IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 5851 of 2022

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HARESHKUMAR BHUPATBHAI PANCHANI

Versus

INCOME TAX OFFICER, WARD 3(3)(1) & ANR.

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Appearance:

MR TUSHAR HEMANI, SR. ADVOCATE WITH MS VAIBHAVI K PARIKH(3238) for the Petitioner(s) No. 1

MR KARAN SANGHANI FOR MRS KALPANA K RAVAL(1046) for the Respondent(s) No. 1

NOTICE NOT RECD BACK for the Respondent(s) No. 2

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CORAM: **HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

and

HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 17/09/2024

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE NIRAL R. MEHTA)

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has sought to challenge notice under Section 148 of the Income Tax Act, 1961 (for short 'the Act') seeking, *inter alia*, to reopen the income-tax assessment for the A.Y. 2016-17.

2. The brief facts can be stated as under.

2.1 The petitioner sold an immovable property along with other co-owners for a

consideration of Rs.12,35,90,464/-, wherein share of the petitioner was for Rs.02,83,54,388/-. The petitioner having made specific investment, claimed deduction of Rs.01,33,02,123/- under Section 54F of the Act. Details of such investment are reflected in the return of income for the year under consideration, in which total income at Rs.88,84,560/- was declared.

2.2 The case of the petitioner was selected for "*limited scrutiny*", for which notice dated 18th September, 2017 under Section 143(2) of the Act was issued. In the said notice, following issues were identified for limited scrutiny.

- Value of consideration for computation of capital gains;
- Capital gains/loss on sale of property;
- Deduction from capital gains.

2.3 The respondent authority vide notice dated 24th August, 2018 under Section 142(1) of

the Act called upon the petitioner to furnish various details including justification of sale consideration of Rs.02,83,54,388/- and purchase deed of residential property of Rs.01,33,02,123/- so as to establish genuineness of deduction under Section 54 of the Act.

2.4 Apropos to the aforesaid notice, petitioner vide letter dated 17th September, 2018 furnished details and information as under.

- Proof of deduction under Section 54F of the Act;
- Bank statement showing payment for above deduction;
- Statement justifying sale consideration.

2.5 Vide notice dated 08th November, 2018 under Section 142(1) of the Act the petitioner was called upon to furnish the details including working of capital gain as well as the registered deed for purchase agreement for property

purchased in respect of claim of deduction under Section 54F of the Act.

2.6 In furtherance thereof, petitioner vide letter dated 26th November, 2018 furnished the details as under.

- Working of capital gain was shown in computation of income and furnished earlier (Point No.1);
- Proof of deduction under Section 54F of the Act was furnished earlier and copy of registered purchase agreement was furnished then (Point No.2).

2.7 The then Assessing Officer having satisfied himself, framed the assessment under Section 143(3) of the Act vide order dated 15th December, 2018 without disturbing the original income declared by the petitioner for the year under consideration.

2.8 On 30th March, 2021 a notice under Section 148 of the Act was issued by the Revenue

Authorities upon the petitioner seeking, *inter alia*, reopening the case for the year under consideration.

2.9 On 26th April, 2021, apropos to the aforesaid notice, the petitioner filed return of income and further requested to supply copy of reasons recorded for reopening.

2.10 The Revenue Authorities vide letter dated 27th July, 2021 supplied copy of reasons for reopening, to which petitioner vide letter dated 25th August, 2021 raised objections against the reopening. The Revenue Authorities, however, vide order dated 02nd February, 2022 disposed of such objections and held that reopening is justified.

3. Being aggrieved and dissatisfied with the aforesaid, the petitioner has approached this Court for the appropriate relief, direction and/or order upon the Revenue Authorities.

4. We have heard learned senior advocate

Mr.Tushar Hemani with learned advocate Ms.Vaibhavi Parikh for the petitioner and learned advocate Mr.Karan Sanghani for learned advocate Mrs.Kalpana Raval for the respondent.

5. Learned senior advocate Mr.Tushar Hemani for the petitioner, while assailing the impugned notice, made following submissions.

