(2016) 09 GUJ CK 0045

In the Gujarat High Court

Case No : Special Civil Application No. 4756 of 2016

Thakorbhai Maganbhai Patel — APPELLANT

Vs

Income Tax Officer — RESPONDENT

Date of Decision : 21-09-2016

Acts Referred:

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

Citation : (2017) 393 ITR 612

Hon'ble Judges : Mr. Akil Kureshi and Mr. A.J. Shastri, JJ.

Bench : Division Bench

Advocate : Mr. R.K. Patel, Advocate, for the Petitioner No. 1; Mr. K.M. Parikh, Advocate, for the Respondent Nos. 1 to 2; Mr. Hardik Vora, A.G.P, for the Respondent No. 3

Final Decision : Dismissed

Judgement

Mr. Akil Kureshi, J.(Oral)—The petitioner has challenged a notice dated 27.3.2015 for reopening the assessment for the assessment year 2008-2009.

2. Brief facts are as under. The petitioner is an agriculturist and held large tracks of agricultural land. On 31.3.2008, the petitioner executed a sale deed for the lands bearing survey Nos. 43, 44, 45, 46 and 65, now consolidated into block No. 23 paikee of village Hanumanpura, Vadodara, in favour of Shri Jitendra Natubhai and Shri Kamlesh Natubhai Patel for a declared sum of Rs.4.98 lacs. According to the petitioner, since he was not liable to pay any income tax, he did not file return for the said assessment year. Earlier the assessment was made under section 147 read with section 143(3) of the Income Tax Act ("the Act" for short). During such assessment, the assessee was confronted with the sale transaction of the agricultural land and the question of capital gain arising from such sale. The assessee contended that the agricultural land which he inherited was sold on 10.6.2008 but the stamp paper was purchased on 31.3.2008 and in fact, the transaction falls within the assessment year 2009-2010. He also relied on a certificate from one Shri K.B. Patel to contend that the land was situated beyond

a distance of 8 kms. from the limit of Vadodara Municipal Corporation. Hanumanpura has a population of about 10,000. Accordingly, the said lands would be covered by the exclusion provided in section 2(14) of the Act and would therefore, be exempt from the payment of capital gain.

3. The Assessing Officer passed the order of assessment on 23.1.2013. He rejected the assessee''s first contention of sale falling outside the year under consideration but accepted the second contention of the land being beyond a distance of 8 kms from the limit of Vadodara Municipal Corporation by accepting the certificate produced by the petitioner stated to have been issued by Shri K.D. Patel Executive Engineer, Road and Building division, District Vadodara, in this regard.

4. It appears that the Assessing Officer later on found that the petitioner had deposited Rs.1.05 crores (rounded off) in his bank account by cash and that the distance between Vadodara Municipal Corporation limit and the lands in question was much lesser than 8 kms. Once again therefore, the Assessing Officer issued the impugned notice seeking to reopen the assessment for the said assessment year 2008-2009. He recorded the following reasons for issuing notice :

"From the information available on record it is noticed that the assessee Shri Thakorebhai Maganbhai Patel (PAN : ACZPP4029K) has sold a land located at R.S. No. 43, 44, 45, 46, and 65, Block No.23 paiki 3(23A) village Hanumanpura admeasuring 2.28.98 Hectare (246382.48 sq ft) to Shri Jitendrabhai Natwarlal Patel and Kamleshbhai Patel vide a sale deed executed on 31.03.2008. The assessee received a sum of Rs.1,10,70,000/- in cheque and cash in this sale of land, which he admitted in his statement. The assessee has invested the sum in various properties, Gold and Instruments like LIC, Mutual Fund, Post office.

The assessment in this case was completed u/s 143(3) r.w.s. 147 of the Act on 23/01/2013 accepting returned income at Rs.1,28,170/-. During the course of assessment, assessee had stated that he had received a sum of only Rs.4,98,000/through cheque and the said land is agricultural land which is beyond the 8 km limits from Vadodara Municipal Corporation. The assessee also furnished a certificate from Executive Engineer (Road and Building) District Vadodara certifying distance of village Hanumanpura from limit of Vadodara Municipal Corporation is more than 8 km. Hence, capital gain does not arise on the sale of the said land.

