(2017) 03 GUJ CK 0212

In the Gujarat High Court

Case No : 16532 of 2016

CHINTAN JADAVBHAI PATEL APPELLANT

Vs

INCOME TAX OFFICER RESPONDENT

Date of Decision : 01-03-2017

Acts Referred:

Constitution of India, Article 226 - Power of High Courts to Issue certain writs

Income Tax Act, 1961, Section 147, Section 147, Section 147, Section 147, Section 148, Section 148, Section 148, Section 148, Section 143(3), Section 143(3), Section 143(3), Section 143(3), Section 143(1), Section 143(1), Section 143(1), Section 143(1) - Income escaping assessment - Issue of notice where income has escaped assessment - Assessment - Assessment

Citation : (2017) 03 GUJ CK 0212

Hon'ble Judges : M R Shah, B N Karia

Bench : Division Bench

Advocate : Tushar P Hemani, Vaibhavi K Parikh, Mauna M Bhatt

Final Decision : Allowed

Judgement

1. By way of this petition under Article 226 of the Constitution of India, the petitioner-asesse has prayed for appropriate writ, direction and order to quash and set aside the impugned notice under Section 148 of the Income Tax Act, by which, the AO has sought to reopen the assessment for AY 2009-10 alleging inter alia that income chargeable to tax has escaped assessment within the meaning of Section 147 of the Income Tax Act.

2. The facts leading to the present petition in nutshell are as under:

2.1. The petitioner-assessee was the owner of land bearing revenue survey no. 41 block no. 49 A situated at Village Vankala, Dist. Surat. That the assessee sold the said land to one Shri Popat Kakadia on 28.03.2008 for a sale consideration of Rs.30,09,500/. That the said sale deed in respect of the said transaction was registered with the Sub Registrar office on 11.07.2008. That the petitioner claimed short term capital gain of Rs. 26,12,040/on sale of the land in question which was dully reflected in the books of account of the income tax return for AY 2008-09.

2.2. That thereafter, the assessee filed return of income for AY 2009-10 on 30.09.2009 declaring total income at Rs. 1,84,740/and agricultural income at Rs. 3,74,062/, which came to be initially processed under Section 143(1) of the Act. That thereafter, assesseee case was selected for scrutiny and assessment was framed under Section 143(3) of the Act vide order dated 8.11.2011 without any any alternation in the return of income.

2.3. That thereafter, after a period of four years from the end of relevant assessment year, AO has issued the impugned notice dated 23.03.2016 under Section 148 of the Act for reopening of the assessment for AY 2009-10 alleging inter alia that income chargeable to tax has escaped assessment for the year under consideration i.e. AY 2009-10.

2.4. That the petitioner-assessee requested the AO to treat the original return of income filed on 30.09.2009 as return filed in response to the impugned notice issued under Section 148 of the Act and further requested to supply the reasons for reopening. That the AO has supplied the copy of the reasons for reopening vide letter dated 2.6.2016. The reasons recorded for reopening, read as under:

"As per sale / purchase deeds of specific land at village Vankala, Block No. 49 A, Dist. Surat., wherein it was found that Shri Prakash Vallabhbhai Sutariya, PAN AKGPS9462A, Shri Chintanbhai Jadavbhai Patel and Shri Rajendrakumar Kantilal Patel and Shri Paraskumar Natwarlal Patel have sold land situated at Vankala, Block No. 49 A, Dist. Surat to purchaserShri Popat Harjibhai Kakadia. Shri Popat H Kakadia is father of Shri Sharad Kakadia who happens to be signatory of "sauda chittihi. Total transaction has recorded consideration of Rs. 56,39,500/ between four separate seller agreement. Out of four below transaction has recorded as below mentioned table as seller in the name of Shri Chintanbhai Jadavbhai Patel PAN: AGRPP3177E. Address: 347, Madhav Darshan, Waghawadi Road, Bhavnagar.

