
(2015) 04 GUJ CK 0104

In the Gujarat High Court

Case No : Special Civil Application No. 1620 of 2015

Devendra Somabhai Naik

APPELLANT

Vs

Asst. Commissioner of Income Tax

RESPONDENT

Date of Decision : 22-04-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 143(1), 143(3), 147, 148, 150

Citation : (2015) 377 ITR 402

Hon'ble Judges : M.R. Shah, J;S.H. Vora, J

Bench : Division Bench

Advocate : B.S. Soparkar, for the Appellant; Sudhir M. Mehta, Advocates for the Respondent

Judgement

M.R. Shah, J.

1. Rule. Learned advocate Shri Sudhir Mehta waives service of notice of rule on behalf of the respondent.
2. With the consent of learned advocates appearing for the respective parties, the matter is taken up for final hearing today.
3. By way of present petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, direction and order to quash and set aside the impugned notice dated 30.7.2013 issued under section 148 of the Income Tax Act (for short "the Act") (Annexure A to the petition), by which the assessment for A.Y. 2005-06 is sought to be reopened after a period of six years from the relevant assessment years.
4. It is an admitted position that for A.Y. 2005-06 and after the case was taken for scrutiny, an order under section 143(1) came to be passed on 30.11.2007. Later on, a notice has been issued under section 148 of the Act on 29.3.2011 and the order came to be passed under section 143(3) read with section 147 of the Act on 25.11.2011. It appears that in the case of one M/s. Devrekha

Engineers Private Limited, assessment for A.Y. 2005-06 was sought to be reopened beyond the period of four years and the question arose whether the amount of Rs. 1,46,00,000/- alleged to have been received by the said assessee as long term capital gain was to be added to the income of the said assessee firm or not? The Assessing Officer passed an order against the assessee and in favour of the revenue. However, on an appeal before the learned CIT (Appeals), the learned CIT (Appeals) was of the opinion that notice under section 148 for A.Y. 2005-06 was required to be issued in the case of the present assessee - Devendra S. Naik.

5. Learned CIT (Appeals) also confirmed the disallowance made by the Assessing Officer by not granting the deduction under section 154EC against the amount of Rs. 87 lac with respect to sale consideration of Rs. 1,46,00,000/-. It appears that on the basis of the observations made by the learned CIT (Appeals) in the case of another assessee M/s. Devrekha Engineers and the directions issued in the order dated 25.6.2013 in Appeal No. CAS-I/282/11-12, by which the learned CIT (Appeals) observed and directed that notice under section 148 of the Act for A.Y. 2005-06 has to be issued in the case of the present assessee - Devendra S. Naik, the Assessing Officer extended the period of limitation as provided under section 150 of the Act and has issued the impugned notice to reopen the reassessment for A.Y. 2006-07. That at the request of the petitioner - assessee, the petitioner assessee has been served with the reasons recorded vide communication dated 22.8.2013. That thereafter, the petitioner raised objections against reopening and by order dated 15.9.2014, the Assessing Officer has disposed of the said objections and overruled the said objections raised by the petitioner - assessee raised against reopening of the assessment for A.Y. 2005-06. Hence, the petitioner has preferred the present petition under Article 226 of the Constitution of India challenging the impugned reassessment proceedings.

6. At this stage, it is required to be noted that in the meantime, an order was passed by the learned CIT (Appeals) dated 25.6.2013 in which the learned CIT (Appeals) issued direction to reopen the assessment for A.Y. 2005-06 in the case of the present assessee and even on merit also, the said assessee M/s. Devrekha Engineers carried the matter before the learned Income Tax Appellate Tribunal (for short "learned Tribunal") and the learned Tribunal by order dated 27.3.2014 allowed the said appeal by observing that reassessment proceedings in the case of said assessee M/s. Devrekha Engineers was beyond the period of limitation as prescribed under section 147 of the Act and therefore, deleted the disallowance. Simultaneously, learned Tribunal also set aside the direction issued by the learned Tribunal, by which the learned CIT (Appeals) directed to issue notice under section 148 of the Act in the case of the present assessee for A.Y. 2005-06 by invoking the provisions of section 150 of the Act.

