto are required to be satisfied.

33. Section 148 of the Act provides for issuance of notice where income has escaped assessment and lays down that before making the assessment, reassessment or recomputation u/s 147, the AO shall serve on the Assessee a notice as laid down therein. Sub-section (2) thereof mandates that the AO shall, before issuing any notice under the said section, record his reasons for doing so. Section 151 of the Act provides for sanction for issue of notice and lays down that in a case where an assessment under Sub-section (3) of Section 143 or Section 147 has been made for the relevant assessment year, no notice shall be issued u/s 148 by the AO, who is below the rank of Asstt. CIT or Dy. CIT, unless the Jt. CIT is satisfied on the reasons recorded by such AO that it is a fit case for the issue of such notice. The proviso thereto provides that after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief CIT or CIT is satisfied, on the reasons recorded by the AO aforesaid, that it is a fit case for the issue of such notice. Sub-section (2) thereof provides that in a case other than a case falling under Sub-section (1), no notice shall be issued u/s 148 by an AO, who is below the rank of Jt. CIT, after the expiry of four years from the end of the relevant assessment year, unless the Jt. CIT is satisfied, on the reasons recorded by such AO, that it is a fit case for the issue of such notice. The Explanation thereto lays down that for the removal of doubts, it is declared that the Jt. CIT, the CIT or the Chief CIT, as the case may be, being satisfied on the reasons recorded by the AO about fitness of a case for the issue of notice u/s 148, need not issue such notice himself.

34. Thus, the scheme of the Act as emerging on a plain reading of the aforesaid provisions indicates that for the purpose of assuming jurisdiction u/s 148 of the Act, the AO is required to record his reasons for doing so as laid down under Sub-section (2) of Section 148 of the Act. In respect of a case which has been subject matter of scrutiny u/s 143(3) or Section 147 of the Act, notice u/s 148 of the Act cannot be issued after the expiry of a period of four years from the end of the

relevant assessment year, unless the Chief CIT or the CIT, as the case may be, is satisfied on the reasons recorded by the AO that it is a fit case for issue of such notice. Thus, reasons recorded form the foundation for assumption of jurisdiction u/s 147 of the Act. In a case which falls under the proviso to Sub-section (1) of Section 151, the Chief CIT or the CIT, as the case may be, is required to be satisfied on the reasons recorded as to whether it is a fit case for issuing of such notice. The reasons would form the basis of such satisfaction. If the reasons do not fulfill the pre-requisite for assumption of jurisdiction u/s 147 of the Act read with the proviso thereto, the satisfaction would stand vitiated.

35. The Supreme Court in the case of GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 has clarified that when a notice u/s 148 of the IT Act is issued, the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound to dispose of the same by passing a speaking order before proceeding with the assessment in respect of the said assessment year. Thus, for the purpose of filing objections to issuance of notice, the Assessee is required to be provided with a copy of the reasons for issuing notice. The reasons (sic.-notice) should set out the reasons for formation of belief of the AO that income has escaped assessment and in case where the reopening of assessment is after the expiry of a period of four years from the end of the relevant assessment year, the belief should be that, by reason of omission or failure on the part of the Assessee to disclose fully and truly the material facts, income has escaped assessment in a particular year. Unless, the reasons recorded clearly spell out the grounds for formation of the belief that there is escapement of income and that such escapement is by reason of failure on the part of the Assessee to disclose fully and truly all material facts, the Assessee would not be in a position to file its objections to the issuance of notice. Hence, if reasons do not record the twin belief, the very purpose of filing objections would stand frustrated. Thus, unless the substratum is laid in the reasons, clearly demonstrating the twin belief, that is, the belief that income has escaped assessment and the belief that such escapement is by reason of failure on the part of the Assessee, filing an affidavit and stating the same before the Court for the first time would amount to bringing on record material which did not form the basis of formation of such belief. The belief that income has escaped assessment by reason of failure on the part of the Assessee to disclose fully and truly all material facts has to be recorded in the reasons, though the same may be elaborated by filing an affidavit. But in the absence of formation of any such belief being recorded in the reasons, it is not open for the AO to express formation of such belief for the first time by way of affidavit-in-reply filed in the Court. This Court is in agreement with the view taken by the Calcutta High Court in the case of East Coast Commercial Co. Ltd. v. ITO and Ors. (supra) that the AO in his affidavit filed in the Court can explain or elaborate or clarify the reasons recorded by him, but cannot thereby introduce new grounds or new reasons or

new materials which were not to be found in the recorded reasons either expressly or by implication.

