IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 16644 of 2012
With
SPECIAL CIVIL APPLICATION NO. 16649 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and
HONOURABLE MR.JUSTICE BIREN VAISHNAV

==========

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 or any order made thereunder ?	

==========

RADHAWAMI SALT WORKS....Petitioner(s)
Versus
ASST.COMMISSIONER OF INCOME TA & 1....Respondent(s)

==========

Appearance:
MR RK PATEL, ADVOCATE with MR.B.D.KARIA, ADVOCATE with MR.DARSHAN R. PATEL for the Petitioner(s)
MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1 - 2

==========

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE BIREN VAISHNAV

Date : 14/06/2017

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These petitions arise in similar background. We may record leading facts from Special Civil Application 16644 of 2012. Petitioner is a partnership firm. For the assessment year 2010-11, the petitioner had filed the return of income which was taken in scrutiny by the Assessing Officer. One of the issues arising out of such return was the petitioner's claim of long term capital gain of Rs.29.92 crores (rounded off). This claim arose in following background.

2. The petitioner was granted lease by the Government of land admeasuring 350 acres for production of salt by the order of Collector dated 10.02.2006 for a period of 10 years. This lease was valid upto 31.07.2015. The petitioner applied to the Collector for surrendering the land as the petitioner no longer required it. This land was thereafter sold by the Government to one Coastal Gujarat Private Limited ('CGPL' for short). CGPL had separately made a payment of Rs.29.92 crores to the assessee in two

installments i.e. Rs.24 crores in the assessment year 2009-10 and Rs.5.92 crores in the assessment year 2010-11. For the assessment year 2010-11, the assessee had showed the said sum in its return as long term capital gain received in lieu of transfer of land.

3. During the assessment proceedings, the assessee however took a slightly different stand and contended that such receipt was not in the nature of capital gain but was one time receipt which was not taxable. This stand of the petitioner could be discerned from a communication dated 15.02.2011 made by the petitioner to the Assessing Officer during the course of assessment proceedings. In such communication, the assessee contended that the transaction in question was in the nature of a capital receipt not liable to tax and not a capital gain.

4. The Assessing Officer passed the order of assessment on 11.03.2011 and treated the said receipt for Rs.29.92 crores as capital gain and taxed it accordingly.

5. To reopen such assessment, the Assessing Officer issued the impugned notice dated 20.09.2012. This notice was thus issued within a period of four years from the end of relevant assessment year. In order to issue the notice, the Assessing Officer had recorded following reasons:

> *" The assessee derives its income from production and selling of salt. A search under section 132 was carried out at the premises of the assessee on 18.3.2010. Proceedings u/s. 153A were initiated. The assessee filed return of income for AY 2010-11 on 31.5.2010. The assessee had shown income of Rs.30,39,58,261/- which included Long Term Capital Gain (LTCG) of Rs.29,43,34,415/-. This LTCG was in respect of transfer of land.*
>
> *The facts of the case is that, land admeasuring 350 acres was given on lease by the state government to the assessee, for production of salt, vide Collector's allotment letter No.land/5/salt/vashi/259/06 dated 10.2.2006 for a period of 10 years. This lease was renewed upto 31.7.2015. The assessee applied (on 11.11.2008) to the Collector, Bhuj for surrender of the leased land stating that it no longer required it. The Collector, vide order No.land/5/vashi/9931/2008 dated 20.12.2008 cancelled the lease and took possession of the same. On request from Coastal Gujarat Power Ltd (CGPL), this land was sold to them by the Collector Bhuj, vide order dated 11.3.2010 for a consideration of Rs.37,32,53,785/- (Rs 34,16,80,175 being price of land + Rs 1,41,38,940/- conversion tax and Rs 1,74,35,120/- being stamp duty for industrial use). M/s CGPL paid the said amount to the State government and the land*

was handed over to the company by the Collector, Bhuj. Meanwhile, CGPL separately made a payment of Rs.29.92 crores to the assessee in two installments, i.e. advance of Rs.24 crores in A. Y. 2009-10 and final amount of Rs.5.92 crores in A.Y. 2010-11. It was noticed that, the assessee, in its return, showed the same as Long Term Capital Gain being the amount received in lieu of transfer of interest in land.