Sr.No Agreement No. Name of the seller Name of the Purchaser Amount of consideration

1 No. SRT/1/ATV/ 11509/2008 Area 14397 sq yrds. Shri Chintanbhai Jadavbhai Patel

Shri Popat Harjibhai Kakadia

30,09,500/-

In view of the facts stated above, it is clear that Chintanbhai Jadavbhai Patel has sold land having area of 14397.328 sq yard as mentioned in the above table and registered deed was executed at Rs. 30,09,500/only. As per information that actual consideration for land sold by Chintan Jadavbhai Patel was Rs. 8,92,77,830 (Rs. 4601 per yard multiply by 14397.328 sq yard = Rs. 8,92,77,830/. Therefore, difference of Rs. 8,62,68,330/received by the assesssee (as deed was executed by Shri Chintan J Patel as capacity of seller). The above named assessee had filed return of income of Rs.2,84,740/(salary income of Rs.1,04,000/Business income of Rs. 10,616/and other sources of income of Rs. 1,70,128/) on 30.09.2009 for AY 2009-10 "No Long Term Capital Gain" shown in his return of income for the relevant year.

In view of the above, I have reason to believe that the Difference between the sale deed and actual consideration received by the assessee to the extent shown as above, capital gain chargeable to tax has escaped assessment for the AY 2009-10 within the meaning of provisions of Section 147 of the Act. Therefore, the proposal under Section 147 of the Income Tax for reopening of assessment for AY 2009-10 may please be accorded, if deemed fit. "

2.5. On receipt of the reasons recorded for reopening the assessment for AY 2009-10, the assessee filed the detailed objection. It was submitted that as such there was no escapement of income at all. It was submitted that the assessee was not party to the "sauda chitthi", upon which, reliance was placed by the AO while holding that the sale consideration was Rs. 8,92,77,830/. It was also submitted that even from the statement of Shri Rajesh Vaghani dated 30.06.2014 also it cannot be said that the assessee has received any amount towards on money in cash. It was also submitted that as such the transaction was with the assessee and one Shri Popat Kakadia and no addition by way of undisclosed investment has been made in the account of Shri Popat Kakadiapurchasers. It was also submitted that as such sale deed executed by the assessee was in AY 2008-09 and even short term capital gain on sale of land in question claimed by the assessee in AY 2008-09 and the notice under Section 148 of the Act has been issued alleging inter alia that on sale of land in question the undisclosed income has arisen in the 2009-10. Therefore, it was submitted that no income had arisen on sale of the land much less undisclosed income the year 2009-10. Therefore, it was requested to drop the notice. That by order dated 26.07.2016 the AO has not accepted the objection raised by the assessee and has disposed of the same. 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. It is vehemently submitted by Shri Tushar Hemani, learned counsel for the petitioners assessee that as such there is no tangible material available with the Assessing Officer to form reasonable belief that the income chargeable to tax has escaped assessment in the year 2009-10. It is submitted that formation of opinion by the Assessing Officer that income chargeable to tax in 2009-10 has escaped assessment is based on surmise and conjectures which cannot be the

basis to reopen the assessment under Section 147 of the Act. 3.1. It is vehemently submitted by Shri Tushar Hemani, learned counsel for the petitioners assessee that in the case of purchasersShri Popat Kakadia who was assessed under Section 143(3) of the Act for AY 2009-10, not a rupee has been added in his assessment by way of unaccounted payment in respect of purchase of the above land. It is submitted that if according to the department, said Popatbhai Kakadia has not made any unaccounted payment to two sellers, there is no question of assessing capital gain of the differential amount of Rs. 8,62,68,330/ in the hands of the assessee.

3.3. It is submitted by Shri Tushar Hemani, learned advocate for the petitionerassessee that from the reasons recorded by the AO to reopen the assessment, it appears that AO has heavily relied upon the "sauda chitthi" dated 12.03.2008. It is submited that the said "sauda chitthi" which was recovered during the search from the premises of one Shri Rajesh Vaghani was signed by one Shri Sharad Kakadia and Shri Vinod Ravani in favour of Shri Sharad Kakadia and one another. It is submitted that apart from the fact that the assessee was not signatory to the said "sauda chitthi" and even the said "sauda chitthi" was executed by the persons who were not owners of the land. It is submitted that even as per the statement of Shri Rajesh Vaghani, the said assessee was not acted upon. It is submitted that thereafter even the sale deed has been executed in favour of Shri Popatbhai Kakadia by the assessee (original owner). It is submitted that even from the statement of Shri Rajesh Vaghani, upon which, much reliance has been placed by the AO there is no material that any amount in cash was received by the assessee. It is submitted that therefore, as such there is no tangible material available with the AO to come to the conclusion that any on money in cash was received by the assessee, more particularly, Rs. 8,92,77,830/received by the asssessee as a sale consideration.

