
(2010) 09 AHC CK 0614

In the Allahabad High Court

Case No : Civil Miscellaneous W.P. No. 899 of 2003

Vikram Kothari (HUF)

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 14-09-2010

Acts Referred:

Income Tax Act, 1961 — Section 139, 142(1), 143(2), 143(3), 147

Citation : (2011) 242 CTR 179

Hon'ble Judges : Yatindra Singh, J;Rajes Kumar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rajes Kumar, J.—In the present writ petition, the petitioner prays for a writ of certiorari for quashing the notice dated 28-3-2003 issued by the respondent no. 2 u/s 148 of the income tax Act, 1961 (hereinafter referred to as the "Act") for the assessment year 1996-97.

2. The petitioner is an assessee under the Act, assessed to tax in the status of HUF and filed return for the assessment year 1996-97 declaring therein income of Rs. 1,80,570. The said return was subjected to scrutiny. The assessing authority had passed the assessment order u/s 143(3) of the Act on 26-10-1998. Thereafter, respondent no. 2 issued a notice on 28-3-2003 u/s 148 of the Act with the view to reopen the proceedings and re-assess u/s 147 of the Act. In pursuance of the said notice, the return was filed on 24-4-2003. The assessing authority had supplied the reasons recorded for the issue of notice u/s 148 of the Act, which are as follows:

The assessee had filed a return of income for the assessment year 1996-97 on 1st July, 1996 showing total income at Rs. 1,80,570. The same was assessed u/s 143(3) on 26-10-1998 on total income of Rs. 1,80,750. The assessee had sold 75,000 shares of M/s. Kothari Products Ltd. during the financial year 1995-96 and claimed expenses of Rs. 6,92,687 on the same. The net consideration was

shown as Rs. 1,43,07,103 (shares sold 75,000 @ 200 per share i.e. Rs. 1,50,00,000 minus expenses claimed Rs. 6,92,897) and an amount of Rs. 1,44,63,525 was invested in residential house at 7/23, Tilak Nagar, Kanpur and claimed exemption from the capital gains u/s 54F. Neither particulars of these expenses were filed with the return of income of the assessee for assessment year 1996-97 nor were they submitted during the course of assessment proceedings. The various expenses had been reportedly incurred by Company M/s. Kothari Products Ltd., in which the assessee was a promoter director and whose shares were sold as per the directions of SEBI. M/s. Kothari Products Ltd. reportedly apportioned the total expenses to the persons who were the holder of the shares. However, M/s. Kothari Products Ltd. performed these entire acts as an agent of the assessee who had given a power of attorney to that company for this effect.

It is observed that on the application money received from purchasers of shares on behalf of the assessee and the other offerers, a sum of Rs. 28,84,943 had been received as interest from the bank deducted from overall expenses on sale of shares. Since no particulars of expenses incurred for sale of shares were furnished by the assessee, the income by way of interest could not be put to tax u/s 56 of the income tax Act, 1961, the escapement has been on account of failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment. This amount being in the nature of a revenue receipt should have been offered for tax by the assessee under the head income from other sources in respect of his shares. But the assessee had failed to do.

The Honble Supreme Court in Tuticorin Alkali Chemicals and Fertilizers Ltd., Madras Vs. Commissioner of Income Tax, Madras, has held that interest income is always of a revenue nature unless it is received by way of damage or compensation. On this reasoning it held that the interest derived by the assessee from the borrowed fund which were invested in short terms deposit with bank would be chargeable to tax under the head income from other sources. Same would not go to reduce the interest payable by the assessee on the loans secured by it (which may be capitalized after the commencement of commercial production). Similarly, in Commissioner of Income Tax Vs. V.P. Gopinathan, the Supreme Court has reaffirmed its view in the CIT v. V.P. Gopinathan that the gross interest received on any deposit is liable to be taxed as income from other sources and it cannot be reduced by the amount of interest paid on the loan taken on the security of such deposit.

