(2012) 03 GUJ CK 0099

In the Gujarat High Court

Case No : Special Civil Applications No''s. 4549 and 4551 of 2002

Ketan B. Mehta APPELLANT

Vs

Assistant Commissioner of Income Tax RESPONDENT

Date of Decision : 16-03-2012

Acts Referred:

Income Tax Act, 1961 — Section 12(2), 143, 143(3), 147, 148

Citation : (2012) 346 ITR 254

Hon'ble Judges : Harsha Devani, J;B.M. Trivedi, J;Akil Abdul Hamid Kureshi, J

Bench : Full Bench

Advocate : Swati Soparkar, for the Appellant; Mauna M. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—Both these petitions challenge the notices dated March 11, 2002, issued by the respondent u/s 148 of the income tax Act, 1961 ("the Act"), reopening the petitioner''s assessment for the assessment years 1996-97 and 1995-96 respectively. Since common questions of fact and law are involved in both these petitions and the parties are also common, the same were taken up for hearing together and are decided by this common judgment.

The facts relating to Special Civil Application No. 4549 of 2002 are that the petitioner, an individual, filed his return of income on November 29, 1996, for the assessment year 1996-97, inter alia, claiming deduction of interest expenditure of Rs. 51,33,658 from income from other sources u/s 57(iii) of the Act, which came to be allowed by the Assessing Officer while framing assessment u/s 143(3) of the Act, vide assessment order dated December 23, 1998.

2. The facts in relation to Special Civil Application No. 4551 of 2002 are that the petitioner filed his return of income for the assessment year 1995-96 on March 29, 1996, declaring total loss of Rs. 7,45,759 wherein, he had, inter alia, claimed interest expenses of Rs. 39,01,689 from income from other sources u/s 57(iii) of

the Act. The assessment came to be framed at a loss of Rs. 3,53,622 u/s 143(3) of the Act by an assessment order dated March 31, 1998.

3. Subsequently, by the impugned notices, the assessments of the petitioner for the assessment years 1996-97 and 1995-96 are sought to be reopened by the Assessing Officer. In response thereto, the petitioner addressed a letter dated March 22, 2002, to the respondent asking for the reasons for issuance of notice u/s 148 of the Act. However, as the respondent neither provided the reasons nor dropped the reassessment proceedings, the petitioner has approached this court by way of the present petitions challenging the aforesaid notices.

4. In response to the petitions, the respondent has filed affidavits-in-reply stating that there are sufficient reasons to believe about the escapement of income chargeable to tax as is evident from the reasons so recorded before the issue of notice u/s 148. That as per the requirement of the statute, proper reasons were recorded before issue of notice u/s 148 of the income tax Act. It is also averred that the petition is filed at a premature stage and that the petitioner also has an alternative efficacious remedy under the Act. Copies of the reasons recorded for reopening the assessment u/s 147 of the Act in relation to assessment years in question have been annexed with the affidavits-in-reply.

5. The Assessing Officer has recorded extensive reasons in relation to both the assessment years which are more or less similar except for the difference in figures and dates, inter alia, in the following terms :

(1) Facts of the case :

The assessee is an individual was having his residence at C/13, Avani Flats, Nr. H. L. Commerce College, Navrangpura, Ahmedabad. For the assessment year 1996-97, the assessee submitted his return of income on November 29, 1996, disclosing nil income. The scrutiny assessment u/s 143(3) of the income tax Act, 1961, was completed on December 23, 1998. In the return of income filed, the assessee has claimed interest expenses of Rs. 51,33,658 from ''Income from other sources'' u/s 57(iii) of the income tax Act, 1961. The assessee did not submit any information as to how the interest expenditure claim u/s 57(iii) is laid out or expended wholly and exclusively for the purpose of making or earning dividend and interest income taxable in other sources head. During the course of the assessment proceedings also, the assessee only submitted that the borrowing were made for either repaying the earlier loan or for making investments in shares of Mastek Ltd. The assessee claimed that since investments were made in shares, which are generating dividend income and, therefore, interest expenditure is allowable u/s 57(iii) of the income tax Act. The assessee did not submit the details relating to his controlling interest or his total holding in Mastek Ltd. The assessee is a director in Mastek Ltd. and increase in the shareholding in Mastek Ltd. is not for the purpose of earning dividend but for acquiring controlling stake in the company (Mastek Ltd.). To determine the clear purpose for making investments in these shares, relevant facts such as percentage holding of the assessee and his group, increase in holding, purpose of such increase, etc., are necessary. The deduction u/s 57(iii) is allowable only when the expenditure was incurred wholly and exclusively for the purpose of earning the said income, i.e., dividend.

(2) How income has escaped assessment :

The assessee has claimed interest expenditure on fund borrowed for the purpose of making investments in shares of Mastek Ltd. The claim of such interest was Rs. 51,33,658. The provisions of section 57(iii) under which the said claim was made is quoted below :

(iii) Any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income.

