

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.1017 OF 2011**

The Indian Hume Pipe Co. Ltd. ..Petitioner.

versus

The Assistant Commissioner of Income Tax,  
Central Circle 22 and others ..Respondents.

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Mr. Percy J. Pardiwala, Senior Advocate with Mr. Satish R. Mody and  
Ms. Aasifa Khan for the Petitioner.

Mr. B.M. Chatterjee for the Respondents.

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**CORAM : DR.D.Y.CHANDRACHUD &  
A. A. SAYED, JJ.**

**8 November 2011.**

**ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :**

1. The Petitioner seeks to question the legality of a notice issued on 29 March 2011 under Section 148 of the Income Tax Act 1961 by which the assessment for Assessment Year 2004-05 is sought to be re-opened. On 31 July 2001 the Petitioner entered into an MOU with a third party, Dosti Associates for the transfer of development rights in certain land for a consideration of Rs.39 Crores. Following this a development agreement was entered into on 31 October 2001. Finally, a supplemental agreement was entered into on 15 December 2003 by which in consideration of the total agreed sum of Rs.39 Crores paid by the developer to the Petitioner, the Petitioner recognized the acquisition by the developer of the absolute right to develop the property. Clause 5 of the agreement stipulated that with effect from

**15 December 2003** the developer had been placed in absolute and complete possession of the property.

2. The Petitioner filed a return of income for Assessment Year **2004-05**. In the computation of assessable income profits on the sale of land in the amount of **Rs.38.75 Crores** were considered separately. The Petitioner annexed a working of the taxable long term capital gains. The total long term capital gains were computed at **Rs.23.19 Crores**. The Petitioner claimed an exemption under Section **54EC** of the Income Tax Act **1961** stating that a total amount of **Rs.23.24 Crores** had been invested in specified bonds of the National Highway Authority of India (**Rs.2 Crores**), the Rural Electrification Corporation of India (**Rs.14.44 Crores**) and the National Housing Bank (**Rs.6.80 Crores**). The computation of capital gains in the amount of **Rs.23.19 Crores** as stated earlier was based on the total consideration of **Rs.39 Crores** received for the sale of development rights under the conveyance executed on **31 December 2003**; from which amount an amount of **Rs.15.80 Crores** was deducted representing the value of the land as on **1 April 1981**. During the course of the assessment proceedings the Assessing Officer addressed a communication dated **14 July 2006** inter alia requiring the Petitioner to make the following disclosures :

“8. In the profit & loss account, you have credited **Rs.38.75 crores** from sale of some property. In this connection, please furnish the copy of sale deed / agreement to sale deed indicating the full name & addresses of the purchasers and details of the properties sold.

9. Please furnish the valuation reports for determination of FMV as on **1-4-1981** in the case of properties sold during the year.

10. Please furnish the detailed working of capital gains arising out of the same of the above property.”

3. In response to the communication the Petitioner by a letter dated 17 August 2006 explained how the total figure of Rs.38.75 Crores was arrived at (representing the sale of the immovable properties of the assessee at Mumbai and Chennai). Copies of the sale agreements were enclosed. The Petitioner also furnished a working of the capital gains. The Assessing Officer passed an order of assessment under Section 143(3) on 27 November 2006. The order of assessment makes a brief reference to the fact that during the previous year the assessee had sold its properties at Wadala (Mumbai) and Arkonam. There was no further discussion in the order on the claim to exemption under Section 54-EC. A notice was issued to the Petitioner by the Assessing Officer after an audit query was raised on 4 June 2007. The audit query was to the effect that a scrutiny of the bonds in which monies were invested by the Petitioner revealed that only an amount of Rs.6.80 Crores was eligible for exemption under Section 54-EC as it has been invested within six months from the date of the sale deed. The remaining amounts had in fact been invested between 1 February 2002 to 30 June 2002 prior to the date of transfer (15 December 2003). Those investments which were made between 17 to 22 months prior to the execution of the sale deed could not, it was stated be considered as investments out of capital gains and should have been disallowed. The notice for reopening the assessment was issued on 29 March 2011 under Section 148. The reasons which have been disclosed to the Petitioner for reopening the assessment under a communication dated 6 April 2011

are as follows :

“The assessee filed its return of income showing total income of Rs.16,10,82,529/- for A.Y. 2004-05 on 31.10.2004. Assessment under section 143(3) of the Income Tax Act, 1961 (hereinafter, “the Act”) was made on 27.11.2006 determining a total income of Rs.19,15,11,500/-.

