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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 373 OF 2012

The Board of Control for Cricket in India,
a Society registered under the Tamilnadu
Societies Registration Act, 1975 and
having its office at Cricket Centre,
Wankhede Stadium, "D" Road,
Churchgate, Mumbai 400 020.

.. Petitioner

Versus

1. The Assistant Commissioner of
Income Tax Central Cir. 35,
Mumbai having his office at Room No. 104,
First Floor, Aayakar Bhavan, M.K. Road,
Churchgate, Mumbai 400 020.

2. The Commissioner of Income Tax,
Central Circle III, Mumbai,
First Floor, Aayakar Bhavan,
M.K. Road, Churchgate,
Mumbai 400 020.

3. The Union of India, through the
Secretary, Ministry of Finance,
North Block, New Delhi 110 001.

... Respondents

Mr. Nitesh Joshi with Mr. P.C. Tripathi i/by Mr. Atul K. Jasani for
petitioner.

Mr. Suresh Kumar for respondents.

**CORAM : DR. D.Y. CHANDRACHUD &
R.D. DHANUKA, JJ.**

DATED : APRIL 02, 2012

ORAL JUDGMENT (Per Dr. D.Y. Chandrachud.J.):

1. The challenge in this proceeding under Article 226 of the Constitution of India is to the reopening of an assessment for Assessment Year 2004-2005 by a notice dated 29 March 2011.

2. For Assessment Year 2004-2005 the assessee filed a return of Income declaring a nil income, in view of the exemption which was claimed under section 11 of the Income Tax Act, 1961. An order of assessment was passed under section 143(3) on 22 December, 2006. While completing the assessment, the Assessing Officer determined the total income of the Assessee at Rs.47,32,738/-. The Assessment is now sought to be reopened by a notice under section 148, which was issued on 29 March, 2011.

3. The reasons on the basis of which the assessment is sought to be reopened, have been disclosed to the assessee on 19 August, 2011. Briefly stated, the reasons are as follows :

(i) During the course of the scrutiny assessment for Assessment Year

2008-2009, the Assessing Officer came to know of the fact that the assessee had lodged a First Information Report (FIR) on 16 March, 2006 against Mr. Jagmohan Dalmiya, the then Secretary of the Board of Control for Cricket in India and others inter alia for misappropriation of funds;

(ii) The FIR was transferred to the Economic Offences Wing (EOW), Crime Branch, CID, Mumbai and was investigated since 21 March, 2007. The FIR sets out that in order to conduct the World Cup cricket tournament in 1996, a Committee called PILCOM was formed amongst Pakistan, India and Srilanka of which Mr. Jagmohan Dalmiya, the then Secretary of BCCI was appointed as Convener Secretary. Another Committee in India called INDCOM was formed for the purpose of disbursing prize money to the teams and players;

(iii) A chargesheet was filed against Mr. Jagmohan Dalmiya by the EOW in the Court of the Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai in which it is alleged that Mr. Dalmiya and certain others had committed offences inter alia punishable under sections 409, 420, 465, 467, 468, 477A, read with section 34 and section 120(B) of the Penal Code by using funds to the extent of Rs. 2.90 Crores from the INDCOM account opened at a Kolkatta Branch of

the Indian Overseas Bank for their own use from 1 July, 1997 to 4 February, 2006.

(iv) The chargesheet indicated that an amount of Rs.30,79,802/- was misappropriated during the financial year 2003-2004;

(v) The investigation by the EOW would indicate that the assessee was not conducting its activities in accordance with its objects, which was mandated, in order to avail of the exemption under section 11 of the Act and the continuation of the registration under Sections 12A/12AA;

(vi) The assessee, during the course of assessment proceedings for Assessment Year 2004-2005, had not furnished any intimation to the Assessing Officer about the alleged misappropriation of funds. Though the FIR was lodged by the Assessee on 16 March, 2006 and the assessment proceedings for Assessment Year 2004-2005 were completed thereafter on 22 December, 2006, the filing of the FIR was not disclosed to the Assessing Officer;

(vii) In the light of the alleged misappropriation of funds, the Assessee's claim to exemption under Section 11, for continuation of its registration under Sections 12A/12AA and the provisions of Section 13 need to be examined and the claim of the assessee may have to be disallowed;

(viii) There was a failure on the part of the assessee to fully and truly disclose all material facts necessary for its assessment for Assessment Year 2004-2005. Though the FIR was filed by the assessee on 16 March, 2006 and the assessment proceedings for Assessment Year 2004-2005 were completed on 22 December, 2006, the figures set out in the FIR were not disclosed to the Assessing Officer.

