
(1995) 09 GUJ CK 0035

In the Gujarat High Court

Case No : Special Civil Application No. 5328 of 1995

Hindumal Balmukund Investment Co. Pvt. Ltd.

APPELLANT

Vs

Appropriate Authority and Others

RESPONDENT

Date of Decision : 19-09-1995

Acts Referred:

Income Tax Act, 1961 — Section 269UD, 269UD(1), 269UD(1A), 271(1)

Citation : (1996) 131 CTR 529 : (1996) 219 ITR 146

Hon'ble Judges : Rajesh Balia, J;M.S. Shah, J

Bench : Division Bench

Judgement

Rajesh Balia, J.—On 23rd Feb., 1995 the petitioner and respondents No. s 4 to 26 entered into an agreement for purchase of the property in question for a consideration of Rs. 25,51,700, the total area being 1607.20 sq. mts. On 29th Feb., 1995 Form 37-I was submitted before Appropriate Authority. On 17th May, 1995 notice under s. 269UD(1A) was issued to the petitioner as well as respondents Nos. 4 to 26. After the petitioner submitted reply to the notice the order under s. 269UD(1) for purchasing the property for Central Government was passed on 30th May, 1995; notice for taking possession was issued. The order of 30th May, 1995 has been challenged in this petition by the purchaser of the said property.

2. It is the contention of the petitioners that on their own showing in the notice as well as in the order, the consideration under the agreement has not been shown to be significantly undervalued by more than 15% of its fair market value to take proceedings under s. 269UD and to raise any presumption of intention to evade tax. It is also contended that in the order dt. 30th May, 1995, the Appropriate Authority has hiked the estimated fair market price by adding the alleged difference between the cost of built up area to be provided by the purchaser by estimating the actual cost to less than the one agreed between the parties under the agreement to make the consideration for transfer. This estimated difference between the cost envisaged under the agreement and

estimated by the Appropriate Authority while passing the order was never the subject matter of enquiry from the petitioner, neither it was disclosed in the notice to show cause nor from the order it is reflected how the Appropriate Authority has fixed the cost of construction to be supplied by the purchaser at 350 sq. ft. instead of 434 sq. ft. agreed between the parties in the agreement for the purpose of fulfilling the consideration. It is by taking into consideration irrelevant material and the grounds which were not disclosed to the petitioner that the difference between the rate per square metre estimated by the Appropriate Authority as fair market value and rate per square metre on the basis of agreement has been hiked to be more than 15% for laying the foundation for purchasing the property in question.

3. It has also been urged that there is a mistake apparent on the face of record in including the difference between the construction cost per sq. mt. as per the agreement and the rate considered reasonable, for making it comparable to the fair market value fetched by Sale Instance Property (SIP) in as much as part of consideration under both the agreements to sell was to be adjusted against the price of certain built up area to be made available by the purchaser at the rate stated in respective agreements. While the difference in the cost of construction as per agreement and the rate considered reasonable to be incurred by the builder has been added to the apparent consideration, the same has not been adjusted while arriving at the comparable figure of the consideration of SIP. It was pointed out by the learned counsel for the petitioner that both the properties namely under consideration as well as the SIP were purchased by the same purchaser on the same date. The two properties are situated adjacent to each other and both properties were owned by a large number of co-owners apparently descendants of the common ancestors for the purpose of using both the properties as one plot. Therefore, in the facts of the present case, there was no occasion for the Appropriate Authority to reach a conclusion about one property being in superior location than the other and make adjustments on only imaginary basis for the sake of arriving at fair market value significantly above the consideration as stated in the agreement so as to raise presumption of evasion against the parties, particularly when in respect of the SIP in the present case the very same authority has found otherwise.

4. Mr. Shelat appearing for the Revenue vehemently opposed the petition. Though it was not disputed that the two properties are situated adjacent to each other, the purchaser in both the cases is the petitioner and the agreement to sell has taken place on the very same day and the consideration as stated in the two documents of agreement to sell by themselves do not go to show that there is a difference of 15% between the per square metre rate calculated by the Appropriate Authority. However, he contends that the part of the land covered by SIP is situated adjacent to railway line, on the one side of it and to the extent the width of the plot the Property Under Consideration (PUC) is situated away from railway line. That gives it a superior locality and on that material, the Appropriate Authority could reach the conclusion to which it has reached. This Court being

not a Court of appeal ought not to interfere under Art. 226 in the matter.

