

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 16884 of 2018**

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BIMLAKUMARI LAJPATRAJ HURRA
Versus
INCOME TAX OFFICER,

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Appearance:

DARSHAN R PATEL(8486) for the Petitioner(s) No. 1

MR. KARAN SANGHANI WITH MRS KALPANAK RAVAL(1046) for the
Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE N.V.ANJARIA**

and

HONOURABLE MR. JUSTICE DEVAN M. DESAI

Date : 17/04/2023

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

In the facts and circumstances of the case and having regard to the request and consent of the learned advocates appearing for the respective parties, the petition was taken up for final consideration.

1.1 Rule, returnable forthwith. Learned advocate Mr. Karan Sanghani waives service of Rule on behalf of the respondent.

1.2 Heard learned advocate Mr. Darshan Patel for the petitioner and learned advocate Mr. Karan Sanghani for the respondent-Income Tax Authority.

2. The challenge in this petition filed under Article 226 of the Constitution is directed against notice dated 30.3.2018 issued by the assessing officer against the petitioner under section 148 of the Income Tax Act, 1961 in respect of the Assessment Year 2011-2012 seeking to reopen the assessment of the petitioner for the year under consideration. It

was stated in the notice that for the said assessment year 2011-2012, the income chargeable to tax had escaped the assessment within the meaning of section 147 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3. The return of income came to be filed by the petitioner assessee in respect of the Assessment Year 2011-2012 on 20.7.2011. In the return of income, the gross total income to the tune of Rs. 3,95,497/- and net income to the tune of Rs. 41,500/- were declared after showing the relevant calculations of income and other relevant details.

3.1 The said return of income came to be processed by the competent authority. The ground for seeking to reopen the assessment as available from the reasons for re-opening of the assessment supplied to the petitioner on 30.08.2018 reads as under,

“As per information available with this office the assessee has sold immovable property for sale consideration of Rs. 9,00,00,000/- jointly with other. Further on verification of return of income filed on 20.7.2011 declaring total income at Rs. 41,500/- by the assessee, the assessee has not declared capital gain on transfer of capital assets in his return of income.

The assessee was liable to tax of Rs. 1,27,94,856/- on account of capital gain earned on transfer of capital assets. In the case of the assessee, Rs. 1,27,94,856/- is required to be taxed on account of capital gain on transfer capital assets. Therefore, there is a escapment of Rs. 1,27,94,856/-, thus, this case required to be re-opened u/s. 147 of the Act.”

3.2 The petitioner assessee filed his objections to the reasons provided by stating *inter alia* in his letter dated 1st September, 2018 that the immovable property was sold by the petitioner assessee alongwith four other persons for the total sale consideration of Rs. 9 crores. It was

stated that the return of income was filed for the Assessment Year 2011-2012 after considering the capital gains, the computation of income was duly reflected and 1/5th share of the value of the sale of the immovable property-bungalow was also shown. There is no dispute about the fact that the sale of the immovable property bungalow was by five joint owners having equal share.

3.3 In the order dated 25.09.2018 disposing of the the objections raised by the respondent-assessee, the assessing officer stated thus, to arrive at the conclusion that he had reasons to believe that income had escaped assessment in respect of year under consideration

“(i) There was a information received to verify that you are the joint holder in the immovable property sold which was valued at Rs. 9 Crore and you filed return of income for AY 2011-2012 declaring the total income at Rs. 41,500/- only. Therefore, there was reason to believe that you have not offered the capital gain for tax on sale of immovable property.

(ii) In the reasons recorded, the AO has “reason to believe” that income chargeable to tax had escaped assessment. “Reason to believe” refers to the prima facie or tentative belief which the Assessing Officer is required to form at the time of recording the reasons and issuing the notice u/s. 148 of the Act. If there would be concrete belief of material, the Assessing Officer should have to invoke the provisions of Income Tax Act and add the income which is believed to be chargeable to tax has escaped from assessment and in the instant case immovable property was sold at the value of Rs. 9 Crore and return of the income was filed declaring total income at Rs. 41,500/- for AY 2011-2012. In the reasons recorded for reopening the assessment, the Assessing Officer has referred to the reasons to believe which in his/her view is applicable. It may be that the issue whether there is escaped assessment of Rs. 1,27,94,856/- on sale of immovable property of Rs. 9,00,00,000/-, but the fact remains that it could not be examined since no notice under section 143(2) had been issued and no assessment under section 143(3) had been framed.”

