

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.16171 of 2017
FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI Sd/-

and

HONOURABLE MR.JUSTICE A.S. SUPEHIA Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

VIJAY HARISHCHANDRA PATEL....Petitioner(s)

Versus

INCOME TAX OFFICER, WARD (3)(5)....Respondent(s)

Appearance:

CHINTAN H DAVE, ADVOCATE for the Petitioner No. 1

MRS MAUNA M BHATT, ADVOCATE for the Respondent No.1

CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE A.S. SUPEHIA

Date : 06/12/2017

ORAL JUDGMENT

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. This petition under Article 226 of the Constitution of India is directed against the notice dated 31.03.2017 issued by the respondent – Income Tax Officer under section 148 of the

Income Tax Act, 1961 (hereinafter referred to as "the Act"), seeking to reopen the assessment of the petitioner for assessment year 2010-11.

2. The facts stated briefly are that:

2.1 The respondent herein assumed jurisdiction under section 147 of the Act, seeking to reopen the assessment of the petitioner for assessment year 2010-11 and accordingly issued a notice dated 31.03.2017 under section 148 of the Act. In response to the said notice, the petitioner called upon the respondent to furnish the reasons recorded for reopening the assessment whereupon, the reasons came to be furnished to the petitioner. The reasons recorded by the respondent for reopening the assessment read as under:

"In this case, assessee has not filed the return of income for the A.Y. 2010-11. Subsequently, on verification of information available with this office on ITD portal regarding assessee who have not filed the return of income (NMS Data – Code AIR 007), it is seen that above named assessee has sold immovable property valued at Rs.40,00,000/- during the F.Y. 2009-10.

Accordingly, capital gain chargeable on the sale transaction made by the assessee for the concerned A.Y. remains unexplained. The sale

consideration received by the assessee is required to be treated as income of the assessee from undisclosed source as assessee has not filed the return of income and not shown transaction to the department. It is clear that income of the assessee has escaped assessment to the tune of Rs.40,00,000/-.

In view of the above I have, therefore, reasons to believe that the income / gain chargeable to tax has/have escaped the assessment within the meaning of section 14 of the I.T. Act, 1961. Total escapement of income is to the extent of Rs.40,00,000/-. The above income / gain chargeable to tax has escaped assessment by reason of the failure on the part of the above named assessee who failed to disclose fully and truly all material facts necessary for the assessment for the A.Y. 2010-11 within the meaning of the IT Act, 1961."

2.2 Upon receipt of the reasons for re-opening the assessment, the petitioner filed his objections dated 08.06.2017, pointing out to the respondent that since the petitioner had not filed return of income for assessment year 2010-11, he had moved an application under section 273A of the Act on 03.09.2013 before the Principal Commissioner of Income Tax-4, Ahmedabad, pursuant to which a notice under section 148 of the Act came to be issued to the petitioner on 27.09.2013. The petitioner had

filed return of income in response to such notice and disclosed the income from the sale of immovable property valued at Rs.40,00,000/-. The petitioner also enclosed therewith a copy of the return of income. It was further stated in the objections that the petitioner's return came to be accepted and the assessment was completed under section 143(3) read with section 147 of the Act on 25.02.2015 and that no income, in relation to assessment year 2009-10 had escaped assessment. The Assessing Officer was, accordingly, requested to drop the proceedings under section 147 of the Act. The Assessing Officer, however, rejected the objections filed by the petitioner, which has given rise to the present petition.

3. Mr. Chintan Dave, learned advocate for the petitioner assailed the impugned notice by submitting that the assessment of the petitioner had already been reopened earlier and that on the same reasons, the assessment of the petitioner is sought to be reopened for the second time. It was submitted that initially, pursuant to the application made by the petitioner under section 273A of the Act, notice under section 148 of the Act had been issued to the petitioner and the petitioner had filed return of income in response thereto, disclosing the sale of the immovable property valued at Rs.40,00,000/- which came to be accepted by the Assessing Officer.

3.1 Referring to the reasons recorded, it was submitted that in the aforesaid backdrop, the reasons recorded indicate non-application of mind on the part of the Assessing Officer to the correct facts of the present case, inasmuch as, he has recorded that the petitioner has not filed any return of income and has not disclosed the sale of the immovable property valued at Rs.40,00,000/-. It was submitted that the petitioner had duly pointed out these facts to the Assessing Officer. He, however, has still proceeded further pursuant to the impugned notice. It was submitted that in these circumstances, the assumption of jurisdiction on the part of the Assessing Officer being without authority of law, the impugned notice deserves to be set aside.

4. On the other hand, learned counsel for the revenue supported the impugned notice on the grounds stated by the Assessing Officer in the order disposing of the objections.

5. As can be seen from the reasons recorded by the Assessing Officer for reopening the assessment, the formation of belief that the income has escaped assessment is based upon the fact that the assessee has not filed the return of income for assessment year 2010-11 and hence, the income derived from the sale of the immovable property valued at Rs.40,00,000/- during the financial year 2009-10 is required to be

considered as income of the assessee from the undisclosed source. In response to the said notice, the petitioner has duly pointed out to the Assessing Officer that way back in the year 2013 he had made an application under section 273A of the Act, pursuant to which proceedings had been instituted under section 147 of the Act by issuance of notice under section 148 of the Act and the return filed by the petitioner in response thereto had been accepted.

