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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 245 OF 2017

Keki Bomi Dadiseth ... Petitioner

vs.

The Assistant Commissioner ... Respondents
of Income Tax –19(2) and 2 Ors.

…....

Mr.Percy Pardiwala, Senior Advocate a/w. Mr.Nitesh Joshi i/b. Mr.Sameer Dalal for the Petitioner.
Mr. Ashok Kotangle a/w. Ms. Padma Divakar for the Respondent.

…....

CORAM : M.S.SANKLECHA &
A. K. MENON, JJ.
DATE : 15th MARCH, 2017

P.C. :

1. This petition under Article 226 of the Constitution of India challenges a notice dated 29th March, 2016 issued by the Assessing Officer under Section 148 of the Income Tax Act, 1961 (the Act). By the impugned notice the Assessing Officer seeks to re-open an assessment for the Assessment year 2009-10.

2. The reasons recorded in support of the impugned notices and communicated to the petitioner reads as under:

" Information has been received in this office that the above

mentioned assessee has sold property in Mumbai to Shaina N, Chudasana, PAN AAAPC6147D during the F.Y. 2008-09 relevant to A.Y. 2009-10 for a consideration of Rs.1,90,00,000/-. However, the market value of the same property was Rs.3,22,52,500/-. Therefore, the provisions of Section 50C of the Income Tax Act, 1961, are clearly attracted in this case. After verifying Income Tax Return details of the assessee it is conclusively proved that the assessee has understated income in the returns of income for A.Y. 2009-10, amounting to Rs.1,32,52,500/-

On the basis of aforesaid information, available records with me and after duly applying my mind, I have reasons to believe that income chargeable to tax, as indicate above, to the tune of Rs. 1,32,52,500/-, or any other income chargeable to tax which comes to my notice subsequently in the course of proceedings for re-assessment, has escaped assessment for A.Y. 2009-10 within the meaning of section 147 of the IT Act, 1961.

3. The petitioner filed his objections to the aforesaid reasons in support of the impugned notices. The objections filed were twofold as under: -

(i) That the capital gain on account of sale of tenancy / leasehold rights arose in the Assessment year 2008-09 and not in the subject Assessment year 2009-10. This was evident according to the petitioners as Rs.1.90 crores was offered as capital gains tax in its return of Income for the Assessment Year 2008-09.

(ii) Section 50C of the Act which is being invoked in respect of transfer of tenancy / leasehold rights would have no application as it applies only to sale of land or buildings and not leasehold rights.

4. By an order dated 13th December, 2016, the Assessing Officer rejected the petitioners objection. An Order disposing of the objections records the fact that the deed of assignment on which was registered at Stamp Duty valued of Rs.3.22 crores was given by the petitioner to the assignee on 8th August, 2008 i.e. during the previous year relevant to subject Assessment year. Further, the issue of Section 50C of the Act being applicable to lease hold rights are concerned, the Assessing Officer did not deal with the same and left open for determination during the regular assessment proceedings.

5. Mr. Joshi, learned Counsel appearing for the petitioners in support of the petitioner submits that the issue of transfer of leasehold interest in the subject property was done by the petitioners in the financial year 2007-08 relevant to the Assessment Year 2008-09. According to him transfer was part performance of possession of property was also handed over to the assignee at that time when consideration of Rs.1.90 crores was received and submits that so far as Section 50C of the Act is concerned this Court has in ***Commissioner of Income Tax,***

Central- II v. Greenfield Hotels & Estates (P) Ltd. [389 ITR 68] has taken a view that Section 50C of the Act would have no application for computing capital gains on transfer of lease hold rights in land and buildings. The aforesaid decision upheld the view of the Tribunal. Consequently, the Assessing Officer could not have reason to believe that income chargeable to tax has escaped assessment.

6. We note that the very issue with regard to transfer having taken place in the Assessment Year 2008-09 by way of part performance as contended by the petitioner is a matter of dispute. This would require investigation by the Assessing Officer and could be appropriately done only during the Assessment proceedings. Dispute arises on account of the fact that deed of assignment which was executed on 8th August, 2008 in paragraph 8.4. thereof records as under

> *"The Assignors have, simultaneously with the execution of these presents, handed over to the Assignee possession of the Demised premises on 'as-is, where-is' basis"*

It is not possible for us in this jurisdiction to examine and investigate into this factual aspect.

7. So far as the submission on behalf of the petitioner that the Assessing

Officer could not have any reason to believe that income chargeable to tax has escaped assessment in view of the decision of this Court in Greenfield Hotels & Estates (P) Ltd. (supra) is concerned, it is observed that the aforesaid decision of this Court did not independently rule appropriate interpretation of Section 50C of the Act. The Court refused to entertain the Revenue's appeal for the reason that the impugned Order of the Tribunal had followed its earlier decision in case of ***Atul G Puranik vs ITO [2011] 132 ITD 499***. The Revenue had accepted the same and in appeal from the Order of the Tribunal in Atul G. Purnaik (supra) was preferred.

8. In the aforesaid background the Court refused to interfere with the Order of the Tribunal as there were no distinguishing features either on facts or in law as reiterated in GreenField Hotels & Estates (P) Ltd. (supra) from that existing in Atul G. Puranik (supra).

9. The other alternative contention of Mr. Joshi in view of the matter decision of the Tribunal held that the transfer of leasehold rights in land and building is not covered by Section 50C of the Act is what certainly requires consideration.

10. However, it may not be noted that in its objections which the petitioners

had filed to the reasons for re-opening notice petitioner had not brought to the notice of the Assessing Officer the decision of the Tribunal in its face. In the result the application of this to the Tribunal decision to the facts of the present case would be matter which the Assessing Officer would have dealt with and disposing of the objection if the same were brought to his notice by the petitioners. This not having been done it would be appropriate that the aforesaid decision could be brought to the notice of the Assessing Officer during the assessment proceedings.

11. Mr. Joshi placed reliance upon decision of this Court in ***German Remedies Ltd. v. Deputy Commissioner of Income Tax and Others [2006] 285 ITR 26*** to contend that the reopening notice is bad in law on the basis of the aforesaid decision. However, in the case of German Remedies Ltd. (supra) the petitioner therein had in its objections brought to the notice of the Assessing Officer the Order of the Tribunal in its favour on the issue on hand mainly processing charge. However, the Assessing Officer rejected the objections filed by the petitioner even without adverting to the petitioner. It is in that conduct of the Assessing Officer to follow the binding decision of the Assessing Officer is deplorable.

12. In the present facts, the petitioner had not brought any decision of the Tribunal on the issue of law while filing its objections which the Assessing Officer could have dealt with bearing in mind facts involved.

13. In the above view, we see no reason to entertain the above petition.

14, Accordingly, petition dismissed. All contentions are kept open.

(A.K. MENON,J.) **(M. S. SANKLECHA,J.)**