2.0 The assessee has sold land at Wadala on 15.12.03 for Rs. 39,00,00,000/- (Rs. Thirty Nine Crores only) and after availing the indexation cost at Rs.15,80,92,967/-, the Long Term Capital Gain was arrived at Rs.23,19,07,033/-. The assessee has claimed exemption u/s 54 EC by investing the amount in the specified bonds. Scrutiny of the bonds revealed that only an amount of Rs.6.80 crores deposited in National Housing Bank is eligible for exemption as it has been invested on 30.04.2004 i.e. within 6 months from the date of sale deed. The remaining amounts invested in Rural Electrification Corpn. Ltd. and National Highway Authority of India were pertained to the prior periods i.e. 1.2.02 to 30.6.02. These investments were made prior to the date of transfer (15.12.2003). As such the allowance of exemption u/s 54EC on the above investment valued at Rs.21.24 crores is irregular. The investments in those bonds are made prior to 22-17 months of the sale deed and assessee has filed no evidence that it made investment in bonds out of sale proceeds. Hence, claim u/s 54EC is not allowable. Not doing so has resulted in under assessment of LTCG of Rs.21.24 crores and consequent short levy of tax of Rs.4,35,42,000/-. Further, the assessee failed to disclose fully and truly all material facts necessary for its assessment for A.Y. 2004-05 by not giving details of the connection of the invested amounts in 54EC bonds with the sale proceeds. In view of this, there is an escapement of income of 21.24 crores.

3.0 It is manifest that the assessee has understated the income. Thus, it is a case where income chargeable to tax has escaped assessment. The assessee failed to disclose fully and truly all material facts necessary for its assessment for A.Y. 2004-05. I, therefore, have reason to believe that income to the extent of Rs.21.24 crores has escaped assessment.”

4. Counsel appearing on behalf of the Petitioner submitted that – (i) The reopening of the assessment in the present case being beyond a period of four years of the end of the relevant Assessment Year, the impugned action can be justified only if there was a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for his assessment for that Assessment Year; (ii) The assessee in the present case complied with the obligation to disclose primary facts; (iii) The primary facts consisted of (a) the agreement under which a capital asset was transferred for which consideration was realized; (b) the cost of the acquisition of the asset and (c) the investment which was made by the Petitioner in specified securities. Whether the assessee is eligible to claim an exemption under Section 54-EC if the investment was made prior to the date of transfer is an inference upon which no disclosure is required to be made by the Petitioner. The Assessing Officer, it was urged, had duly applied his mind to the return; queries have been raised to which the Petitioner had furnished replies.

5. Consequently it was submitted that there being no failure on the part of the Petitioner to fully and truly disclose all the material facts the action to reopen the assessment beyond a period of four years cannot be justified.

6. On the other hand, it was urged on behalf of the Revenue that – (i) In the original return of income that was filed by the Petitioner, there was a careful avoidance on the part of the Petitioner to disclose the dates on which investments were made in the specified

bonds; (ii) Even after the Assessing Officer raised a query by his communication dated **14 July 2006** the Petitioner in its response once again did not specifically point out the dates on which investments were made in the specified bonds; (iii) The Assessing Officer had in the circumstances not applied his mind to the question as to whether the Petitioner had fulfilled the necessary requirements for an exemption under Section **54-EC**; (iv) The mere submission of certificates by the Petitioner would not amount to a full and true disclosure of material facts having regard to the provisions of Explanation **1** to Section **147**.

7. The reopening of the assessment has in the present case been sought to be effected by a notice dated **29 March 2011** which is beyond a period of four years of the end of the relevant Assessment Year **2004-05**. In such a case the first proviso to Section **147** mandates that the validity of the reopening of the assessment must depend upon whether there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that Assessment Year. Explanation **1** to Section **147** provides that the 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 a disclosure within the meaning of the proviso. The expression 'necessarily' means inevitably or as a matter of compelling inference. The obligation to disclose primary facts lies on the assessee. The assessee has to disclose fully and truly all material facts. The import of Explanation **1** was noticed in a judgment of a Division Bench of this Court in **3I Infotech Ltd. v.**

**Assistant Commissioner of Income Tax<sup>1</sup>** in the following observations :

“In other words, an assessee cannot rest content merely with the production of account books or other evidence during the course of the assessment proceedings and challenge the reopening of the assessment on the ground that if the Assessing Officer were to initiate a line of enquiry, he could with due diligence have arrived at material evidence. The primary obligation to disclose is on the assessee and the burden of making a full and true disclosure of material facts does not shift to the Assessing Officer. The assessee has to disclose fully and truly all material facts. Producing voluminous records before the Assessing Officer does not absolve the assessee of the obligation to disclose and the assessee, therefore, cannot be heard to say that if the Assessing Officer were to conduct a further enquiry, he would come into possession of material evidence with the exercise of due diligence. An assessee cannot throw reams of paper at the Assessing Officer and rest content in the belief that the officer better beware or ignore the hidden crevices in the pointed material at his peril.”

8. The Division Bench observed that the words “not necessarily” in Explanation 1 would indicate that whether there was a full and true disclosure within the meaning of the Section would depend upon the facts and circumstances of each case; that is to say on the nature of the document and the circumstances in which it is produced (reliance was placed in that regard on the judgment of the Calcutta High Court in **Imperial Chemical Industries Ltd. v. ITO<sup>2</sup>** and of the Delhi High Court in **Rakesh Agarwal v. Asst. CIT<sup>3</sup>**).

