

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 15867 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

sd/-

and

HONOURABLE MR.JUSTICE B.N. KARIA

sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

PARIMAL SURESHBHAI PATEL....Petitioner(s)

Versus

DY COMMISSIONER OF INCOME TAX CIRCLE 5(2)....Respondent(s)

Appearance:

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

MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 18/01/2017

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

1.0. By way of this petition under Article 226 of the Constitution of India, the petitioner-assessee has prayed for an appropriate writ, direction and order to quash and set aside the impugned notice under Section 148 of the Income Tax Act, by which, the Assessing Officer has sought to reopen the assessment for AY 2009-10 alleging that income chargeable to tax has escaped assessment

under Section 147 of the Income Tax Act.

2.0. The facts leading to the present petition in nutshell are as under:

2.1. That the assessee filed its original return of income for AY 2009-10 on 17.12.2009 declaring the total income of Rs. 3,47,29,400/- and agricultural income at Rs. 78,250/-. During the year under consideration, the assessee sold the the land situated at Sarkhej after obtaining appropriate permission from the Collector, Ahmedabad to sell the said land as agricultural land. The petitioner claimed the exemption under Section 54 B of the Act of Rs.1,37,11,725/- against capital gain arising out of the sale of the aforesaid land. It appears that thereafter, the original assessment came to be reopened by the Assessing Officer. One of the reasons for reassessment proceedings were initiated with respect to computation of the exemption under Section 54 B of the Act claimed in the return of income. That thereafter, Assessing Officer framed the assessment under Section 143(3) of the Act and did not disturb the exemption granted under Section 54 B of the Act with respect to sale of aforesaid land. That thereafter, again the Assessing Officer has issued the impugned notice under Section 148 of the Act and has sought to reopen the assessment for AY 2009-10 alleging inter alia that income chargeable to tax has escaped assessment within the meaning of Section 147 of the Income Tax Act. At the request of assessee, the Assessing Officer served the reasons recorded to reopen the assessment for AY 2009-10 which reads as under:

“In this case, return of income declaring total income of Rs.3,47,29,398/- was filed on 17.12.2009. The return of income processed u/s 143(1) of the Act. Subsequently, the case was selected for security through CASS and order

u/s 143(3) was passed on 29.08.2011 accepting the returned income. Subsequently, the case was re-opened u/s 148 and order u/s 143(3) r.w.s 147 was passed on 26.03.2015 determining total income of Rs.8,44,74,110/- after making addition on account unexplained cash payment for purchase of land. The said addition has been deleted by the CIT(A).

On verification of case records, it is found that during the year under consideration the assessee had sold land of Sarkhej Survey No. 335 and 344. The assessee had shown short term capital gain of Rs.3,39,25,411/- after claiming exemption u/s 54 B of the I.T. Act. On perusal of the sale deeds it is seen that the sale deeds are executed for non agriculture purpose. Hence, the assessee was not fulfilling the basic conditions as laid down in the Section 54B of the I.T. Act, 1961 for claiming exemption u/s 54 B of the I.T. Act. Therefore, such exemption of Rs. 1,37,11,725/- u/s 54B of the Income Tax Act, 1961 is not allowable.

In view of the above facts, I have reason to believe that by reason of failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment, an amount of Rs. 1,37,11,725/- has escaped assessment. Accordingly, I am satisfied that the income chargeable to tax has escaped assessment and hence, it is a fit case for reopening the assessment within the meaning of Section 147 of the Act.”

2.2. The assessee raised the objections against the reasons recorded to reopen the reassessment proceedings for AY 2009-10 which has been disposed of by the Assessing Officer against the assessee and the Assessing Officer has not agreed with the objection raised by the assessee. Hence, petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India.

3.0. Shri Divatia, learned advocate for the petitioner – assessee has vehemently submitted that impugned notice under Section 148 of the Act to reopen the assessment for AY 2009-10 is absolutely illegal and bad in law and contrary to the provision of Section 147 of the Act.

3.1. It is submitted that as such the sale deeds with respect to land sold in the relevant year under consideration were already before the Assessing Officer. It is submitted that not only that but subsequently AO reopened the assessment for the very AY 2009-10 for the reasons that with respect to the sale of land bearing survey nos. 335 and 344 exemption under Section 54 B of the Act was not allowable. It is submitted that thereafter AO framed the reassessment and did not disturb the exemption granted under Section 54 B of the Act. It is submitted that therefore, the impugned reopening of the proceedings is nothing but change of opinion of the subsequent Assessing Officer which is not permissible.

