
(1995) 10 GUJ CK 0024

In the Gujarat High Court

Case No : Special Civil Application No. 6864 of 1995

Ranchhodbhai Galabhai Patel

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 20-10-1995

Acts Referred:

Constitution of India, 1950 — Article 226

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

Citation : (1996) 87 TAXMAN 83

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

Bench : Division Bench

Advocate : S.N. Soparkar, for the Appellant; M.J. Thakore, for the Respondent

Judgement

M.S. Shah, J.—This petition under article 226 of the Constitution challenges the order passed by the appropriate authority u/s 269UD of Chapter XX-C of the income tax Act, 1961 ("the Act"). On 9-4-1994, petitioner No. 1 (transferor) and petitioner No. 2 (transferee) entered into an agreement for sale in respect of a plot of land admeasuring 4000 sq. mts. situated within the limits of village Ravat, Tal. Haveli, District Pune, for a consideration of Rs. 25 lakhs. On 14-9-1994, the petitioners filed Form No. 37-1 in the office of the appropriate authority. On 12-12-1994 show-cause notice was issued by the appropriate authority u/s 269UD(1A) to the petitioners. On behalf of the petitioners reply dated 17-12-1994 was submitted by the Chartered Accountants. The appropriate authority thereafter passed the impugned order dated 26-12-1994, Annexure A to the petition. The petitioners thereafter filed rectification application dated 19-1-1995 and also Tiled supplementary submissions before the appropriate authority on 17-5-1995. The Competent Authority by its order dated 30-6-1995 rejected the rectification application of the petitioners. The aforesaid order dated 26-12-1994 passed u/s 269UD(1A) and the order dated 30-6-1995 rejecting the rectification application, have been challenged in this petition by the transferor as well as the transferee.

2. The learned counsel for the petitioners contended that-

(1) the appropriate authority had failed to determine the fair market value of the property in question. He also contended that the finding of the appropriate authority that the property under consideration (PUC) was comparable to the sale instances properties (SIPs) was perverse;

(2) the order was also otherwise bad because the appropriate authority had not given any finding that the alleged under valuation was done with a view to evade tax.

3. The learned counsel for the petitioners submitted that the impugned order suffers from total non-application of mind because the SIP is not comparable with the PUC. The SIP is in commercial zone whereas the PUC is in residential zone. Out of 4000 sq. mts. of the land in question 3000 sq. mts. land was the subject-matter of the proceedings under the Urban Land (Ceiling & Regulation) Act, 1976 (the ULC Act). The learned counsel for the petitioners further pointed out that the authority under the ULC Act had granted exemption in respect of the aforesaid 3000 sq. mts. of land subject to the condition that petitioner No. 1 was required to construct 51 tenements for sale to weaker section and 4 tenements were required to be sold to the Government of Maharashtra. The learned counsel, therefore, contended that the PUC could never be expected to fetch as much price as the SIP. It was, therefore, strenuously contended on behalf of the petitioners that the appropriate authority had not determined the fair market value of the land in question and, therefore, there was no question of any undervaluation.

4. The learned counsel for the petitioners then submitted that the impugned order u/s 269UD(1A) was even otherwise bad inasmuch as the appropriate authority had not given any finding to the effect that there was any attempt to evade tax which is sine qua non for the exercise of power of pre-emptive purchase u/s 269UD(1A) as held by the Supreme Court in the case of C.B. Gautam Vs. Union of India and Others, .

5. On the other hand, Mr. Thakore, the learned standing counsel for the revenue, relied upon the affidavit-in reply filed on behalf of the appropriate authority and contended that since the agreement filed with Form No. 37-1 of the Act, was in violation of the provisions of the ULC Act, this Court should not entertain the present petition as petitioner No. 1 was intending to transfer the property under consideration in favour of petitioner No. 2 in defiance of the express condition incorporated in the exemption order passed by the Government in favour of petitioner No. 1 and without obtaining the permission of the authority under the ULC Act. Mr. Thakore further submitted that the very fact that the appropriate authority has found that the rate of PUC mentioned in the agreement dated 29-9-1994 was less than the rate of consideration mentioned in the agreement dated 11-6-1992 (SIP), it was apparent that there was an attempt to evade tax.