Thus it is clear that any interest income received is taxable as income from other sources whether it arises out of borrowed funds or from any source. It has also been clearly held that for such interest would not go on to reduce any amount of interest of other expenditure during the course of which this income has been earned irrespective of the Act whether the expenditure or interest so incurred was a deductible expenditure or not. In the case of assessee an expenditure of Rs. 1,44,33,221.73 had been incurred for the purposes of making public issue/

offer for sale of shares held by the assessee and his associates. This was an expenditure, which has been wholly, and exclusively in connection with transfer/sale of shares. The gross amount, therefore, was deductible u/s 48(i) for the purposes of computing capital gains. There is however, no provision in the statute for reducing the amount of interest received in the course of such public issue from the expenses incurred for the purposes of transfer. The same was liable to be taxed separately under the head income from other sources. A total of 12,50,000 shares had been offered for sale against which the application money was received on which this interest had been earned, the assessee had offered for sale 75,000 shares and accordingly his proportionate shares in the total interest comes to Rs. 1,73,097. I have, therefore, reason to believe that income for tax as a result of which, the income has escaped assessment. Accordingly, the assessee is required to be reopened u/s 147 of the income tax Act, 1961. Since the matter pertains to assessment year 1996-97, approval of Ld. Commissioner of income tax (Central), Kanpur, is required before issuing notice u/s 148.

3. Heard Sri V.K. Upadhyaya, learned Senior Advocate assisted by Sri Ritvik Upadhyaya, learned counsel for the petitioner and Sri Ashok Kumar, learned Standing Counsel.

Learned counsel for the petitioner submitted that:

(i) In the return, under the head "Capital Gains", the petitioner had disclosed the sales of shares and its sale proceeds at Rs. 1,43,07,103 and claimed exemption of the same amount on the ground that the sale proceeds Rs. 1,43,07,103 have been invested in the residential house, 7/23, Tilak Nagar, Kanpur and excess amount of Rs. 1,56,422 invested u/s 54F of the Act and accordingly, NIL capital gain has been shown.

(ii) A sum of Rs. 1,93,572 has also been shown under the head "Income from other sources" as interest income chargeable to tax.

(iii) Along with the return a chart of computation of income and tax has been filed, which was clearly mentioned in Part 4 of the return which provides, list of the documents attached along with the return. In chart of computation of income and tax a complete details of the shares sold by the petitioner was shown, under the head "Capital Gain", wherein sales of 75,000 shares of M/s. Kothari Products Limited @ Rs. 200 for Rs. 1.50 crores, the deduction of amount of expenses at Rs. 6,92,897; and the net amount received at Rs. 1,43,07,103, which has been claimed to have been invested in the residential house of 7/23, Tilak Nagar, Kanpur have been shown. The interest income at Rs. 1,93,572 has also been shown as income from other sources.

(iv) The petitioner also had filed the chart along with the return giving details of total number of shares sold and expenses incurred on the sales of the aforesaid shares. In the details of number of shares sold, the name of shareholders, number of shares and the amount on which shares were sold was given. The

total number of shares were 12,50,000, which include 75,000 shares of the petitioner, 5,00,000 shares of M.M. Kothari (HUF), 3,00,000 shares of Vikram Kothari (Individual), 3,12,500 shares of Deepak Kothari (HUF) and 62,500 shares of Deepak Kothari (Individual). The total expenses in selling the shares was Rs. 1,44,33,221.03p. In the aforesaid details, the petitioner had disclosed the receipt of Rs. 28,84,943 as interest from bank on temporary deposit of the application money in respect of the aforesaid shares. In the said details of the expenses incurred on the sale of aforesaid shares, the aforesaid interest income at Rs. 28,84,943 was deducted bringing expenses to the figure of Rs. 1,15,48,278.73p. The said expenses relating to the sales of the aforesaid shares were apportioned amongst the shareholders whose shares had been sold. The proportionate expenses in the case of the petitioner was Rs. 6,92,897, which had been duly shown in the computation chart of the income and tax.

(v) Complete details relating to the sales of the shares, the sales proceeds and expenses have been furnished before the assessing authority along with the return and on scrutiny of the return various other details as required by the assessing authority have also been furnished during the course of assessment proceeding and on consideration of such details, the assessment order has been passed u/s 143(3) of the Act.

(vi) The perusal of the assessment order also reveals that under the head "Capital gains", the shares sold by the petitioner has been referred. The sale proceeds, expenses and the investment in the residential house at 7/23, Tilak Nagar, Kanpur have also been referred in the order, which clearly reveals that the sales of the shares was duly considered in the assessment order.