6. A perusal of the documents annexed along with the petition reveals that during the course of the earlier proceedings under section 143(3) read with section 147 of the Act, the Assessing Officer had issued a notice dated 17.04.2014 to the petitioner under section 142(1) of the Act, calling upon him to furnish various details, including copy of purchase deed and sale deed of bungalow sold during the year and details of bank account maintained by him as well as copy of the bank statement for the year under consideration, which came to be furnished by the petition. It appears that during the course of hearing on 16.06.2014, the Assessing Officer had asked for further details, pursuant to which the petitioner had also filed submission of details vide communication dated 24th June 2014 giving all details regarding the sale of the bungalow for Rs.40,00,000/- and details of capital gain calculation and exemption thereof. After

considering the details submitted by the petitioner, the Assessing Officer accepted the return filed by the petitioner. Thereafter the respondent Assessing Officer seeks to reopen the assessment to once again examine the very aspect which has been gone into by his predecessor Assessing Officer in the first round of proceedings under section 147 of the Act. It is settled legal position that when the Assessing Officer has applied his mind to an issue in the assessment proceedings, the successor Assessing Officer cannot seek to reopen the proceedings on the same ground as it would amount to a mere change of opinion.

7. Besides, the facts of the present case are quite gross, inasmuch as, in the reasons recorded the Assessing Officer has based his belief on the fact that the assessee has not filed any return of income on account of which there is escapement of income on account of sale of the immovable property. After obtaining the reasons, the assessee has pointed out to the Assessing Officer that he had filed the return of income disclosing sale of the immovable property valued at Rs.40,00,000/-, and the same had been duly accepted by the then Assessing Officer. However, the respondent Assessing Officer, instead of dropping the assessment proceedings, by the order rejecting the objections, seeks to proceed with the re-assessment proceedings on a fresh ground

which does not find place in the reasons recorded, viz. that "on perusal of copy of the assessment u/s 143(3) read with section 147 and computation of income, satisfaction of the AO while recording satisfaction is found based on fact as genuinity of deduction availed u/s 54 and discharge of liability of LTCG in the case is not found any reflection through the assessment order."

8. In the case of **GKN Driveshafts (India) Ltd. v. ITO**, (2003) 1 SCC 72, the Supreme Court held that when a notice under section 148 of the Income Tax Act, 1961 is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections and the Assessing Officer is bound to dispose of the same by passing a speaking order before proceeding further.

9. The filing of objections and passing an order thereon, is not an empty formality. The object behind the assessee filing objections and the Assessing Officer passing a speaking order thereon is to ensure that if the assessee is in a position to impress upon the Assessing Officer that there is no reasonable ground for reopening the assessment, the Assessing Officer may drop

the proceedings and not proceed further. In the facts of the present case, despite the fact that the assessee had duly pointed out to the Assessing Officer that he had, in fact, filed his return of income, wherein this very issue had been gone into, instead of acting fairly and reasonably and dropping the proceedings, the respondent Assessing Officer seeks to proceed further for reasons which are alien to the reasons recorded for reopening the assessment. Thus, the very intent and purpose behind submitting objections and passing a speaking order thereon is frustrated.

10. As is apparent on a plain reading of the reasons recorded, the very basis for reopening the assessment is that the petitioner had not filed any return of income disclosing such sale of the immovable property valued at Rs.40,00,000/-. The record of the case shows that earlier, pursuant to a notice under section 148 of the Act, the petitioner had, in fact, filed return on income disclosing the sale of such immovable property, and the Assessing Officer after duly applying his mind to the issue had accepted the return of income. Considering the fact that a return of income had been filed disclosing sale of the immovable property, the very foundation on which the reopening is based in the reasons recorded by the Assessing Officer for reopening the assessment, collapses.

Therefore, on the reasons recorded, the Assessing Officer could not have formed the belief that income had escaped assessment, inasmuch as such belief had been formed on a factually incorrect premise. It is settled legal position, that the reopening of the assessment has to be maintainable on the reasons recorded for reopening the same, and that such reasons cannot be substituted. In the facts of the present case, when the original ground for reopening the assessment does not survive, the Assessing Officer seeks to proceed further with the assessment on totally different grounds, which is impermissible in law. Moreover, what the Assessing Officer now seeks to do is to sit in judgment over the assessment framed by his predecessor Assessing Officer, which again, is not permissible in law.

11. In the light of the fact that very basis for reopening no longer survives, the assumption of jurisdiction under section 147 of the Act by the Assessing Officer by issuing notice under section 148 of the Act is without authority of law and cannot be sustained.

12. For the forgoing reasons, the petition succeeds and is accordingly allowed. The impugned notice dated 31.03.2007 issued by the respondent – Income Tax Officer under section 148 of the Act

is hereby quashed and set aside. RULE is made absolute accordingly with no order as to costs.

Sd/-
[HARSHA DEVANI, J]

Sd/-
[A. S. SUPEHIA, J]

Bhavesb-[pps]*

