IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12598 of 2012
With
SPECIAL CIVIL APPLICATION No. 12600 of 2012
With
SPECIAL CIVIL APPLICATION No. 12614 of 2012

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

ASHWAMEGH CO OP HOUS. SOC. LTDVIBHAG 2 - Petitioner(s)
Versus
DY. COMMISSIONER OF INCOME TAXCIRCLE 9 & 1 - Respondent(s)

==========

Appearance :
MR RK PATEL & MR B D KARIA for Petitioner(s) : 1,
MS PAURAMI B SHETH for Respondent(s) : 1 - 2.

==========

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 06/11/2012

COMMON ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These petitions arising in common back-ground have been heard together and are being finally disposed of by this common judgement.

2. Petitioners, in all the petitions, have challenged notices issued by the Assessing Officer under Section 148 of the Income Tax Act,1961 (for short 'the Act') of the completed assessments. We may notice the facts as emerging from the record of Special Civil Application No. 12598 of 2012.

2.1 The petitioner is a co-operative society. For the assessment year 2007-08, the petitioner had filed a return of income alongwith supporting documents declaring total income of Rs. 37,32,950/-. Such return was taken by the Assessing Officer in scrutiny for which purpose he issued notice under Section 143(2) of the Act.

2.2 We may notice that in such return, the assessee had disclosed that it had earned income through sale of certain landed properties and treated it as capital gain. After adjusting the expenses and other allowable deductions, the assessee had worked out the capital gain at Rs. 37,32,950/- which was the only item of income disclosed by the assessee in the said return.

2.3 During the scrutiny assessment, Assessing Officer examined such claim. Several queries were raised and replies were received from the assessee. To these queries and replies, we would advert at a later stage.

2.4 Eventually, the Assessing Officer framed scrutiny assessment under Section 143 (3) of the Act and accepted the computation of income done by the assessee in the return. In such assessment order dated 21.05.2009, the Assessing Officer recorded as under:

“The assessee is a housing co-operative society engaged

in purchase and sale of land/plots. In response to notices issued on various dates of this office Shri Bhavesh P. Shah C.A. and authorized representative of the assessee and Shri Priyam Khambhata of M.S.Dhiren Shah & Co. has attended from time to time and furnished the details called for. The case was discussed in the light of details furnished during the course of scrutiny proceedings.

After going through the details furnished during the case of scrutiny proceedings and after detailed discussion with the A.R the assessment is finalized as under."

2.5 It is this scrutiny assessment which the Assessing Officer desires to reopen for which impugned notice came to be issued on 29.03.2012. At the request of the petitioner, the Assessing Officer supplied his reasons recorded for issuing such notice. Such reasons read as under:

"In this case of Ashwamegh Co. Op. Hsg Soc Ltd. Vibhag-2 the assessee had filed return on 31.03.2009 declaring total income of Rs. 37,32,950/-. The assessment u/s. 143(3) of the I.T. Act has been finalized on 21.05.2009 on a total income of Rs. 37,32,950/-.

On verification of case records it is noticed that during the A.Y. 2007-08 the assessee has sold five plots of non-agricultural land admeasuring 7685 Sq. Yards at sale price of Rs. 57,63,750/-. The assessee had offered "long terms capital gain income" of Rs. 37,32,945/- after adjusting the expenses towards cost of acquisition and improvement etc. The business of the assessee is land development and sale and purchase of plots and hence the land/plots are nothing but stock in trade and the profit/income arrived by the assessee should be treated as business income. Since the income returned is a business income in view of above position, the assessee shall not also be entitled to the benefit of cost indexation u/s. 48 of the Act.

Accordingly to section 2(14) "Capital Asset" means

property of any kind held by assessee but does not include any stock in trade, consume stores or raw materials held for the purpose of his business or profession. As per Sn. 45(2), the profits or gain arising from the transfer by way of conversation by the owner of a capital asset into or its treatment by him into, or its treatment by him as stock in trade of a business carried by him shall be chargeable to income tax as his income of the previous year in which such stock in trade is sold or otherwise transferred by him and for the purposes of Section 48.

In view of the above, I have reasons to believe that income chargeable to tax has escaped assessment for A.Y. 2007-08 and intend to reassess such income chargeable to tax which has escaped assessment and which comes to the notice subsequently in the course of proceedings under this section."

2.6 The petitioner raised his objections to such proposal for reopening the assessment under communication dated 30.04.2012. Respondent No.1, Assessing Officer, however, rejected such objections vide his order dated 27.07.2012. Hence, this petition.

3. Learned counsel for the petitioner submitted that the only head under which the assessee had earned income and which was disclosed in the return was of long term capital gain on sale of plots. Such return was taken in scrutiny, several queries were raised and replies were filed by the assessee. After considering such replies, the Assessing Officer accepted the computation of income made by the assessee in the return. Such scrutiny assessment cannot be reopened even within four years on the ground that the sale proceeds should have been treated as income from business and not as long term capital gain. Counsel submitted that any such attempt on part of the Assessing

Officer would be on the basis of mere change of opinion.