(vii) In the reasons recorded, the allegation is that on the application money received from the purchasers of the shares on behalf of the assessee and other offerer a sum of Rs. 28,84,943 had been received as interest from the bank deducted from overall expenses of sale of shares. Since no particulars of expenses incurred for the sales of shares were furnished by the assessee, the income by way of interest could not be put to tax u/s 56 of the Act, 1961, the escapement has been on account of the failure on the part of the assessee fully and truly all material fact necessary for the assessment, is absolutely wrong.

(viii) Along with the return, details of the expenses made for the sale of the shares have been duly given. These expenses were relating to the sales of 1250000 shares including the sales of the 75,000 shares of the petitioner. The interest from the bank was received at Rs. 28,84,943 on the temporary deposit of the application money in respect of the entire shares of 12,50,000 and, therefore, from the expenses incurred at Rs. 1,44,33,721.23p. on the sale of 12,50,000 shares including the share of 75,000 of the petitioner, the interest received at Rs. 28,84,943 was deducted.

(ix) During the course of assessment proceedings, the queries were made in respect of the sale of shares vide notice dated 7-8-1998 and in pursuance

thereof, the complete details have been furnished, which were duly examined before passing the assessment order. These facts have been averred in paras 4, 5, 6, 7 and 8 of the writ petition. The averments made in the writ petition have not been disputed in the counter-affidavit and it has only been stated that these details have not been examined and considered in the assessment order.

(x) There was a complete disclosure of the material facts, which were necessary for the assessment and there was no failure on the part of the petitioner to disclose truly and fully all material facts which are necessary for the assessment.

(xi) After the disclosure of the fully and truly facts relating to the sales of shares, the responsibility of the petitioner was over and it was on the assessing authority how to pass the assessment order.

(xii) Since there was no failure on the part of the assessee to disclose fully and truly all material facts, the limitation to take action u/s 147 of the Act was four years. In the present case, the notice was issued on 29-3-2003, which was beyond four years and therefore, it was barred by limitation.

(xiii) Moreover, interest received at Rs. 28,84,943 was deducted from the expenses incurred relating the amount of expenses which has been further deducted from the total sale proceed. There was no escapement at all.

Learned Standing Counsel submitted that no question was asked relating to the sale of shares. Regarding the sales of shares, the petitioner did file the letters on his own motion on 26-10-1998. However, these facts were not gone through and the assessment order was passed on the same date. Thus, it is a case of failure on the part of the assessee to disclose fully and truly material facts. He submitted that in the present case the escaped income was more than one lakh and, therefore, the limitation to issue the notice u/s 148 of the Act was six years u/s 149(1)(b) of the Act and since, the notice was issued within six years, it was within time.

We have considered the rival submissions and perused the contents of the writ petition and the counter-affidavit.

It would be appropriate to reproduce the relevant provisions of the Act.

Section 147 of the Act reads as follows:

If the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings, under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereinafter in this section and in sections 148 to 153 referred to as the relevant assessment years):

Provided that where an assessment under sub-section (3) of section 143 or this

section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return 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:

Provided further that the assessing officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

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

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

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

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

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

(i) income chargeable to tax has been under-assessed; or

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

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

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

Explanation 3.--For the purpose of assessment or reassessment under this section, the assessing officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.

Issue of notice where income has escaped assessment.

Section 148(1) Before making the assessment, reassessment or recomputation u/s 147, the assessing officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished u/s 139:

Provided that in a case--

(a) where a return has been furnished during the period commencing on the 1-10-1991 and ending on the 30-9-2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice :

Provided further that in a case--

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

(Explanation--For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.)

((2) The assessing officer shall, before issuing any notice under this section, record his reasons for doing so.)

Time limit for notice.

Section 149. ((1) No notice u/s 148 shall be issued for the relevant assessment year--

((a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.)

Explanation--In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.)

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice u/s 148 is to be served is a person treated as the agent of a non-resident u/s 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year.)

7. It would be appropriate to first adjudicate the issue, whether there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, it would be useful to reproduce paras 4, 5, 6, 7 and 8 of the writ petition and paras 5, 6, 7, 8, 9 and 10 of the counter-affidavit.

Paras 4, 5, 6, 7 and 8 of the writ petition

4. That the petitioner had disclosed in the aforesaid return the income derived from sale of 75,000 shares of Kothari Products Limited and had claimed expenses to the tune of Rs. 6,92,897 relating to the sale of said shares. The net receipt after deducting the aforesaid expenses relating to the sale of said shares was shown at Rs. 14,37,103 and Rs. 1,44,63,525 was declared to have been invested in the construction of residential house at 7/23, Tilak Nagar, Kanpur.