Subsequently, Shri Soham N. Patel, Addl. Assistant Engineer, VMC, Baroda was examined on oath on 10.07.2013 and he has stated that the said plot of land is situated not more than 2 km from the outer limit of VMC. Therefore, the said plot of land does not fall under the exclusion clause of being Agriculture land u/s 2(14) of the IT Act and will attract capital gain tax. The incidence of capital gain arise in FY 2007-2008 as sale deed was executed on 31.03.2008, though, the said sale deed was registered in the Sub registrar on 10.06.2008.

In view of new facts brought on record, firstly admission of the assessee that he has received cash onmoney of Rs.1,05,72,000/- on the sale of land and secondly statement on oath of Additional Assistant Engineer, Vadodara Municipal Corporation, Baroda, it is proved that assessee has not disclosed complete and true facts to the Assessing Officer in original assessment proceedings.

Moreover, fresh material is also on record which negates the incorrect evidence submitted by assessee regarding distance of land. Under the above said facts, I have reason to believe that the assessee has not disclosed Rs.1,05,72,000/- as cash sale consideration of the land and Rs, 1,10,70,000/has escaped assessment as capital gain receipts.

Hence, there has been failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for AY 2008-09. The notice u/s 148 of the IT Act for AY 2008-09 is required to be issued for initiation of reassessment proceedings of capital gain to the extent of Rs. 1,10,70,000/- which has escaped assessment."

5. The petitioner raised objections under his communication dated 12.12.2015. He followed the same with subsequent objections. Grievance of the petitioner is that such objections were not disposed of and in the meantime the last date for framing the assessment was approaching. He therefore, approached the Court to avoid framing of assessment without disposal of the objections.

6. From the reasons recorded, it can be seen that for the assessment year 2008-2009, the assessee had upon notice being issued by the Revenue filed a return disclosing sale of agricultural land for a sum of Rs.4.98 lacs. No further disclosure of any sale consideration paid or to be paid came on record during the entire assessment proceedings. However, it appears that in the later year i.e. assessment year 2009-2010, the assessee was confronted with cash deposits in his bank accounts totalling to Rs. 1,05,72,000/-.

The Assessing Officer added this sum to the income of the assessee as his cash receipts. The assessee challenged the same before the appellate Commissioner. Before the appellate Commissioner, with respect to these cash receipts, the representative of the assessee contended as under :

"c. The assessee belongs to a family of farmers and owned an agricultural land bearing Revenue Survey No. 43 to 46 and 65 (Block No.2) at Village Hanumanpura, Taluka Vaghodia in the District Vadodara together with his father and two brothers. The said land was equally divided by three brothers by Memorandum of Understanding entered on 17/01/2008. Copy of Memorandum of Understanding is enclosed herewith. The appellant entered into a banakhat to sell his share admeasuring 2,46,000 sq. ft. at the rate of Rs. 45 per square feet. The banakhat was entered with Shri Kamleshbhai Natubhai Patel and Shri Navinbhai Pujabhai Patel on 25/03/2008 and the said banakhat came to be registered with notary on 04/04/2008 under Regd. Serial No. 677. The land deal was to be made only with Shri Kamlesh Natubhai Patel but since banakhat was executed on the stamp paper held in the name of Shri Navinbhai Pujabhai Patel, his name was included in the banakhat so that there may not be any legal dispute on a later date. This fact has been admitted and explained by Shri Navinbhai Pujebhei Patel in a notarized affidavit dated 23/03/2012. Copy of notarized affidavit is enclosed herewith for ready reference. The appellant received Rs. 2,01,000/- at the time of entering in to said banakhat from these two persons. Out of this, Rs. 1,55,000/- were paid in cash and remaining amount of Rs. 46,000/- was received by Bank of Baroda Cheque No. 269168 which is stated in the said banakhat. It is further stated in the said banakhat that remaining amount would be paid at the time of execution of sale deed. Copy of banakhat is enclosed herewith. As per this banakhat, appellant was to receive Rs. 1,10,70,000/- as sale consideration for sale of the said agricultural lands."

