IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 22610 of 2017

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RAJESH SHANTILAL SHAH....Petitioner(s)
Versus
INCOME TAX OFFICER....Respondent(s)
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Appearance:
MR SN DIVATIA, ADVOCATE for the Petitioner(s) No. 1
MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1
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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 20/02/2018
ORAL ORDER
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged notice dated 02.05.2016 seeking to reopen the petitioner's assessment for the assessment year 2010-11. The petitioner had filed the return of income for the said assessment year on 14.02.2011 declaring total income of Rs. 4.65 lacs (rounded off). This return was accepted without scrutiny under section 143(1) of the Income Tax Act, 1961. To reopen such assessment, the Assessing Officer issued the impugned notice. He had recorded following reasons for doing so:

"The assessee has filed his return of income for A.Y. 2010-11 declaring total income of Rs. 4,62,240/- on 31.12.2015. The return of income was processed u/s. 143(1) of the I.T.Act, 1961.

2. As per the details available on record, a search and seizure action 132 of the I.T.Act was carried out in case of Shri Ashokbhai I Prajapati on 08.12.2009. During the course of search action, the incriminating documents were found and seized.

2.1 On perusal of Page No. 52-53 of Annexure-2, it reveals that Shri Ashok Prajapati has received Rs. 3,32,50,000/- from Milan H. Mehta through his agents Shri Rajubhai (Rajesh Shantilal Shah) and Shri Andesh Navganbhai Bharwad, Shri Ashokbhai I Prajapati has admitted that cash of Rs. 3,32,50,000/- was received by him from Shri Milan H Mehta towards the sale of 100 bighas of land at the rate of Rs. 11,11,111/- per bigha. However, in the statement recorded subsequent to search during the assessment proceedings, Shri Ashokbhai I Prajapati replied to the question No. 7,8 & 9 has confirmed that he has received Rs. 3,35,00,000/- from Shri Rajubhai (Rajesh Shantilal Shah) on behalf of Shri Milan H Mehta. However, in the statement recorded subsequent to search Shri Milan H Mehta admitted having paid cash of Rs. 1,07,50,000/- only as against the figure of Rs. 3,32,50,000/-.

2.2 Thereafter, the assessment order of both the case i.e. Shri Ashokbhai I Prajapati and Shri Milan H Mehta was passed by the ACIT. Central Circle 2(2), Ahmedabad. In the assessment order of Shri Milan H Mehta passed by the A.O. in A.Y. 2010-11, protective addition of Rs. 70,80,000/- is the differential of Rs. 1,20,00,000/- (the amount appearing the seized paper during the F.Y. 2009-10). Thereafter, an appeal was filed before the Ld. CIT(A). Ld. CIT(A) who vide order dated 04.05.2012 has remarked that is not Shri Milan H Mehta but Shri Rajubhai (Rajesh Shantilal Shah) should be liable to explain the sources of cash appearing on page No. 52 of Annexure A/2.

In view of the above, it is therefore, the source of cash of Rs. 70,80,000/- paid by Rajesh Shantilal Shah to Shri Ashok Prajapati (the amount appearing in the seized paper during the F.Y. 2009-10) remains unexplained.

In view of the above, I have reasons to believe that the income chargeable to tax of Rs. 70,80,000/- has escaped assessment which is more than Rs. 1,00,000/- within the meaning of provisions of section 149(b) the I.T.Act, 1961 and I am satisfied, this is a fit case for reopening the assessment u/s. 147 r.w.s. 148 of the I.T.Act, 1961 for the A.Y. 2010-11."

2. The petitioner raised objections for notice of reopening under communication dated 09.12.2017. Such objections were, however, rejected by the Assessing Officer by an order dated 11.12.2017.

3. Upon perusal of the documents on record and having heard learned advocates for the parties, we notice that under very similar circumstances in case of this very assessee, a notice of reopening was quashed by this Court under a judgement dated 16.08.2017. The only distinction between the two cases being that in the present case, the return was accepted without scrutiny whereas in the judgement noted above, the return for the assessment year 2009-10 was initially made after scrutiny which was sought to be reopened. However, this distinction is of no material since the reasons recorded by the Assessing Officer in both cases are exactly same. The cause on which the notice was quashed in the earlier case is available in the present petition also. To appreciate such ground, few facts may be noted. Before the reasons recorded, there was a sale transaction of land between Ashok Prajapati being a seller and Milan Mehta, the purchaser. The present petitioner Rajubhai Shah and

one Andeshbhai Bharwad were the commission agents. During a search and seizure operation in case of Ashok Prajapati he, in his statement, had accepted having received Rs. 3.32 crores from Milan Mehta through the said two agents. In the statement recorded subsequent to the search during assessment, Ashok Prajapati confirmed that he received Rs. 3.35 crores from the petitioner paid on behalf of Milan Mehta. However, Milan Mehta in his statement admitted having paid only cash of Rs. 1.07 crores (rounded off). When the assessment of Milan Mehta and Ashok Prajapati were completed, addition of Rs. 70.80 lacs was made on protective basis in the hands of Milan Mehta. In the appeal, CIT (Appeals) deleted such addition. The Assessing Officer believes that in such order, the Commissioner had observed that it would be Rajubhai Shah i.e. the present petitioner, who would be liable to explain the source of the cash. It is for such purpose that the impugned notice has been issued.

