

(2017) 03 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 16481 of 2010

Akshar Infrastructure Pvt. Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 02-03-2017

Acts Referred:

Income Tax Act, 1961 — Section 147, Section 148

Citation : (2017) 393 ITR 658 : (2017) 246 Taxman 353

Hon'ble Judges : Mr. M.R. Shah and Mr. B.N. Karia, JJ.

Bench : Division Bench

Advocate : Mr J.P. Shah, Senior Advocate with Mr. Manish J. Shah, Advocate, for the Petitioners No. 1; Mr. Sudhir M. Mehta, Advocate, for the Respondents No. 1

Final Decision : Dismissed

Judgement

Mr. M.R. Shah, J.(Oral)—By way of this petition under Article 226 of the Constitution of India the petitioner has prayed for an appropriate writ, order or direction to quash and set aside the impugned notice issued by the Assessing Officer under Section 148 of the Income Tax Act (hereinafter referred to as "the Act") by which the Assessing Officer has sought to reopen the assessment for the Assessment Year 2005-06 alleging inter alia that the income chargeable to tax has escaped assessment.

2. The facts leading to the present Special Civil Application in a nutshell are as under;

2.1 The assessee filed the return of income for the Assessment Year 2005-06. During the year under consideration, the assessee purchased one land at a price of Rs.78 lakhs. However, stamp authorities valued the same at Rs.1,85,05,800/- and charged the stamp duty accordingly. In the scrutiny assessment under Section 143(3) of the Act the Assessing Officer added the difference of Rs.1,07,05,800/- (Rs.1,85,05,800/- - Rs.78,00,000/-) as deemed income, being unexplained under Section 69 of the Act. It appears that feeling aggrieved and

dissatisfied with the scrutiny assessment under Section 143(3) of the Act the assessee preferred Appeal before the learned CIT(A). At this stage, it is required to be noted that during pendency of the scrutiny assessment, the Assessing Officer made Reference to the District Valuation Officer ("DVO" for short). However, as according to the revenue, time limit to frame the scrutiny assessment was to over, the Assessing Officer without waiting for the DVO's report finalised the scrutiny assessment under Section 143(3) of the Act and added Rs.1,07,05,800/- as deemed income, being unexplained investment, under Section 69 of the Act. As observed herein above, against the scrutiny assessment under Section 143(3) of the Act the assessee preferred Appeal before the learned CIT(A). In the meantime, the Assessing Officer received the DVO's report valuing the property at Rs. 4,43,83,000/- by letter dated 5/10/2008 and letter dated 29/09/2009. Before the learned CIT(A) the Assessing Officer requested to enhance the deemed income on the basis of the DVO's report. However, relying upon its earlier decision in the case of Balkishan Poddar rendered in ITA No.3412, 3413 and 3414/Ahd/2008 dated 12/06/2009, learned CIT(A) has specifically observed that no addition can be sustained based on either stamp duty valuation or the valuation report of the DVO, and therefore, the learned CIT(A) rejected the prayer of the Assessing Officer to make the addition on the basis of the DVO's report. Thereafter, the Assessing Officer issued the impugned notice under Section 148 of the Act dated 09/10/2009 to reopen the assessment for the Assessment Year 2005-06 stating that the income had escaped the assessment and asked the assessee to file the return. By letter dated 27/11/2009 the assessee asked for the reasons recorded.

Thereafter, the Assessing Officer has furnished /supplied the reasons recorded to reopen the assessment for the Assessment Year 2005-06. The reasons to reopen the assessment for the Assessment Year 2005-06 reads as under;

"1. The return of income of, for the year under consideration, declaring the total income of Nil was filed on 31/10/2005. Assessment in the case was completed under Section 143(3) of the Act on 31/12/2007, determining the total income of the assessee company at Rs.1,58,17,760/-. The assessee is in appeal before the Hon"ble CIT(A)-I against the said assessment order, which is pending.

2. The assessee company was incorporated on 05/05/2004 and has purchased a piece of land measuring 4406.14 sq meters. In katargam area of Surat. The assessee company disclosed the value of the said land at Rs.78,00,000/-. During the course of assessment proceedings, it was observed by the Assessing Officer that the Deputy Collector, Stamp Duty Valuation Officer, Vibhag-I, Surat had valued the land at Rs.1,85,05,800/- and the assessee company had paid stamp duty of the said value of Rs.1,85,05,800/- and the assessee company had paid stamp duty of the said value of Rs.1,85,05,800/-. After giving sufficient opportunity and looking at the inability of the assessee company to explain the difference, the Assessing Officer added the differential amount of Rs.1,07,05,800/- to the total income of the assessee company under Section 69

of the Act. The Assessing Officer has referred the property for valuation to the Valuation Officer. However, the valuation report was not received by the Assessing Officer till the time of completion of the assessment.