Accordingly, purchasers i.e. Shri Kamlesh Natubhai Patel purchased required stamps for executing registration deed on 31/03/2008. The registration documents have been made for a sale consideration of Rs. 4,98,000/- which has been paid entirely by cheques on several dates appearing in the registration documents which were registered before the Subregistrar Vaghodia on 10th June, 2008. Copy of registered sale deed for Rs. 4,98,000/- is enclosed herewith. Shri Kamlesh Natubhai Patel issued several cheques of Rs. 1,04,17,000/- from State Bank Of Mysore as security towards amount remained to be paid as per banakhat and not reflected in the registered sale deed. The said cheques were not presented by appellant in the bank as per mutual understanding with Shri Kamlesh Natubhai Patel. Shri Kamlesh Natubhai Patel handed over cash on various dates as per the terms of banakhat in lieu of the cheques issued from the State Bank of Mysore. Thus, appellant received cash on surrender of cheques. As a matter of evidence, copy of cheque issued by Shri Natubhai Patel in the name of appellant''s brotherinlaw Shri Bharat M. Patel is enclosed herewith which have been returned back but Xerox of which remained with appellant accidentally. The breakup of cash consideration on sale of aforesaid agricultural land and not reflected in the registered sale deed is as under :

Date of receipt of cash

Amount of cash received

Document against which cash received

25/03/2008

1,55,000

As stated in banakhat

04/04/2008

4,00,000

At the time of registration of banakhat with notary

10/06/2008

90,17,000

At the time of registration of sale deed

20/10/2008

4,00,000

On surrender of State Bank of Mysore cheq. No.s 23888 and 23889 of Rs. 2,00,000/- each given earlier as security towards amount aggregate in banakhat

20/20/2008

6,00,000

On surrender of State Bank of Mysore cheq . Nos. 23890 and 23891 of Rs. 3,00,000/- each given earlier as security towards amount aggregate in banakhat

Total

1,05,72,000

7. Thus the fact that the land in question was not sold for a sum of Rs.4.98 lacs but in addition to such sale consideration reflected in the sale deed, the assessee had received and purchaser had paid cash amount of Rs.1,05,72,000/, was not part of the record during the original assessment. Further, the important question of capital gain arising out of such sale being subjected to capital gain tax or not would in terms of section 2(14) of the Act depend on the fact whether the land was situated beyond a distance of 8 kms from the outer limits of Vadodara Municipal Corporation. Section 2(14) defines the term ''capital assets'' which means besides other property of any kind held by an assessee, whether or not connected with his business or profession, an agricultural land in India not being land situate in any area within such distance not being more than eight kilometers from the local limits of any municipality or cantonment board, as the Central Government may, having regard to the extent of and scope for urbanisation of that area and other relevant considerations specified in this behalf by notification in the official gazette. Thus, the question of land being situated beyond a distance of 8 kms became crucial. We may recall in this context during the scrutiny assessment, the assessee had relied on a certificate stated to have been issued by the competent authority indicating that the land was situated beyond 8 kms from Vadodara Municipal Corporation limits. In this context, the reasons recorded suggest that subsequently statement of Shri Sohan M. Patel, Additional Assistant Engineer, Vadodara Municipal Corporation was recorded on oath on 10.7.2013 who stated that the land in question is situated not more than 2 kms from the outer limit of Vadodara Municipal Corporation. The Assessing Officer therefore, formed a belief that the land falls within the exclusion clause and capital gain arising out of such asset would be chargeable to tax. The assessee would also have to account for the undisclosed sale consideration of Rs. 1.05 crores. He recorded that fresh material was found which proves that the evidence submitted by the assessee regarding the distance

of land was incorrect. In his opinion, therefore, on the total sale consideration of Rs. 1.10 crores, the assessee would have to pay the capital gain.

8. In this petition, counsel for the petitioner raised the following contentions :

(1) That the Assessing Officer proceeded with the assessment without disposing of the petitioner''s objection.

(2) There was no failure on part of the assessee to disclose truly and fully all material facts.

(3) The assessee relied on certificate issued by Shri K.D. Patel, the then Executive Engineer, which clearly stated that the land was situated beyond a period of 8 Kms. from the outer limitation of Vadodara Municipal Corporation.

(4) The authorities are considering aerial distance between the boundary of Vadodara Municipal Corporation and the land in question which provision was not there at the relevant time in section 2(14) of the Act.