5.1 Learned senior advocate for the petitioner mainly submitted that the notice under Section 148 of the Act is nothing but a mere change of opinion and the same is not permissible in eye of law. To substantiate the aforesaid contention, learned senior advocate submitted that the case of the petitioner was selected for scrutiny assessment and the issue on hand was examined by the then Assessing Officer in threadbare. He submitted that at the time of scrutiny, all the necessary evidences and details were already submitted and thereby it cannot be said that the Assessing Officer has come in

possession of any new information or any tangible material, based on which reassessment can be justified. Learned senior advocate, therefore, submitted that the jurisdiction under Section 147 of the Act cannot be assumed by the Assessing Officer merely because he formed a different opinion than in the same facts and circumstances in which the then Assessing Officer had formed.

5.2 Learned senior advocate for the petitioner submitted that the Assessing Officer has issued notice under Section 148 of the Act only on the basis of audit objection. Learned senior advocate submitted that the Assessing Officer ought to have formed his own independent opinion based on new tangible material and information and thereby the impugned notice under Section 148 of the Act is impermissible in eye of law.

5.3 To substantiate the aforesaid contention, learned senior advocate has placed

reliance on the decision of the Apex Court in case of **Commissioner of Income-tax, Delhi v. Kelvinator of India Ltd. [(2010) 187 Taxman 312 (SC)].**

5.4 By making above submissions, learned senior advocate requested this Court to allow the petition as prayed for.

6. *Per contra,* learned advocate Mr.Karan Sanghani for the Revenue Authority, while justifying the impugned notice, made following submissions.

6.1 Learned advocate for the respondent, at the outset, submitted that the present petition may not be entertained being premature in nature as the Assessing Officer has not passed any adversarial order. He further submitted that in the event of any adversarial order, petitioner will have a statutory alternative remedy available to challenge the same before the Commissioner (Appeals) and thereafter before the

Income Tax Appellate Tribunal. Accordingly, learned advocate for the respondent requested this Court to dismiss the petition.

6.2 Learned advocate for the respondent submitted that the Assessing Officer has taken care of all the necessary legalities prior to issuance of notice under Section 148 of the Act. He further submitted that the Assessing Officer has formed an independent opinion on the basis of materials available on record and thereby come to the conclusion that the petitioner has escaped the income. Accordingly, assumption of jurisdiction under Section 147 of the Act cannot be said to be a mere change of opinion.

6.3 By making above submissions, learned advocate for the respondent requested this Court to dismiss the petition.

7. We have heard learned advocates for the respective parties and have gone through the materials produced on record. No other and/or

further submissions have been canvassed by learned advocates for the respective parties.

8. Having considered the submissions advanced by learned advocates for the respective parties and materials produced on record, a short question that falls for consideration of this Court is whether the impugned notice under Section 148 of the Act can be said to be legal and justified?

9. So as to decide the aforesaid question, in our view, a close look of the reasons recorded for reopening requires to be considered and thereby the same is hereby reproduced.

> *"1. Brief Details of the Assessee:*
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> *The assessee had filed its return of income for AY 2016-17 on 31.03.2017 declaring total income at Rs.88,84,560/-, Scrutiny assessment has been completed U/s. 143(3) of the Act on 15.12.2018, accepting returned income.*
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> *2. Brief Details of Information collected/received by the AO:*

As per information available, it is revealed that the assessee had sold immovable property alongwith other co-owners for a consideration of Rs. 12,35,90,464/- situated at Plot No. 4, Final Plot No. 134, TPS 14, Gam-Pal, Dist. Surat, and his share was Rs. 2,83,54,388/- and the assessee has claimed deduction U/s. 54F to the tune of Rs. 1,33,02,123/-. However, it is noticed that the assessee has furnished only a "Sale Agreement without Possession and not furnished the supporting evidence to show that he has actually purchased a new residential property within the prescribed time as per the provisions of Section 54F of the IT.Act, 1961. In view of the above, the assessee is not entitled for deduction U/s. 54F of the Act and Rs. 1,33,02,123/- claimed as deduction U/s. 54F in this regard is required to be added in the hands of the assessee.