5. That along with the said return the petitioner had filed the details of expenses made for the sale of the aforesaid shares. In the aforesaid details the petitioner had disclosed the receipt of Rs. 28,84,943 as interest from the bank on the temporary deposit of the application money in respect of the aforesaid shares. In the said details of expenses incurred for the sale of the aforesaid shares the total expenses incurred in the sale of the aforesaid shares was shown at Rs. 1,44,33,221.73p. from which the aforesaid interest income was reduced bringing the expenses to the figure of Rs. 1,15,48,278.73p. The said figure of expenses for the sale of said shares was apportioned amongst the shareholders whose shares had been sold in proportion to the shares sold by them. On the sale of 75,000 shares by the petitioner the proportionate share of expenses in the name of the petitioner came to Rs. 6,92,897 which was accepted by the assessing officer in the regular assessment for the said assessment year.

6. That apart from the said details of the expenses appended along with the aforesaid return, in the form of the chart the petitioner had also appended the details of expenses head-wise relating to the sale of the aforesaid shares. True copy of the computation of income along with the details of expenses made for the sale of said shares and the details of public issue expenses filed along with the return on 01.07.1996 and which was duly considered along with all the relevant records by the assessing officer for the purposes of framing an assessment u/s 143(3) of the Act.

7. That during the course of assessment proceedings for the assessment year 1996-97 detailed queries were made by the assessing officer with regard to the income from sale of shares declared by the petitioner in the computation of income and the details thereof appended along with the return. One such query was dated 7-8-1998.

8. That after considering in details the income and expenses declared by the petitioner in the said return of income, the assessing officer was satisfied that the declaration made by the petitioner was justified and correct. He was also satisfied that the interest income received by the petitioner in the transaction of sale of aforesaid shares had been correctly and legitimately been shown as reducing the total expenses incurred for the sale of the aforesaid shares, the entire transaction being part and parcel of one and the same transaction of sale of shares. The assessment order was passed by the assessing officer on 26-10-1998 u/s 143(3) of the Act.

Paras 5, 6, 7, 8, 9 and 10 of the counter-affidavit

5. That in reply to the contents of paragraph No. 3 of writ petition, it is admitted that the petitioner filed the return of income for the Assessment Year 1996-97 on 1st July, 1996. It is further submitted that the Notice under sections 143(2) and 142(1) were issued to the petitioner. It is incorrect on the part of the petitioner to suggest that the assessment was made after detailed scrutiny and discussion. This is evident from the Notice dated 7.8.1998 issued to the petitioner bearing No. VNK/CC-IV/KNP/98 which is reproduced below :

To,

Sri Vikram Kothari (HUF)

24/19, The Mall, Kanpur

Sub: Asstt. Proceedings for the assessment year 1996-97

In connection with the asstt. proceedings for the assessment year 1996-97 you are hereby required to furnish/explain and produce the following:

1. The details of household expenses keeping in view the size of family and standard of living may be furnished.

2. To produce the bank pass book from which the interest income has shown in

the computation of income.

3. To furnish the details of new investment made either in immovable or in movable property during the year.

4. To furnish the details of share income as shown in the computation of income.

Notices under sections 143(2) and 142(1) are enclosed herewith fixing the date of hearing on 20-8-1998 at 11.00 AM.

Encl: As above.

Sd

(Budh Sen)

Asstt. Commissioner of income tax

Central Circle-IV, Kanpur.

No question was asked regarding sale of shares. Regarding sale of shares the petitioner did file letters on his own motion dated 26-10-1998. However, these were not gone through and the Asst. Order was passed on the same date. For the sake of convenience the body of the assessment order is reproduced below:

Return declaring income of Rs. 1,80,570 filed on 1.7.1996 which was processed u/s 143(1)(a) on returned income on 27-8-1996. Notices u/s 143(2)/142(1) was issued. In compliance thereto, Shri Ram Ji Mehrotra, CA appeared on behalf of the petitioner with whom case has been discussed.

After discussion total income of the petitioner is computed as under :

Income from Capital Gains :

75000 shares of Kothari Products Ltd. Sold @ 200

Rs. 1,50,00,000

Less : Expenses

Rs. 6,92,897

Net received

Rs. 1,43,07,103

Less : Invested in residential house at 7/23 TilakNagar, Kanpur (Self occupd.)