4. In support of his contention, counsel relied on following decisions:

1. In case of ***Commissioner of Income-Tax Vs. (1) Kelvinator of India Ltd. (2) Eicher Ltd***. reported in ***320 ITR 561***.

2. In case of ***Gujarat Power Corporation Ltd. Vs. Assistant Commissioner of Income Tax*** *reported in* ***(2012) 77 DTR (Guj) 89***.

3. In case of ***Commissioner of Income Tax Vs. Usha International Ltd. (Delhi) (Full Bench)*** *reported in* ***(2012) 77 DTR (Del) (FB) 396***.

5. On the other hand, learned counsel, Ms. Paurami Sheth for the department opposed the petition contending the notice for reopening is issued within four years from the end of relevant assessment year. During the original assessment, the question whether the assessee was in the business of buying and selling land and that therefore, the land should form part of the stock-in-trade and the income generated from sale of such land should be business income was never examined by the Assessing Officer. In her contention, therefore, reopening cannot be stated to be on the basis of mere change of opinion.

6. From the record, it clearly emerges that the petitioner's return contained a single item of receipts upon sale of plots held by the petitioner-co-operative society. Petitioner claimed that the same was its long term capital

gain. After adjustments permissible under law, the petitioner disclosed total income of Rs. 37,32,950/-. No other item were included in the return. The Assessing Officer, during scrutiny assessment, threadbare examined such return of the assessee. As many as three replies were elicited from the petitioner-assessee. In fact, specific queries were also raised. For example, on 20.02.2009, the Assessing Officer called upon the assessee to furnish following details:

i) Basis of sale consideration,

ii) Proof of basis of Commission paid to Navratna Organizers,

iii) Details/proof of compensation paid to Agrawal Estate Organizers,

iv) Name and address of plot purchased

v) Total area/extent/remaining plot with the Co-Op.Soc.,

vi) Bank account extract/statement

7. In response to such a query, the petitioner addressed a detailed letter dated 13.05.2009. In such letter, it was stated as under:

"The Society decided not to develop the said land and accordingly informed the Project Consultant and Organizer Agarwal Estate Organizers Ltd., to terminate their development rights as the Society wants to sell the land of the society to the Prospective Buyer. It is to be taken note of that the society was not in a position to sell the land of the Society till the development agreement entered into between the society and Agarwal Estate Organizers Ltd. in operation. Therefore, if the society wants to sell the land of the society, first of all, the

society was required to terminate the development rights given to Agarwal Estate Organizers Ltd. and for which the Society entered into a termination agreement with Agarwal Estate Organizers Ltd. and compensation amount payable to Agarwal Estate Organizers Ltd. on sale of land of the society was determined and agreed upon between both the parties.

In view of the aforesaid facts and legal submission, the compensation paid to Agarwal Estate Organizers Ltd. is deductible in computation in computation of capital gain in the case of the Society as an expenditure in connection of the sale of land of the Society and therefore, the proportionate expenditure incurred on compensation paid to Agrawal Estate Organizers Ltd. in comparison to the aggregate area of land sold during the year has been deducted in the computation of capital gain as expenditure incurred in the computation filed with return of income and it has not been claimed as cost of improvement to the property in computation of capital gain. It is submitted that the compensation paid to Agarwal Estate Organizers Ltd. shown as a separate entry in the computation of capital gain and it has not been stated as cost of improvement. However, to avoid confusion and misunderstanding on this issue. We are attaching herewith the working of long term capital gain once again as per Exhibit-V with a clear cut demarcation that compensation paid to Agarwal Estate Organizers Ltd. has been claimed as an expenditure incurred in connection with the transfer of land of the Society."

[underline supplied by us]

8. In yet another letter dated 15.05.2009, in connection with the petitioner's earlier submission dated 13.05.2009 the petitioner wrote to the Assessing Officer as under:

" Your honour has called for the details of basis of income over expenditure at Rs. 1,44,70,717/-. In this regard, we are attaching hereinabove the Income U Expenditure Account and Balance Sheet as on 31.03.2007 of the Society as per Exhibit-II, wherein in income side, there are capital gain for the Accounting Year 2005-06 relevant

to A.Y. 2006-07 in respect of Sola Plot of Land (Kalhar scheme) amounting to Rs 91,62,304/- and in respect of Sole Land amounting to Rs. 46,08,459/-. Both capital gains are pertaining to A.Y. 2006-07 which are duly offered for taxation in the Income Tax Return for A.Y. 2006-07. The copy of return of income for A.Y. 2006-07 is attached herewith as per Exhibit-III. However, in A.Y. 2006-07, such items were shown in Balance sheet and in current year, it is transferred to income & Expenditure Account and hence, the said items are appearing in income & Expenditure Account of accounting year 2006-07."

9. Yet again on 21.05.2009, the petitioner made further clarifications to the Assessing Officer as under:

"Your honour has asked to finish the details of Name, Address and P.A. Corporation is a proprietary concern of Shri Gauttambhai S.Shah. Further, we are submitting herewith the contra confirmation of Shah Corporation for the period 2006-07 as per ***Exhibit-I****."*

Along with such reply, the petitioner produced at Exh.I the opinion with respect to Shah Corporation as called for by the Assessing Officer.