(5) In any case, the outer limit of Vadodara Municipal Corporation as on issuance of notification dated 6.1.1994 as referred in section 2(14) of the Act, would be relevant and not the later revised boundaries under which the Vadodara Municipal Corporation area is bound to have expanded. In this context, counsel relied on decision of Jabalpur Bench of Income Tax Appellate Tribunal in case of Smt.(Dr.) Subha Tripathi v. Deputy Commissioner of Income-tax, Circle-6, Jaipur.

9. On the other hand, learned counsel Shri Parikh for the department opposed the petition contending that the petitioner produced a false certificate. Shri K.D. Patel has disowned having issued any such certificate. The entire assessment originally done was on the basis of a certificate which was not genuine. There is sufficient material on record to suggest that the distance between outer boundaries of Vadodara Municipal Corporation and the land in question is far less than 8 kms envisaged in section 2(14) of the Act. He submitted that the representations made by the petitioner were only in response to notices issued under section 142 of the Act in which the petitioner requested for supplying documents or time. Since no formal objections were raised, the Assessing Officer did not pass any order disposing of such objections.

10. We may first take up the question of non disposal of the objections. It is true that in the communications, the petitioner has requested for supply of documents. However, the petitioner also raised the objections to the Assessing Officer exercising the powers of reassessment. In true spirit if these communications were examined, the Assessing Officer would have realised that the assessee was objecting to the process of reopening. In terms of decision of Supreme Court in case of GKN Driveshafts (India) Ltd. v. Income-tax officer and others reported in (2003) 259 ITR 19 (SC), the Assessing Officer ought to have disposed of the objections. Ordinarily, we would have insisted on Assessing Officer doing so. However, facts in the present case are somewhat peculiar and no useful purpose would be served in ensuring only cosmetic purpose of

completion of formality and then inviting a fresh litigation. Under the circumstances, we have examined the merits of the petitioner''s challenge to the reopening also.

11. As noted, the Assessing Officer pressed in service two grounds which according to him were not on record during the original assessment. One is the undisclosed sale consideration of Rs. 1.05 crores received by the petitioner for the sale of land in question. It has now come on record through the petitioner''s own admission that though the sale deed recorded sale consideration of Rs.4.98 lacs, the petitioner received additional sum of Rs.1.05 crores in cash. The purchaser had given cheques by way of security which were however, not deposited with the bank upon the matching sum in cash being paid to the petitioner.

12. Central question of the petitioner''s liability to pay the capital gain tax, however, would depend on the fact whether the agricultural land sold by the petitioner was situated beyond the distance of 8 kms. from the Vadodara Municipal Corporation limit. Here also, the question would be subdivided into two parts. First is, as on which date, the outer boundary of Vadodara Municipal Corporation is to be reckoned for the purpose of measuring the distance. Would it be the date of notification i.e. 6.1.1994 under which the Government of India in terms of clause (iii) of subsection (14) of section 2 of the Act specified the outer limits in connection with different township and cantonment area or the date on which the sale of land actually took place. Second aspect would be what would be the exact distance between the outer limits of Vadodara Municipal Corporation and the lands sold.

13. In plain terms, clause(iii) of section 2(14) refers to agricultural land in India not being land situate within such distance, not more than eight kilometers from the local limits of any municipality or cantonment board, as the Central Government may specify in the notification. This provision does not give any indication that the outer limit of Municipality would be frozen as on the date of such notification. The petitioner would however rely on second explanation to this notification in which it has been specified as under ((1994) 205 ITR (St.) 121):

"(2) The reference to municipal limits or the limit of Cantonment Board in the schedule to this notification is to the limits as existing on the date on which the limits as existing on the date on which the notification is published in the Official Gazette."

14. For two reasons, the contention of the petitioner, that for the purpose of this petition, the outer limit of Vadodara Municipal Corporation as on 6.1.1994 should be reckoned, cannot be accepted. First, it is question of interpretation of above noted explanation. Whether by this explanation, the intention was to freeze the outer limit of various urban agglomeration and Cantonment Board included in the notification as on the date of notification without taking into account the future

expansion of such urban agglomeration, an issue we would be well advised not to go into while examining the challenge of reopening of the assessment. Secondly, whether 6.1.1994 was the last of the notifications issued by the Union of India or were there later notifications either expanding the boundaries or refixing the distances, depend on the development of various urban agglomeration, is also not clear on record. We may therefore, for prima facie consideration, accept the stand of the Revenue that it would be the outer limit which would be relevant for ascertaining the distance. It is well settled at the stage of reopening of assessment the Assessing Officer must have reason to believe that income has escaped assessment. The reason to believe cannot be equated with final proof.