An order u/s. 143(3) r.w.s. 153A of the I T Act was passed in the case of the assessee on 11.3.2011 accepting the income returned by the assessee.

However, subsequently on analyzing the facts of the case, it was noticed that the amount received by the assessee was not in lieu of transfer of any capital asset so that the profit from the same could be taxed as long term capital gain. Section 45 of the Income tax Act, 1961 specifies that any profits or gains arising from the transfer of a capital asset effected in the previous year, shall be chargeable to income tax under the head 'Capital Gains' and shall be deemed to be the income of the previous year in which transfer took place. Hence, in order to treat the profit and gains out of such receipts, it is imperative that the receipt should be in lieu of transfer of a capital asset. In this case, there is no dispute over the fact that, the land in question belonged to the Government of Gujarat and the same was given to the assessee on lease vide an order dated 10.02.2006 and a contract was made between the assessee and the representative of the State Government, the Collector of Kutch, Bhuj on 23.3.2006. As per the terms and conditions of the above agreement, the assessee was authorized to use the above land only for its own business of production of salt and its bye products and it was not authorized to use the land for any other purpose and also therefore, not

authorized to assign this land to any third party for their business purposes. As per this agreement, the assessee was entitled to surrender the land to the state government and as per clause (4) of the note to the agreement, the assessee could claim compensation from the state government in lieu of premature surrender of land subject to the amount decided by the Salt Commissioner. Hence, it is evident that, the only compensation the assessee was entitled for, was what it could claim from the state government, subject to decision of the Salt Commissioner. In other words, the assessee was not authorized to claim any compensation from any other party for either surrendering its interest in the said land. Further, as per clause (11) of the said note, the assessee was not entitled to transfer its right in the land, by way of sale or gift or any other mode, without the prior permission of the lessee i.e., the state government.

It is evident from the above that, the assessee did not have any authority or right to transfer the above land to any other party or to either sub-lease the same to some other party. Further, the assessee had subsequently surrendered the said land to the state Government and the necessary order accepting the surrender of land by the assessee was passed by the state Government vide letter / order dated 20.12.2008 of the Collector of Kutch, Bhuj. The assessee has ceased to have any right or authority in respect of the said land after the above order. Hence, there could be no dispute about the fact that the said land was given on lease to the assessee by the state government and the assessee has subsequently surrendered it back to the state government and there was no involvement of any other party in respect of these transactions. Thus, it can be seen from the transactions mentioned above that there was no transfer of interest in land by the assessee in favour of CGPL. Since the land

was alloted on lease by the Government (Collector) the assessee had extinguished its interest in land by surrendering the land to the Collector. Subsequently, this land was transferred by the Collector de novo to M/s. CGPL for consideration of Rs.37,32,53,785/- including conversion tax and stamp duty. As such, there was no transfer of either assets or any interest in assets by the assessee to CGPL under the provisions of the Income tax Act, or under the provisions of Transfer of Properties Act.

While examining this issue, it will be pertinent to refer to the decision of the Hon. Calcutta High Court in the case of A Gasper Vs CIT (1979) 117 ITR 581 and to examine whether the facts of the case of the assessee had any similarity with the facts of the above case so as to decide the applicability of the above decision of the Hon. Calcutta Court, in the case of the assessee. The facts of this case is that, the assessee was a tenant in a premises at AJC Bose road, Calcutta. He was monthly tenant in the said property since 1940 under earlier land lords as well. On March 27, 1967, the landlords entered into an agreement for leasing out the property to a company namely Associated Batteries, permitting therein to construct a building on the same premises. The assessee was also a party to the said agreement. As part of the agreement, the assessee received a sum of Rs.4,50,000/-, in consideration of which he permitted the new lessee to put up the construction. He transferred his tenancy rights to the said company and became a licensee in respect of the premises under the same company. It was held by the Hon. Court that, that contention of Mr Banerjee that no capital asset has been transferred was to be rejected because, the assessee's monthly tenancy rights or the lease hold right is a capital asset and it has been transferred to the Associated Batteries with a consent of