6. As far as the preliminary contention of Mr. Thakore regarding the alleged

violation of the ULC Act is concerned, it is true that the agreement in question is for sale of property a substantial portion of which was otherwise liable to be declared as surplus vacant land being in excess of the limit stipulated under the ULC Act and that granting any relief in favour of the petitioner in connection with the said agreement may prima facie amount to assisting the petitioners, who are about to commit breach of the provisions of the ULC Act, when in the exemption order under the ULC Act shown to this Court, there is an express condition prohibiting transfer of the exempted land in favour of any other person and it is not pointed out that petitioner No. 1 has obtained any modification of the said condition or permission of the authority under the ULC Act for such transfer. However, Mr. Soparkar, the learned counsel for the petitioners has invited our attention to the judgment of the Delhi High Court in the case of Tanvi Trading and Credits P. Ltd. and Others Vs. Appropriate Authority and Others, .

In the aforesaid case of Tanvi Trading & Credits (P.) Ltd. (Tanvi Trading) respondent Nos. 3 to 10 therein had purchased 5000 sq. yds. of land in Delhi. The competent authority under the ULC Act had passed eight separate orders holding that there was a total excess vacant land of 680.26 sq. mts. in the said property owned by respondent Nos. 3 to 10. By agreement dated 10-5-1989, respondent Nos. 3 to 10 had agreed to sell the said land to the petitioner for a sum of Rs. 4,15,00,000. In accordance with the provisions of section 269UC of the Act, the petitioner and respondent Nos. 3 to 10 jointly filed statement in Form No. 37-1 with the appropriate authority for the grant of a certificate. The appropriate authority passed order dated 19-7-1989 observing that it was not certain as to which portion of the land would be surrendered to the State Government in view of the orders having been passed under the ULC Act declaring 680.26 sq. mts. of land as being surplus and that the agreement to sell was a contingent contract depending upon the orders of the competent authority under the ULC Act and, therefore, No-objection certificate could not be issued by the appropriate authority under the Act. The appropriate authority had concluded that the statement in Form No. 37-1 was premature and invalid and the same was ordered to be filed. In view of this development respondent Nos. 3 to 10 took necessary steps for specifying and demarcating the excess vacant land and filed a fresh statement in Form No. 37-1 on 24-11-1989, informing the appropriate authority about the demarcation of the excess vacant land and about the surrender thereof. The appropriate authority passed another order on 22-1-1990 and refused to grant no-objection certificate on the ground that the agreement between the parties was not a proper agreement as already held by the previous order dated 19-7-1989. In the background of the aforesaid facts, Tanvi Trading filed a writ petition before Delhi High Court and challenged the orders of the appropriate authority. The learned counsel appearing for the appropriate authority defended the orders on the ground that it was open to the appropriate authority to determine the legality of the proposed sale transaction and if the appropriate authority comes to the conclusion that the sale transaction was being effected against the provisions of any law then it could decline to give

the certificate asked for.

After considering the rival contentions, the Division Bench of Delhi High Court allowed the writ petition quashing the orders impugned in the petition and further issued a writ of mandamus directing the appropriate authority to issue "no objection certificate" in terms of section 269UL(3) of the Act. In our view the ultimate decision of the Delhi High Court in the above case was unexceptionable because the excess vacant land under the ULC Act was already demarcated and surrendered and respondent Nos. 3 to 10 in that case did not apply for a certificate u/s 269UL in respect of any such excess vacant urban land. However, the Delhi High Court went on to observe that the only power which is conferred upon the appropriate authority u/s 269UD is the power to decide whether to purchase the property or not and that any investigation which will be undertaken by the appropriate authority is only with a view to determine whether the pre-emptive right of purchase should be exercised or not. The Court further held that if the appropriate authority had reservations or doubts with regard to the legality of the proposed sale, it is open to the Authority not to exercise its right to purchase, but section 269UD does not contemplate the rejection of any statement in Form No. 37-1 by the appropriate authority. The Court ultimately observed as under:

It was contended by Mr. Jain that if a certificate u/s 269UL(3) is issued the effect of that would be that the IT Department would have pronounced upon the legality or validity of the proposed sale. In our opinion, the apprehension of Mr. Jain is unfounded. The certificate issued u/s 269UL, would, in effect, only indicate that the Govt. is not interested in purchasing the property. The certificate so issued does not pronounce on the legality or validity of the transaction. If the transaction is otherwise illegal or invalid, it will be for some other authority, in another forum to decide on the same. As far as the Appropriate Authority is concerned, the certificate which is issued has relation only to the question whether the Govt. is interested in purchasing the property or not."

[Emphasis supplied]

Mr. Soparkar stated at the Bar and it was not disputed by Mr. Thakore for the revenue that before the Registering Authority under the Registration Act accepts for registration such conveyance it also requires no objection certificate from the authority under the ULC Act. It, therefore, appears that the contention that issuance of NOC by the income tax Department for transfer of the property under consideration, would amount to permitting an illegality to be perpetuated, is misconceived. In any view of the matter, the controversy appears to have been set at rest by the Hon''ble Supreme Court, the above decision of the Delhi High Court in the case of Tanvi Trading & Credits (P.) Ltd. (supra) has been affirmed by the Hon''ble Supreme Court. Their Lordships of the Hon''ble Supreme Court while dismissing the appeal preferred by the appropriate authority in Appropriate Authority and Another Vs. Tanvi Trading and Credits P. Ltd. and Others, observed

as under:

We agree that two alternatives are open under the scheme of the legislation : (i) the Union of India through the Appropriate Authority could buy the property, or (ii) in the event of its decision not to buy, it has to issue a "No objection certificate" leaving it open to the parties to deal with the property. In that view of the matter, the High Court was right in its conclusion...." (p. 308)

In view of the aforesaid binding decision of the Apex Court, the preliminary objection on behalf of the revenue is overruled. We may also point out that the Bombay High Court has also taken the same view in the case of *Irwin Almeida and others Vs. Union of India and others*, and also in the case of *J. Gala Enterprises Estate & Investment (P.) Ltd. v. W. Hassan*, CIT [1994] 122 CTR 160.

7. Coming to the merits of the matter, we find that it is not necessary to consider the first contention of the petitioners as the petition deserves to be allowed and the impugned order at Annexure A deserves to be quashed and set aside by accepting the second contention of the petitioners inasmuch as the appropriate authority has passed the impugned order dated 26-12-1994 without arriving at a specific finding that the apparent consideration mentioned in the agreement was not the real consideration or that it was with a view to evade tax that the apparent consideration was understated in the agreement.

In the case of *C.B. Gautain (supra)*, their Lordships of the Hon'ble Supreme Court held that the very historical setting in which the provisions of this Chapter XX-C were enacted, suggests 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. It was further held that if the appropriate authority concerned is satisfied that, in an agreement to sell immovable property in such areas as set out earlier, the apparent consideration shown in the agreement for sale is less than the fair market value by 15 percent or more, it may draw a presumption that this undervaluation has been done with a view to evade tax. Of course, such a presumption is rebuttable and the intending seller or purchaser can lead evidence to rebut such a presumption. Moreover, an order for compulsory purchase of immovable property under the provisions of section 269UD requires to be supported by reasons in writing and such reasons must be germane to the object for which Chapter XX-C was introduced in the Act, namely, to counter attempts to evade tax.

