

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 12763 of 2014****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE JAYANT PATEL****and****HONOURABLE MR.JUSTICE S.H.VORA**

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- 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 ?

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JAGDISHBHAI GOVINDLAL PATEL....Petitioner(s)

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WEB PY
Versus

INCOME- TAX OFFICER....Respondent(s)

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Appearance:

MR SN DIVATIA, ADVOCATE for the Petitioner(s) No. 1

MR NITIN K MEHTA, ADVOCATE for the Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE JAYANT PATEL
and
HONOURABLE MR.JUSTICE S.H.VORA

Date : 02/02/2015

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE JAYANT PATEL)

1. Rule. Mr.Mehta, learned Counsel for the respondent, waives service of notice of Rule.
2. The learned Counsel appearing for both the sides are heard for final disposal.
3. The short facts are that on 27.7.2008, return of income was filed by the Assessee for the assessment year of 2008-09, declaring the total income of Rs.90,540/-. Notice under Section 143(2) of the Income Tax Act (hereinafter referred to as the "Act") was issued, commencing regular assessment proceedings on 18.8.2009. Thereafter, as per the Assessee, all relevant details, including the date on which the property was acquired and the sale deed were submitted. Ultimately, the assessment order was passed assessing the income of Rs.90,540/-. On 25.3.2014 Notice under Section 148 of the Act was issued for reopening of the assessment. On 9.4.2014, letter was addressed by the Assessee to the respondent demanding reasons. On 2.6.2014,

reasons recorded were furnished to the Assessee. On 10.6.2014, the Assessee submitted objections against the reasons for resisting the reopening of the assessment. On 19.8.2014, order was passed by the respondent, rejecting the objections for reopening of the assessment. Under these circumstances, the present petition before this Court.

4. We have heard Mr.Divatia, learned Counsel for the petitioner and Mr.Mehta, learned Counsel for the respondent.

5. As such, it is an admitted position that the period of four years from the end of the assessment year has expired on the date when the assessment was proposed to be reopened.

Therefore, in our view, the case may fall in the proviso (1) to Section 147 of the Act. As per proviso (1) to Section 147 of the Act, assessment can be reopened even after four years if it is found that there was failure on the part of the Assessee to disclose fully and truly all material facts necessary for his assessment for that year.

6. It appears that in the return of income, the

Assessee had had mentioned the statement of long-term capital gain, wherein the date for purchase of the property was shown as 1.4.1981 and thereafter income tax cost was considered and the capital gain was arrived at. In the assessment proceedings, when the reply was submitted for computation, Vide Item No.5, computation of capital gain and the copy of the sale deed was also enclosed. Thereafter, it appears that the final assessment order was passed on 6.9.2010. At the first brush, one may say that the details pertaining to the transaction of sale of the property with the support of sale deed were produced. In the reasons recorded by the respondent, there is no clear opinion expressed or the reasons recorded that there was escapement of income in the assessment, but it appears that the re-computation of the capital gain on the basis of the 'Will' was considered as the basis and it was expressed that as per the provisions of Explanation 3 to Section 48 of the Act, the cost index of 2006-07 i.e. the year in which the property was acquired by 'Will' by the Assessee was to be considered as the basis and thereafter

the long-term capital gain was to be computed.

7. We may record that for invoking the powers under Section 147 of the Act, it is necessary for the competent authority to record the reasons for arriving at the opinion that there was escapement of income for assessment. Such powers could be exercised within the outer limit of four years, but if the power is to be exercised beyond the period of four years, then as per the proviso (1) to Section 147, reasons are also required to be recorded that there was failure on the part of the Assessee to declare true and material facts for the assessment. No such reasons are specifically recorded by the respondent.

8. At this stage, we may record that this Court in the case of **Sky Diamonds Vs. Assistant Commissioner of Income Tax** in Special Civil Application No.18004 of 2014 decided on 21.1.2015 had observed thus:-

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2. The only question which may arise for consideration in the present matter is "Whether the bar of four years provided by first proviso of section 147 of the Income Tax Act can be made applicable to the facts of the present case or not?"

3. The relevant facts are that as per the petitioner, for the assessment year 2008-2009, the scrutiny was made under section 143(3) of the Income Tax Act (hereinafter referred to as the "Act") and the petitioner submitted detailed letter on various points connected with the return of income tax filed under section 139 of the Act. On 18.11.2010, during the course of regular assessment, in reply to the notice under section 142(1), the Chartered Accountant of the petitioner, vide letter, had submitted various documents including the audit report and the details about the salary of the partners. On 28.12.2010, the assessing officer passed a scrutiny assessment order under section 143(3) of the Act and while passing the said order, the survey made on 22.08.2008 and other relevant aspects were considered and the order was passed.