3. Analysis of information collected / received:

The assessee had filed its return of income for AY 2016-17 on 31.03.2017 declaring total income at Rs.88,84,560/-. Scrutiny assessment has been completed U/s. 143(3) of the Act on 15.12.2018, accepting returned income. As per information available, it is revealed that the assessee had sold immovable property alongwith other co-owners for a consideration of Rs. 12,35,90,464/- situated at Plot No. 4, Final Plot No. 134, TPS 14 Gam - Pal Dist. Surat, and his share was Rs. 2,83,54,388/- and the assessee has

claimed deduction U/s: 54F to the tune of Rs. 1,33,02,123/-. However, it is noticed that the assessee has furnished only a "Sale Agreement without Possession and not furnished the supporting evidence to show that he has actually purchased a new residential property within the prescribed time as per the provisions of Section 54F of the I.T.Act, 1961. In view of the above, the assessee is not entitled for deduction U/s. 54F of the Act and Rs. 1,33,02,123/- claimed as deduction U/s. 54F in this regard is required to be added in the hands of the assessee.

4. Enquiries made by the AO as sequel to information collected/ received:

As per Column (3) above.

1. Findings of the AO:

As narrated above, the total income chargeable to tax escaped is worked out to Rs. 1,33,02,123/- for the AY. 2016-17 as the assessee has failed to fulfill the conditions as per the provisions of Section 54F of the Act.

6. Basis of forming reason to believe and details of escapement of income:

The assessee had filed its return of income for AY 2016-17 on 31.03.2017 declaring total income at Rs.88,84,560/-. Scrutiny assessment has been completed U/s. 143(3) of the Act on 15.12.2018, accepting returned income. As mentioned in above paragraphs, it is observed that the assessee has failed to

fulfill the conditions as per the provisions of Section 54F of the Act. In view of the above facts/material available on records and after analyzing the same, I have reason to believe that income of the assessee to the extent of Rs. 1,33,02,123/- has escaped assessment for AY. 2016-17 within the meaning of Section 147 of the Income Tax Act, 1961.

7. Escapement of income chargeable to tax in relation to any assets (including financial interest in any entity) located outside India: N.A.

8. Findings of AO on true and full disclosure of material facts necessary for assessment under Proviso to section 147:

In view of the above facts narrated above and material available on records and after analyzing the same, I have reason to believe that income of the assessee to the extent of Rs. 1,33,02,123/- has escaped assessment for AY. 2016-17 within the meaning of Section 147 of the Income Tax Act, 1961.

9. Applicability of the provisions of section 147/151 to the facts of the case.

As noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly attracting provisions of Explanation 1 of section 147 of the Act.

> *It is evident from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment and the assessee never brought into the knowledge of the Assessing Officer. Hence for aforesaid reasons, it is not a case of change of opinion by the AO. In this case, more than four years have not lapsed from the end of assessment year under consideration. Hence, necessary sanction to issue notice uls. 148 is sought for from Jt. CIT-Range 1(1), Surat, as per the provisions of section 151 of the Act."*

9.1 Considering the reasons for reopening recorded by the Revenue Authority, it appears that the Revenue Authority has sought to reopen broadly on the ground that petitioner was not entitled for claiming deduction under Section 54F of the Act and the details with regard to sale of immovable property and purchase of new property are concerned, the same was without any supporting evidence.

9.2 In our considered opinion, the assessee – petitioner at the time of filing the original return and thereafter in the scrutiny, has

already furnished the requisite details about the transaction of sale and purchase of immovable property and the working of capital gain along with all the necessary evidence. Thus, in our view, the Assessing Officer forming his opinion on the material already available on record and/or the material which were already considered by the then Assessing Officer, is nothing but a change of opinion. It is not the case of the Assessing Officer that new information and/or any tangible material has come into possession. Thus, in our view, forming any opinion based on same facts and circumstances which were then available with the Assessing Officer at the time of scrutiny is said to be change of opinion and thereby the same is not permissible.

10. The aforesaid view can be fortified from the decision in case of **Kelvinator of India Ltd. (supra)**. The relevant observations from the said decision is reproduced hereunder.

"6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power

to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

> *"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in Section 147.--A number of representations were received against the omission of the words `reason to believe' from Section 147 and their substitution by the `opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, `reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary*

> *powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression `has reason to believe' in place of the words `for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."*
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> *[Emphasis supplied)*

We answer the question accordingly.

11. In view of the aforesaid, the petition requires to be allowed and is hereby allowed. The impugned notice dated 30th March, 2021 issued under Section 148 of the Income Tax Act, 1961 is hereby quashed and set aside.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA,J)

ANUP