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True and Full Disclosure

- A Fetter on the power of the AO to reopen

1. The provisions related to reassessment u/s 147 to 151 of the Income Tax Act, 1961 (hereinafter referred as "*the Act*") has been the most litigated piece of legislation and this saga continues so. The powers conferred upon the Assessing Office, under section 147 of the Act, to reopen a concluded assessment is certainly wide in scope and the said provision has been interpreted by the courts to be meant solely for the benefit of the Revenue. However, howsoever vast such powers are, they are not unbridled and the legislature, being fully aware of the possibility of its abuse, have also suitably provided built-in checks and safety measures.

The Hon'ble Supreme Court primitively in the case of **ITO vs Lakhmani Mewaldas**, (1976)103 ITR 437, has held that the powers of ITO to reopen assessment,

though wide, are not plenary and observed that the reopening of assessment after the lapse of many years is a serious matter. It is, therefore, essential that before such action is taken, the requirements of the law be satisfied.

2. One of the hurdle which the AO has to essentially concur is the Proviso to S.147, which states that in the cases where the original assessment has been completed u/s 143(3) (i.e. the scrutiny assessment), the AO can invoke section 147 after the expiry of 4 years from the end of the relevant A.Y only and only if the escapement is the result of the failure on the part of assessee *to disclose fully and truly all material facts necessary for the assessment*. The AO, for a valid assumption of jurisdiction under section 147, therefore has to establish on facts that the assessee has really failed to disclose fully and truly all material facts which were necessary for the assessment but not otherwise.

3.1 Recently, the Hon'ble Apex Court had an occasion to deal with this pre-condition in the case of **NDTV vs. DCIT [2020] 116 taxmann.com 151 (SC)**. The relevant facts of this case in brief are as under: **(Relevant A.Y. 2008-09)**

- A.** The Assessee-company (**NDTV**) is an Indian company engaged in running television channels of various kinds. It has various foreign subsidiaries INCLUDING subsidiary based in the United Kingdom (UK) named **NDTV Network Plc., U.K. (hereinafter referred to as 'NNPLC')**.
 - B.** The NNPLC in July 2007 issued step-up coupon bonds amounting to US\$100 million in which the assessee acted as a guarantor. These bonds were to be redeemed at a premium of 7.5% after the expiry of the period of 5 years i.e in 2012. However, these bonds were redeemed in advance in November, 2009 itself at a discounted price of US \$74.2 million.
 - C. In the original assessment u/s 143(3)**, the Id. AO held that NNPLC it had no business of his own, & had virtually no financial worth, and therefore, it could
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not be believed that it could have issued convertible bonds of US\$ 100 million, unless the repayment along with interest was secured and this was secured only because the assessee acted as the guarantor. It was only because of assessee's assurance, NNLPCL could have raised such a huge amount. **The assessing officer did not doubt the genuineness of such transaction**, but he considering the transaction at arm's length imposed guarantee fee @ rate of 4.68% by treating it as a business transaction and added Rs. 18.72 crores to the income of the assessee, vide his order dated 03.08.2012.

- D.** Later on, in 2015, the AO, stating escaped income from assessment, **reopened the case** by issuing notice u/s 147/148 dated 31.03.2015 on the basis of reason that the Dispute Resolution Panel (DRP) has given a finding (*with reference to subsequent years*) that the **transactions with the subsidiary companies in Netherlands were sham and bogus transactions** and that these transactions were done with a view to get the undisclosed income, for which tax had not been paid, back to India by this circuitous round tripping.
- E.** The assessee filed a writ petition before the Hon'ble High Court, which was dismissed vide order dated 10.08.2017. Against the said order, the assessee filed the present Appeal before the Hon'ble Supreme Court.

3.2 The Hon'ble Apex formulated the following question to be answered lay it:

“Whether assessee did not disclose fully and truly all material facts during course of original assessment which led to finalization of assessment order and undisclosed income escaping detection”

3.3 Thus, the question which came before the Apex Court for consideration was ***“What is meant by Full and True disclosure of all necessary material facts?”***

3.4 On the above aspect the Hon'ble Apex Court held as under:

*“30. According to the revenue the assessee to avoid detection of the actual source of funds of its subsidiaries did not disclose the details of the subsidiaries in its final accounts, balance sheets, and profit and loss account for the relevant period as was mandatory under the provisions of the Indian Companies Act, 1956. It is not disputed that the **assessee had obtained an exemption from the competent authority under the Companies Act, 1956 from providing such details in its final accounts, balance sheets, etc.** As such it cannot be said that the assessee was bound to disclose this to the Assessing Officer. **The Assessing Officer before finalising the assessment of 03.08.2012 had never asked the assessee to furnish the details.***

*31. The revenue now has come up with the plea that certain documents were not supplied but **according to us all these documents cannot be said to be documents which the assessee was bound to disclose at the time of assessment.** The main ground raised by the revenue is that the assessee did not disclose as to who had subscribed what amount and what was its relationship with the assessee. As far as the first part is concerned it does not appear to be correct. There is material on record to show that on 08.04.2011 NNPLC had sent a communication to the Deputy Director of Income Tax (Investigation), wherein it had not only disclosed the names of all the bond holders but also their addresses; number of bonds along with the total consideration received. This chart forms part of the assessment orders dated 3-8-2012 in the case of M/s. NDTV Labs Ltd. and M/s. NDTV Lifestyle Ltd. The said two assessment orders were passed by the same officer who had passed the assessment order in the case of the assessee on the same date itself. Therefore, the entire material was available with the revenue.....”*