6. The Assessing Officer has thereafter referred to various decisions of this High Court, viz., (1) Virmati Ramkrishna Vs. Commissioner of Income Tax, Gujarat-III, , (2) Sarabhai Sons (P.) Ltd. Vs. Commissioner of Income Tax, , (3) Padmavati Jaykrishna Vs. Commissioner of Income Tax, Gujarat, , affirmed by the Supreme Court in Smt. Padmavati Jaikrishna Vs. Additional Commissioner of Income Tax, Gujarat, , (4) the decision of the Bombay High Court in the case of COMMISSIONER OF Income Tax Vs. SIR HOMI M. MEHTA., , (5) Commissioner of Income Tax, Bombay City-I Vs. Jagmohandas J. Kapadia, and (6) the decision of this High Court in COMMISSIONER OF Income Tax, GUJARATI II, AND ANOTHER Vs. KASTURBHAI LALBHAI AND ANOTHER., . The decision of the Supreme Court in the case of T.S. Krishna Vs. Commissioner of Income Tax , Madras, , was cited for the proposition that if the sum laid out is in a capacity different from that in making or earning the income, the expenditure is outside the scope of section 57(iii) of the Act.

7. Thereafter, the Assessing Officer has recorded as follows :

In view of the above, it is quite clear that if the interest expenditure is not solely for the purpose of earning dividend income, the same is not allowable as an expenses u/s 57(iii) of the income tax Act, 1961. Prima facie the assessee has invested in shares to acquire the controlling stake in the company, namely, Mastek Ltd., and his investment was not apparently for the purpose of earning dividend income. Considering this the assessee was allowed excess claim of interest to the extent of Rs. 51,33,658. As per Explanation 2(c)(i) and (iv) of section 147, such excess allowance of interest is deemed to be the income which has escaped assessment.

The assessee has not submitted the following information/details relevant to decide the purpose of making investments in the shares of Mastek Ltd. The balance-sheet and capital account of the assessee was not filed along with the return or during the assessment proceedings. In the absence of the balance-sheet, the details of investment, source of investment, application of fund for the purpose of making investments in shares, etc., have not been disclosed by the assessee. How much percentage of shares, the assessee and his group was holding in Mastek Ltd. was not submitted by the assessee. This is very relevant in the light of the Gujarat High Court''s judgment discussed above.

Details of total borrowings and their use for making investments in shares have not been submitted by the assessee. The details of loans taken with date and amount and investments made with copy of accounts of the persons and also to linking up of the loans taken for investments, etc., and interest paid during the year, has been furnished. The assessee has not submitted the details of loans taken nor the copies of accounts from all the parties were furnished. Thus, the assessee has not discharged the primary onus of giving details of loans taken, interest paid and linking the same with the investments made in shares.

The assessee nowhere submitted the investments in the shares of Mastek Ltd., is

In relation to the assessment year 1995-96, in place of the immediately preceding paragraph, the reasons recorded read thus :

Details of total borrowings and their use for making investments in shares have not been submitted by the assessee. Despite specifically being asked the details of loans taken with date and amount and investments made with copy of accounts of the persons and also to link loans taken for house construction and investments and interest paid during the year, the same were not furnished. The assessee has submitted details of loans taken of Rs. 37,50,000 + Rs. 42,90,000 + Rs. 84,00,000 = Rs. 1,64,45,000. Copy of accounts from the parties were not furnished. Even interest taken on these loans at the normal rate of 21 per cent, cannot be Rs. 39.01 lakhs. The assessee nowhere submitted that investments in the shares of Mastek Ltd. is to keep the control over the company.

Thereafter, the reasons recorded in respect of both the assessment years, except for figures, read thus :

The approximate shareholding pattern for the assessment year from the details of the return are as follows :

Assessment year

1995-96

1996-97

Total number of shares held in the MASTEK

8,83,350

9,16,150

Authorized capital

50,00,000

50,00,000

Issued subscribed and paid up capital

30,00,000

30,56,200

The above data has been culled from and the comparison has been derived from the details of the income tax returns of the company Mastek Ltd. in which the abovenamed assessee is a director and it can be safely deduced that the shares were purchased with clear purpose of object of getting controlling interest over the company and the only purpose or even the dominant purpose was not the earning dividend income.

In the absence of balance-sheet and other relevant information, the real nature of investments could not be decided and as such, income has escaped assessment by way of excessive deduction. In view of the non-allowable interest of Rs. 51.33 lakhs claimed by the assessee from dividend income taxable income to that extent has escaped assessment within the meaning of Explanation 2(c)(i) and (iv) of section 147 of the income tax Act, 1961.

(3) Legal aspects of reopening the assessment :

For reopening an assessment completed u/s 143(3) of the income tax Act, 1961, beyond four years, the following conditions need to be satisfied :

(i) The Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment.

(ii) The escapement of income should be by reasons of failure on the part of the assessee who disclosed fully and truly all material facts necessary for that assessment year.

(iii) More than six years have not lapsed from the end of the relevant assessment year.

(iv) The income escaped is likely to amount to Rs. 1 lakh or more.

In the assessee''s case, all the above four conditions, required for issue of notice u/s 148 are satisfied as under :

(i) In view of the foregoing paras, the assessee has claimed deduction of interest on funds borrowings for the purpose of making investments in the shares of Mastek Ltd., which is not allowable u/s 57(iii) of the income tax Act, 1961, considering the factual and legal position discussed above. As per Explanation 2(c)(i) and (iii) of section 147, such excessive allowance is deemed to be the case where income has escaped assessment. In view of this, there is sufficient reason to believe that substantial income chargeable to tax has escaped assessment.