the landlords and on such transfer, his rights in it stood extinguished. It is evident from the above that, in this case there is no dispute about the fact that Mr Banerjee had a tenancy right in the property which he transferred in the favour of Associated Batteries and his rights stood extinguished on such transfer. However, in the case of the assessee, it is an undisputed fact that, the assessee did not transfer its right in the said land to M/s. CGPL., but has surrendered the same back to the state government. Moreover, the MoU between the assessee and the CGPL has no endorsement or authentication from the state government which is the sole owner of the land. Hence, the facts in the case of A Gasper, as above, is not applicable in the case of the assesssee and therefore, the above decision of the Hon. Calcutta High Court could not have any bearing in this issue of taxability of receipts of the assessee from M/s. CGPL.

In view of this, amount received by the assessee from CGPL was to be treated as 'Income from other sources' and not as LTCG as the assessee has not sold or transferred any land to the CGPL, neither it had any authority or right to transfer the land to CGPL.

As per section 56(1) of the Act, income of every kind which is not to be excluded from the total income, shall be chargeable to income tax under the head 'Income from other sources' if it is not chargeable to income tax under any of the heads specified in section 14, item A to E. Whereas, section 45(1) stipulates that any profits or gains arising from the transfer of a capital asset effected in the previous year shall be chargeable to income tax under the head 'Capital Gains' and shall be deemed to be the income of the previous year in which the transfer took place. Further, as per section 2(47), 'transfer' in relation to a capital

asset, includes the sale, exchange, relinquishment of the asset or the extinguishment of any rights therein.

For chargeability of any income under the head 'Income from Capital Gain', there ought to be either transfer of capital assets or transfer of any interest in capital assets by the assessee. Here the assessee had extinguished all its interest and right in land by surrendering the land to the Collector. This land was later on sold by the Collector to CGPL independently and the due amount of consideration was also paid by CGPL to the State Government authorities as stated earlier. Had the assessee got money from the government for surrender of lease or had it transferred its lease hold right in favour of the CGPL, and got consideration for that, then it would constitute transfer of capital assets or transfer of any interest in capital assets. By surrendering the leased land to government it had extinguished all its interest and right in land. As such the amount received by the assessee from CGPL as per their MOU cannot be termed as 'Income from capital gain' but it has to be taxed as 'Income from other sources'.

Without prejudice to the above and for the sake of discussion, even if the receipt of the assessee from M/s. CGPL was to be considered as receipt in lieu of transfer of capital asset, it has to be seen whether the profit on the same could be taxed as long term capital gain as claimed by the assessee. As mentioned earlier, there is no dispute about the fact that the said land was alloted to the assessee vide an agreement dated 10.2.2006. The land was subsequently surrendered by the assessee to the State Government which was accepted vide an order dated 20.12.2008 of the Collector, Kutch, Bhuj. With the passing of this order by the Collector, Kutch, Bhuj, all rights of the assessee in the said land had extinguished.

As per the provisions of sub-section (42A) of section 2, short term capital assets means a capital asset held by an assessee for not more than 36 months immediately preceding the date of its transfer. Hence, it is evident that the asset in the hands of the assessee was a short term capital as it was held by the assessee from 10.2.2006 to 20.12.2008 which is less than 36 months, and the assessee was required to pay tax on the same as applicable in the case of transfer of short term capital asset as against tax as applicable in the case of transfer of long term capital asset claimed by the assessee. The contention of the assessee that the said land was taken over by the state government vide a panchnama dated 13.5.2009, is not relevant for the purpose because, the taking of possession of the land by the state government is a procedural formality which followed from the legal order of the Collector, Bhuj, Kutch dated 20.12.2008 and the rights of the assessee in the land had extinguished with that order and it is immaterial when such procedural formalities were completed by the state government by taking possession of the land. Hence, the right of the assessee in the land has got transferred to the state government on the date of passing of legal order by the Collector, Bhuj and not on the date on which the procedural formality of taking possession of the land was completed. Incidentally, even the substantial part of the payment of RS 24 crores was also received within the period of 36 months of surrender of land to the state government. Hence, even on this account, there is a case of escapement of assessment of income within the meaning of clause (c)(ii) of explanation to section 147 as the income could be said to have been assessed at too low a rate by way of treating the same as long term capital gain instead of short term capital gain, as discussed earlier.