15. Coming to the central issue of distance being less or more than 8 kms between the outer limits of Vadodara Municipal Corporation and land in question, we notice that during the previous assessment, the petitioner had relied on a certificate stated to have been issued by one Shri K.D. Patel, Executive Engineer, Road and Building division, District Vadodara, on 16.1.2013 in which it was stated that the distance between the limit of Vadodara Municipal Corporation and the Hanumanpura village is more than 8 kms.

16. Income-tax authorities however, later on obtained a certificate dated 12.7.2013 from Deputy Municipal Commissioner, Vadodara, in which he had indicated that shortest aerial distance between various blocks of land and Vadodara Municipal Limit is as under :

Sr. No.

Block No. (Hanumanpura)

Areal Distance in (KM)

1

43

0.760

2

44

0.434

3

45

0.528

4

46

0.456

5

65

1.094

6

23

1.708

17. This is in addition to statement of Shri Sohan M. Patel, Additional Assistant Engineer, Vadodara Municipal Corporation, which was recorded on oath on 10.7.2013 in which he stated that the land in question is situated not more than 2 kms from the outer limit of Vadodara Municipal Corporation. Intrigued by such major discrepancy between the certificate of Shri K. D. Patel, Executive Engineer, produced by the petitioner before the Assessing Officer during the original assessment and the materials collected by the revenue authority later on, in our order dated 10.8.2006, we issued notice to the Secretary, Road and Building division, Government of Gujarat and called for certain information. We may reproduce the order as under :

"1. While hearing this petition challenging a notice for reopening of the petitioner''s assessment for the assessment year 2008-09, we noticed that prime question is of charging capital gain tax to the petitioner upon sale of his agricultural land. Case of the petitioner is that such land was situated beyond a distance of 8 kms from the limit of Vadodara Municipal Corporation and was therefore, in terms of section 2(14)(iii) of the Income Tax Act not exigible to capital gain tax. In this respect during the original assessment, the petitioner had relied on a certificate dated 16.01.2013 issued by one Shri K.D. Patel, Executive Engineer, Road and Building Department, Vadodara, in which he had certified that the distance between the limit of Vadodara Municipal Corporation and village:Hanumanpura is more than 8 kms. A copy of this certificate tendered by the petitioner is taken on record.

2. In the reasons recorded by the Assessing Officer for issuing the impugned notice for reopening, he has referred to a statement of Shri Sohan M. Patel, Additional Assistant Engineer, Vadodara Municipal Corporation, recorded on oath on 10.07.2013, in which he has stated that the land in question is situated at a distance not more than 2 kms from the outer limits of Vadodara Municipal Corporation. We notice that the department has obtained a certificate dated 11.03.2016 issued by the Executive Engineer, Road and Building Department, Vadodara, in which, it is stated that the distance between the outer limit of Vadodara Municipal Corporation and Hanumanpura bus stand is 2.8 kms. The incometax authorities also have a certificate dated 12.07.2013 issued by Deputy Municipal Commissioner, Vadodara Municipal Corporation, in which it is stated that the shortest aerial distance between the survey numbers in question ranges between 0.434 kms to 1.708 kms.

3. The later certificate referred to above, raise a serious doubt about the veracity of the first certificate dated 16.01.2013 issued by the Executive Engineer Shri K.D. Patel. If the aerial distance between the plot of land and the outer limit of Vadodara Municipal Corporation is barely a half km., it seems very unlikely that a distance by road between the Vadodara Municipal Corporation limits and the village in question would exceed 8 kms. We would therefore like to ascertain correct facts.

4. Let the petitioner join the Secretary, Road and Building Division, Government of Gujarat, as an additional respondent.