(ii) In this case, as discussed earlier, the assessee has not submitted the balance-sheet, capital account, his holding in Mastek Ltd., linking of investments with the borrowings, copy of accounts of lenders, etc. These information''s are very relevant to decide whether the expenses was solely incurred for the purpose of earning dividend or not. If the assessee would have disclosed the facts relating to the nature of investments in the shares of Mastek Ltd., the deduction u/s 57(iii) would not have been allowed to the assessee. It is, therefore, clear that the substantial income has escaped assessment by reasons of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. In view of this, the second condition is also satisfied in the assessee''s case.

(iii) Assessment can be reopened up to six years from the end of the relevant assessment year. For the assessment year 1996-97, six years period will end on March 31, 2003, therefore, this assessment can be legally reopened by March 31, 2003.

(iv) The income likely to have escaped assessment should be Rs. 1 lakh or more in this case more than Rs. 51.33 lakhs have escaped assessment from the above, it is clear that all the conditions required for reopening the assessment are satisfied in the assessee''s case.

8. Thereafter, the Assessing Officer has discussed various judicial decisions and has found that wherever material facts have not been disclosed fully and truly by the assessee suo motu, the reopening of the assessment is justified. That, in the present case, as discussed in the preceding paragraphs, the assessee had not disclosed the basic fact relating to his investments in Mastek Ltd., he has also not disclosed the details of total assets and liabilities to link the borrowings with investment and also to determine the purpose of such borrowings. This has resulted in excess allowance of interest. The Assessing Officer has thereafter recorded the following conclusion :

5. Conclusion

It can be seen from the return of the income that the assessee has claimed interest payments of Rs. 51,33,658 on the borrowed (capital) fund for acquiring the shares of the company Mastek Ltd., in which the assessee is a managing director (for the assessment year 1995-96 the words used are promoter/ director). The assessee has no intention to earn income by investing the borrowed capital for the purchase of shares of the company in which the assessee is a promoter director. Thus, the assessee has borrowed the money for the investment purpose and, hence, the interest paid is not allowable as expense u/s 57(iii) of the income tax Act, 1961.

In view of the above, I am of the firm belief that substantial income has escaped assessment within the meaning of section 147, for which assessments need to be reopened.

9. In reply to the affidavits-in-reply, the petitioner has filed affidavits-in-rejoinder in both the petitions placing on record various documents produced by the petitioner during the course of the assessment proceedings before the Assessing Officer. The respondent has not filed any reply to the rejoinder rebutting the averments made therein. Thus, it is an accepted position that the documents annexed with the rejoinder affidavit have been submitted by the petitioner during the course of the assessment proceedings for the respective assessment years.

10. Mr. S. N. Soparkar, senior advocate, learned counsel for the petitioner submitted that, in the present case, the original assessment order was framed u/s 143(3) of the Act. The impugned notices have been issued on March 11, 2002, in relation to the assessment years 1996-97 and 1995-96, which is clearly beyond a period of four years from the end of the relevant assessment years and as such, in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment for the assessment years under consideration, the assumption of jurisdiction by the Assessing Officer u/s 147 of the Act is without authority of law. Inviting attention to the reasons recorded, it was submitted that the Assessing Officer seeks to reopen the assessment on the ground that the petitioner had claimed interest expenses in relation to loans taken by him for the purpose of purchasing shares. According to the Assessing Officer, the petitioner did not submit details relating to his controlling interest or his total holding in Mastek Ltd. wherein the petitioner is a director and that he has assumed that the increase in the share holdings in Mastek Ltd. is for the purpose of gaining controlling stake in the company (Mastek Ltd.) and that by not disclosing the percentage of his holding in Mastek Ltd., the petitioner has failed to disclose fully and truly all material facts. It was submitted that the Assessing Officer has recorded that the petitioner has not submitted the balance-sheet and capital account along with the return or during the assessment proceedings and that, in the absence of the balance-sheet, the details of investment, source of investment, application of fund for the purpose of making investments in shares, etc., had not been disclosed by the petitioner. Referring to the documents annexed along with the affidavits-in-rejoinder, the learned counsel submitted that during the course of assessment proceedings, the petitioner has produced all documents which were called for by the Assessing Officer in support of his claim. That the petitioner had submitted copies of dividend warrants as well as confirmations from the various parties in respect of loans availed of by the petitioner and had also submitted the statement of account for the relevant period. Referring to the statements of total income submitted along with the return of income, it was pointed out that for the assessment year 1996-97 the petitioner had clearly stated that the petitioner had dividend income of Rs. 15,81,906 and that the petitioner had claimed deduction of interest expenditure of Rs. 51,33,658 and that for the assessment year 1995-96, it had been stated that the petitioner had dividend income of Rs. 16,75,157 and had claimed interest expenditure of Rs. 39,01,689. It was submitted that the petitioner had, in the statements of income also, categorically

stated the dividend income derived from his shareholdings in Mastek Ltd. and as such, all primary facts necessary for the purpose of assessment of the petitioner had been produced before the Assessing Officer.