(ix) On this basis, the Assessing Officer has stated that there was reason to believe that at the minimum, income of the appellant in the amount of Rs.30,79,802/- chargeable to tax has escaped assessment within the meaning of section 147 of the Act.

5. The Assessee raised objections to the reopening of the assessment on 16 September, 2011. The objections were disposed of by an order dated 27 September, 2011 passed by the Assessing Officer.

6. Counsel appearing on behalf of the Assessee submits that :

(i) The reopening of the assessment for Assessment Year 2004-2005 has taken place beyond a period of four years of the end of the relevant assessment year. Since the assessment was completed under Section 143(3), the proviso to Section 147 would come into operation and the reopening can be justified only if there was a failure on the part of the

assessee to fully and truly disclose all material facts necessary for the assessment for that assessment year ;

(ii) The FIR filed by the assessee on 16 March, 2006 only dealt with the misuse of funds in the amount of Rs.21,74,606/- for the period between September, 2004 and February, 2006. Therefore, the FIR dealt with facts which pertain to the period after the financial year relevant to Assessment Year 2004-2005;

(iii) The EOW in the chargesheet which has been filed before the Additional Chief Metropolitan Magistrate on 26 March, 2008 has alleged misappropriation of funds of Rs.30,79,802/- for Financial Year 2003-2004 (relevant to Assessment Year 2004-2005). The Petitioner obtained knowledge of the filing of the chargesheet only on 22 June, 2011, when the gist of the investigation report was annexed to an affidavit in reply filed by the Revenue in the earlier writ proceedings before this Court under Article 226 of the Constitution of India where the reopening of the assessment for an earlier year was questioned. The order of assessment was passed on 22 December, 2006 while a chargesheet was filed on 26 March, 2008. Consequently there was no question of the assessee having failed to disclose fully and truly all material facts necessary for assessment for Assessment Year 2004-2005;

(iv) The reopening in the present case is based on a chargesheet which has been filed by the EOW. The reason to believe under Section 147 has to be of the Assessing Officer. There must be material before the Assessing Officer to which he must apply his mind before he forms a belief that there is an escapement of income and the reasons for his belief must have a live nexus with the material. The Assessing Officer has merely acted on the basis of the opinion formed by the EOW and has not applied his mind to any live material before he came to the conclusion that there was an escapement of income for Assessment Year 2004-2005.

7. On the other hand, it has been urged on behalf of the Revenue that though the reopening in the present case has taken place beyond a period of four years, the Revenue would be entitled to do so in law if there was a failure on the part of the assessee to fully and truly disclose material facts necessary for the assessment for that year. In this regard, the Counsel submitted that :

(i) The reopening of the assessment is based on the information which was received by the Assessing Officer during the course of the assessment for Assessment Year 2008-2009, after the assessment for

Assessment Year 2004-2005 was completed;

(ii) The assessee had filed an FIR on 16 March, 2006, at which point of time, the assessment proceedings for Assessment Year 2004-2005 were pending. The assessment proceedings for Assessment Year 2004-2005 were completed on 22 December, 2006. The fact that the assessee had filed an FIR in which it is alleged by the assessee that the funds pertaining to the World Cup had been misappropriated and had not been utilized for the charitable purposes on the basis of which an exemption has been granted to the assessee under section 11, was not disclosed to the Assessing Officer. Therefore, the jurisdictional requirement as stipulated in the proviso to section 147 has been fulfilled;