However, as discussed in the earlier paragraphs, the whole receipt in the hands of the assessee is taxable as income from other sources within the meaning of section 56 of the Income tax Act as the assessee has not transferred any capital asset to M/s. CGPL from whom the money has been received by the assessee, instead, the land which has been claimed as capital asset for which such money has been claimed to have been received by the assessee belongs to the state government and it was alloted to the assessee on lease for its business purposes and the same was subsequently surrendered back to the state government and the said M/s. CGPL was not at all involved in any capacity in surrendering of land.

I have, therefore, reasons to believe that assessee's income to the above extent has been under assessed leading to escapement of income, within the meaning of Explanation 2(c)(ii) to section 147 of the I.T. Act, 1961, as the assessment in the present case for AY 2010-11 has been assessed at too low a rate. Hence, notice u/s. 148 is being issued."

6. To briefly summarize the long reasons recorded by the Assessing Officer, in his opinion, the receipt was not in the nature of capital gain at all, but was by way of income from other sources. The assessee was a lease holder and did not have the right to transfer the land or any rights therein in favour of anyone as per the conditions of the lease. The receipt of Rs.29.45 crores from CGPL was thus, not for the purpose of transfer of rights in land. According to

the Assessing Officer thus, the receipt was not in the nature of capital gain. His alternate contention was that if the receipt was a capital gain, the same was a short term capital gain. According to him the lease was terminated by the Collector by an order dated 20.12.2008. The assessee thus held the capital asset for a period between 10.02.2006 to 20.12.2008 i.e. for a period less than three years. The receipt should therefore be taxed as short term capital gain.

7. The petitioner opposed the notice for reopening by raising the objections which were however rejected by the Assessing Officer. At which stage this petition came to be filed. In Special Civil Application No.16649 of 2012 facts are similar except that in the reasons recorded by the Assessing Officer, the alternative suggestion that if the receipt is in the nature of capital gain, the same is a short term capital gain and not long term, is not taken by the Assessing Officer.

8. On the basis of such facts, the counsel for the petitioner has raised following contentions:

I. The issue was thoroughly scrutinized by the

Assessing Officer during the original assessment. Reopening would not be permissible under such circumstances.

II. The notice has been issued by the Assessing Officer upon insistence of the audit party. The Assessing Officer himself was not convinced about reopening the assessment.

III. The ground on which the Assessing Officer wishes to reopen the assessment, is a subject matter of further appeals. On the ground of merger therefore the reopening would not be permissible. Counsel relied on certain decisions, to which, we would refer at the appropriate stage.

9. On the other hand, learned counsel Shri Manish Bhatt for the department opposed the petition contending that;

I. The order dated 20.12.2008 by the Collector canceling lease was not part of the original assessment proceedings.

II. The audit party had merely suggested to the Assessing Officer that the receipt was not in the

nature of capital gain but income from other sources. Even if the Assessing Officer was not fully convinced about this element of taxability, he had independently recorded the reason of the receipt being in the nature of short-term capital gain.

III. Counsel lastly contended that the question whether the assessee enjoyed lease for a period of less than three years or more was never subject matter of appeal proceedings.

10. Facts are not seriously in dispute and may be summarized thus. The assessee was granted lease of land by the Government for a period of 10 years. CGPL was interested in purchasing such land and therefore privately negotiated with the petitioner to give up its rights prematurely. For such purpose, CGPL paid Rs.29.92 crores for the assessee. According to the assessee this receipt was in the nature of capital gain and offered to tax after adjusting to the cost of acquisition. During the assessment proceedings, the assessee in fact went a step further and tried to urge that the receipt is not taxable at all being capital receipt. The Assessing Officer did not accept the

contention and taxed the same as long term capital gain.