11. In relation to the claim for deduction u/s 57(iii) of the Act, Mr. Soparkar for the petitioner submitted that the question in the present case is whether the interest can be allowed against the dividend income. Referring to the decision of the Supreme Court in the case of Commissioner of Income Tax, West Bengal-III Vs. Rajendra Prasad Moody, , it was submitted that the interest can be allowed against dividend income ; hence, the petitioner had rightly made such a claim. According to the learned counsel, controlling interest is not statutorily defined and is a matter of perception. In relation to his claim of deduction u/s 57(iii) of the Act, the petitioner had filed dividend warrants, and all other information called for by the Assessing Officer during the course of assessment proceedings, like confirmations from depositors, etc., and that the Assessing Officer after being satisfied as regards the admissibility of the petitioner''s claim had allowed the deduction. It was contended that the Assessing Officer cannot commence the reassessment proceedings merely because he entertains a view different from his predecessor. It was further submitted that the petitioner had disclosed fully and truly all primary facts necessary for the purpose of assessment and on that account also, the Assessing Officer had no jurisdiction to Initiate reassessment proceedings.

12. The learned counsel further submitted that the petitioner had made a claim for expenditure along with supporting documents and the Assessing Officer after due application of mind, had allowed the said claim. The petitioner had placed all primary facts on record before the Assessing Officer and as such, there was no failure on the part of the petitioner to disclose fully and truly all material facts. It was submitted that the case of the ?Assessing Officer in the reasons recorded is that the petitioner has not submitted the balance-sheet and capital account along with the return of income or during the assessment proceedings and that the petitioner had failed to disclose his percentage holding in Mastek Ltd. It was submitted that in so far as the submission of the balance-sheet and capital account of the petitioner is concerned, the petitioner is an individual and is not required by law to maintain the balance-sheet and as such, does not maintain balance-sheets. Inviting attention to the rejoinder affidavits, it was pointed out that, vide letters dated December 14, 1998, and December 21, 1998, all the information and details called for were placed before the then Assessing Officer, who framed the original assessment. It was urged that it is not the case of the respondent that any information was called for and was not submitted by the petitioner. That at best, this is a case of perception of the Assessing Officer vis-a-vis perception of the petitioner. It was submitted that in so far as the petitioner''s holding in the company, viz., M/s. Mastek Ltd. is concerned ; there is no requirement under law that the petitioner should disclose his holding in the said company. Reliance was placed upon the decision of this High Court in the case of Commissioner of Income Tax Vs. Akbarali Jummabhai, , for the proposition that

the duty to disclose material facts necessarily postulates existence of a thing or material. If a material is not in existence or if a material is such of which the assessee had no knowledge or of which he cannot be attributed with any knowledge, there would be no duty to disclose such material. It was, accordingly, submitted that when the petitioner was not maintaining balance-sheets or capital accounts, such material not being in existence, there was no obligation cast upon the petitioner to produce such documents. According to the learned counsel, in case the Assessing Officer, during the course of assessment, found it difficult to make the assessment in the absence of such documents, he could have called upon the petitioner to prepare the balance-sheet and to produce the same. It was submitted that in relation to the assessment year 1995-96, it appears that the Assessing Officer had called for the balance-sheet ; hence, the petitioner had prepared the same and produced them during the course of assessment proceedings. In respect of the assessment year 1996-97, no such information was called for by the Assessing Officer, who proceeded to assess the petitioner on the material before him. In the circumstances, it is clear that the Assessing Officer did not find the material necessary for assessment. In the circumstances no failure to disclose fully and truly all material facts can be attributed to the petitioner. Reliance was also placed upon a decision of the Supreme Court in the case of Commissioner of Income Tax, Gujarat Vs. Bhanji Lavji, Porbandar, , wherein the court had held that when all primary facts have been disclosed by the assessee, action u/s 34(1)(a) of the Indian income tax Act, 1922, is not valid.

13. Inviting attention to the reasons recorded, it was submitted that there is a basic inconsistency therein inasmuch as on the one hand that the Assessing Officer has recorded that the assessee had claimed interest expenditure on funds borrowed for the purpose of making investment in shares in Mastek Ltd. and that the petitioner had invested in shares to acquire controlling stake in company, hence, the investment was not for the purpose of earning dividend income, whereas on the other hand, he says that the petitioner had not discharged the primary onus of giving details of loans taken, interest paid and linking the same with the investment in shares