Rs. 1,44,63,525

Excess invested

Rs. 1,56,422

NIL

Income from other sources

(i)

Interest from saving Bank

Rs. 19,466

(ii)

Interest from FDR

Rs. 1,72,175

(iii)

Interest on NSC maturity

Rs. 1,930

Rs. 1,93,572

Gross total income

Rs. 1,93,572

Less : Deduction u/s 80L

Rs. 13,000

Total income

Rs. 1,80,572

OR

Rs. 1,80,570

Assessed on income of Rs. 1,80,570 Issue notice of Demand and challan. Charge interest as per rule.

Dated : 26-10-1998

Sd/-

(Budh Sen)

Asstt. Commissioner of income tax

Central Circle-IV, Kanpur.

Copy to the assessee :

Sd/-

(Budh Sen)

Asstt. Commissioner of income tax

Central Circle-IV, Kanpur.

The petitioner filed return of income on 1st July, 1996 disclosing therein the following particulars as under :

A. Capital Gain

75000 Shares of Kothari Products Ltd. Sold @ 200

Rs. 1,50,00,000

Less : Expenses

Rs. 6,92,897

Net received

Rs. 1,43,07,103

Less: Invested in residential house at 7/27, TilakNagar, Kanpur (Self occupd.)

Rs. 1,44,63,525

Excess invested

Rs. 1,56,422

NIL

B. Income from other sources

(i)

Interest from saving Bank

Rs. 19,466

(ii)

Interest from FDR

Rs. 1,72,175

(iii)

Interest on NSC maturity

Rs. 1,930

Rs. 1,93,572

Gross total income

Rs. 1,93,572

Less : Deduction u/s 80L

Rs. 13,000

Total income

Rs. 1,80,572

OR

Rs. 1,80,570

(ii) From the perusal of the above, it would be seen that the petitioner had shown the sale proceeds of the shares of Rs. 1,50,000,00 and against this sale expenses were claimed at Rs. 6,92,897. The Answering Respondent submits that the income of Rs. 1,43,07,103 was claimed by the petitioner to be exempt u/s 54F of the Act.

(iii) This shows, in the first instance, that the petitioner has earned taxable income in the form of capital gains, from the sale of capital assets which in the case of petitioner is shares of Kothari Products Ltd. He is entitled to claim following deduction u/s 48(1) of the Act on such sales:

(a) Expenditure incurred wholly and exclusively in connection with such transfer.

(b) The cost of acquisition of the asset and the cost of any improvement thereto. The petitioner has claimed Rs. 6,92,897 as expenses u/s 48(1) of the Act.

(iv) That answering respondent respectfully further submitted that the petitioner in its reply dated 26-10-1998 did submit that he alongwith other persons of this Group sold shares of Kothari Products Ltd. in pursuance of guidelines of SEBI. As per reply of the petitioner the total expenses for selling the share of Kothari Products Ltd. by the Group as whole are as under :

(a)

Stock Exchange

45,000

(b)

Travelling expenses

4,94,250

(c)

Legal expenses

24,735

(d)

Printing & Stationery exp.

34,32,493

(e)

Postage & Telegram exp.

1,64,101

(f)

Advertisement expenses

73,45,252

(g)

Management consultancy charge

26,00,000

(h)

Bank charges

1,90,115

(i)

Misc. expenses

1,37,275

1,44,33,221

Less: Intt. received from Bank

28,84,943

1,15,48,278

The total expenses, therefore, for transferring the shares is Rs. 1,44,33,220. The petitioner is entitled to deduction of these expenses in view of the provisions laid down in section 48(1) of the Act.

(v) The Answering Respondent further submits that however, petitioner presented the figure of expenses incurred in a round about manner to confuse the entire issue relating to the sale of shares and reduced it by a sum of Rs. 28,84,943 being interest received from the Bank. This interest was received by the petitioner as has been gathered from the details filed in other case of this Group on account of monies deposited in Bank Account and was therefore separately taxable and could not have been deducted from the total expenses incurred for the transfer of shares.

(vi) The expenses of Rs. 1,15,48,278 after the deduction of abovementioned interest were allocated among the petitioner and other shareholders namely M.M. Kothari, HUF, Vikram Kothari, Indl. Vikram Kothari HUF, Deepak Kothari, Indl. Deepak Kothari, HUF on pro rata basis and claimed in the return of income. On this basis, the share of petitioner comes to Rs. 6,92,897.