5. We have carefully considered the contentions raised before us and gone through the material made available to us. It has to be noticed that Chapter XX-C under which the provisions of pre-emptive purchase have been enacted are not laws enacted as such for acquiring the property but are provisions relating to implementation of the IT Act. It is also true that any provision under such statute may not only contain the provisions related to levy, but may contain all incidental and necessary provisions to make the levy effective. That provision must necessarily either relate to the levy of the tax or provide for necessary machinery provisions for its due collection. It may also provide for preventing evasion and avoidance of tax. It is only in the light of this scope that the provisions of Chapter XX-C are to be viewed. In our opinion, the provisions contained in Chapter XX-C are directly referable to providing for meeting the challenge of evasion of tax liability which may arise as a result of transfers of immovable property. Therefore, for invoking such provision the nexus between the estimated undervaluation and attempt to tax evasion has to be established. The Supreme Court in the case of C.B. Gautam Vs. Union of India and Others, has stated :

"Chapter XX-C of the IT Act, 1961, providing for pre-emptive purchase at apparent consideration by the Government of immovable property proposed to be transferred does not confer arbitrary or unfettered discretion on the Appropriate Authority to compulsorily purchase immovable properties and does not violate Art. 14 of the Constitution of India. The very historical setting in which the provisions of this chapter were enacted indicates that it was intended to be resorted to only in cases where there is an attempt at tax evasion by significant undervaluation of immovable property agreed to be sold."

Though at the time when the matter was decided by their Lordships of Supreme Court, there was no specific provision for providing an opportunity to the concerned parties and still there is no provision in the statute about the difference between the apparent consideration stated in the agreement to sell and the fair market value of the property which may permit Appropriate Authority to raise any presumption about understatement of consideration with a view to evade tax and assume jurisdiction to act under s. 269UD, the two ingredients the apex Court read into it, when it said :

"This is strengthened by Instruction No. 1A-BB issued by the CBDT. The powers of compulsory purchase conferred under the provisions of Chapter XX-C are intended to be (and are being) used only in cases where, in an agreement to sell an immovable property in an urban area to which the provisions of that chapter apply, there is a significant undervaluation of the property by 15%, or more. If the Appropriate Authority is satisfied that the apparent consideration shown in the agreement for sale is less than market value by 15%, or more, it may draw a presumption [that this undervaluation has been done with a view to evading tax. Such a presumption], however, is rebuttable and the intending seller or purchaser can lead evidence to rebut it. The reasons for such acquisition which

are required by s. 269UD to be in writing must be germane to the object for which the chapter was introduced, namely, to counter attempts to evade tax."

From the aforesaid, it can be fairly concluded that before any action under s. 269UD can validly be taken, the Appropriate Authority must on material before it should prima facie be satisfied that there is a significant undervaluation of property by 15% or more and secondly that such undervaluation is an attempt of tax evasion. On coming to this satisfaction, the Appropriate Authority is further required to offer reasonable opportunity permissible in the limited time frame prescribed for making order of purchase under s. 269UD, to the concerned parties, namely, the intending purchaser, intending seller and the persons in occupation of immovable property if the transferor is not himself in occupation of the property and to other persons whom the Appropriate Authority knows to be interested in the property. The Appropriate Authority is further ordained to specify grounds on which order of purchase is made.

The portents of the requirement of giving opportunity of hearing and making a reasoned order specifying the grounds for making order are that the order of purchasing the property under s. 269UD must satisfy the ground spelling out the satisfaction of the Appropriate Authority firstly about there being factual understatement of consideration in the agreement to sell in the context of its fair market value and secondly that such understatement is an attempt to evade tax by the transferor. Unless satisfaction of Appropriate Authority on these two aspects appears from the order, in our opinion, the order of purchase cannot be sustained. Therefore, the final order which comes into existence must by itself spell out the application of mind of the Appropriate Authority to all the relevant material which were before him for arriving at such finding and its conclusion thereon. It cannot be left to the guess work or presumptions to be raised if the order is challenged, in appropriate proceedings, by the reviewing authority about the intention of the acquiring authority. The order must itself speak.