14. The next submission advanced by the learned counsel for the petitioner was that the reopening of assessment by the Assessing Officer seems to be based upon an incorrect reading of the decision of this court in the case of Sarabhai Sons (P.) Ltd. Vs. Commissioner of Income Tax, , inasmuch as in the facts of the said case, the assessee therein had purchased the shares with the clear purpose or object of getting 100 per cent. control over a company, viz., Swastik Oil Mills Ltd. (SOML). However, when the assessee could not purchase the entire 100 per cent. shares, the assessee sold the shares to another company, viz., Kasturbhai group and Patel group (KPPL). During the financial year which ended on March 31, 1969, the assessee paid by way of interest Rs. 6,05,291 to the shareholders from whom it had purchased shares. It received Rs. 3,18,195 as interest from KPPL for the unpaid price of the shares which it had sold to KPPL. Thus, despite the fact that by that time it had already acquired more than 90 per cent, shares,

which would have satisfied its object of earning more income by possessing more shares, the assessee sold the shares for the reason that it was not able to get 100 per cent. control by purchasing all the remaining shares. The assessee claimed net deficiency in the interest account calculated on the basis of interest paid by the assessee to the shareholders of SOML on the unpaid purchase price and interest received on unpaid sale price by KPPL as a deduction in computing its income from other sources. It was in the background of the aforesaid facts that the court held that the dominant purpose for which the expenditure was incurred was not for earning income and at the highest, it was a mixed purpose. It was submitted that the said decision was rendered in a totally different set of facts and would not be applicable to the facts of the present case.

15. The learned counsel further submitted that the main reason for reopening, according to the Assessing Officer, is that the purchase of shares of Mastek Ltd. by the petitioner was made with the motive of gaining controlling stake in the said company and not for the purpose of earning dividend. It was submitted that assuming without admitting that the petitioner has purchased the shares with a motive to gain controlling interest, the petitioner would still be entitled to deduction u/s 57(iii) of the Act, if he has purchased the shares for the purpose of earning dividend income. Reliance was placed upon the binding pre-bifurcation decision of the Bombay High Court in the case of Ormerods (India) Private Ltd. Vs. Commissioner of Income Tax, Bombay City, , wherein the court held that the word "purpose" in the expression "expenditure incurred solely for the purpose of making or earning such income, profits or gains" in section 12(2) of the income tax Act, did not mean motive for the transaction ; much less could it mean the ulterior motive or the ultimate object of the purchase of the shares by the assessee. The court, accordingly, held that the finding of the Tribunal that the purchase was made to serve the convenience of two others was no more than a finding as to the ulterior motive in purchasing the shares, whereas the purpose of the purchase was an entirely different matter. The learned counsel, accordingly, submitted that the purpose of purchasing the shares in the present case is for the purpose of earning dividend income, as is evident from the statement of income submitted by the petitioner which clearly shows that a major portion of the income of the petitioner is comprised dividend income. Hence, assuming that there is a motive to gain controlling interest, the same would not detract from the fact that the amount has been expended wholly for purchasing shares for the purpose of earning dividend income.

16. In the background of the aforesaid contentions, the learned counsel, submitted that in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts, the respondent has no jurisdiction to invoke the provisions of section 147 of the Act by issuance of the impugned notice u/s 148 of the Act.

17. Vehemently opposing the petition, Mr. M. R. Bhatt, senior advocate, learned counsel for the respondent, emphatically argued that the petitioner had invested

amounts taken by way of loans in shares of Mastek Ltd. in which he had considerable holding. For the purpose of claiming deduction on interest expenditure u/s 57(iii) of the Act, the petitioner should have expended the amount wholly and exclusively for the purpose of earning such income. In the facts of the present case, the Assessing Officer while making assessment in the case of Mastek Ltd. had noticed the percentage of shares held by the petitioner which led him to deduce that the petitioner had acquired shares for the purpose of gaining a controlling stake in the company and not solely for the purpose of earning dividend income. In the circumstances, when the petitioner had purchased shares for the purpose of gaining controlling stake in Mastek Ltd., he was bound to inform the Assessing Officer about the Mastek Ltd.''s total share holding as well as the percentage of shares held by him as that would be necessary to determine as to whether the petitioner was entitled to deduction u/s 57(iii) of the Act. It was submitted that a fact which was necessary for arriving at a decision as regards admissibility of a claim is a material fact and as such, the petitioner has failed to disclose fully and truly all material facts.

18. Mr. Bhatt further submitted that the petitioner has failed to disclose fully and truly all material facts necessary for his assessment and as such, the Assessing Officer is justified in reopening the assessment beyond a period of four years from the end of the relevant assessment years. Inviting attention to the reasons recorded, it was submitted that in the facts of the present case, since the petitioner has purchased the shares with a view to gain controlling stake in the company, viz., Mastek Ltd., of which the petitioner was the promoter/director, the petitioner was not entitled to deduction u/s 57(iii) of the Act and as such, he had made a false claim which amounts to non-disclosure of correct facts. According to the learned counsel the petitioner having purchased a considerable number of shares of Mastek Ltd., he was duty bound to bring the same to the notice of the Assessing Officer during the course of scrutiny as the same was a material fact necessary for his assessment.

19. Replying to the contention that the petitioner was not required to disclose the percentage of his holding in Mastek Ltd. as there was no such statutory requirement under the Act or the Rules, the learned counsel placed reliance upon a decision of the Andhra Pradesh High Court in the case of K.C.P. Ltd. Vs. Income Tax Officer, Central Circle, Vijayawada-3, wherein the court held thus (page 295) :

The form which was prescribed for the relevant assessment year, undoubtedly, did not contain any column requiring the assessee to state whether it had availed of the initial depreciation in respect of the machinery for which it is claiming normal depreciation in that year. But, we are not prepared to hold that the non-disclosure must be confined only to failure to fill up the columns contained in the form of return prescribed by the Rules. We find no reason to give such restricted meaning. Section 147 speaks of omission or failure to disclose fully and truly all material facts necessary for the assessment for that year. Which fact, or facts, are material for assessment for that year is a question of fact to be decided in each case, and it is not possible to lay down any hard and fast rule.

