

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 9293 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MR.JUSTICE Z.K.SAIYED

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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 ?
- =====

HIABEN JAYANTILAL SHAH - Petitioner(s)
Versus
INCOME TAX OFFICER & 1 - Respondent(s)

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Appearance :

MR SN SOPARKAR with MR VARUN K. PATEL for Petitioner(s) : 1,
MR MANISH R BHATT for Respondent(s) : 1,
NOTICE SERVED for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA

and

HONOURABLE MR.JUSTICE Z.K.SAIYED

Date : 21/04/2008

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. This petition has been preferred challenging the Reference dated 26.4.1996 made by the respondent no. 1, namely the Assessing Officer to respondent no. 2, namely the District Valuation Officer (D.V.O.) under section 55A of the Income Tax Act, 1961 (the Act) in respect of the share of the petitioner in the property bearing Final Plot No. 547, Sub-plot Nos. 7 and 8, Town Planning Scheme No. 3, Moje Kocharab, Taluka: City, in the District and Sub District of Ahmedabad.

2. The petitioner, was the co-owner of the aforesaid property along with her husband and son. On 29.11.1994, the petitioner entered into an agreement to sell the said property as a whole, along with other co-owners, for a sum of Rs. 1.40 lacs. The petitioner, who was having 25% share in the property, was thus, entitled to Rs. 35,00,000/- as her share in the sale consideration.

3. As the value of the share of the petitioner exceeded the figure of Rs. 20,00,000/-, the provisions of Chapter-XX-C of the Act were attracted and the petitioner preferred the necessary application in form No. 37-I seeking "No Objection Certificate" from the appropriate authority for transferring the said property. Accordingly, a certificate dated 7.2.1995 came to be issued by the appropriate authority under sec. 269UL(3) of the Act. The petitioner also applied for certificate under

sec. 230A of the Act on 22.12.1995. On 28.12.1995 the sale-deed was executed. The Assessing Officer issued certificate under sec. 230A of the Act on 24.1.1996 and thereby the sale-deed was registered by the registering authority.

4. On 27.8.1996, the petitioner filed return of income for Assessment Year 1996-97 showing capital gain worked out at Rs. 17,43,750/- on the basis of valuation report of a registered Valuer, whereunder, the cost of acquisition of the property was arrived at in terms of the option exercised under sec. 55(2) of the Act.

5. It is the case of the petitioner that in the first week of October, 1997, the petitioner received an undated notice from the D.V.O. informing that a Reference was made by the Assessing Officer on 26.4.1996 under sec. 55A of the Act to the D.V.O. The D.V.O., therefore, proposed to estimate the market value of the property as on 1.4.1981 at Rs. 3,97,000/- as against Rs. 6,25,000/- shown by the assessee – petitioner and also estimate the fair market value of the property as on 28.12.1995 (the date of execution of the sale-deed, i.e. transfer) at Rs. 8,08,000/-.

6. The petitioner, after corresponding with the respondents and the superior authority has challenged the aforesaid Reference by way of this petition. On behalf of the petitioner, learned Senior advocate has

contended that on 26.4.1996 when the Reference was made, no assessment was pending and the Reference could not have been made by the Assessing Officer because return of income has been filed only on 27.8.1996. It was further submitted that the Reference was bad in law because sec. 55A of the Act did not permit the authority to find out the fair market value of the property on the date of the sale.

7. On behalf of the respondents, learned Senior Standing Counsel submitted that once the petitioner – assessee has exercised option under sec. 55(2) of the Act, the Assessing Officer was entitled to invoke the provisions of sec. 55A of the Act, if the Assessing Officer found it necessary so to do having regard to the nature of the asset and other relevant circumstances. That section 55A(b)(ii) of the Act specifically permitted such an exercise by the Assessing Officer. In relation to second part of the Reference, namely, estimating fair market value as on 28.12.1995, learned Senior Standing Counsel relied on the averments made in the affidavit-in-reply.

8. Section – 55A of the Act, at the relevant point of time, reads as under:

“55A. With a view to ascertaining the fair market value of a capital asset for the purposes of this chapter, the [Assessing] Officer may refer the valuation of capital asset to a Valuation Officer-

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the [Assessing] Officer is of opinion that the value so claimed is less than its fair market value;

(b) in any other case, if the [Assessing] Officer is of opinion-

(i) that the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage of the value of the asset as so claimed or by more than such amount as may be prescribed in this behalf; or

(ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do,

and where any such reference is made, the provisions of sub-section (2), (3), (4), (5) and (6) of section 16A, clauses (ha) and (i) of sub-section 91) and sub-sections (3A) and (4) of section 23, sub-section (5) of section 24, section 34AA, section 35 and section 37 of the Wealth-tax Act, 1957 (27 of 1957), shall with the necessary modifications, apply in relation to such reference as they apply in relation to a reference made by the [Assessing] Officer under sub-section (1) of section 16A of that Act.

Explanation- In this section, "Valuation Officer" has the same meaning, as in clause (r) of section 2 of the Wealth-tax Act, 1957 (27 of 1957).]"