The aforesaid decision was followed by this Court in the case of *Anagram Finance Ltd. Vs. Appropriate Authority and Another*, and also in the decisions of this Court rendered in *Krishnakumar Agarwal and Another Vs. Appropriate Authority and Another*, and in *Special Civil Appln. 5328 of 1995* decided on 19-9-1995. This Court held in *Special Civil Appln. No. 3853 of 1995* as under:

9. Thus necessary concomitants of exercise of powers u/s 269UD(1) are that firstly, the appropriate authority must arrive at a decision that there is significant undervaluation of the property by 15 percent or more and, secondly, such

undervaluation is an attempt at tax evasion. It is only on the existence of second indicia and not merely in the case of undervaluation that the Authority has been empowered to have resort to the power of pre-emptive purchase. It is true that in a case of significant undervaluation of the property to the extent of 15 per-cent, the appropriate authority may draw a presumption about undervaluation having been done with a view to evading tax, a presumption which is rebuttable. However, such presumption is not an obligation under statutory provision. It is for the appropriate authority to raise presumption or not on the basis of the estimated valuation. Whether such presumption has in fact been resorted to and has not been rebutted must, in our opinion, be reflected in the order which is finally passed by the appropriate authority disclosing application of mind to all available material on record.... As this exercise of power depends upon the satisfaction of the appropriate authority and appropriate authority is under an obligation to pass a speaking order by specifying the reasons for purchasing the property, its satisfaction about the facts must be reflected in the order and cannot be left to the guess work or for raising the presumption by the Court in favour of the appropriate authority, if the order is challenged. The order must speak for itself. The impugned order in our opinion, does not even whisper about the satisfaction of appropriate authority about the undervaluation being with an intention to evade tax. It must be noticed that the presumption is rebuttable one and what evidence is required to rebut depends upon facts and circumstances of each case. The presumption may even be rebutted, without leading evidence, on the basis of material already available on records...." (p. 160)

[Emphasis supplied]

Thereafter, in the decision dated 19-9-1995, rendered in Special Civil Appln. No. 5328 of 1995, this Court held as under:

It may further be noticed that if in the estimate of appropriate authority apparent consideration of the property situated 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.... 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 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 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."

[Emphasis supplied]

8. In light of the above discussion, we may refer to the relevant portion of the impugned order which reads as under:

4.

(a) ****

(b) ****

considering the time lag between the two transactions and considering a compounded rate of appreciation in the property @ 15% per annum, the apparent consideration in the case of PUC appears to be understated by more than 15%.

(c) ****

(d) ****

5. We have carefully considered all relevant facts, material gathered and submissions made by transferor and transferee and we are satisfied that the property is fit for pre-emptive purchase under the provisions of Chapter XX-C of the income tax Act, 1961. Therefore, in exercise of the powers vested in us u/s 269UD(1) of the Act, we hereby order to purchase the said immovable property.

9. In our view, the appropriate authority has not given any specific finding that there was an attempt to evade tax or that the apparent consideration was lower than the real consideration. The authority could have raised a presumption about intention to evade tax in the show-cause notice. After hearing the parties, the appropriate authority could have held that the presumption was not rebutted and given the finding that the apparent consideration mentioned in the agreement was understated with a view to evade tax. However, since the mandatory requirement of giving such specific finding is not complied with, in our opinion, the order deserves to be quashed and set aside. Accordingly, this petition succeeds. The impugned order dated 26-9-1994, passed by the appropriate authority, at Annexure A to the petition, is quashed and set aside. The respondents shall also take within eight weeks from the date of receipt of this judgment or from the date of receipt of writ of this Court whichever is earlier, all the steps consequent to the impugned order being set aside [and shall also send a copy of this judgment to the authority under the ULC Act in the Government of Maharashtra]. The observations made under this judgment are only in the context of the controversy under Chapter XX-C and we may not be understood to have expressed any opinion on the legality or otherwise of the transaction which petitioner No. 1 proposes to enter into with petitioner No. 2 in respect of the property under consideration.

The rule is made absolute accordingly with no order as to costs.