3.4. It is vehemently submitted by Shri Hemani, learned counsel for the petitioners assessee that if the sale has taken place between the petitioner-ssellers and Popatbhai Kakadia on 27.03.2008, how can Shri Alpesh Kotadia and Shri Vinod Ravani entered into a sauda chittihi on 12.03.2008 to Sharda Kakadia and Rajesh Vaghani of the land which Shri Alpesh Kakadia and Shri Vinod Ravani were not owning and in that case how can unaccounted capital gain arise in case of two of real sellers of the land i.e. Shri Rajendra Patel and Shri Parasbhai.

3.5. It is submitted that therefore, there is no tangible material available with the AO to form a reasonable belief that the income chargeable to tax in the year 2009-10 has escaped assessment within the meaning of Section 147 of the Act.

Making above submissions and relying upon the above decision, it is requested to allow the present petitions and to quash and set aside the impugned notices and reassessment proceeding for AY 2009-10.

4. Present petition is opposed by Ms. Mauna Bhatt, learned counsel for the revenue. It is vehemently submitted by Ms. Bhatt, learned counsel for the

revenue that after considering the material on record, more particularly, "sauda chittihi" dated 12.03.2008 and the statement of Shri Rajesh Vaghani on whose premises search was conducted, the AO has rightly framed the reasonable belief that the income chargeable to tax to the extent of Rs. 8,62,68,330/has escaped assessment for AY 2009-10 as full sale consideration has not been shown as long term capital gain and therefore, the AO is justified in reopening the assessment for AY 2009-10. 4.1. It is vehemently submitted by Ms. Mauna Bhatt, learned counsel for the revenue that as the sale deed was registered with the office of SubRegistrar on 25.07.2008 and therefore, it can be said that the transfer of land as well as sale consideration was received by the assessee in AY 2009-10 and therefore, AO has rightly reopened the assessment for AY 2009-10.

4.3. It is vehemently submitted by Ms. Mauna Bhatt, learned counsel for the revenue that the sauda chittihi dated 12.03.2008 was made prior to the date of registration of the land in question by assessee i.e. 25.07.2008, which clearly proves that the assessee was in contact with the sellers i.e. Shri Vinod S Ravani and Shri Alpesh G Kotadia, whose names appear in said sauda chitthi which shows that the said land was transferred on account of payment of Rs. 18,23,19,011/in cash. It is submitted that it is true that the said Shri Vinod Ravani and Shri Alpesh Kotadia who signed the sauda chittihi were not legal owner. It is submitted that however it is common modus operandi used in purchase and sale of land that land are transferred through middlemen which facilitate the actual owners of the land to find out prospective buyers at the suitable price. It is submitted that in the present case Shri Vinod S Ravani and Shri Alpesh Kotadia were not in a capacity to transfer said land as they were not the legal owner of the said land and they just acted as a middle man to facilitate the transfer of said land to Shri Popat H Kakadia. It is submitted that Shri Shard P Kakadia who appeared as one of the purchaser of said land in the said sauda chittihi is son of actual purchaserShri Popat H Kakadia. It is submitted that thus it is clear that Shri Vinod Ravani and Shri Alpesh Kotadia acted on behalf of the assessee and Shri Sharad P Kakadia acted on behalf of Shri Popat H Kakadia and amount mentioned in said sauda chittihi was ultimately transferred to the assessee. It is submitted that therefore, the AO is justified in forming belief that income chargeable to tax has escaped assessment for the AY 2009-10.

Making above submissions, it is requested to dismiss the present petitions.

5. Heard the learned counsel for the respective parties at length. We have perused and considered the reasons recorded to reopen the assessment for AY 2009-10. We have also perused and considered the statement of Shri Rajesh Vaghani, on the basis of which, the AO has formed an opinion that in the case of assessee the income chargeable to tax for AY 2009-10 has escaped assessment. 5.1. From the reasons recorded to reopen the assessment for AY 2009-10, it appears that on the basis of one "sauda chittihi" dated 12.03.2008, seized during the search of the premises of one Shri Rajesh Vaghani, to which, one Shri Sharad Kakadia was the signatory, the assessee has sold the land having area of