20. The learned counsel, accordingly, submitted that the percentage holding of the petitioner in Mastek Ltd. was a material fact, which had a bearing on the assessment of the petitioner inasmuch as, if the said fact had been disclosed to the Assessing Officer while framing the original assessment, the petitioner would not have been allowed deduction u/s 57(iii) of the Act in respect of the shares purchased by it to gain controlling stake in Mastek Ltd. It was submitted that in the circumstances, non-disclosure of the petitioner''s holding in Mastek Ltd. amounts to failure on the part of the petitioner to disclose fully and truly all material facts and as such, the Assessing Officer was justified in reopening the assessment after a period of four years from the end of the relevant assessment year.

21. Reliance was also placed on the decision of the Bombay High Court in the case of Amin''s Pathology Laboratory Vs. P.N. Prasad, Joint Commissioner of Income Tax and Others, , for the proposition that mere production of balance-sheet, profit and loss account or account books will not necessarily amount to disclosure within the meaning of the proviso to section 147 of the Act. It was submitted that the case of the Department is that though interest expenditure was not allowable u/s 57(iii) of the Act, in the light of the fact that the petitioner had purchased the same to gain a controlling interest in Mastek Ltd., the petitioner had failed to disclose fully and truly all material facts by not disclosing his shares in Mastek Ltd. Reliance was also placed on the decision of the Madras High Court in the case of Tamil Nadu Petroproducts Ltd. v. CIT [2011] 330 ITR 342 (Mad) for the proposition that even a wrong claim would amount to incorrect disclosure.

22 Strong reliance was placed on the decision of this High Court in the case of Sarabhai Sons (P.) Ltd. Vs. Commissioner of Income Tax, , for the purpose of contending that where the shares have been purchased for the dominant purpose of gaining controlling interest and not for the purpose of earning income, the expenditure was inadmissible u/s 57(iii) of the Act. The learned counsel also placed reliance upon the decision of the Supreme Court in the case of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , for the proposition that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "underassessment", that would be sufficient to give jurisdiction to the income tax Officer to issue notice u/s 34 (now 148) of the Act. It was submitted that primary facts which have a material bearing would be such facts which, if taken into account, would have an adverse effect on the assessee resulting in a larger assessment than the one actually made. That in the facts of the present case, if the petitioner had disclosed his percentage shareholding in Mastek Ltd., the same would have had an adverse effect on him and would have resulted in a larger assessment than the one actually made, and as such, the said fact was a material fact.

23. Reliance was also placed on an unreported decision of a Division Bench of this High Court in the case of Dishman Pharmaceuticals and Chemicals Limited Vs. Deputy Commissioner of Income Tax (OSD), , wherein the court, in the facts of the said case in the context of the assessee, the assessee will get an opportunity to challenge the same by filing a writ petition so that he does not have to wait till completion of the reassessment proceedings which would have entailed the liability to pay tax and interest on re-assessment and also to go through the gamut of appeal, second appeal before income tax Appellate Tribunal and then reference/tax appeal to the High Court. Viewed in this light, it appears to me that the rigour of availing of the alternative remedy before the Assessing Officer for objecting to the re-assessment notice u/s 148 has been considerably softened by the Apex Court in the GKN case in the year 2003. In my view, therefore, the GKN case does not run counter to the Calcutta Discount Co. case but it merely provides for challenge to the re-assessment notice in two stages, that is-

(i) raising preliminary objections before the Assessing Officer and in case of failure before the Assessing Officer,

(ii) challenging the speaking order of the assessing Officer u/s 148 of the Act.

24. The decision in the case of the "GKN Driveshafts (India) Ltd.", (Supra), was rendered after the notices for reopening assessments were issued by the Assessing Officer and challenged by the assessee. Therefore, the question of following the procedure laid down therein, would not arise in the present case.

This brings me to central question, whether the notice for reopening the assessments were invalid. The Scope of Section- 147 of the Act and the power of the Assessing Officer for reopening the assessments, previously, framed after scrutiny has come up for consideration before the Apex Court and various High Courts, on a number of occasions. The principles are well laid down and do not need much elaboration. From the days of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , it is well settled that it is the duty of the assessee to make full and true disclosure of all primary facts. His duty, however, does not extend beyond this. 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 as to what inference of facts can be reasonably drawn and what legal conclusions are to be ultimately drawn. It is not for the assessee to tell the assessing authority as to what inference on facts or law should be drawn from the primary facts. It is also held by the Apex Court in the case of Ess Ess Kay Engineering Co. P. Ltd. Vs. Commissioner of Income Tax, that merely because certain facts were disclosed in the original assessment 14, it does not preclude the Assessing Officer from reopening the assessment of the assessee under Section- 147 of the Act on noticing additional findings of facts arrived at from fresh material obtained in the course of assessment in the next assessment year.