9. The basic principle which has been laid down by the Supreme

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1 (2010) 329 ITR 257 (Bom)

2 (1978) 111 ITR 614..

3 (1996) 221 ITR 492.

Court in **Commissioner of Income Tax v. Bhanji Lavji**<sup>4</sup> is whether the assessee has disclosed the primary facts which are necessary for assessment fully and truly. If the assessee has done so, the Assessing Officer is not entitled on a mere change of opinion to commence proceedings for reassessment. If the Assessing Officer has been apprised of all the primary facts necessary for assessment he may well have raised a wrong legal inference from the facts disclosed. On that count he would not be justified in reopening the assessment. Essentially, therefore in each case the Court has to determine as to whether there was a full and true disclosure of primary facts by the assessee. The full and true disclosure which the statute contemplates must be judged in the context of Explanation 1 to Section 147. The assessee cannot merely rely upon the fact that if the Assessing Officer had followed an enquiry with due diligence on the basis of the account books or other evidence produced by the assessee, he could have discovered material evidence. The mere production of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer does not necessarily amount to a disclosure within the meaning of the first proviso to Section 147. The nature of the material produced and the circumstances in which it was produced assumes some significance.

10. In the present case, the assessee, in the return of income that was originally filed, submitted a computation of taxable long term capital gains. After computing the long term capital gains at Rs.23.19 Crores, the assessee sought to deduct therefrom an amount of Rs.23.24 Crores invested under Section 54-EC. The statement, however, was

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4 (1971) 79 ITR 582.



silent on the date on which the amounts were invested. The Assessing Officer did during the course of the assessment proceedings raise a query on **14 July 2006** seeking an explanation of an amount of **Rs.38.75 Crores** credited from the sale of certain property. The Assessing Officer called upon the assessee to furnish a copy of the sale deed together with the details of the property sold; valuation reports for determination of the fair market value as on **1 April 1981** and a detailed working of capital gains arising out of the sale of the property. The assessee disclosed the sale agreements and furnished a working of capital gains which was in terms of what was submitted with the return of income. Significantly neither in the return of income nor in the disclosures that were made in response to the query of the Assessing Officer did the assessee make any reference to the dates on which amounts were invested in bonds of the National Highway Authority of India, Rural Electrification Corporation of India and National Housing Bank. The assessee did enclose copies of the certificates which do bear the date of allotment. However, in our view, it is evident that the Assessing Officer had clearly not applied his mind to the question as to whether the assessee had fulfilled the conditions specified in Section **54-EC** for availing of an exemption. But more importantly the assessee in the present case was required to make a full and true disclosure of material facts which does not appear either from the computation of taxable long term capital gains in the original return of income or in the computation that was submitted in response to the query of the Assessing Officer. In both the sets of computation there was a complete silence in regard to the dates on which the amounts were invested. The assessment order does not deal with this aspect. In

the circumstances, having applied the touch stone of the legal principles underlying the reopening of an assessment beyond a period of four years, we have come to the conclusion that there was no full and proper disclosure by the assessee of all the material facts necessary for the assessment.

**11.** Full and true disclosures must mean what the statute says. These disclosures cannot be garbled or hidden in the crevices of the documentary material which has been filed by the assessee with the Assessing Officer. The assessee must act with candor and the disclosure must be full and true. A full disclosure is a disclosure of all material facts which does not contain any hidden material or suppression of fact. A true disclosure is a disclosure which is truthful in all respects. Just as the power of the Revenue to reopen an assessment beyond a period of four years is restricted by the conditions precedent spelt out in the proviso to Section 147, equally an assessee who seeks the benefit of the proviso to Section 147 must make a full and true disclosure of all primary facts. The assessee in the present case did refer to the fact that the capital gains had resulted from the transfer of a capital asset and in the course of the computation did provide for the cost of acquisition notionally as of 1 April 1981. An exemption was claimed under Section 54-EC. All the necessary facts on the basis of which the claim to an exemption are founded must be disclosed. As the assessee failed to do so, the Revenue in the present case would be justified in reopening the assessment on the ground that income has escaped assessment. Clause (c) of Explanation 2 to Section 147 provides for cases where income chargeable to tax is deemed to have escaped assessment.

Among those cases are cases where an assessment has been made but (i) income chargeable to tax has been under assessed; or (ii) such income has been assessed to a lower rate; or (iii) such income has been made the subject of excessive relief under the Act; or (iv) an excessive loss or depreciation allowance or any other allowance under the Act has been computed. The Assessing Officer in the present case has not exceeded his jurisdiction in reopening the assessment. We, however, clarify that in the view which has been taken it has not been necessary for the Court to furnish its interpretation of the provisions of Section 54-EC which really do not fall for consideration at this stage. For the reasons aforesaid, we do not find any reason to exercise the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution. The Petition is accordingly dismissed.

(Dr. D.Y. Chandrachud, J.)

(A. A. Sayed, J.)

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