14397.328 sq yard for total sale consideration of Rs. 8,92,77,830/(Rs. 4601 per yard multiply by 14397.328 sq yard = Rs. 8,92,77,830/). According to the AO, the sale consideration in the sale deed executed by assessee in favour of one Shri Popatbhai Kakadia was for sale consideration of Rs. 30,09,500/and therefore, the difference of Rs. 8,62,68,330/has escaped assessment by way of long term capital gain in the account of assessee. However, it is required to be noted that as such the "sauda chittihi" upon which the reliance has been placed, the assessee is not the signatory. Even the concerned persons who signed and / or executed the said "sauda chittihi" were not even the owners of the land in question. It has also come on record that even the said "sauda chittihi" was not acted upon. Even thereafter, the assessee has sold the property to one Shri Popatbhai Kakadia, who is also not signatory to "sauda chittihi". There does not appear to be any other tangible material available with the AO to even prima facie show that the assessee had received any on money in cash and / or sale consideration of Rs. 8,92,77,830/. Similarly on the basis of the amount mentioned in the "sauda chittihi" to which, neither assessee nor even the purchasers Shri Popatbhai Kakadia were signatory, the formation of the opinion by the AO that the assessee has sold the land at Rs. 8,92,77,830/(Rs. 4601 per yard multiply by 14397.328 sq yard = Rs. 8,92,77,830/) is only on surmises and conjectures and for which, there is no tangible material available with the AO. Under the circumstances, the AO has materially erred in forming the opinion that assessee had received the sale consideration of Rs. 8,92,77,830/and thereby has wrongly considered the difference of Rs. 8,62,68,330/as undisclosed income and thereby has materially erred in holding that any income chargeable to tax has escaped assessable for AY 2009-10. There is no other tangible material with the AO, by which, it can prima facie be considered that Rs. 8,92,77,830/has been received by the assessee-sellers as sale consideration.

6. Present matter is also required to be considered from another angle. It is required to be noted that in the present case, the sale deed has been executed by the petitioner on 27.03.2008. The sale consideration has been received by the petitioner on 27.03.2008. It is also required to be noted that when the petitioner filed return of income for the AY 2008-09, he claimed the short term capital gain of Rs. 26,12,040/on sale of the aforesaid land in question, which was duly reflected in books of account and income tax return for AY 2008-09. Therefore, the transfer had taken place in AY 2008-09. Thus, the the transfer of land has been taken place on 27.03.2008 when the sale deed has been executed. Therefore, it can be said that income has arisen in the AY 2008-09 and therefore, if at all any income has escaped assessment, the same can be said to be in AY 2008-09. By impugned notice, assessment for AY 2009-10 is sought to be reopened on the ground that income chargeable to tax has escaped assessment in 2009-10. When, it was pointed out to AO that the transfer had taken place on 27.03.2008 and therefore, it can be said that the income has arisen in the year 2008-09 and therefore, there cannot be any escapement of income in the year 2009-10, while disposing of the objection raised by the assessee against the

reasons recorded, the AO has overruled the said objection by observing that as the document has been executed only on 11.07.2008 and therefore, the transaction pertains to AY 2009-10 and therefore, the date of execution of the document as 11.07.2008 relevant to AY 2009-10 and therefore, the AO has overruled the objection. Even otherwise, as per the decision of the Full Bench of this Court in the case of CIT vs. Hormasji Mancharji Vaid reported in 250 ITR 542 the capital gain under Section 45 of the Act arises in the year of execution of deed and not when the same was registered with the office of the SubRegistrar. In the said decision, the Full Bench of this Court has observed and held as under:

"For the purpose of tax on capital gains under Section 45 of the Income Tax Act, 1961 transfer of immovable property of value exceeding Rs. 100 is effected on the date of execution of the document of transfer and not either on the date of presentation of the document for registration or on the date on which registration of the deed is completed. The capital gains on the transfer has to be assessed to tax in the assessment year relevant to the previous year within which the date of execution of the deed of transfer falls, and not the subsequent assessment year relevant to the previous year in which the deed is registered."

6.1. Under the circumstances also, the AO has materially erred in forming the opinion that any income chargeable to tax has escaped assessment for the year 2009-10.

6.2. In view of the above and for the reasons stated above, impugned proceedings for reopening of the assessment for AY 2009-10 and the impugned notice cannot be sustained and same deserve to be quashed and set aside.

7. In view of the above and for the reasons stated above, present petition succeeds. The impugned notice dated 23.03.2016 issued under Section 148 of the Income Tax Act and impugned proceedings for reopening of the assessment for AY 2009-10 are hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No costs.

