IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 750 OF 2014

Commissioner of Income Tax-5,
Mumbai .. Appellant

v/s.

Devkumar Haresh Vaidya .. Respondent

Ms. S.V. Bharucha for the appellant
Mr. J.D. Mistri, Senior Counsel a/w Mr. Mandar Vaidya for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

DATED : 5th DECEMBER, 2016.

P.C.

1. This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act) takes exception to the order dated 31st July, 2013 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order is in respect of Assessment Year 2007-08.

2. The Revenue urges the following substantial questions of law for our consideration :-

"(i) Whether on the facts and in the circumstances of the case

and in law, the Tribunal was justified in stating that the re-opening of the instant case was not according to law and facts.

(ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in allowing the appeal of the assessee without appreciating the fact that as per Section 54EC of the Income Tax Act, 1961, the investment in specified bonds are to be made after the transfer of long term capital asset which happened on the registration of the sale deed and transfer of possession that is during the A.Y. 2007-08 and not A.Y. 2006-07?"

3. <u>Regarding question (i) :-</u>

(a) For the Assessment Year 2007-08, the respondent assessee filed its return of income declaring a total income of Rs.24.69 lakhs. The same was accepted under Section 143(1) of the Act by issue of intimation.

(b) Thereafter, the Assessing Officer received information from the Deputy Director of Income Tax (Investigation), Surat that property situated at 5, Man Singh Road, New Delhi (said property) was sold on 23rd August, 2006 for a total consideration of Rs.148.93 crores by the

12 family members, including the assessee and the assessees's share in the said amount was Rs.6.21 crores. Consequently, a notice under Section 148 of the Act was issued seeking to reopen the assessment for Assessment Year 2007-08. The reason for reopening the assessment was that said property had been sold on 23rd August, 2006 to one M/s. Mineral Management Services (I) Ltd. Thus, the sale was assessable to tax in the A.Y. 2007-08 as it was so assessed in the hands of M/s. Mineral Management Services (I) Ltd. in that year. Thus, the reasons sought to deny the benefit under Section 54EC of the Act in excess of Rs.50 lakhs in view of amendment thereto w.e.f. A.Y. 2007-08.

(c) The respondent assessee challenged the reopening notice pointing out that he had offered to tax the entire consideration of Rs.6.21 crores (Rs. 4 crores in his hands and Rs.2.21 crores as a part of his late father's income was offered to tax) in the earlier assessment year i.e. A.Y. 2006-07. Moreover, he had also claimed the benefit of Section 54EC of the Act in A.Y. 2006-07. This was accepted by the Assessing Officer in scrutiny proceedings under Section 143(3) of the Act by order dated 26th November, 2008. It was pointed out that the said property was a family property in which his mother (Devhuti Vaidya) had undivided and indeterminate rights / share in the said property. Therefore, though the respondent assessee and his family members did not have possession of the said property, they had filed caveat objecting the grant of probate to the Will of the respondent assessee's maternal grand father Mr. Anantrai Pattani in favour of his maternal uncle Mr. Kumar Pattani.

(d) In the above view, as a part of the settlement arrived at between the respondent assessee and his family members with his uncle Mr. Kumar Pattani, an Agreement for Sale dated 25th October, 2005 by which the respondent assessee sold his rights in the said property to one M/s. Duce Property and Services Pvt. Ltd. and withdrew his objections to grant of probate to Mr. Kumar Pattani. All this in consideration of Rs.12 crores (as a family) and Rs.4 crores as a part thereof being for the transfer of his interest / right in the immovable property was also received in A.Y. 2006-07. All the above facts were examined by the Assessing Officer while passing the assessment order for the A.Y. 2006-07 on 26 November, 2008 and held that the respondent assessee had sold his rights / share in the immovable property and sought benefit of the investment made of the sales proceeds under Section 54EC of the Act. It was also pointed out that as is evident from the reasons for reopening the assessment that the amendment made in Section 54EC of the Act effective from A.Y. 2007-08 which would restrict the benefit of that provision to Rs.50 lakhs had triggered the reopening notice. This is evident from the following observations recorded in the reasons, which reads as under :-