4. In such background, for the earlier assessment year the notice of reopening in case of this very assessee was quashed by the High Court by above noted judgement dated 16.08.2017 making following observations:

"6. More minute perusal of the reasons recorded by the Assessing Officer would show that as per the department one Ashok Prajapati had sold land to one Shri Milan Mehta in which the petitioner Rajesh Shah and one Andesh Bharwad had acted as brokers. Search and seizure operation was carried out in case of Ashok Prajapati on 08.12.2009 during which incriminating documents were found and seized. One of the documents recorded that Shri Ashok Prajapati had received a sum of Rs.3.32 crores from Shri Milan Mehta through his agents Rajesh Shah i.e. the petitioner and Shri Andesh Bharwad. Ashok Prajapati had admitted receipt of such cash from Shri Milan Mehta towards sale of Rs.100 bighas of land. In the statement of Shri Milan Mehta he admitted only having paid a sum of Rs.1.07 crores. Assessments in cases of Shri Ashok Prajapati and Shri Milan Mehta were carried out. In case of Shri Milan Mehta for the assessment year 2009-10, the Assessing Officer had made a protective addition of Rs.1.58 crores. Shri Milan Mehta challenged such order before the Commissioner (Appeals). According to the Assessing Officer in the reasons recorded in such appellate proceedings the Commissioner remarked that it is not Milan Mehta but the petitioner who would be liable to explain the source of such cash. This is the foundation of the reasons recorded by the Assessing Officer for issuing notice.

7. We have perused the appellate order of the Commissioner in case of Shri Milan Mehta. We do not find that the Commissioner in such order ever intended to convey even by way of a prima facie suggestion that it is the petitioner Rajesh Shah who should be assessed for such differential amount. In fact the Appellate Commissioner had given detailed reasons for discarding the entries made in the documents regarding receipt of a sum of Rs.3.32 crores from Milan Mehta through his agents. The Commissioner preferred to believe the statement of Milan Mehta that all in all a sum of Rs.1.07 crores was paid for such land deal. In fact all along the case of the department has been that Ashok Prajapati was a seller of the land which was purchased by Milan Mehta and Rajesh Shah had acted as his broker. The amounts in cash were paid by Rajesh Shah at all stages for and on behalf of Milan Mehta. The Appellate Commissioner also observed that “none of the brokers namely Rajesh Shah and Andesh Bharwad had confirmed that they have paid cash on behalf of Milan Mehta to Ashok Prajapati over and above the amount of Rs.1.07 crores admitted by the appellant”.

In the process the Appellate Commissioner made a passing remark as under:

> "...The cash of Rs.2.99 crores is shown as received from Shri Rajubhai who had filed an affidavit saying that total amount of Rs.1.07 crores was paid to Shri Ashok Prajapati on behalf of the appellant for the purchase of land. In other words, even if the contents of the seized papers are presumed to be correct, then also Shri Rajubhai and not the appellant is liable to explain the source of entries of cash as appearing on page number 52 of Annexure A/2. In the absence of any evidence, no addition can be made in the hands of the appellant even on protective basis."

8. Thus, as recorded earlier, the Appellate Commissioner did not even by way of a prima facie impression convey that the differential amount was paid by Raju Shah. His conclusions were that Milan Mehta paid a total cash amount of Rs.1.07 crores. The observations noted above are merely in the nature of passing remarks. Even the case of the department all along has been that the petitioner is a broker. He is not shown in the sale deed or any other document to have any interest in the land in any capacity. There is no prima facie suggestion as to why would he pay cash of Rs.1.58 crores when he stands to gain nothing out of the deal. The Assessing Officer has mechanically adopted the observations of CIT(A), taking them out of context and making the basis of formation of his belief that income chargeable to tax in the hands of assessee has escaped assessment. To link the observations of the CIT(A) he has not referred to any other material at his command which would even prima facie suggest that the petitioner had paid such sum. We are conscious that we are at the stage of testing the confirmation of belief by the Assessing Officer and not the certainty of his observations. Nevertheless, when the belief is founded on no material whatsoever the same would be open to interference. In other words, if the material at the command of the Assessing Officer was so inadequate as no prudent person would form a belief that income chargeable to tax had escaped assessment, the court certainly even at this stage would

interject."

5. In the result, this petition is also allowed. Impugned notice dated 02.05.2016 is set aside. Petition is disposed of.

(AKIL KURESHI, J.)

(B.N. KARIA, J.)

Jyoti