(vii) The income arisen from the sale of shares taxable under Chapter IVF of the Act, which deals with Capital Gains while income arising in the case of the petitioner falls under Chapter IVF as has been shown by the petitioner in the Return of Income. The petitioner was therefore, required to separately show the interest income earned by it in the return of Income and offer it for taxation. Your humble Respondent respectfully submits that earning of interest has nothing to do with the Computation of Income under the head "Capital Gains". While filing the details on 26-10-1998 the petitioner resorted a clever device inasmuch as it adjusted interest received from Bank against the expenses. As per section 48(1) of the Act, the petitioner is entitled only to the deduction of expenses incurred for selling the shares and is not entitled to deduct the interest received from Bank from the expenses and then claim the expenses.

6. That in reply to the contents of paragraph No. 4 of the writ petition, it is admitted that petitioner did file the statement of expenses incurred on the sale of shares; this was however done at its own motion. However at the end of the statement the petitioner deducted a sum of Rs. 28,84,943 on account of interest received from the Banks. The total expenses were Rs. 1,44,33,221 and after reducing sum of Rs. 28,84,943 being the interest earned by the petitioner and other members of the family, the expenses were artificially reduced by Rs. 1,15,48,278. The sole purpose of the petitioner, in doing so was to avoid the payment of taxes on the interest income earned during this period.

7. That in reply to the contents of paragraph No. 5 of the writ petition, it is submitted that the petitioner should file the head-wise statement of expenses on 26-10-1998 and on the same date the assessment order was also passed. The Answering Respondent submits that there is no dispute regarding the allowance/disallowance of expenses incurred by the petitioner and others. The dispute is only with regard to the fact whether the petitioner is entitled to adjust the interest income earned on account of deposit on sale of shares to the extent of Rs. 28,84,943 against expenses. Therefore, nothing hinges on the averment made in para under reply.

The Answering Respondent further submits that the petitioner did file the details of expenses on 26-10-1998 and on the same date the assessment order was passed. No query worth the name was made regarding the adjustment of interest earned against the expenses incurred by the petitioner at any stage of the Assessing proceedings.

8. That the contents of paragraph No. 6 of the writ petition need no reply at this stage, as the same has already been replied in reply to the contents of paragraph No. 3 of the writ petition, as the same are reiterated and re-affirmed.

9. That the contents of paragraph No. 7 of the writ petition are not admitted, incorrect as such denied. It is wrongly stated by the petitioner that the assessing officer had examined the issue of adjustment of interest income against the expenses incurred and had come to the conclusion that the petitioner is entitled

to do so. However, it is submitted that in this regard the proper and correct reply had already been given in reply to the contents of paragraph No. 4 of the writ petition, which are re-iterated and re-affirmed.

10. That the contents of paragraph Nos. 8, 9, 10 and 11 of the writ petition need no comment at this stage, being matter of record.

From the perusal of the return, the details furnished, the assessment order and averments made in the counter-affidavit referred hereinabove, it is apparent that the petitioner had disclosed all the necessary material facts relating to the sales of the shares. The number of shares sold, sale proceeds and expenses, the details of the expenses, the interest received from the bank, the sale proceeds invested in the house etc. u/s 54F of the Act, the claim of exemption thereof and calculation of capital gains as NIL, have been furnished. The complete details have been furnished along with the return and during the course of assessment proceedings. More so, during the course of assessment proceedings, a notice was issued on 7-8-1998 by the assessing authority asking the petitioner to furnish the details of share income as shown in the computation of income and to furnish the details of the new investment made either in the immovable or in the movable property during the year, apart from the other queries. In pursuance thereof, the petitioner had furnished the details of the share income and the details of the new investment in the property. The assessment order has been passed after the proper enquiry and due consideration of the relevant materials relating to the sales of the shares. On these facts, we are of the view that there was no failure on the part of the assessee in disclosing fully and truly all material facts relating to sales of shares, expenses incurred, interest received and computation of capital gains.

Now coming to the second question namely, whether the notice is barred by limitation. A notice was issued on 29-3-2003 beyond the period of four years. The assessment year involved is 1996-97. The four years expired on 31-3-2001. We have already held above that it is not the case of the failure on the part of the assessee in disclosing fully and truly all material facts necessary for assessment.