25. Some of the principles emerging from the various decision of this Court as well as of the Apex Court were culled out by the Division Bench of this Court in the case of "Dishman Pharmaceuticals And Chemicals Limited vs. Deputy Commissioner of Income Tax (OSD)", reported in (2011)2 GLH 699, which reads as under,

8. From the above judicial pronouncements, following principles can be culled out :--

[i] To confer jurisdiction to the Assessing Officer to reopen the assessment u/s 147 of the income tax Act, beyond four years from the end of assessment year, following two conditions must be satisfied [a] that the Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment; and that [b] same occasioned, on account of either failure on the part of the assessee to make a return of his income for that assessment year, or to disclose fully and truly all material facts necessary for assessment of that year. (ii) Both the above conditions are condition-precedent and must be satisfied simultaneously before the income tax Officer can assume jurisdiction to reopen assessment beyond four years of the end of assessment year. (iii) Such reasons must be recorded and if the reasons recorded by the Assessing Officer do not disclose satisfaction of these two conditions, reopening notice must fail. (iv) There is no set format in which such reasons must be recorded. It is not the language but the contents of such recorded reasons which assumes importance. In other words, a mere statement that the Assessing Officer had reason to believe that certain income has escaped assessment and such escapement of income was on account of non-filing of the return by the assessee or failure on his part to disclose fully and truly all material facts necessary for assessment would not be conclusive. Nor, absence of any such statement would be fatal, if on the basis of reasons recorded, it can be culled out that there were sufficient grounds for the Assessing Officer to hold such beliefs. (v) Such reasons must emerge from the reasons recorded by the Assessing Officer and cannot be supplied through an affidavit filed before the Court. However, Gujarat High Court in the case of Aayojan Developers v. Income Tax Officer [Supra] has accepted the view that to elaborate such reasons already recorded, reference would be permissible to the affidavit filed by the Department before the Court. (vi) What would amount to true and full disclosure of all material facts must depend on each case and no strait-jacket formula of universal application can be provided. It can however safely be stated that the duty of the assessee is to disclose primary facts and it is not his duty to lead the Assessing Officer to any particular inference of fact or of law on the basis of such primary disclosures. In other words, once the assessee discharges his duty of stating all the primary facts, what inferences and conclusions should be drawn is the duty of the Assessing Officer. (vi) At the time of ascertaining whether the notice was validly issued, what could be the probable conclusion of fresh assessment if re-opening is permitted, is not the inquiry of the Court. In other words, the merits of the proposed action, through opening of the assessment, cannot be gone into by the

court beyond prima facie stage.

26. It is not necessary to burden this judgment with various other authorities on the point, since, as already recorded, the parameters for reopening the assessment within and beyond a period of four years from the end of relevant assessment year, have been well laid down by a series of decisions by the various Courts.

27. We may, now, advert to the facts of the present case.

In the present case, the assessee filed his return for the assessment year 1995-96. In the return, he had disclosed that he had paid interest on various loans totaling to Rs. 39,01,689/-. This was adjusted against dividend income from Mastek Limited. He, further, disclosed that he had received dividend of Rs. 16,75,157/-, against which he claimed deduction towards interest paid on various loans. Thus, the fact that the assessee had paid interest on the loans and such interest he claimed as deduction under the dividend income from the Mastek Limited was very much within the knowledge of the Assessing Officer in the original return, itself. Moreover, in response to the queries raised by the Assessing Officer, the assessee filed further documents. Vide letter dated 15.02.1998, the assessee made further disclosures in which in the first paragraph itself he stated that he had worked for two years with NOCIL after which he co-funded Mastek Limited. He was currently the Director of Mastek Limited. He gave details of various investments made by him in shares. He supplied the details at Schedule-A to the letter. After taking into account such material, the Assessing Officer, passed his order of assessment. In the assessment order, he referred to the assessee''s letter dated 15.02.1998 and the contents of such letters also. Some of the claims of the assessee were disallowed and the original loss of Rs. 7.45,759/- was reduced to Rs. 3,53,622/-. Significantly, however, no additions were made with respect to the claim of deduction on the interest paid for funds used for purchase of shares of Mastek Limited.

28. In the next assessment year i.e. assessment year 1996-97, once again, return of the assessee was taken in scrutiny. The Assessing Officer raised several queries. The assessee thereupon wrote to the Assessing Officer on 14.12.1998 providing interest confirmation letters from various parties. He, further, stated that he was assessed under Section- 143 of the Act for the assessment year 1992-93, 1993-94, 1994-95 and 1995-96. He stated that, initially, loans were taken for acquiring shares of Mastek Limited, and thereafter, loans were taken to repay earlier loans. Once again, during such assessment, the assessee addressed a letter to the Assessing Officer, providing the proof of payment of interest to various parties. He, further, requested the Assessing Officer to refer to earlier letter for the assessment year 1995-96, explaining the purpose for which the loan was taken. Even in the original returns that the assessee filed, he had claimed dividend income of Rs. 15,81,906/-, which included gross dividend of Rs. 14,15,525/- and net dividend of Rs. 11,65,227/- after deduction of TDS of Rs.

2,91,298/- from Mastek Limited. Against such dividend income, he claimed deduction of interest of Rs. 51,33,658/- paid to various entities.

