(1995) 07 GUJ CK 0019

In the Gujarat High Court

Case No : Special Civil Application No. 710 of 1995

Naginbhai G. Patel APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 27-07-1995

Acts Referred:
Income Tax Act, 1961 — Section 132, 132(5), 147, 148, 2(47)

Citation : (1996) 134 CTR 210 : (1997) 224 ITR 459

Hon'ble Judges : Rajesh Balia, J;C.K.Thakker, J

Bench : Division Bench

Advocate : J.P. Shah, for the Appellant; B.R. Shah, for the Respondent

Judgement

Rajesh Balia, J.—In this petition the notice dt. 21st Dec., 1995 issued by the ITO, Ward I (Surat) for reassessment for asst. yr. 1988-89 issued to the petitioner on the ground that the income of the assessee has escaped the assessment is under challenge.

2. The notice is challenged on the ground that there has been no failure or omission on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the asst. yr. 1988-89 and the Assessing Officer (AO) in that assessment year (Exh. E dt. 27th March, 1991) after due application of mind to the facts put before it had come to the conclusion that the petitioner was not liable to capital gains in respect of Rs. 42 lakhs received by him under an agreement to sell the land, possession of which was handed over to the buyer in the year 1983, in absence of any duly executed sale deed. In view of the aforesaid, it is contended that the assessing authority had acted in issuing the notice only on mere change of opinion and he had no reason to hold a belief that the income chargeable to tax for the asst. yr. 1988-89 has escaped assessment. It is also the case of the petitioner that at any rate it is not a case of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year.

Therefore the notice which has been issued beyond a period of four years from the end of relevant assessment year is wholly without jurisdiction.

3. We have heard the learned Counsel and perused the material placed on record.

4. The facts that clearly emerge are that on 23rd July, 1987 a search operation took place against the petitioner in pursuance of which proceedings under s. 132(5) took place. During the course of those proceedings, it has been disclosed by the assessee that the possession of the land was given in the year 1983 to the purchaser and he has received total consideration of Rs. 42 lakhs in lieu thereof under an agreement to sell. However, no sale document in respect thereof was executed. Unless a capital asset is transferred no capital gain in respect thereof can arise. A sale of immovable property takes place only through a registered sale deed and until a sale deed is duly executed and registered in accordance with law, no transfer of asset takes place. The liability to pay tax on capital gains would arise only when a completed sale transaction comes into existence and not earlier to that. It was also brought to the notice of the assessing authority that possession of the land having been delivered way back in 1983, the amended definition of transfer under s. 2(47) of the IT Act which is not retrospective, cannot also be invoked in the present case by treating it to be a transfer for the purpose of asst. yr. 1988-89. This contention of the assessee found favour with the ITO and he recorded this finding in Exh. E the assessment order for asst. yr. 1988-89 which is as under :

"There was an action under s. 132 in this case on 23rd July, 1987 and it came to light that the assessee had handed over possession of 30,000 sq. yards of land to Shri Popatlal Naranbhai Patel for total consideration of Rs. 42 lakhs. It was contended on behalf of the assessee that the capital gains would be chargeable only when the sale document is executed in the light of Gujarat High Court decision reported in Commissioner of Income Tax, Gujarat Vs. Ashaland Corporation, .The possession of the land having been given in 1983, the amended provisions will not affect his case. Though the possession was given the land still stands in his name and the value is being shown in the WT returns. The definition of ''capital gains'' has been amended with effect from asst. yr. 1988-89 and has no retrospective effect. The capital gain will be included in his total income as and when document is executed. There is considerable force in the assessee''s contention."

5. Thereafter the Asstt. CIT, Circle 1(i), Surat after issuing show cause notice as to why the aforesaid amount of Rs. 42 lakh should not be treated as a sum which has escaped assessment, issued a notice under s. 148 on 30th March, 1993. The said notice was challenged vide Special Civil Appln. No. 3924 of 1993, inter alia, on the ground that the officer issuing notice had no jurisdiction over the assessee. Said petition was withdrawn on 2nd July, 1993 when the counsel for the Revenue made a statement before the Court that the notice dt. 30th March, 1993 will be withdrawn by the respondents on or before 12th July, 1993. However, the Court left it to the Department to issue notice afresh in accordance

with law. Thereafter the present notice has been issued.

6. The reasons recorded by the ITO issuing notice reads as under :

"In this case a search and seizure operation was carried out on 23rd July, 1987 and it has come to the light of the Department that the assessee has sold some land to Shri Popatbhai Naranbhai Patel, partner of M/s Jay Construction for a total consideration of Rs. 42 lacs. The assessee had disclosed the said amount, i.e., Rs. 42 lacs. However, the same has not been taxed in asst. yr. 1988-89. A notice under s. 148 of the Act was issued by the Asstt. CIT (Inv), Cir. 2(1), Surat as the income chargeable to tax had escaped assessment (being sale proceeds of land) within the meaning of s. 147 of the IT Act, 1961. The assessee filed a writ application challenging the validity of the abovesaid notice in the Hon''ble High Court of Gujarat at Ahmedabad.

The Hon''ble Gujarat High Court, after accepting the argument of the standing counsel, has given direction that the notice is withdrawn with the condition to reserve the right of the Department to issue the notice under s. 148 of the IT Act. Thereafter, the case records of the abovenamed assessee was transferred from Asstt. CIT (Inv), Cir. 2(i), Surat to Asstt. CIT (Inv), Cir. 1(i), Surat. The Asstt. CIT (Inv), Cir. 1(i), Surat again transferred the case records to the Asstt. CIT, Cir. 1(i), Surat. Further, the Asstt. CIT, Cir. 1(i), Surat transferred the case records to the ITO Ward 1(4), Surat having correct jurisdiction.

In view of the above fact, I am satisfied that the income chargeable to tax had escaped assessment within the meaning of s. 147 of the Act, in so far as the sale proceeds of the land is concerned. Hence, approval to issue notice under s. 148 of the Act may kindly be accorded."

From the perusal of the assessment order and the reason recorded by the AO, it is apparent that there has been no failure on the part of the assessee to disclose any material fact relevant for the asst. yr. 1988-89, which has been made the basis of issuing notice. The fact that assessee has received Rs. 42 lakhs under agreement to sell, that possession of land in question has been delivered to buyer in 1983 and that sale deed has not been executed were all noticed by the ITO in his assessment order of the year in question. The assessing authority after noticing those facts and the decision of the Gujarat High Court, accepted the contention raised by the assessee about the transaction in question not attracting the provisions relating to capital gains. In fact, in the reasons recorded by the assessing authority itself it has been stated that ''assessee had disclosed the said amount, that is Rs. 42 lakhs''. Apparently, the notice has been issued after the expiry of four years from the end of the relevant assessment year income in relation to which is sought to be reassessed. It is also beyond argument that in order to assume jurisdiction for initiating proceedings under ss. 147 and 148 beyond the period of four years from the end of the relevant assessment year the condition precedent is that the AO must have reason to believe that the escapement of income chargeable to tax has arisen on account of failure or omission on the part of the assessee to disclose truly and fully all material facts necessary for his assessment for that assessment year.

7. As the condition precedent for assuming jurisdiction beyond the period of four years is not existing in the present case, the issuance of the impugned notice, in our opinion, suffers from inherent lack of jurisdiction and deserves to be quashed. Apart from the above, we are also satisfied on the facts of this case that this is a case of mere change of opinion.

8. Accordingly the petition succeeds. The impugned notice Annexure L dt. 21st Dec., 1994 is quashed. Rule is made absolute with no order as to costs.