3. The requisite valuation report has been received recently from the DVO, Ahmedabad vide letter No.2(44)/DVO/2007-08, dated 29/09/2009, wherein the value of the said land is assessed at Rs.4,43,83,000/-. While completing the assessment, the Assessing Officer adopted the value of the land at Rs.1,85,05,800/- as against the value of Rs.4,43,83,000/- assessed by the Valuation Officer. As such, the value of the land in question is assessed less by Rs.2,58,77,200/-.

4. In view of the above facts, the undersigned has a reason to believe that income to the extent of Rs.2,58,77,200/- has escaped assessment in the hands of the assessee company. As such, an income of Rs.2,58,77,200/- has escaped assessment within the meaning of Section 147 of the Act and the undersigned is satisfied that this case is a fit case for issue of notice under Section 148 of the Act."

2.2 The assessee raised the objection against reopening of the assessment/ reasons recorded to reopen the assessment. It was specifically pointed out that the learned CIT(A), after considering the DVO's report, rejected the proposal for making the addition on the basis of the fair market value fixed by the DVO, and therefore, it was submitted that thereafter it was not open for the Assessing Officer to reopen the assessment on the aforesaid ground relying upon the DVO's report. By order dated 24/11/2010 the Assessing Officer has rejected the objections of the assessee. Hence, the petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India challenging the impugned notice under Section 148 of the Act.

3. Shri J.P. Shah, learned Senior Advocate appearing on behalf of the assessee has vehemently submitted that the impugned notice under Section 148 of the Act and reopening of the assessment for the Assessment Year 2005-06 is bad in law. It is vehemently submitted by Shri J.P. Shah, learned Senior Advocate appearing on behalf of the assessee that as such solely on the basis of the DVO's report the Assessing Officer is not justified in reopening the completed / concluded scrutiny assessment under Section 143(3) of the Act. It is vehemently submitted by Shri J.P. Shah, learned Senior Advocate appearing on behalf of the assessee that as observed by the Hon'ble Supreme Court in the case of Assistant Commissioner of Income-Tax v. Dhariya Construction Co. reported in (2010) 328 ITR 515 (SC) the opinion given by the DVO is not per se information for the purpose of reopening an assessment under Section 147 of the Act. It is submitted that therefore solely on the basis of the DVO's report, the Assessing Officer is not justified in reopening the assessment, which was, as such, scrutiny assessment under Section 143(3) of the Act.

3.1 It is further submitted by Shri J.P. Shah, learned Senior Advocate appearing

on behalf of the assessee that even otherwise and having failed before the learned CIT(A) to enhance the deemed income, relying upon the DVO's report, thereafter it is not open for the Assessing Officer to reopen the assessment on the very ground, which was not accepted by the learned CIT(A). It is submitted that in the present case, in Appeal against the scrutiny assessment under Section 143(3) of the Act, the Assessing Officer did request to enhance the unexplained / unaccounted income, however, the learned CIT(A) specifically rejected the said request by observing and relying upon its earlier decision in the case of Balkishan Poddar (Supra). It is submitted that the decision in the case of Balkishan Poddar (Supra) has been subsequently confirmed by the Division Bench of this Court. It is submitted that therefore having failed before the learned CIT(A) to get any enhancement relying upon the DVO's report, thereafter it is not be open for the Assessing Officer to reopen the assessment on the very ground relying upon the DVO's report.

Making the above submissions, it is requested to allow the present petition and quash and set aside the impugned reopening.

4. The present petition is vehemently opposed by Shri Sudhir Mehta, learned Advocate appearing on behalf of the revenue. It is vehemently submitted by Shri Sudhir Mehta, learned Advocate appearing on behalf of the revenue that in the facts and circumstances of the case and having received the information in the form of DVO's report, which was not available at the time when the scrutiny assessment was framed, the Assessing officer is justified in reopening the assessment for the Assessment Year 2005-06.

4.1 It is further submitted by Shri Sudhir Mehta, learned Advocate appearing on behalf of the revenue that as such there is a vast difference between the valuation determined by the Assessing Officer while framing the scrutiny assessment and the DVO's report. It is submitted that therefore having received an information in the form of DVO's report and thereafter when the Assessing Officer has formed an opinion that the income chargeable to tax has escaped the assessment, the Assessing Officer is justified in reopening the assessment. Shri Sudhir Mehta, learned Advocate appearing on behalf of the revenue has heavily relied upon the decision of the Delhi High Court in the case of ACC Ltd. v. District Valuation Officer reported in 357 ITR 160 (Delhi) as well as the decision of the Allahabad High Court in the case of Sunder Carpet Industries v. Income-tax Officer reported in (2010) 324 ITR 417 (All).

Making the above submissions and relying upon the above decisions, it is requested to dismiss the present petition.

5. Heard the learned Advocates appearing on behalf of the respective parties at length. At the outset, it is required to be noted that the scrutiny assessment under Section 143(3) of the Act is sought to be reopened by the Assessing Officer solely relying upon the DVO's report. Nothing is on record that except the DVO's report there was any further inquiry and/or material available with the

Assessing Officer to form an independent opinion that the income chargeable to tax has escaped the assessment for the Assessment Year 2005-06. As held by Hon''ble the Supreme Court in the case of Dhariya Construction Co. (Supra) opinion given by the District Valuation Officer is not per se information for the purpose of reopening an assessment under Section 147 of the Act.