29. It was after such a scrutiny and taking into account, the returns filed by the assessee and further material produced during scrutiny that the assessing officer framed the assessment observing that looking to the practice followed for the assessment year 1995-96, the total income is determined. He made no additions under any of the heads including, deduction of interest paid for earning dividend income.

30. Section- 57(iii) of the Income Tax Act provides as under:

S. 57 : Income chargeable under the head "income from other sources" shall be computed after making the following deductions;

(iii) any other expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income.

31. The issue which is being raised by the Assessing Officer through reopening of the assessment is that the assessee was not entitled to any deductions for the interest paid for borrowings, which he utilized for purchase of shares in Mastek Limited. The case of the Assessing Officer in brief is that such investments were not made for the purpose of earning dividend, but, for the purpose of acquiring controlling shares in Mastek Limited and recorded the reasons for the same. He, therefore, opined that the assessee was not entitled to deduction under Section-57(iii) of the Act since such expenditure cannot be held to have been incurred exclusively for the purpose of earning such income.

32. Whether the Assessing Officer is justified in holding such, prima facie, belief is not an issue, on which I need to make any conclusive statement. The question is whether did the assessee fail in his duty to disclose fully and truly all primary facts. This question is important since the Assessing Officer sought reopening of the assessment beyond a period of four years from the end of relevant assessment year.

33. To my mind, considering the facts emerging from the record, it cannot be stated that the assessee failed in his duty. His duty was to make the disclosure about the investments as well as the interest paid for borrowings for making such investments. On the basis of such material, if the Assessing Officer was of the opinion that any further inquiry was necessary to examine the nature of such investments and to ascertain whether the investment was made for the sole purpose of earning dividend income or was predominantly or exclusively for the purpose of acquiring controlling shares of the Mastek Limited, it was open to the Assessing Officer to make further inquires. To my mind, nothing is pointed out to suggest that the assessee owed such a duty to disclose further facts in this regard.

34. Whether the certain expenditure is made wholly and exclusively for the

purpose of earning dividend income is to be judged in the light of provisions of Section- 57(iii) of the Act. It may be that by virtue of the decision of the Division Bench in the case of Virmati (Supra), it was arguable whether the assessee had made such investments for the sole and exclusive purpose of earning income or whether with the dominant or sole purpose of acquiring controlling shares of the Company. However, this is not in the same as to suggest that beyond disclosing the investments made, the borrowings for making such investment, the interest paid and the dividend earned, the assessee owed no further duty to make disclosures with respect to various aspects that the Assessing Officer wanted to examine after reopening the assessment.

35. As already noted, in both the assessments, the assessee had disclosed primary facts in the returns filed. Further, the Assessing Officer had raised certain queries about borrowings and the interest paid thereon and the dividend earned. The assessee, on both the occasions, supplied necessary material through letters and documents produced on record. Thus, during the scrutiny assessment proceedings, the Assessing Officer was actually aware about the claim of the assessee under Section- 57(iii) of the Act. If, on the basis of such disclosures, the Assessing Officer was curious to verify the percentage shift in the holding of the assessee, in the company in question, it was well-within his powers to ask for such material during the assessment. However, primary onus to provide such details even if not disclosed cannot be shifted on the assessee.

36. Under the circumstances, if the assessment was sought to be reopened within a period of four years from the end of the relevant assessment year, the situation may have been different. It was perhaps open for the Revenue to contend that, since, there was no opinion formed by the Assessing Officer on the original assessment, on such an issue, reopening of assessment cannot be stated to be based on mere change of opinion. However, the present case is related to reopening of assessment beyond a period of four years. Reopening notice must, therefore, be quashed.

37. I am, however, unable to concur with the view of the Hon''ble Justice Devani when she holds that even on merits, no additions could have been made. She examined the nature of interest paid by the asses see, the nature of investment made in purchase of shares of Mastek Limited and came to the conclusion that the interest paid on borrowed funds, which were utilized for the purpose of shares for earning dividend would fall within the parameters of Section- 57(iii) of the Act.

38. With profound respect, I am unable to adopt such a line. Such an issue, in my opinion, was wholly within the purview of the Assessing Officer. The material necessary to examine the nature of investment made by the assessee in purchasing shares of Mastek Limited had to be brought on record. Its effect on the claim towards expenditure in the form of interest paid on the borrowed funds had to be judged on the basis of various facts and circumstances. Such facts have not yet been brought on record. What would be the ultimate outcome of

such a consideration, particularly, bearing in mind the decision of this Court in the case of "Virmati" (Supra) cannot be pre-judged. Such issue in my humble opinion ought to have been left open for the Assessing Authorities to be judged on the basis of facts, which may be brought on record, if ultimately, the assessment was permitted to be reopened. This was, therefore, in my opinion was not a case, where it could be held that even on merits Revenue was not justified in suggesting that any taxable income had escaped assessment.

39. Such conclusion would not be fatal to the petitioners, when I hold that there was no failure on the part of the assessee to disclose fully and truly all material facts, necessary for assessment. The notices for reopening the assessments beyond a period of four years, from the end of relevant assessment years, must fail on that ground alone. In the result, both the petitions are allowed. The impugned notices are quashed. Rule, in each petition, is made absolute.