11. The assessee had filed appeal on this issue before the Commissioner (Appeals). We are informed that the appeal stands dismissed. Further appeal of the assessee before the Tribunal is pending.

12. At that stage, the Revenue wishes to reopen the assessment on the grounds that; (i) the receipt was not in the nature of capital gain but income from other sources and (ii) in the alternative, the gain was a short term capital gain.

13. From the above, it can be seen that the assessee had in return itself offered the receipt to tax as capital gain. In the context of the assessee's further expectation that the same may not be taxed at all, issue was examined by the Assessing Officer. Thus, on the question of taxability of such receipt, there was a scrutiny by the Assessing Officer. May be at that time, the Assessing Officer had not noticed that the Collector had passed an order on 20.12.2008 terminating the lease. The reference to the order was very much in the document in the nature of panchnama

dated 13.05.2009. According to the assessee, this was the date on which his right to use the land got extinguished. If the Assessing Officer held a different belief or desire to inquire into the effect of the order of the Collector, he could and should have done so during the course of assessment.

14. Yet another reason on which we cannot permit reopening on the grounds stated in the reasons is that the assessee carried the issue in appeal before the Appellate Commissioner and canvassed that to tax the income as capital gain was wrong. The Commissioner having dismissed the appeal, the issue is pending before the Tribunal in assessee's appeal. Section 147 of the Act as is well known, empowers the Assessing Officer to reopen the assessment, subject to certain conditions. 3rd proviso to section 147 however provides that the Assessing Officer may assess or reassess such income other than the income involving the matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. When the subject matter viz. the receipt of transfer of rights in land and the income relatable to such matter was the

subject matter of appeal and thereafter second appeal, the principle of merger would apply. There cannot be two separate considerations to the same subject matter relatable to the income. One by the appellate authority or forum and another by the Assessing Officer in fresh assessment. Had material particulars concerning the income been withheld by the assessee, issue perhaps would stand on a different footing. Since such facts are not presented before us, we would not comment any further in this respect.

15. Appeal against an order of assessment at the hands by the assessee would lie before the Commissioner (Appeals) in terms of section 246A of the Act. Section 250 of the Act lays down procedure in such appeal. Section 251 concerns the power of the Commissioner in such appellate proceedings. As per sub-section (1) of section 251, while disposing of the appeal, the Commissioner would have powers to confirm, reduce, enhance or annul the assessment. Thus, while disposing of an appeal filed by an assessee against the order of assessment, the Commissioner after following the requirement of hearing provided in sub-section (2) of section 251 may even enhance the

assessment. The question of correct taxability of the receipt by the assessee was thus at large before the Commissioner (Appeals) and now is open before the Tribunal. At that stage, it would not be open for the Assessing Officer to reopen the assessment on this matter which is a subject matter of the appeals. Our attention is drawn to a judgment of Division Bench of this Court in case of ***National Dairy Development Board v. Deputy Commissioner of Income Tax Anand Circle,*** dated 24.03.2011 passed in Special Civil Application No.14449 of 2010. The relevant paragraph of the said judgment reads as under:

> "14. Moreover, insofar as the second ground for reopening of assessment is concerned, it may be noted that the second proviso to section 147 of the Act expressly provides that the Assessing Officer may assess or reassess such income, other than the income involving matters which are subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. Thus by virtue of the second proviso to section 147 of the Act, income involving matters which are subject matters of any appeal, reference or revision has expressly been taken out of the purview of the said section. In the circumstances, insofar as the income stated to have escaped assessment under the second ground is concerned, the same having been subject matter of appeal would not fall within the ambit of section 147 of the Act and as such the Assessing Officer lacks jurisdiction to reopen the assessment on the said ground."

16. In the result, petition is allowed. Impugned notice dated 20.09.2012 is set aside. We clarify that we have not expressed any opinion on the rival contentions regarding the nature of receipt and the treatment it should receive for the purpose of tax.

(AKIL KURESHI, J.)

(BIREN VAISHNAV, J.)

ANKIT