Similar view has been taken by the Division Bench of this Court in the case of Dr. Rajivraj Ranbirsingh Choudhary v. Assistant Commissioner of Income-Tax rendered in Special Civil Application No. 21470/2016. Under the circumstances, solely relying upon and /or on the basis of the information in the form of DVO's report, the Assessing Officer is not justified in reopening the scrutiny assessment under Section 143(3) of the Act.

5.1 It is also required to be noted that as such while framing the original assessment, it was the scrutiny assessment and the Assessing Officer made the addition of Rs.1,07,05,800/- as deemed income, being unexplained investment under Section 69 of the Act, considering the valuation determined by the stamp authorities and thereafter the Assessing Officer framed the assessment.

5.2 Now so far as the submission on behalf of the revenue that at the time when the Assessing Officer framed the scrutiny assessment, the Assessing Officer was not having the DVO's report though reference was already made during the assessment proceedings, which came to be received subsequently, and therefore, the Assessing Officer is justified in reopening the assessment on the basis of the information in the form of DVO's report is concerned, it is required to be noted that as such against the original scrutiny assessment under Section 143(3) of the Act, the assessee preferred Appeal before the learned CIT(A) and in the meantime the Assessing Officer received the DVO's report. It is required to be noted that before the learned CIT(A), relying upon the DVO's report, the Assessing Officer did make the request to make enhancement, however, considering its earlier decision in the case of Balkishan Poddar (Supra), which is subsequently confirmed by the Division Bench of this Court by specifically observing in paragraph 2.3.1 the learned CIT(A) has refused to make the addition on the basis of the DVO's report by observing that no addition can be sustained based on either stamp duty valuation or the valuation report of the DVO. Relevant observations in paragraph 2.3.1 of the learned CIT(A) reads as under;

"2.3.1. I have considered the submission made by the appellant and the observation of the A.O. In view of the higher valuation of the DVO, this case could have been a case of enhancement, however, in view of the decision of the jurisdictional Hon''ble ITAT, Ahmedabad in the case of Shri Bharkat Kumar N. Patel, ITA No.1749/Ahd/2008 dated 29/08/2008 and also the decision of the Hon''ble ITAT, Ahmedabad in the case of Balkishan Poddar, ITA No.3412, 3413 and 3414/Ahd/2008 dated 12/06/2009, no addition can be sustained based on either stamp duty valuation or the valuation report of the DVO. In view of this reason, the arguments against the DVO report are not considered."

5.3 That thereafter, the Assessing Officer has issued the impugned notice under Section 148 of the Act and has reopened the reassessment for the Assessment Year 2005-06 solely based upon the DVO's report, which was considered by the learned CIT(A) and the learned CIT(A) has specifically refused to make any addition relying upon the DVO's report. Once having failed before the learned CIT(A) to enhance the unexplained investment, which was relying upon the DVO's report, thereafter it is not open for the Assessing Officer to reopen the assessment under Section 148 of the Act on the very ground i.e. relying upon the DVO's report. Under the circumstances, the impugned notice under Section 148 of the Act and /or reopening of the assessment for the Assessment Year 2005-06 cannot be sustained and the same deserves to be quashed and set aside.

5.4 Now, so far as the reliance placed upon the decision of the Delhi High Court in the case of ACC Ltd (Supra) is concerned, on going through the decision of the Delhi High Court, we are of the opinion that the said decision shall not be applicable to the facts of the case on hand. In the case before the Delhi High Court the assessee challenged the reference to the DVO and /or DVO's report on the ground that the valuation report was received after completion of the assessment proceedings. In the present case, having found that during pendency of the assessment proceedings Reference was already made to the DVO, however the DVO's report was not received and as the time limit to frame the assessment was likely to be over, the Assessing Officer completed the assessment and directed for recomputation of the capital gain and on receipt of the DVO's report, it was found that reference to the DVO was made during the assessment proceedings, the same can be relied upon by the Assessing Officer. Thus, on facts, the said decision shall not be applicable to the facts of the case on hand.

5.5 Now, so far as the reliance placed upon the decision of the Allahabad High Court in the case of Sunder Carpet Industries (Supra) is concerned, on considering the same, we are of the opinion that the said decision also shall not be applicable to the facts of the case on hand. Before the Allahabad High Court firstly it was not the scrutiny assessment under Section 143(3) of the Act and secondly in the present case as observed herein above, on the basis of the DVO's report before the CIT(A) the Assessing Officer did attempted to enhance the deemed income /unexpected investment relying upon the report of the DVO, which was not accepted by the learned CIT(A).

6. In view of the above and for the reasons stated herein above, the present petition is allowed. The impugned notice under Section 148 of the Act dated 09/10/2009 for the Assessment Year 2005-06 is hereby quashed and set aside. Rule is made absolute accordingly. No order as to costs.