6. It may further be noticed that if in the estimate of Appropriate Authority apparent consideration of the property stated in the agreement to sell is less by 15% or more of its fair market value, the presumption of understatement having been made with the intention to evade the tax may be raised by it. However, such presumption is not a statutory presumption which is mandatorily required to be drawn in all cases. The raising of presumption depends upon as to what is the material available with the Appropriate Authority about the fair market value, and other relevant circumstances having a bearing on the market value and intention of tax evasion which may reasonably give rise to such presumption or militate against raising of such presumptions. Even if such consideration is not made at the time of issuance of notice at least the Appropriate Authority is required to take into consideration all those materials before making order for coming to the conclusion that presumption raised by him does not stand rebutted. Law is well settled that what amount of evidence is necessary to rebut the presumption of the nature raised depends upon the facts and circumstances

of each case and no specific mode of proof or methodology is required to be followed. The affected party may not lead any evidence, yet, it may draw the attention of the authority to the material already existing on the record to rebut the presumption raised against him. In this connection, we may refer to the decision of this Court in the case of Commissioner of Income Tax, Gujarat-III Vs. Vinaychand Harilal, , wherein the Court said, while dealing with presumption :

"In order to rebut the presumption raised by the Expln. to s. 271(1)(c), it is open to the assessee to point to the record of the case and point to materials on the record which would enable him to show that he had not concealed the particulars of his income or furnished inaccurate particulars of his income."

".... It is also not necessary that any positive material should be produced by the assessee in order to discharge this burden which rests upon him. The assessee may claim to have discharged the burden by relying on the material which is on record in the penalty proceedings, irrespective of whether it is produced by him or by the Revenue." If that is the position it cannot be a matter of overemphasis that before finally deciding the question to purchase or not to purchase the property with respect to which Form 37-I has been filed, the authority is under an obligation to look into all the material which is available on record and to come to its own finding about the understatement of consideration vis-a-vis fair market value and such understatement being an attempt to evade the tax. Mere finding of understatement, without recording the conclusion of the Appropriate Authority himself, about nexus between understatement of consideration and attempt to tax evasion, it is not permissible to raise presumption that Appropriate Authority has also found that such understatement was an attempt to evade the tax when such an order is challenged before Courts. It is also to be seen that for element of a nexus being present with the understatement of consideration and attempt to evade tax, it is essential that apparent consideration is not the real consideration. Therefore, merely on the finding that the apparent consideration is less than fair market value without there being any satisfaction that the apparent consideration is not real consideration, the nexus cannot be established with an attempt to evade tax. Therefore, it is also necessary in the chain of decision making not only to arrive at conclusion of the differentiation between fair market value and apparent consideration but it is required that the fair market value of the property concerned is arrived at and a conclusion is reached that apparent consideration is not the real consideration, or to say presumption about understatement of consideration raised by Appropriate Authority has not stood rebutted. Likewise if surrounding circumstances which are available on record militate against the attempt to evade tax, the presumption raised on the basis of sufficient difference between fair market value and apparent consideration stands rebutted.

7. If we analyse the facts of the present case and the order passed, we find that undisputed facts as emerging from the show cause notice, reply submitted to Appropriate Authority and which has not been disputed and the impugned order

are that the PUC and SIP are adjacent plots; purchaser of both the plots is the same party; agreement to sell in respect of both the plots has been entered on the same day; the PUC and SIP are part of one ancestral property divided between heirs and, therefore, two separate agreements were entered into between the co-tenants of the two plots. Out of total consideration agreed to, in both the cases, part of the consideration is to be adjusted by the purchaser making available certain constructed area to the sellers, for value which has been determined in the agreement itself; on one side of the SIP is situated a railway line and the railway signal lines and telephone poles are passing through the PUC. The notice to show cause disclosed there was no substantial difference in the valuation of the two properties on the basis of apparent consideration in both cases to give rise to any presumption about understatement of consideration or about transaction having any nexus with evasion of tax. It was only by hiking the fair market value of the PUC by 20% on the basis of supposed better location that the difference between the apparent consideration and the fair market value was raised to more than 15% and notice was issued. The show cause notice speaks that the PUC and SIP are adjacent plots and situated in the same area at Bopati, Pune. The statement in the notice that location of PUC is superior to that of SIP, makes any body no wiser as to how on the basis of facts disclosed in notice location of PUC is superior and what is to be explained by the person called upon to show cause. No conclusion on the basis of show cause notice and facts disclosed therein about superior locality of the PUC could be arrived at by any reasonable standard. The very purpose of requirement to issue show cause notice under s. 269UD(1A), with limited time frame is defeated. Such a notice cannot be termed as a reasonable opportunity keeping the short time frame in view. No other material or ground was disclosed in show cause notice as to why fair market value of the property under consideration is otherwise more than the apparent consideration. It is also not disputed that Form 37-I was also furnished in respect of SIP and no understatement of consideration in the case of SIP was found by the Appropriate Authority and NOC in respect of the transfer of that property had been issued.