3.2. It is further submitted by Shri Divatia, learned advocate for the petitioner-assessee that even otherwise it cannot be said that there was any failure on the part of the assessee in not disclosing the true and correct facts while claiming exemption under Section 54 B of the Act. It is submitted that while framing the reassessment / assessment under Section 143(3) of the Act, the sale deeds executed by the assessee were very much available on record with the AO. It is submitted that thereafter the AO did not disturb the exemption granted under Section 54B of the Act. It is submitted that even otherwise belief formed by the AO that the income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act has been vitiated inasmuch as what was sold by the assessee was the agriculture land after obtaining permission from the Collector to sell the same as agriculture land. It is submitted that therefore, the assessee was entitled to exemption under Section 54 B of the Act. It is submitted that merely because the subsequent AO was of the opinion that exemption

under Section 54 B of the Act was not allowable, it cannot be a ground to reopen the assessment beyond four years. Under the circumstances, it is requested to allow the present Special Civil Application.

4.0. Present petition is opposed by Ms. Mauna Bhatt, learned advocate for the revenue. It is submitted that on verification of the case record it was found that during the year under consideration the assessee claimed exemption under Section 54 B of the Act on sale of land of Sarkhej Survey No. 335 and 344 treating it as an agriculture land, however it was found that the lands were sold for non agriculture purpose and therefore, the assessee was not entitled to exemption under Section 54 B of the Act and therefore, no error has been committed by the Assessing Officer to reopen the assessment / reassessment after forming an opinion that the income chargeable tax has escaped assessment within the meaning of Section 147 of the Act.

Making above submissions, it is requested to dismiss the present Special Civil Application.

5.0. Heard the learned advocates for the respective parties at length. At the outset, it is required to be noted that in the present case assessment for AY 2009-10 is sought to be reopened beyond the period of four years from the relevant assessment year. Therefore, unless and until, it is found that there was any failure on the part of the assessee in not disclosing the true and correct facts which has resulted into escapement of tax from assessment, reopening is not permissible. Therefore, to reopen the assessment beyond the period of four years, proviso to Section 147 of the Act are required to be satisfied. In the present case, it is required to be noted that after the original assessment was framed under Section 143(1), the same was reopened

and in the reassessment proceedings specific issue with respect to exemption under Section 54 B of the Act was considered by the Assessing Officer and only thereafter the assessment under Section 143(3) of the Act was confirmed. At the stage of framing of the assessment under Section 143(3) of the Act relevant material i.e. the sale deeds were also before the Assessing Officer. Under the circumstances, it cannot be said that there was any failure on the part of the assessee in not disclosing the true and correct facts. In fact, the issue with respect to exemption under Section 54 B of the Act was gone into by the Assessing Officer while framing assessment under Section 143(3) of the Act and same was not disturbed in reassessment proceedings. That thereafter, again Assessing Officer is issued the impugned notice on the very ground i.e. on the ground that the assessee was not entitled to exemption under Section 54 B of the Act. Under the circumstances, on the ground that the subsequent reassessment proceedings have been initiated on change of opinion by the subsequent Assessing Officer and also on the ground that there was no failure on the part of the assessee in not disclosing true and correct facts and therefore, condition precedent to assume the jurisdiction under Section 147 of the Act are not satisfied, impugned reassessment cannot be sustained. At this stage, it is required to be noted that as mentioned in the sale deeds, the assessee sold the agriculture land after obtaining appropriate permission from the Collector to sell the agriculture land. Under the circumstances also, formation of opinion by the Assessing Officer is vitiated.

6.0. In view of the above and for the reasons stated above, more particularly, on the ground that the condition precedent to assume the jurisdiction under Section 147 of the Act to reopen the

assessment beyond the period of four years, as per the proviso to Section 147 are not satisfied and also on the ground that earlier while framing the reassessment under Section 143(3) of the Act the aforesaid issue was specifically gone into by the Assessing Officer and exemption under Section 54 B of the Act was not disturbed, the impugned reassessment proceedings cannot be sustained and same deserves to be quashed and set aside. Accordingly, the impugned notice under Section 148 of the Income Tax Act issued by the Assessing Officer to reopen the assessment for AY 2009-10 is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No costs.

sd/-

(M.R. SHAH, J.)

sd/-

(B.N. KARIA, J.)

Kaushik