5. Let there be NOTICE to the newly added respondent, returnable on 31.08.2016. On the said date, he shall supply following details:

I. The exact distance by shortest road between the outer limit of Vadodara Municipal Corporation as on 31.03.2008 and lands bearing revenue survey numbers 43, 44, 45, 46 and 65 and block No.23 paiki 3(23A) of village Hanumanpura.

II. The authority shall also indicate whether Shri K.D. Patel, Executive Engineer, Road and Building Department, Vadodara, is still in service. If so, his affidavit shall be filed stating as to on what basis the said certificate dated 16.01.2013 was issued by him.

6. For said purpose, along with this order, the newly added respondent shall also be supplied a copy of certificate dated 16.01.2013. Direct service to the newly added respondent is permitted."

18. Pursuant to such order, an affidavit dated 10.9.2016 came to be filed by one Sadiya Tusharbhai Ghelabhai, Executive Engineer, in which he stated as under :

"7. I say and submit that the exact distance by shortest road between outer limit of Vadodara Municipal Corporation as on 31.08.2008 and Hanumanpura village bus stand is 2.8 KM (Certificate of Executive Engineer dated 11.03.2016 is annexed herewith and marked as Annexure R-1).

Further the exact shortest distance between Hanumanpura village site and land bearing revenue survey Nos. 43, 44, 45, 46 and 65 and Block No.23 paiki 3 (23A)of village Hanumanpura is 0.716 KM (Attach herewith and marked as Annexure-R2 is certificate of Assistant Town Planner, Vadodara Urban Development authority dated 06.09.2016.

Thus, exact distance as required by shortest road is 3.516 km.

8. I further say and submit that, Shri K.D. Patel Executive Engineer R&B Department, Vadodara is retired from the Department on dated 31.08.2013. I further submit that neither outward register number nor signature of Shri KD Patel as per certificate of 16.01.2013 is matched with official records.

9. I say and submit that as per certificate of 16.01.2013 given by the herein,

outward register number is stated as DD/Anter/108/2013. However, from the perusal of outward register, serial number for outward of 16.01.2013 starts from 198. (Attach herewith and marked as Annexure R-3 is outward register dated 16.01.2013).

10. I further say and submit that, signature in the stated certificate is not even remotely matched with the signature of Mr. K.D. Patel. (Attached herewith and marked as Annexure-R4 is specimen signature card submitted to Treasury office, Vadodara for verification of signature.)

11. I say and submit that even Mr. K.D. Patel has denied issue of any such certificate. (Attached herewith and marked as Annexure-R5 is affidavit by Mr. K.D. Patel)."

19. Along with this affidavit, the deponent has also produced several documents including the affidavit of Shri K.D. Patel dated 8.9.2016 stating that he had never issued certificate dated 16.1.2013 and the document does not carry his signature.

20. It can thus be seen that there is serious doubt about genuineness of the certificate dated 16.1.2013 of the Executive Engineer certifying that the land in question was situated beyond 8 kms from the outer limit of Vadodara Municipal Corporation, upon which the petitioner heavily relied. Shri K.D. Patel who is supposed to be the author of the certificate has since retired from Government service but has filed an affidavit stating that he has never issued the said certificate and the document does not carry his signature. The Road and Building division contends that a copy of said certificate is not found in their official records. A strong case is built up against the petitioner of having produced a document which was not genuine. For the purpose of this petition, at least, we must proceed on the basis of declaration of official of Road and Building division that no copy of such document is found on the record and Shri K.D. Patel, retired Executive Engineer, who has gone on oath stating that he had never issued said certificate. If that be so, the very foundation of the petitioner''s case of the land being at a distance of more than 8 kms from the outer limit of Vadodara Municipal Corporation fails. This would also match with the present information which Revenue collected after the assessment was over in form of statement of Shri Sohan M. Patel and certificate issued by the Deputy Collector of Vadodara Municipal Corporation, both indicating that the distance between the two limits is much shorter. In fact, the Executive Engineer of Road and Building division also in the latest affidavit has confirmed this aspect.

21. In view of such facts, we are not inclined to quash the notice for reopening. However we clarify that the assessment may be carried out on the basis of evidence that may be brought on record including by the petitioner, unmindful of the observations made herein above.

22. Petition is dismissed. Interim relief stands vacated.