4. While learned advocate for the petitioner submitted with reference

to the details mentioned in the return of income for the year under consideration figuring on record that 1/5th share in the bungalow and other attendant facts were mentioned and thereafter the entire action to reopen the assessment was without any basis, on the other hand, learned advocate for the respondent relied on the affidavit-in-reply filed by the respondent to contend on that basis that the return of the petitioner was accepted under section 143(1) of the Act without scrutiny.

4.1 It was submitted that assessing officer had reopened the case beyond the period of four years from the end of the relevant assessment year. According to the submission, the petitioner had jointly with other five co-owners sold the immovable property for total consideration of Rs. 9 crores and filed return of income, which was only for the net income, it was submitted of Rs. 41,500/-.

4.2 According to the contention of the respondent, the petitioner had not declared the capital gains and there was escapment of income. It was also contended that other co-owner assessed total capital gain at Rs. 1,27,94,856/-. Learned advocate for the respondent relied on the decision of the supreme Court in **Assistant Commissioner of Income-Tax vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd. [(2007) 291 ITR (SC)]**.

5. In light of the factual scenario emerging as above, when the reasons for reopening are to be looked at, the assessing officer stated that there was a sale of immovable property for a consideration of Rs. 9 crore jointly with others and that in the return of income filed on 20.7.2011, the net income declared by the assessee was Rs. 41,500/- only and that the assessee had not declared the capital gains. Seeing the copy of the return for the year under consideration, 1/5th share of the total consideration of Rs. 9 crores which was the income of the petitioner assessee was to the

tune of Rs. 1.80 lakhs and was shown in the return of income.

5.1 The purchase price of the property as standing in the year 1981, was also indicated. The exemption was claimed under section 54EC of the Act by investing the amount received towards share of sale consideration in the bond and in flat. The amounts in that regard to the tune of Rs. 50 lakhs, and Rs. 51,44,806, totalling Rs. 1,01,44,806/- was mentioned. After working out other figures and details, the gross total income was shown to be 3,95,497/- and the net income was Rs. 41,500/-. The return was duly processed.

5.2 Thus, the petitioner duly showed her sale proceeds of Rs. 1.80 crores. She computed the value of the property as on 1.4.1981, which was the date of purchase of property at Rs. 10.89 lakhs (approximated), and the index cost of property at Rs. 77.48 lakhs and deducted Rs. 90,000/- by way of transfer expense. Also mentioned in the return of income was the investment to the tune of Rs. 1.01 crores (approximated) as stated above in a combination of bonds under section 54EC of the Act and purchase of flat.

5.3 Learned advocate for the petitioner in support of his submission that the reopening was without any basis, could successfully relied on a decision of this court in **Mumtaz Haji Mohmad Memon vs. Income Tax Officer being Special Civil Application No. 21030 of 2017** decided on 21.3.2018 where the facts of the case were akin to one on hand.

6. What surfaced from the facts and contentions is that the notice for reopening and the grounds on which it was rested, were without supported by any foundational facts. When the return of income was filed and all the relevant details including the share in the sale proceeds,

the basis of the details of exemption claimed under section 54EC, the index cost etc. were shown, there was nothing to doubt the said details which figured in the return of income, which was processed. The submission that the co-owners showed the capital gains of different amount, is also not a valid ground since the facts and computation in case of each assessee in respect of return of income would differ. Petitioner assessee showed all facts and details in the return of income.

6.1 Neither there existed foundational facts, nor it could be said that any tangible material was available with the assessing officer to justify exercise of power. It could be said that the basis for reopening was absent. When the foundation was missing, there could not have been erection of ground to seek reopening of assessment. It could not be said, in the facts of the case, that the assessing officer could have harboured a reason to believe acceptable in eye of law to seek reopening.

6.2 As a result of the above discussion, the impugned notice deserves to be set aside.

6.3 Accordingly, the notice dated 30.03.2018 seeking to reopen the assessment of the petitioner in respect of Assessment Year 2011-2012 is hereby set aside.

7. The petition stands allowed. Rule is made absolute.

(N.V.ANJARIA, J)

(D. M. DESAI, J)

C.M. JOSHI