4. On 17.01.2014, the assessing officer issued notice under section 148 of the Act informing the petitioner that the income has escaped assessment for the assessment year 2008-2009 and vide letter dated 01.04.2014, the respondent provided reasons recorded for reopening of the assessment. On 17.06.2014, the petitioner filed objections against the reasons and it was contended inter alia that full disclosure was made including the points on the basis of which the assessment is sought to be reopened and the period of limitation of four years expired was also contended by way of objection. On 10.10.2014 the respondent passed the order, whereby the objections filed by the petitioner were disposed of and the notice for reopening of the assessment was maintained. Under the circumstances, the present petition before this Court.

5. We have heard Mr.J.P. Shah, learned counsel appearing with M.J.Shah for the petitioner and Mr. Sudhir Mehta, for the

respondent Revenue.

6. As such, apart from the aspect as to whether income escaped assessment, we find that one of the major point which may go to the root of the matter is the bar operating on the power of Revenue to reopen the assessment after the expiry of the period of four years from the end of the relevant assessment year. Section 147 of the Act upto first proviso which is relevant for the purpose of this petition reads as under:

"147. Income escaping assessment. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under subsection (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for

his assessment, for that assessment year”

7. Section 147 of the Act enables the AO to reopen the assessment subject to the provisions of sections 148 to 153 of the Act, but the first proviso to the very section 147 of the Act provides that no action shall be taken under this section (147) after the expiry of the period of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by the reason of failure on the part of assessee to disclose full and truly all material facts necessary for assessment for the respective assessment year.

8. The aforesaid shows that unless the case falls in the exceptional category of “failure to disclose fully and truly all material facts necessary for the assessment”, the action after the expiry of four years for reopening of the assessment is not permissible. As we are not required to examine other contingencies of failure, we do not deal with the same.

9. As per the learned counsel Mr. Shah for the petitioner, full and true disclosure of all material facts relevant to the reasons which is the ground for reassessment were disclosed before the AO at the time when the scrutiny of the assessment had taken place. He submitted that not only that but the audit report was also produced which included the remuneration to the partners from the disclosed item of Rs.74,90,834/and during the course of the assessment, this aspect is deemed to have been considered and the assessment order was passed. He submitted that once the petitioner succeeds to satisfy that full and true disclosures were made of the relevant material and thereafter, if the assessment order is

passed, the bar of four years would apply. Apart from the aforesaid contention, as per Mr. Shah, it cannot be said that the income escaped the assessment and therefore section 147 of the Act cannot be invoked by the Department.

10. Whereas, Mr. Mehta, learned counsel appearing for respondent is not in a position to dispute the factual aspect that the true disclosure was made by the assessee for the remuneration paid to the partners and computed while computing the business income. He is also unable to dispute that the audit report showing the aforesaid details were produced.

11. In view of the above, we find no reason to believe that true and full disclosure was not made by the assessee to come out from the bar of four years as provided by first proviso to section 147 of the Act. Once the bar operates upon the power by express statutory provision, the action can be said as without jurisdiction. If the action of issuance of notice is without jurisdiction, it would be a case for interference under Article 226 of the Constitution.

12. In view of the above, we find that the impugned action under section 147 of the Act and consequently issuance of notice under section 148 of the Act (Annexure E) including disposal of the objection dated 10.10.2014 (Annexure I) may not stand in the eye of law. Hence, they are quashed and set aside.

13. The petition is allowed to the aforesaid extent. Rule made absolute accordingly. Considering the facts and circumstances, no order as to costs.

9. In our view, unless it is specifically found by the competent authority that there was failure on

the part of the Assessee to declare true and full disclosure of the material facts for assessment, the assessment already made cannot be reopened after a period of four years.

10. Apart from the above, our attention is brought to the decision of this Court in the case of **Commissioner of Income Tax Vs. Rajesh Vithalbhai Patel** in Tax Appeal No.13 of 2013 decided on 17.4.2013, wherein this Court by interpreting the deeming fiction of Section 49 of the Act has found that when the property is acquired through the modes specified under Section 49(2) of the Act by gift or 'will', cost of acquisition shall be the date on which the property was acquired or the cost of the previous owner of the property is to be considered. We may, for ready reference, refer to the observations made by this Court in the above referred decision at paragraphs 4 to 9 as under:-

4. We are however, of the opinion that CIT(Appeals) as well as Tribunal committed no error. We may recall that in the present case, since the assessee had acquired the property through gift, in normal understanding of law, there would be no cost of acquisition attached to such property. Section 49 of the Act, however, makes a deeming provision for computing the cost of

acquisition in such cases. Relevant portion of section 49 reads as under :

"49. Cost with reference to certain modes of acquisition: (1) Where the capital asset became the property of the assessee-

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(ii) under a gift or will;

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the cost of acquisition of the asset shall be deemed to be the total cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the assets incurred or borne by the previous owner or the assessee as the case may be.

Explanation : In this sub-section the expression "previous owner of the property" in relation to any capital asset owned by an assessee means the last previous owner of the capital asset who acquired it by a mode of acquisition other than that referred to in clause(i) or clause(ii) or clause(iii) or clause(iv) of this sub-section."