8. With these premises, if we read the order under challenge, we find that there is no satisfaction of the Appropriate Authority has been reached that understatement of the apparent consideration has been with a view to evade tax. While, it is admitted case that both the properties in question are abutting on the main road on the northern side and properties are adjacent to each other, total land area of PUC and SIP taken together is not more than 2,800 sq. mts. and both the plots divided are almost equal in measurement, it does not stand to reason how far away the plot under consideration can be situated from the said railway line to give it such a superior location commencing from the southern end of SIP, particularly when railway signal lines and telephone poles are passing through the land under consideration, to give it such a superior locality to attract 20% additional price. The estimated rise of 20% appears to have been adopted only for assuming the existence of facts for the purchase of raising the

presumption of understatement or attempt to tax evasion rather than on any relevant consideration on existing material germane to fix the fair market value of the PUC.

9. The order under challenge further discloses that it has proceeded on the grounds other than one disclosed in the show cause notice. One fails to understand, when the subject matter of transfer is open piece of land, for the reason that part of the relevant rate for the purpose of deciding the fair market value for the purpose of s. 269UD has to be taken on saleable FSI. What has been sold is an open land. Part of price was payable in the form of area constructed. Parties have also agreed to a rate at which such area is to be valued for the purpose of setting off the total consideration. As a matter of fact the agreement clearly envisages that total consideration for PUC shall be a fixed sum. Construction has been agreed to be sold to vendor by the buyer at an agreed rate, and such sale price has further been agreed to be adjusted against consideration of agreement in question. One fails to understand what actual cost of construction of such area has to do with the consideration which is receivable by the transferor, in respect of PUC. For transferor the total consideration remains the one stated in the agreement to sell. Part of it is to be received in cash and the balance is to be adjusted against sale price of such agreement. So far as transferor is concerned, his consideration remains unchanged. If the cost of construction is less, to the transferee it may result in some benefit, but results in no reduction in apparent consideration to the transferor. The consideration of the sale is what is received by the transferor and not what it may cost the transferee. On the contrary the only conclusion of Appropriate Authority's reasoning results in accepting that vendor will pay more than market value for the construction agreed to be sold to him by the petitioner and that transaction will not be amenable to provision of s. 269UD because vendor of such transaction will be receiving more than fair market value for its construction. But in no case it can lead to any honest belief that because of this sub-agreement the fair market value of PUC is understated to the extent of assumed difference between the two cost prices. We also find that the Appropriate Authority has not at all taken into consideration the fact that both the transactions of PUC and SIP have taken place on the very same day, the two properties in question are part of the same plot, which on division between the heirs of the ancestors holding the property came to be owned by separate co-tenants and that the PUC and SIP were to be amalgamated for the purpose of development by the purchaser; and the price difference appears to be only on account of separate negotiations with two sets of owners. The Appropriate Authority has not taken into consideration that in these circumstances, when two properties have been agreed to be purchased by the same person on the same day, while no understatement of apparent consideration with a view to evade tax in the case of one property has been found, difference between apparent consideration of PUC and SIP is not to the extent to give rise to presumption about understatement of consideration and such understatement being with a view to evade tax. In these facts and

circumstances, the assumption of 20% higher value of PUC over the SIP appears to be based on no material and is such to which no person of reasonable prudence would arrive at.

We are also of the view, that even if it be assumed that Appropriate Authority could have reasonably hiked the fair market value of property under consideration by 20% on the basis of assumed superior location, there is sufficient material on the record as discussed above to rebut the presumption assumed to have been raised by the Appropriate Authority.

10. The impugned order, therefore, cannot be sustained not only on the ground that it does not disclose the satisfaction about the condition necessary for sustaining the order under s. 269UD, but also on the ground that the order suffers from errors apparent on the face of record and having been made in breach of principles of natural justice in as much as it is founded on grounds which were not disclosed to the petitioner and for which no explanation was called for.

11. Accordingly, this petition succeeds. The impugned orders of Appropriate Authority Exh. F and G dt. 30th May, 1995 are quashed. The respondents shall take all necessary consequential steps including issuance of NOC within a period of eight weeks from the date of receipt of writ or production of this order before Appropriate Authority. In case possession of the property has been taken and payment has been made to the transferor, the petitioner shall pay the requisite amount to the respondent No. 1 within a period of six weeks and on return of such amount the possession of the property shall be delivered to the petitioners along with necessary certificate within two weeks of making the payment, required to be made by the petitioner, if any. Rule made absolute as aforesaid. No order as to costs.