7. It is reported and it is not in dispute that the order passed by the learned Tribunal dated 27.3.2014 has been confirmed by the Division Bench of this Court vide order passed in Tax Appeal No. 1059 of 2014.

8. Shri B.S. Soparkar, learned advocate appearing on behalf of the petitioner has vehemently submitted that in the present case, admittedly, the assessment for A.Y. 2005-06 has been reopened after a period of six years. It is submitted that the reopening proceedings have been initiated for A.Y. 2005-06 solely on the direction issued by the learned CIT (Appeals) issued in the order dated 25.6.2013 in the case of one another assessee M/s. Devrekha Engineers, by which the learned CIT (Appeals) directed to issue notice upon the present assessee under section 148 of the Act invoking the extended period of limitation as prescribed under section 150 of the Act. It is submitted that when the direction issued by the learned CIT (Appeals) to reopen the assessment for A.Y. 2005-06 in the case of the present assessee itself has been set aside by the learned Tribunal and the same has been confirmed by the Division Bench of this Court, there was no question of invoking section 150 of the Act. It is submitted that section 150 of the Act can be invoked to give effect to the order passed by the appellate authority and/or any other authority and on the eventuality, as mentioned in section 150 of the Act. It is submitted that therefore, in the present case when the order/direction issued by the learned CIT (Appeals) which was sought to be given effect by invoking section 150 of the Act itself has been set aside by the learned Tribunal, there was no question of invoking any power now under section 150 of the Act. It is submitted that when the learned Assessing Officer initiated reopening proceedings by impugned notice dated 30.7.2013, the Assessing Officer might have justified in reopening the assessment proceedings on the basis of the direction issued by the learned CIT (Appeals) issued in the order dated 25.6.2013 (subject to his submission that the effect of any order must be in the case of the very assessee). However, it is submitted that in the present case, the direction/order of which the effect is given in exercise of powers under section 150 of the Act by reopening the assessment for A.Y. 2005-06 itself has been set aside by the learned Tribunal and confirmed by this Court, in that case, the basis for invoking the powers under section 150 of the Act would not be existed and/or survive and therefore, the impugned reopening proceedings deserves to be quashed and set aside. Making above submissions, it is requested to allow the present petition.

9. Shri Sudhir Mehta, learned advocate appearing on behalf of the respondent revenue has tried to oppose the present petition and justify the reopening proceedings. He has relied upon the Affidavit-in-reply filed by the Assessing Officer. He has tried to submit on merits, however, as this Court is required to consider whether the reopening proceedings, which are admittedly beyond the period of six years issued by invoking section 150 of the Act, are justified or not. Unless and until it is found that assumption of jurisdiction for reopening is justified and/or permissible, this Court is not required to go into the merit of the claim/case at all. He has submitted that at the relevant time, when the Assessing Officer issued notice for reassessment, the direction issued by the learned CIT (Appeals) to issue notice upon the present assessee under section 148 of the Act by invoking the provisions of section 150 of the Act was very much there and

therefore, the Assessing Officer is justified in issuing the impugned notice. It is further submitted that as it has been found that the income to the tune of Rs. 1,46,00,000/- had escaped the assessment of the present assessee as per the observations of the learned CIT (Appeals) in the case of M/s. Devrekha Engineers, the income of Rs. 1,46,00,000/- is to be taxed in the hands of the present assessee in the nature of long term capital gain and therefore, for the reasons recorded, the Assessing Officer is justified in issuing the impugned notice under section 148 of the Act and is justified in reopening the assessment for A.Y. 2005-06.

10. It is submitted that in the present case, section 150 of the Act has rightly been invoked and that too in view of the observations and directions issued by the learned CIT (Appeals) in the order dated 25.6.2013, it is requested to dismiss the present petition.

11. Heard learned advocates appearing on behalf of the respective parties at length.

12. It is required to be noted that what is challenged in the present petition is the impugned notice at Annexure A issued under section 148 of the Act, by which the assessment for A.Y. 2005-06 has been sought to be reopened beyond the period of six years. The reasons recorded for reopening of the assessment for A.Y. 2005-06 has been communicated to the petitioner - assessee vide communication dated 22.8.2013, which reads as under:

"Sub: Reasons recorded for re-opening the assessment for A.Y. 2005-06

Reg: Your letter dt. 17.08.2013.