5. In terms of sub-section(1) of section 49, thus, the assessee having acquired the property through a gift, the cost of acquisition on the asset by deeming fiction would be the cost for which the previous owner of the property acquired it, as increased by the cost of any improvement of the asset incurred or borne by the previous owner or the assessee as the case may be.

6. For the purpose of computation of such cost of acquisition of assets, one shall have to fall back to section 48, relevant portion of which reads as under :

"48. Mode of computation – The income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely-

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto. Xxx

Explanation – For the purpose of this section : xxx

(iii) "indexed cost of acquisition" means an amount which bears to the cost of acquisition the same proportion as the Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for the year beginning on the 1st day of April, 1981, whichever is later."

7. Under section 48 of the Act, thus capital gain is computed by deducting from the full value of the consideration received or accruing as a result of the transfer, the amounts of expenditure incurred wholly and exclusively in connection with such transfer, the cost of acquisition of the asset and the cost of any improvement thereto. Term "cost of acquisition of the asset" is explained in explanation (iii) to section 48. In terms of such explanation, indexed cost of acquisition would be an amount which bears to the cost of acquisition the same proportion as the Cost Inflation Index for the year in which the asset is transferred bears to the Cost Inflation Index for the first year in which the asset was held by the assessee or for

the year beginning on the 1st day of April, 1981, whichever is later. In simple words, therefore for an asset acquired prior to 1.4.1981 the indexed cost of acquisition would be the cost of acquisition multiplied by the ratio of the Cost Inflation Index in the year in which assessee's asset is transferred to the Cost of Inflation Index for the year beginning on 1.4.1981. It was therefore, that the Tribunal in our opinion correctly held that the indexed cost of acquisition shall have to be worked out with reference to 1.4.1981 since in the present case the asset was acquired by the previous owner of the property. Learned counsel for the Revenue however, submitted that such interpretation would fail to take into account the expression "Cost Inflation Index for the first year in which the asset was held by the assessee". In his opinion the "assessee" referred to under such expression would be the present assessee and not the previous owner. In our opinion, such interpretation cannot be accepted. We say so for the following reasons. Firstly, by virtue of a deeming fiction provided in sub-section(1) of section 49, cost of acquisition in hands of the assessee would be the cost for which the previous owner of the property acquired it. It is for this purpose that we need to fall back on computation provision of section 48. When we do so, we work out the cost of acquisition of the asset in the hands of previous owner. While doing so, we cannot transpose the assessee in explanation (iii) of section 48. Doing so, would amount to falling short of giving full effect to the deeming fiction contained in sub-section(1) of section 49. To our opinion such deeming fiction must be allowed to have its full play. As is often stated, a deeming fiction must be allowed its full application and should not be allowed to boggle.

8. Additionally, we notice that in sub-

section(1) of section 49, the legislature has provided that cost of acquisition of the asset shall be deemed to be the cost for which the previous owner of the property acquired, as increased by any cost of improvement of the assets incurred or borne by the previous owner or the assessee as the case may be. If the interpretation of the counsel for the Revenue was correct, this later reference to the cost of improvement borne by the assessee would not have been necessary since section 48 itself would take care of any improvement on the capital asset to be included for the cost of acquisition. It is precisely because such improvement referred to in section 48 would have reference only to that made by the previous owner that the additional provision had to be made in the deeming fiction provided in sub-clause(1) of section 49. Further the interpretation sought to be given by the Revenue would be unacceptable because there is no provision under which the cost of acquisition in the hands of the assessee in cases such as gift on the date of acquisition of the property can be made and found in the Act. A Serious road-block would be created if such property is acquired through Will and would therefore have no reference to its actual cost on the date of operation of the Will.

9. There is nothing on record to show on what basis the Assessing Officer adopted the cost of acquisition of the property at 15.63 lakhs as on 23.5.1995. In the assessment year there is no indication whatsoever on what basis the Assessing Officer arrived at such a figure. Counsel doing some guess work submitted that the said figure may have been indicated in the sale deed itself or may have been the amount on which necessary stamp duty for the purpose of registration of the gift deed might have been computed. In absence of any provision in the Act enabling the Assessing Officer to adopt

either of the said figures as the cost of acquisition of the property on the date of gift, simply cannot be accepted.

11. In view of the above, we find that even on merits also it could not be said that there was any escapement of the income for assessment. Under these circumstances, the action for reopening of the assessment by the impugned Notice at Annexure-A can be said to be without jurisdiction and hence, deserves to be quashed and set aside. Accordingly, the same is quashed and set aside.

12. The petition is allowed to the aforesaid extent. Rule is made absolute accordingly. No order as to costs.

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(JAYANT PATEL, J.)

THE HIGH COURT
OF GUJARAT

(S.H.VORA, J.)

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