We do not find any substance in the argument of learned Standing Counsel that where the escaped income exceeds rupees one lakh, the limitation to issue notice is six years u/s 149 of the Act, whether the case falls under the exception of the proviso to section 147, or not.

In our view both sections 147 and 149 of the Act are to be read together. The proviso to section 147 of the Act specifically provides the limitation for taking action under the said section within four years and only in the exceptional case mentioned therein, namely, where there is failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for the assessment year, the proceeding can be initiated beyond the period of four years. The proviso to section 147 completely prohibits to take action beyond four years

unless the case is covered under the exception mentioned in the proviso itself section 149 provides limitation for the issue of notice u/s 148. Section 149(1)(a) provide general limitation for issue of notice four years. Section 149(b) is a exception to sub-section (a) of section 149(1) of the Act provides six years limitation for issue of notice in case escaped income exceeds one lakh. Section 149(1)(a) and (b) read with proviso to section 147 of the Act clearly provides that where the case falls under the exception mentioned in the proviso to section 147 of the Act the proceeding can be taken beyond the period of four years, but within six years if the escaped income exceeds rupees one lakh and in for all other cases, the limitation for issue of notice remains four years meaning thereby that if the income chargeable the tax which has escaped assessment is less than rupees one lakh, the limitation to issue notice u/s 148 of the Act is only four years even if case falls under the exception mentioned in proviso to section 147 and six years limitation is applicable only in case where escaped income chargeable to tax exceeds rupees one lakh and the case falls under exception, namely there is a failure on the part of the assessee to disclose fully and truly material fact. Therefore, where there is a case of failure to disclose fully and truly all material facts on the part of the assessee, the action can be taken beyond the period of four years but if the escaped income chargeable the tax is less than rupees one lakh, the period of limitation for the issue of notice is only four years and where the escaped income exceeds rupees one lakh the limitation to issue the notice u/s 148 is up to six years. The object fixing such limitation appears to be that where the escaped income is less than one lac, the tax incidence may be small the action u/s 147 should not be taken beyond the period of four years in any case.

Thus, on the plain reading of section 147 and section 149 legal position in respect of limitation emerges as follows:

(i) In view of proviso to section 147 no action can be taken u/s 147 beyond the period of four years if the case does not fall within the exception of the proviso mentioned in the proviso itself namely, if there is no case of failure on the part of the assessee to disclose fully and truly all material facts which are necessary for assessment for the year of assessment etc.

(ii) If the case falls under the exception mentioned in the proviso to section 147, namely there is failure on the part of the assessee to disclose fully and truly all material facts which are necessary for assessment for the year of assessment etc., then action can be taken beyond four years subject to the issue of notice u/s 148 of the Act within the limitation provided u/s 149 of the Act.

(iii) Where case falls under the exception to proviso to section 147 and escaped income exceed rupees one lakh the notice u/s 148 can be issued beyond the period of 4 years but within 6 years u/s 149(1)(b).

(iv) In case when the escaped income is less than rupees one lakh the limitation to issue the notice u/s 148 is only four years, even if the case falls under the

exception of proviso to section 147.

It may be mentioned here that our above view is supported by the decision of the Bombay High Court in the cases of Anil Radhakrishna Wani Vs. Income Tax Officer, Commissioner of Income Tax and Union of India (UOI), in the case of Multiscreen Media (P) Ltd. v. Union of India (No. 1) (2010) 324 ITR 48 (Bom.) , in the case of IPCA Laboratories Ltd. Vs. Gajanand Meena, Deputy Commissioner of Income Tax and Others (No. 2), and in the case of Supreme Treves (P.) Ltd. Vs. Deputy Commissioner of Income Tax, and the decision of the Gujarat High Court in the case of Arvind Mills Ltd. v. Deputy CIT (Assessment) (2000) 242 ITR 173 (Guj.) , in the case of Gujarat Fluorochemicals Ltd. Vs. Deputy Commissioner of Income Tax, and in the case of Inducto Ispat Alloys Ltd. Vs. Asstt. Commissioner of Income Tax,

In view of the above, we are of the view that the impugned notice issued u/s 148 of the Act is barred by limitation being issued beyond the period of limitation inasmuch as no case of failure on the part of the assessee to disclose fully and truly material fact necessary for assessment for the assessment year is made out.

The writ petition is accordingly allowed and notice dated 28-3-2003 issued u/s 148 of the Act for the assessment year 1996-97 is hereby quashed. There shall be no order as to costs.