36. On behalf of the revenue, strong reliance has been placed upon the decision in the case of *Calcutta Discount Co. Ltd. v. ITO* (supra), to submit that in the said case, the Constitutional Bench of the Apex Court has considered the affidavit filed by the AO and as such, it is always permissible for the Court to look into the affidavit filed by the AO in support of the reasons recorded by him. However, as has been rightly observed by the Calcutta High Court in the case of *East Coast Commercial Co. Ltd. v. ITO and Ors.* (supra), the said decision related to the reopening of assessment u/s 34 of the old Act and there was no controversy that the reasons given by the ITO were not in conformity with or were contrary to the reasons recorded by the AO for reopening the assessment.

37. In the opinion of this Court if on the face of the reasons recorded, by necessary implication it is apparent that there is non-disclosure or failure to disclose fully and truly all material facts, viz., at times the reasons may be self-explicit, like in case where suppression, fraud etc. is alleged, as a natural corollary it implies that there is non-disclosure or failure to disclose true facts, in which case merely because the reasons recorded do not use the expression "failure to disclose fully and truly all material facts" would not mean that the same do not reflect failure on the part of the Assessee to disclose all material facts as laid down in the provision. In such a case the reopening would not be invalid. Conversely, if it is neither alleged in the reasons that there is any failure on the part of the Assessee to disclose fully and truly all material facts, nor do the reasons reflect any facts or material from which it could be inferred that there was any such failure on the part of the Assessee, the reopening of assessment would be invalid. When no foundation is laid in the reasons, no material brought on record for the first time by filing counter affidavit to indicate that there is escapement of income by reason of failure on the part of the Assessee to disclose fully and truly all material facts, can be taken into consideration for the purpose of deciding the validity of proceedings u/s 147 of the Act. The reasons, independent of any counter affidavit should satisfy the pre-requisites for assumption of valid jurisdiction u/s 147 of the Act.

38. The Supreme Court in the case of *Calcutta Discount Co. Ltd. v. ITO* (supra) had an occasion to examine the precise scope of disclosure which the section demands and held thus:

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 ITO 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 AO 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.

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?

12. 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 ITO 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 ITO.

13. 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.

39. Examining the facts of the present case in the light of the above principles enunciated by the Supreme Court, a bare perusal of the reasons recorded indicates that there is not even a whisper as regards any failure on the part of the Petitioner to disclose fully and truly all material facts, nor is it possible to infer any such failure from the reasons recorded. Merely because of the fact that the Assessee had asserted that it is a developer in the returns filed by him, it cannot be said that there is any failure on the part of the Petitioner to disclose fully and truly all material facts. At best, the Petitioner has made a claim along with supporting documents, namely, development agreements for construction of housing projects, etc. and based upon the said documents, the AO had formed an opinion and granted deduction u/s 80-IB(10) of the Act. As to whether in a given set of facts, the Assessee is a developer or a works contractor is a matter of inference. Hence, the assertion that the Petitioner is a developer, without anything more cannot be said to be an incorrect disclosure of facts, as is sought to be contended on behalf of the revenue. In the circumstances, in the absence of any failure on the part of the Petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration, the assumption of jurisdiction u/s 147 of the Act after the expiry of four years from the end of the relevant assessment year is illegal and invalid. The proceedings u/s 147 of the Act which have been initiated by issuance of the impugned notice u/s 148 of the Act, therefore, cannot be sustained.

40. On behalf of the Petitioner, reliance has been placed upon the decision of this Court in the case of *Sadbhav Engineering Ltd. v. Dy. CIT* (supra) rendered on 20th July, 2010 in Special Civil Appln. No. 5846 of 2010 and other allied matters. On behalf of the revenue, nothing has been pointed out to indicate as to why the said decision would not be applicable to the facts of the present case. It is also not the case of the revenue that the said decision has been carried further and that the same has been stayed or set aside by a higher forum. In the circumstances, the facts of the present case would also stand squarely covered

by the said decision and therefore, the impugned notice cannot be sustained on this ground also.

41. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dt. 12th March, 2010 issued u/s 148 of the Act, is hereby quashed and set aside. Rule is made absolute, accordingly, with no orders as to costs.