

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 21030 of 2017****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE B.N. KARIA**

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 or any order made thereunder ?	

**MUMTAZ HAJI MOHMAD MEMON**

Versus

**INCOME TAX OFFICER, WARD 6(1)(1)**

Appearance:

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

MRS MAUNA M BHATT(174) for the RESPONDENT(s) No. 1

**CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI**

and

**HONOURABLE MR.JUSTICE B.N. KARIA****Date : 21/03/2018****ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. The petitioner has challenged a notice dated

31.03.2017 issued by the respondent-Assessing Officer for reopening of the petitioner's assessment for the assessment year 2010-11.

2. Facts are as under.

3. Petitioner is an individual. For the said assessment year 2010-11, the petitioner had filed the return of income on 16.06.2010. On 28.04.2009, the petitioner had along with two other co-owners, sold immovable property situated at Village:Udhna, for a declared sale consideration of Rs.50 lakhs. In the return of income, the petitioner disclosed such sale and after adjusting the cost of improvement and indexed cost of acquisition, offered a sum of Rs.2,45,900/- by way of capital gain. Such return was not taken in scrutiny. To reopen such assessment, the Assessing Officer issued the impugned notice. In order to do so, he had recorded following reasons:

*"As per the information available with office, the assessee had sold an immovable property for consideration of Rs.1,18,95,000/- with Sub-Registrar Office, Surat-2, Udhana, during the FY.2009-10 relevant to A.Y. 2010-11, jointly with two other persons. Therefore, the share of the assessee comes to Rs.39,65,000/- (presuming 1/3<sup>rd</sup> of Rs.1,18,95,000/-). However, on verification from ITD system, it is seen*

*that the assessee has not filed return of income for A.Y. 2010-11. Since, the assessee has not filed return of income, capital gain earned on the sale of immovable property has not been offered for taxation by the assessee. Therefore, the property sale transactions made by her during the financial year 2009-10 are unexplained/undisclosed.*

*In view of the above facts, I, have reason to believe that income chargeable to tax has escaped assessment within the meaning of Section 147 of the IT Act for A.Y.2010-11 by an amount of Rs.39,65,000/- and it is a fit case for re-opening the assessment for A.Y.2010-11."*

4. Perusal of the reasons would show that according to the Assessing Officer, the petitioner had not filed any return at all for the said year. Further, as per the information available to him, the Assessing Officer believed that the property in question was sold for a consideration of Rs.1,18,95,000/- jointly. The petitioner's share being 1/3<sup>rd</sup> thereof, he would have received total sale consideration of Rs.39,65,000/-. The Assessing Officer further recorded that upon verification of ITD system, the assessee has not filed the return of income for the said assessment year and not offered the capital gain arising out of the said sale consideration to tax.

5. The petitioner raised objections to the notice of reopening under a letter dated 09.10.2017. In such objections, he pointed out that the property was sold on 28.04.2009 for a sale consideration of Rs.50 lakhs and not for Rs.1,18,95,000/- as stated in the reasons. He produced copy of the sale deed. He therefore contended that the reasons proceeded on wrong factual foundation. He also pointed out that he had filed the return of income, in which, he had declared his share of Rs.16,66,667/- of the sale consideration. After deducting the cost of acquisition and improvement charges, he also offered a sum of Rs.2,45,900/- by way of capital gain. He therefore contended that on both counts, the Assessing Officer had recorded wrong reasons.

6. The Assessing Officer rejected such objections by an order dated 27.10.2017. In such order, he recorded that the co-owner Ayubkhan Pathan had declared the total sale consideration of the property at Rs.1,18,95,000/-. Further, the report received from the sub-registrar, Surat, would show that the market value of the said property was determined at Rs.1,18,95,000/-. He was therefore of the opinion

that the assessee should have shown his share of the sale consideration at Rs.39,65,000/-, in spite of which, he declared the sum at Rs.16,66,667/-. Primarily on these grounds, the objections were rejected. Notably, the Assessing Officer did not make any comment on the assessee's contention that contrary to what was recorded in the reasons, the assessee had only filed the return of income for the relevant assessment year.