9. The concept of fair market value for the purpose of Chapter-IV of the Act pertaining to COMPUTATION OF INCOME FROM CAPITAL GAIN can be found under sec.

55(2)(b) of the Act, whereunder, an assessee has the option to take the actual cost of the acquisition of the asset or the fair market value of the asset on the first day of April, 1981 for the purpose of sections 48 and 49 of the Act. In other words, for arriving at the taxable figure of capital gain while deducting the cost of acquisition an assessee may adopt the figure of cost of acquisition actually incurred or the fair market value of the property as on 1.4.1981. It is only in this fact situation that, with a view to ascertain the fair market value of the capital asset, the Assessing Officer may refer the valuation of the capital asset to a Valuation Officer.

10. Under clause(a) of sec. 55A of the Act under the Assessing Officer is entitled to make the reference to the Valuation Officer in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer is of the opinion that the value so claimed is less than the fair market value. In any other case, as provided under clause(b) of Sec. 55A of the Act, the Assessing Officer has to record an opinion that (i) the fair market value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage or by more than such an amount as may be prescribed; or (ii) having regard to the nature of the asset and other relevant circumstances, it is necessary to make such a reference.

11. As can be seen from the communication dated - Nil (Annexure-D) from respondent no. 2 -D.V.O. to the petitioner in so far as the fair market value of the property as on 1.4.1981 is concerned, the petitioner had claimed the same at a sum of Rs. 6,25,000/- as per Registered Valuer's report. Therefore, the Assessing Officer was required to form an opinion that the value so claimed is less than the fair market value. The estimated value proposed by the D.V.O. is shown at Rs. 3,97,000/-, which is less than the fair market value shown by the assessee as on 1.4.1981. Therefore, clause(a) of Sec. 55A of the Act cannot be made applicable. Clause(b) of Sec. 55A of the Act can be invoked only in any other case, namely when the value of the asset claimed by the assessee is not supported by an estimate made by a Registered Valuer. In the facts of the present case, clause(b) of Sec. 55A of the Act also cannot be invoked. Therefore, there is no question of having recourse to sub-clause (ii) of clause(b) of Sec. 55A of the Act.

12. There is one more aspect of the matter. For invoking sec. 55A of the Act, there has to be a claim made by the assessee, before the Assessing Officer can record opinion either under clause(a) or clause(b) of Sec. 55A of the Act to make a reference to the Valuation Officer. The facts of the present case go to show that the reference was made on 26.4.1996, whereas, the return of income had been filed by the assessee only on 27.8.1996. Hence, on

the date of making the reference by the Assessing Officer, no claim was made by the assessee and the Assessing Officer could not have formed any opinion as to existence of prescribed difference between the value of the asset as claimed by the assessee and the fair market value. Therefore also, provisions of sec.55A of the Act could not have been resorted to by the Assessing Officer.

13. The record of the petition does not indicate as to what was the opinion formed by the Assessing Officer before making reference to the D.V.O. It is only from the undated communication of the D.V.O. that one gathers that the valuer has undertaken estimation of the fair market value of the property as on 1.4.1981 and 28.12.1995. However, in the affidavit-in-reply the Assessing Officer himself states "to ascertain the fair market value of the property, a reference was made by this office to the Valuation officer on 26.4.1996, since according to this office the value declared by the assessee as on the date of execution and registration of the sale deed was lower by more than 25%. The petitioner filed return on 27.8.1996 for assessment year 1996-97 and the fair market value as on 1.4.1981 was shown at Rs. 6,25,000/-. The capital gain was worked out at Rs. 17,43,750/- taking the sale value of the property at Rs. 17,50,000/- as per the banakhat dated 29.11.1994. In the above background of facts it is humbly submitted that since the capital gain is required to be worked out on the fair market value of the

property on the date of the sale deed, the respondent No. 1 has acted within jurisdiction for making reference to the Valuation Officer under the provisions of section 55A of the Act."

14. Therefore, it is apparent that the Assessing Officer had, at no point of time, formed an opinion that the fair market value, in substitution of the cost of acquisition, as claimed by the assessee was required to be disturbed because prescribed parameters were fulfilled. In fact, as can be seen from the affidavit-in-reply the only ground on which reference was made to the Valuation Officer was that the value declared by the assessee as on the date of the execution and registration of the sale-deed was lower by more than 25%. There is no provision in the Act which permits the Assessing Officer to disturb the sale consideration, at least section 55A of the Act cannot be invoked for the said purpose.

15. In the aforesaid set of facts and circumstances of the case, no case is made out by the Revenue for upholding the Reference made on 26.4.1996 under sec. 55A of the Act. The reference made on 26.4.1996 by respondent No. 1 is without jurisdiction and dehors the provisions of the Act.

16. The petition is accordingly allowed and the

Reference made to the D.V.O. Vide communication dated 26.4.1996 is quashed and set aside. Rule is made absolute. There shall be no order as to costs.

(D.A. MEHTA, J.)

(Z.K. SAIYED, J.)

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