10. It was only after such detailed scrutiny that the Assessing Officer framed original assessment on 21.05.2009 making no additions to the income disclosed by the petitioner. As already noted, the Assessing Officer recorded that the representative of the assessee had attended the office from time to time and furnished details of the information called for. Thus, it is established inescapably that the Assessing Officer examined the claim thoroughly before passing the assessment order. The question is whether such scrutiny assessment can be reopened even within

four years from the end of relevant assessment year on the reasons recorded by the Assessing Officer.

11. In our opinion, the answer has to be in the negative. It is true that the impugned notice has been issued within a period of four years from the end of relevant assessment year. Therefore, the requirement that the income chargeable to tax should have escaped assessment for the reason of the failure on the part of the assessee to disclose truly and fully all material facts need not be established. However, as held by the Apex Court in case of Commissioner of Income-Tax Vs. (1) Kelvinator of India Ltd. (2) Eicher Ltd. (supra.) reopening even within four years would not be permissible on a mere change of opinion.

12. In the present case, the Assessing Officer having examined the entire claim threadbare, any deviation from his decision on the ground that the receipts of the assessee from sale of land should be treated as business income in and not as long term capital gain must be taken to be a change of opinion. It may be that in the assessment order, the Assessing Officer did not elaborate on this aspect of the matter. To our mind the same would be of no consequence. In the decision of Division Bench of this Court in case of *Gujarat Power Corporation Ltd. Vs. Assistant Commissioner of Income Tax,* it was held and observed as under:

"41. The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial

order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be re-opened by the same authority. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interest of the revenue, therefore, such special provisions are made under section 147 of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to entire original assessment, of course at the hands of the revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that power to reopening cannot be equated with review.

42. Bearing in mind these conflicting interests, if we revert back to central issue in debate, it can hardly be disputed that once the Assessing Officer notices a certain claim made by the assessee in the return filed, has some doubt about eligibility of such a claim and therefore, raises queries, extracts response from the assessee, thereafter in what manner such claim should be treated in the final order of assessment, is an issue on which the assessee would have no control whatsoever. Whether the Assessing Officer allows such a claim, rejects such a claim or partially allows and partially rejects the claim, are all options available with the Assessing Officer, over which the assessee beyond trying to persuade the Assessing Officer, would have no control whatsoever. Therefore, while framing the assessment, allowing the claim fully or partially, in what manner the assessment

order should be framed, is totally beyond the control of the assessee. If the Assessing Officer, therefore, after scrutinizing the claim minutely during the assessment proceedings, does not reject such a claim, but chooses not to give any reasons for such a course of action that he adopts, it can hardly be stated that he did not form an opinion on such a claim. It is not unknown that assessments of larger corporations in the modern day, involve large number of complex claims, voluminous material, numerous exemptions and deductions. If the Assessing Officer is burdened with the responsibility of giving reasons for several claims so made and accepted by him, it would even otherwise cast an unreasonable expectation which within the short frame of time available under law would be too much to expect him to carry. Irrespective of this, in a given case, if the Assessing Officer on his own for reasons best known to him, chooses not to assign reasons for not rejecting the claim of an assessee after thorough scrutiny, it can hardly be stated by the revenue that the Assessing Officer can not be seen to have formed any opinion on such a claim. Such a contention, in our opinion, would be devoid of merits. If a claim made by the assessee in the return is not rejected, it stands allowed. If such a claim is scrutinized by the Assessing Officer during assessment, it means he was convinced about the validity of the claim. His formation of opinion is thus complete. Merely because he chooses not to assign his reasons in the assessment order would not alter this position. It may be a non-reasoned order but not of acceptance of a claim without formation of opinion. Any other view would give arbitrary powers to the Assessing Officer.

43. We are, therefore, of the opinion that in a situation where the Assessing Officer during scrutiny assessment, notices a claim of exemption, deduction or such like made by the assessee, having some prima facie doubt raises queries, asking the assessee to satisfy him with respect to such a claim and thereafter, does not make any addition in the final order of assessment, he can be stated to have formed an opinion whether or not in the final order he gives his reasons for not making the addition."

13.Similarly in a recent decision Full Bench of Delhi High

Court by a majority opinion in case of Commissioner of Income Tax Vs. Usha International Ltd. held as under:

" It is, therefore, clear from the aforesaid position that:

(1) Reassessment proceedings can be validly initiated in case return of income is processed under s. 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;

(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the AO does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the AO did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the AO had formed an opinion in the original assessment, though he had not recorded his reasons."

14. In the result, the impugned notice dated 29.03.2012 is quashed. Since facts are common in all petitions, respective impugned notices in all petitions would stand quashed. All petitions are allowed and disposed of accordingly.

[AKIL KURESHI, J.]

[HARSHA DEVANI, J.]

JYOTI