IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 329 of 2018

==

PRINCIPAL COMMISSIONER OF INCOME TAX-1
Versus
LALITABEN GOVINDBHAI PATEL

==

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

==

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 11/04/2018
ORAL ORDER
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Revenue is in appeal against the judgement of the Income Tax Appellate Tribunal dated 17.05.2017 raising following question for our consideration:

   "Whether the Appellate Tribunal has erred in law and on facts in quashing the order passed by the CIT (A) u/s. 263 of the Act?"

2. Respondent-assessee is an individual. For the assessment year 2009-10, assessee had filed the return of income declaring capital gain of Rs. 5.04 lacs in sale of landed property. Facts on record would suggest that the assessee had acquired such property at a cost of Rs. 33,69,763/- after converting the land from agriculture purpose to non-agriculture purpose by paying conversion charges of Rs. 2,21,338/-. She entered into an

agreement to sale the land to one Melody Complex Pvt. Ltd on 15.09.2008 for a sale consideration of Rs. 38,74,431/-. At the time of execution of the agreement, the assessee received a sum of Rs. 1 lac from the prospective buyer. As per the agreement, the possession would be handed over on receiving balance sale consideration of Rs. 37,74,431/-. However, subsequently, the assessee executed another document which was in the nature of a sale deed on 25.03.2009. Under this deed, the land in question was sold to one Gatil Properties Ltd for a sale consideration of Rs. 4,43,52,100/-. The assessee was the seller. Gatil Properties Ltd was the buyer and Melody Complex Pvt. Ltd was the confirming party in the said document. The document also showed that the assessee also received the balance sale consideration of Rs. 37,74,431/- whereas the remaining amount of Rs. 4,04,77,669/- was received by Melody Complex Pvt. Ltd. The possession was handed over to the petitioner on 25.03.2009.

3. In the return filed, the assessee claimed that the cost of acquisition of the land was Rs. 33,69,763/- and was sold for Rs. 38,74,431/-. The difference of Rs. 5,04,886/- was offered to short term capital gain. The Assessing Officer after examination, accepted such declaration of the assessee.

4. This order of assessment, the Commissioner took in revision under section 263 of the Income Tax Act, 1961. He was of the opinion that at the time of execution of the agreement to sale

dated 15.09.2008, the possession of the land was not handed over to the purchaser. Therefore, in terms of section 53A of the Transfer of Property Act, the principle of part performance would not apply. The sale deed was executed only on 25.03.2009 when the possession was also actually handed over to the new buyer. The sale consideration being Rs. 4,43,52,100/- the assessee had to offer a sum of Rs. 4,09,82,337/- by way of short term capital gain.

5. The assessee challenged this order before the Tribunal. The Tribunal, by the impugned judgement, held that the Commissioner committed an error in exercising revisional powers. The Tribunal relied on a detailed judgement in an earlier case concerning another assessee but similar facts.

6. In the present case, the Tribunal has primarily gone on merits of Commissioner's revisional powers under section 263 of the Act. Had this been the sole ground employed by the Tribunal, we would have examined the issue further. However, when the Tribunal had referred to an earlier judgement which has detailed consideration of all relevant facts, by reference, the Tribunal must be seen to have adopted similar principles.

7. Quite apart from what the Tribunal had said in the impugned order, the fundamental issue which according to us requires consideration is did assessee receive sale consideration of Rs.4,43,52,100/- out of such sale? In the sale deed, the

assessee did pose as a seller and sale consideration stated to have been paid by the purchaser Gatil Properties Ltd was undoubtedly Rs. 4,43,52,100/-. However the entire amount was never received by the assessee. It was a confirming party-Melody Complex Pvt. Ltd which, under the agreement to sale, had a right to insist on purchasing the land or seek specific performance of the agreement and receive bulk of the sale consideration. Out of the total sale consideration, Rs. 4,04,77,669/- was received by such confirming party. When the assessee never received anything beyond Rs. 38,74,431/- originally agreed, question of charing capital gain from the assessee on a sum larger than the said amount of Rs. 38,74,431/- would not arise.

8. It is true that in a short span, the parties to the said transactions showed spectacular appreciation in land price. If the Revenue was of the opinion that such unusual rise in the land price indicated non-genuineness of the transaction itself, no such angle has been probed.

9. In any case, the remaining sale consideration of Rs. 4,04,77,669/- received by Melody Pvt. Ltd can always be taxed appropriately in the hands of the said recipient. We fail to see how the Commissioner could have held the asssessee answerable for capital gain for a sum which she never received.

10. In the result, tax Appeal is dismissed.

(AKIL KURESHI, J)

(B.N. KARIA, J)

JYOTI V. JANI