7. In this petition, the petitioner has reiterated the grounds raised in the objections. In the affidavit-in-reply, the respondent has conceded that the reference to the assessee not having filed the return of income was an error. However, he has stressed on the fact that the market value of the property was assessed at Rs.1,18,95,000/- for the purpose of stamp valuation and in terms of section 50C of the the Income Tax Act, 1961 ('the Act' for short). This would substitute the sale consideration for the purpose of computing capital gain tax.

8. Learned counsel for the petitioner raised following contentions:

I. The reasons recorded are erroneous. The Assessing Officer has proceeded on completely wrong factual premises. The reasons therefore lack validity.

II. Report of the sub-registrar, Surat, referred to by the Assessing Officer in the order disposing of the objections was received only after recording reasons and issuing notice. Any reliance on such report would therefore be wholly impermissible.

III. The Assessing Officer has attempted to improve the reasons in the affidavit in reply filed in the petition which is not permissible. In this respect, counsel relied on the judgment of Division Bench of this Court in case of **Sagar Enterprises v. Assistant Commissioner of Income-tax** reported in [2002] 257 **ITR 335 (Guj)**.

9. Learned counsel for the Revenue opposed the petition contending that even though reference to the assessee not having filed the return may be an error, the same would not vitiate the action of the Assessing Officer. The fact remains that the assessee had shown a sale consideration of Rs.50

lakhs in the sale deed whereas for the purpose of stamp duty calculation, the market value of the property was valued at Rs.1,18,95,000/-. Section 50C of the Act would therefore apply.

10. We are conscious that in the present case, the return filed by the assessee was not taken in scrutiny. Nevertheless, in such a case also the requirement that the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment, would apply. Reference in this respect can be made to the decision of this Court in case of ***Inductotherm (India) P. Ltd. v. M. Gopalan, Deputy Commissioner of Income-Tax*** reported in [2013] 356 ITR 481 (Guj). Validity of the reasons recorded by the Assessing Officer would therefore be one of the issues.

11. In this context, we have noted that the reasons proceeded on two fundamental grounds. One, that the property in question was sold for a sum of Rs.1,18,95,000/- and two; that the assessee had not filed the return and that therefore his 1/3<sup>rd</sup> share out of the sale proceeds was not offered to tax. Both

these factual grounds are totally incorrect as is now virtually admitted by the Revenue. It is undisputed that the assessee had actually filed the return of income for the said assessment year and income also offered his share of the declared sale consideration to tax as capital gain. The Assessing Officer may have dispute with respect to computation of such capital gain, he cannot simply dispute the fact that the assessee did file the return. Importantly, even the second factual assertion of the Assessing Officer in the reasons recorded is totally incorrect. He has referred to said sum of Rs.1,18,95,000/- as a sale price of the property. The assessee had produced before the Assessing Officer, the sale deed in which, the sale consideration disclosed was Rs.50 lakhs.

12. The Assessing Officer may be correct in pointing out that when the sale consideration as per the sale deed is Rs.50 lakhs but the registering authority has valued the property on the date of sale at Rs.1,18,95,000/- for stamp duty calculation, section 50C of the Act would apply, of course, subject to the riders contained therein. However, this is not the cited reason for reopening the assessment. The

reasons cited are that the assessee filed no return and that 1/3<sup>rd</sup> share of the assessee from the actual sale consideration of Rs.1,18,95,000/- therefore, was not brought to tax. These reasons are interconnected and interwoven. In fact, even if these reasons are seen as separate and severable grounds, both being factually incorrect, Revenue simply cannot hope to salvage the impugned notice. Through the affidavit-in-reply a faint attempt has been made to entirely shift the center of the reasons to a completely new theory viz. the possible applicability of section 50C of the Act. The reasons recorded nowhere mentioned this possibility. Reasons recorded, in fact, ignored the fact that the sale consideration as per the sale deed was Rs.50 lakhs and that the assessee had by filing the return offered his share of such proceeds by way of capital gain.

13. In the result, impugned notice is quashed. Petition is disposed of.

**(AKIL KURESHI, J)**

**(B.N. KARIA, J)**

ANKIT SHAH