(iii) Even a reading ex facie, of the letter of the assessee dated 16 March 2006 addressed to the Officer in Charge of Marine Drive Police Station and the FIR lodged on the same date would indicate that the period to which the misappropriation relates also covers Assessment Year 2004-2005. A plain reading of the complaint and the FIR would reveal facts to the contrary to what is asserted by the Petitioner;

(iv) The merits of the contentions of the assessee would have to be decided by the Assessing Officer. Therefore, issues such as whether the

assessee had applied its income for charitable purposes or whether there is accumulation only to the extent permissible are matters to be decided by the Assessing Officer after the assessment is reopened. In the present case, the only issue is whether there was any material before the Assessing Officer on the basis of which the assessment could be reopened. That material has been brought to the attention of the Assessing Officer after the chargesheet was filed on 26 March 2006. The Assessing Officer obtained knowledge of these facts during the course of assessment proceedings for Assessment Year 2008-2009 and hence, was entitled to reopen the assessment for the Assessment Year 2004-2005 though it would be beyond a period of four years.

8. Under Section 147, the Assessing Officer can proceed to reopen an assessment where he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. Where the assessment has been completed under sub section (3) of section 143, the jurisdiction of the Assessing Officer is conditioned by the requirement inter alia that there has been a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Within a period of four years, the power of the Assessing Officer to reopen an assessment is somewhat wider but even

then as the Supreme Court observed in its judgment in ***Commissioner of Income Tax Versus Kelvinator of India Ltd.***¹ there must be tangible material before the Assessing Officer before he proceeds to reopen the assessment and which leads him to form a belief that income has escaped assessment. Beyond a period of four years, the power to reopen is even stricter since it is conditioned by a requirement of a failure on the part of the assessee to fully and truly disclose material facts necessary for the assessment for that year.

9. The assessment proceedings for Assessment Year 2004-2005 were completed on 22 December 2006. The assessee had filed an FIR with Marine Drive Police Station on 16 March 2006. The FIR covers the period from December 1995 to 4 February 2006. The letter which was addressed by the Honorary Secretary of the assessee to the Officer in Charge of the Marine Drive Police Station (Exh. B) makes it abundantly clear that the allegations of misappropriation relate to the period from the opening of the account and thereafter until the account was closed on 4 February 2006. That period also includes the period of Assessment Year 2004-2005. In fact a close reading of the letter dated 16 March 2006 (Exh. B) indicates that specific transactions are alleged to have

¹ (2010) 320 ITR 561(SC)

taken place even during the period covered by the financial year relevant to Assessment Year 2004-2005. Therefore, on a plain reading of the FIR as it stands, we are unable to accept the contention of the learned counsel for the petitioner that the filing of the FIR was irrelevant and it was not required to be disclosed to the Assessing Officer. The allegations made by the Assessee would indicate that the income of the assessee was misappropriated and was not applied to that extent for charitable purposes. The submission of the counsel for the assessee was based on the foundation that the period covered by the FIR relates to a time span after the conclusion of the financial year relevant to Assessment Year 2004-2005. As we have noted earlier, that is factually incorrect. Be that as it may, the issue before the Court is whether there was material before the Assessing Officer on the basis of which he could have formed reason to believe that income has escaped assessment. As the record would indicate the Assessing Officer has formed that belief on the basis of the material revealed in the investigation which was carried out by the EOW, which eventually resulted in the filing of a chargesheet on 26 March 2008. The chargesheet which has been filed by the EOW would in our view constitute tangible material on the basis of which the Assessing Officer could have reopened the assessment. The

Assessing Officer has stated that there was a failure on the part of the assessee to fully and truly disclose material facts necessary for the assessment for the Assessment Year 2004-2005. This conclusion of the Assessing Officer would have to be upheld, on the basis of the record as it stands. The fact that the FIR had been lodged on 16 March 2006 was a circumstance which was not disclosed to the assessing officer when the assessment proceedings for the Assessment Year 2004-2005 were pending and which concluded by the order of assessment dated 22 December 2006. The fact that the lodging of the FIR was not disclosed before the Assessing Officer is not disputed by counsel. Consequently the jurisdictional requirement in the proviso to section 147 has been duly fulfilled.