As requested, the reasons recorded for reopening the assessment is communicated as under:

"In the case of M/s. Devrekha Engineers Pvt. Ltd., assessment u/s. 143(3) r.w.s 147 of the I.T. Act was completed on 29.12.2011 assessing total income at Rs. 59,25,200/-. The AO made an addition on account of Long Term Capital Gain of Rs. 59,00,000/- and income from other sources of Rs. 325,195/-.

Aggrieved by the order of the A.O., the assessee filed an appeal before the Ld. CIT(A)-I, Surat. The Ld. CIT(A)-I, Surat vide his order No. CAS-I/282/11-12 dt. 25.06.2013 enhanced the addition made by the AO and partly allowed the appeal of the assessee.

ii The assessee M/s. Devrekha Engineers Pvt. Ltd. failed to submit any proof of payment to GIDC or any document copy in support of its claim regarding cost of purchase of land and thus the indexed cost of acquisition of Rs. 59,20,188/- cannot be permissible. The property rights in question were vested in the sister concern and therefore, LTCG/STCG is to be taxable only in the hands of sister concern. The Ld. CIT(A) has given directions u/s. 150(1) to issue notice. u/s. 148

of the I.T. Act in the case of Shri Devendra S. Naik for A.Y. 2005-06.

iii. M/s. D.S. Synthetics was technically only a licensee in the books of accounts of GIDC. The erstwhile M/s. D.S. Synthetics was converted into proprietorship concern of Shri Devendra S. Naik during A.Y. 2005-06 as application was filed vide letter dt. 16.10.2004 requesting for change of in Constitution of M/s. D.S. Synthetics from partnership to proprietorship concern. Eventhough the change in the constitution of the firm M/s. D.S. Synthetics had taken place in F.Y. 1991-92, the transfer had taken place in A.Y. 2005-06 after its conversion into proprietorship concern.

iv. The agreement between M/s. DV.S. Synthetics or M/s. R.D. Dyg. and Ptg. Mills Pvt. Ltd. is an unregistered notarized agreement and shows M/s. D.S. Synthetics Prop. Shri. Devendra S. Naik as transferor and owner/lessor. This unregistered agreement was not reported to GIDC apparently to evade higher payment of unearned incremental value in land.

v. The issue of cost of acquisition is to be examined and deemed dividend as some payments have been made by M/s. Devrekha Engineers Pvt. Ltd., to Shri Devendra S. Naik in A.Y. 2005-06.

vi. As per Ld. CIT(A)"s decision, the sum of Rs. 1,46,00,000/- is taxed in the hands of M/s. Devrekha Engineers Pvt. Ltd. as income under the head "Other Sources" and assessment is enhanced. In view of the above, the income in the hands of Shri. Devendra S. Naik is to be taxed in the nature of Long Term Capital Gain.

I have therefore reason to believe that the income to the tune of Rs. 1,46,00,000/- has this is a fit case for issue of notice u/s. 148 of the L.T. Act."

13. Thus, from the reasons recorded, it appears that reopening of the assessment for A.Y. 2005-06 seems to be on the basis of the directions issued by the learned CIT (Appeals) in the order dated 25.6.2013 in the case of one M/s. Devrekha Engineers. It is to be noted that while considering the appeal in the case of one M/s. Devrekha Engineers, the learned CIT (Appeals) observed and directed as under:

"As discussed in this order, the property rights in question were vested in the sister concern and therefore, LTCG/STCG is to be taxable only in the hands of sister concern. Therefore directions u/s. 150(1) are being issued for issue of notice u/s. 148 in the case of Shri Devendra S. Naik for assessment year 2005-06. The assessing officer is directed to do the same. If the jurisdiction over the case of Devendra S. Naik does not lie with him/her these directions must be communicated to the concerned AO for taking necessary action. As per case records, the PAN of Devendra S. Naik is AAIPN4664K. The erstwhile firm M/s. D.S. Synthetics was converted into Proprietorship concern of Devendra S. Naik during A.Y. 2005- 06 or earlier as application before GIDC was filed vide letter dated 16.10.2004 requesting for change in Constitution of M/s. D.S. Synthetics