3.5 The Hon'ble court, while deciding the above case, took note of number of judgments on what true and full disclosure means and thereafter analysed as under:

*“A careful analysis of this judgment indicates that the Constitution Bench held that it is the duty of the assessee to disclose full and truly all material facts which it termed as primary facts. **Non-disclosure of other facts which may be termed as secondary facts is not necessary. In light of the above law, we shall deal with the facts of the present case.**”*

4. Thus, the bedrock condition to be essentially satisfied by the AO is to establish that the escapement is the result of the “*omission or failure to disclose fully and truly all material facts*” before assuming jurisdiction under section 147 proviso. The said expression pre-supposes that the facts which are required to be disclosed are already within the knowledge of the assessee at the material point of time. The word “*fully*” refers to a complete disclosure of all relevant and necessary facts for making an assessment as against a partial disclosure thereof, whereas the word “*truly*” refers to the correctness of the facts so disclosed/required to be disclosed as against false or made up facts. The duty of the assessee as regard to disclosure is with respect to both and his failure on accounts of any of these may provide a valid ground to the AO to proceed under section 147 proviso.

Further, it is not that any or every fact, which is required to be disclosed but it is only that fact which is necessary for the completion of the assessment, the assessee is required to disclose truly and fully. What facts will constitute as material & necessary will vary case to case. If the primary facts have been disclosed by the assessee, the duty of the assessee comes to an end. Then it is for the AO to draw a proper legal inference from the primary facts and the further facts on a correct interpretation of the law as to what would be the tax liability in a given case. There may be varied factual situations, where one has to examine whether the assessee has fulfilled the cumulative conditions or not.

5. Whether the Requirements/Exemption under other laws are relevant ? :

5.1 In the **NDTV case (supra)**, the case of the Revenue was that the assessee, with a view to avoid detection of the actual source of funds of its subsidiaries did not disclose the details of such subsidiaries in its final accounts, balance sheets, and profit and loss account for the relevant period, though it is a mandatory requirement as per the provisions of the Indian Companies Act, 1956. Meeting with this contention, the Hon'ble court observed that the undisputed fact was that the said assessee had already obtained an exemption from the competent authority under the Companies Act, 1956 from providing such details in the final accounts, balance sheets, etc. and consequently it can't be said the assessee was bound to disclose this to the AO.

5.2 Thus, non-fulfillment of the requirement of disclosing some facts under Other Acts, than the Income Tax Act, though may be relevant considering but merely on that basis the assessee cannot be charged for the failure/omission of disclosing fully and truly the material facts, unless the assessing officer had specifically asked the assessee with respect to those facts and details, the necessity of which he felt in absence of the disclosure by the assessee. In the case of **NDTV (supra)**, the Hon'ble court observed that under the Companies Act, the assessee was not required and secondly the AO also did not take care to ask the assessee to furnish those details and therefore, the Hon'ble court held the there was no failure on the part of the assessee to disclose fully and truly the necessary facts which were material for making assessment.

6. The Hon'ble Apex Court heavily relied upon the judgment of its **Constitutional Bench in the case of Calcutta Discount Co. Ltd. V. ITO 41 ITR 191 (SC)**, which has succinctly laid down as to what is meant by true & full disclosure. The relevant paras are reproduced here under:

“(8) The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every

assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise — the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.

(9) There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example — "I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose: My duty is done with disclosing these account-books and the documents." His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them — including

particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

(10) Does the duty however extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else — far less the assessee — to tell the assessing authority what inferences — whether of facts or law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences — whether of facts or law — he would draw from the primary facts.

(11) If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?"

7. Whether the existence of valid reasons alone will suffice for reopening after 4 years ?

7.1 Another pertinent aspect which is coming up is that apart from S. 149 prescribing the period of limitation, the Proviso to S. 147 has also put a limitation of 4 years from the end of relevant A.Y. and therefore, where the AO initiate proceedings u/s 147 for an A.Y. beyond the said period of 4 years therefrom, where assessment has already been made u/s 143(3), the AO has to satisfy the above condition mentioned in the proviso. In other words, even though the AO is having valid reason to believe under the main provisions of S. 147, that by itself will not suffice in such cases. Therefore, in order to assume valid jurisdiction beyond the normal period of 4 years, it is incumbent

upon the AO to establish, atleast, prima facie that the escapement was the result of failure to disclose fully and truly all necessary material facts.

7.2 In the **NDTV case (supra)** also, the Hon'ble court, despite holding that there did exist valid reasons to believe u/s 147, quashed the reassessment proceedings on the sole reason of non-fulfillment of the basic precondition of the Proviso to S. 147, by the AO in establishing that the escapement was the result of failure to disclose fully and truly all necessary material facts.

7. Summing up the above discussion :

- ❖ **Firstly**, the duty of the assessee is only to disclose fully and truly all the material facts for making the assessment. It is for the AO to draw inference from such primary facts.
 - ❖ **Secondly**, if the AO needs some additional information or documents, he must ask the assessee during the original scrutiny assessment proceedings.
 - ❖ **Thirdly**, non-compliance of requirements of other law cannot be made a basis for alleging assessee's failure. The AO can, if he considers such information w.r.t the other law to be relevant, ask the assessee to provide the same. Only in cases where the assessee fails to provide such additional information, it may be considered as a failure.
 - ❖ **Fourthly and most importantly**, the AO cannot get over by merely referring to the reasons to believe, unless he prima facie proves that there is a failure on the part of the assessee to fully and truly disclose all the material facts.
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