The conclusion which we have arrived at is supported by the law laid down by the Supreme Court in this respect. In ***Income Tax Officer Vs. Selected Dalurband Coal Co. (P) Ltd.***² notices were issued under section 148 for reopening assessments for the Assessment Years 1962-63, 1963-64 and 1965-66. The notices were issued by the Assessing Officer on the basis of a letter addressed by the Chief Mining Officer to him. The letter of the Chief Mining Officer reported that on a

² (1996) 217 ITR 597 (SC)

joint inspection made in the colliery of the assessee, upon taking underground measurements it was revealed that the assessee had under-reported the raising figures to a certain extent. A Single Judge of the Calcutta High Court allowed the petition filed by the Assessee and the Division Bench dismissed the Letters Patent Appeal. The period for which the reopening related was prior to the amendment brought about by Parliament to section 147. The judgment of the Supreme Court is significant, in that it held that the report made by a government department, after a joint inspection provided a specific estimate of excessive coal mining said to have been done by the assessee over and above the figure disclosed by it in its returns and this could provide the foundation for reopening the assessment. The Supreme Court held as follows :

"Whether the facts stated in the letter are true or not is not the concern at this stage. It may well be that the assessee may be able to establish that the facts stated in the said letter are not true but that conclusion can be arrived at only after making the necessary enquiry. At the stage of the issuance of the notice, the only question is whether there was relevant material, as stated above, on which a reasonable person

could have formed the requisite belief. Since we are unable to say that the said letter could not have constituted the basis for forming such a belief, it cannot be said that the issuance of notice was invalid."

10. On behalf of the petitioners reliance was placed on the judgment of the Division Bench of this Court in ***S.P. Divekar and A.P. Divekar Vs. Commissioner of Income Tax (Central)***³. The judgment is clearly distinguishable for the reason that as the Division Bench held in that case the memorandum recording reasons for the reopening of the assessment was not produced either before the Appellate Assistant Commissioner or the Tribunal. There was therefore, not even a statement of the Assessing Officer indicating the reasons on the basis of which he had formed the belief that income had escaped assessment. Moreover, the Division Bench noted that there was nothing on record to indicate that the report made by another Income Tax Officer to the Inspecting Assistant Commissioner was before the Assessing Officer when he issued a notice for reopening the assessment under section 34 of the Income Tax Act, 1922. That judgment therefore, is clearly on a situation which was different in law and in fact.

11. In its decision in ***Indian Hume Pipe Co. Ltd. Vs. The Assistant Commissioner of Income Tax, Central Circle 22 and Ors.***⁴ this court after adverting to the requirements of section 147 has observed as

3 1986 157 ITR 629

4 W.P. No. 1017 of 2011 decided on 8th November, 2011

follows :

"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. "

12. In ***Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income Tax and Others***⁵, a Division Bench of this Court has laid down that the reasons recorded by the Assessing Officer contain a manifestation of his mind and provide the link between the conclusion and the evidence. In the present case, the reasons indicated by the Assessing Officer meet the requirements as spelt out in that judgment.

13. For the reasons that we have indicated, we have come to the conclusion that :

5 2004 268 ITR 332

- (i) The Assessing Officer had sufficient material on the basis of which he has formed a reason to believe that the income of the assessee for Assessment Year 2004-2005 has escaped assessment;
- (ii) The jurisdictional requirement contained in the proviso to section 147 has been duly fulfilled. We however, clarify that this would not preclude the assessee, in the course of assessment proceedings, to urge all appropriate submissions on the merits on the issues which would be determined by the Assessing Officer.

14. Hence, we do not find any reason to entertain the petition. The Petition shall accordingly stand dismissed. There shall be no order as to costs.

15. On 30 November 2011 this Court had granted ad interim relief in terms of Prayer Clause (D) restraining the Assessing Officer from taking any steps in pursuance of the notice under section 148 of the Act dated 29 March 2011 till the next date of hearing. Consequent upon the dismissal of the writ petition, the interim order shall stand vacated to facilitate a completion of the assessment in accordance with law.

(DR. D.Y. CHANDRACHUD,J.)

(R.D. DHANUKA,J.)