from partner- ship to Proprietorship concerned. Even earlier the change in the constitution of the firm M/s. D.S. Synthetics had taken place in F.Y. 1991-92. However, the transfer has taken place in A.Y. 2005-06 after its conversion into Proprietor ship concern. Therefore, notice u/s. 148 for Asstt. Year 2005-06 has to be issued in the case of Devendra S. Naik. The issue of cost of acquisition shall be examined by the AO on the basis of evidence that may be furnished by Shri Devendra S. Naik in his re - assessment proceedings. The issue of deemed dividend may also be examined as some payments have been made to Shri Devendra S. Naik by appellant Co in Asstt. Year 2005-06. It needs to mentioned that as per GIDC records total payment is of Rs. 39,02,001/- only (para 7.8 supra): "

14. Further, it is required to be noted and it is not in dispute that the aforesaid order passed by the learned CIT (Appeals) in the case of M/s. Devrekha Engineers came to be challenged by the said assessee before the learned Tribunal by way of ITA No. 2090/Ahd/2013 and not only the reassessment in the case of the aforesaid assessee came to be held to be beyond the scope of section 147 of the Act and consequently, held to be invalid, even, the direction issued by the learned CIT (Appeals) directing to issue notice under section 148 upon the present assessee considering section 150 of the Act also came to be set aside by the learned Tribunal. In para 7.3, the learned Tribunal while setting aside such direction observed as under:

"Apart from the above discussion, before learned CIT(A) an another controversy has been addressed that the land in question was not a property of the assessee, therefore, the Long Term Capital Gain was not to be assessed in the hands of the assessee but to be assessed in the hands of M/s. D.S. Synthetics. It appears that the learned CIT(A) wanted to step into shoes of AO while recording reasons for issuance of notice u/s. 148 of IT Act. The same is not permissible in the eyes of law. The reasons recorded for issuance of notice u/s. 148 was not that the Long Term Capital Gain did not arise to the assessee, but to Ms. D.S. Synthetics. The reasons for reopening assigned were that the wrong computation of Long Term Capital Gain, especially, the indexed cost of acquisition, was shown by the assessee. We therefore hold that in a situation when the assessee has owned up the Long Term Capital Gain in its hands and made an investment in REC bonds which was duly examined at the time of original assessment while framing the assessment u/s. 143(3) of IT Act and a disclosure was made on the material facts then there was no occasion on the part of the learned CIT(A) to twist the reasons of reopening and thereupon upheld the action u/s. 148 of- IT Act. We are of conscientious view that learned CIT (A) went wrong in upholding the action of the AO; hence, his findings is hereby reversed."

15. The aforesaid decision of the learned Tribunal has been confirmed by the Division Bench of this Court in the appeal preferred by the revenue vide order dated 1.12.2014 in Tax Appeal No. 1059 of 2014. Under the circumstances, the basis on which the reassessment proceedings were sought to be initiated to

reopen the assessment for A.Y. 2005-06 itself has been set aside by the learned Tribunal and further confirmed by this Court. It is true that the assessment proceedings can be reopened even after a period of six years as per section 150 of the Act to give effect to any finding or direction contained in order passed by any authority and in any proceedings under the Income Tax Act by way of appeal, reference or revision in any proceedings under any other law. Therefore, at the time when the reassessment proceedings for A.Y. 2005-06 by impugned notice dated 30.7.2013 was initiated, it can be said that it can be argued that to give effect to direction issued by the learned CIT (Appeals) in the order dated 25.6.2013 in the case of M/s. Devrekha Engineers considering section 150 of the Act, assessment/reassessment might be permissible. However, when the direction of which the effect was to be given while initiating assessment/reassessment proceedings for A.Y. 2005-06 itself has been set aside, there was no question of giving any effect to the said direction which has been set aside by the learned Tribunal. Under the circumstances, on the aforesaid ground alone, the impugned reassessment proceedings/notice under section 148 of the Act (Annexure A to the petition) to reopen the assessment proceedings for A.Y. 2005-06 deserves to be quashed and set aside.

16. For the reasons stated above, the petition succeeds. The impugned notice dated 30.7.2013 issued under section 148 of the Act at Annexure A to the petition and the reopening of the assessment for A.Y. 2005-06 is hereby quashed and set aside. Rule is made absolute accordingly. No costs.