> *"In view of above amendment, if the assessee would have shown the capital gain correctly in the A.Y. 2007-08, then she would not have been eligible for deduction of more than Rs.50 lakhs even if she would have complied with the time limit provision of the Section 54EC."*

(e) However, the Assessing Officer by order dated 26th December 2011 passed under Section 143(3) r/w Section 147 of the Act did not accept the petitioner's objections. Consequently, the Assessing Officer brought to tax an amount of Rs.6.21 crores on the above account. (Rs.4 crores being the respondent's share and Rs.2.21 crores being his share in his late father Mr. Haresh Vaidya's interest, who had expired in the meantime.) On appeal, the CIT(A) also dismissed the respondent assessee's appeal.

(f) On further appeal, the Tribunal by the impugned order held that the Assessing Officer could not have any reason to believe that income chargeable to tax has escaped assessment. In particular, it held as the respondent assessee had offered capital gains to tax in the Assessment Year 2006-07 and the same was accepted after examination / consideration while passing an order dated 26th November, 2008 under Section 143(3) of the Act. Thus, the Assessing Officer having already assessed the income arising on sale of rights in the said property as evidenced by the Agreement for Sale dated 25th August, 2005 and letter dated 17th October, 2005 evidencing the family arrangement coupled with having received the consideration in the Assessment Year 2005-06 which was also offered to tax in that year could not have had any reason to believe that income chargeable to tax has escaped assessment. The impugned order also records the fact that there were disputes amongst the legal heirs of late Mr. Anantrai Pattani including pending probate proceedings before the High Court. The dispute between the respondent assessee and his uncle Mr. Kumar Pattani stood settled on the basis of offer made by the uncle in his letter dated 17th October, 2005 to the respondent assessee and his family members to give up their rights in respect of the said property (including not contesting the probate petition) on his uncle paying a sum of Rs.12 crores in the aggregate. This resulted in the Agreement of Sale dated 25th October, 2005 with M/s. Duce Property and Services Pvt. Ltd. by which the respondent assessee gave up his interest/share in the said property on receipt of consideration of Rs.12 crores (3 members of the family of respondent assessee in the aggregate). The respondent assessee also gave up his objection to grant of the probate in favour of Mr. Kumar Pattani, uncle of respondent assessee, by withdrawing his objection to the probate petition. Further, the impugned order also refers to the fact that the communication received from the Deputy Director of Income Tax (Investigation), Surat which was the material for issuing the impugned notice, also seems to indicate that the entire exercise was only for denying the benefit of Section 54EC of the Act in view of the amendment thereto with effect from Assessment Year 2007-08. In the above view, the impugned order held that reopening notice was bad in law as the Assessing Officer could not have had any reason to believe that the income chargeable to tax has escaped assessment. The impugned order also held on merits in favour of the respondent assessee.

(g) Mrs. Bharucha, learned Counsel appearing for the Revenue in support of the appeal emphasizes the reasons recorded in support of the impugned notice to justify the reopening of assessment. Nothing was pointed out to indicate why the impugned order of the Tribunal is not sustainable.

(h) We find that once the respondent assessee has offered the capital gains to tax on the basis of the Agreement for Sale dated 25th October, 2005 read with the letter dated 17th October, 2005 and the receipt of consideration for sale of his interest in said property and accepted on due examination under Section 143(3) of the Act, the Assessing Officer could not have had any reason to believe that income chargeable to tax has escaped assessment. In fact, this to our mind is a case of change of opinion, in as much as for the A.Y. 2006-07, the Assessing Officer in scrutiny proceedings accepted that the transaction qua the respondent is taxable in A.Y. 2006-07 and now seeks to tax it in A.Y. 2007-08. In any event, as held by the Tribunal there could be no reason to hold that the income chargeable to tax had escaped assessment in the present facts. The trigger for issuing the reopening notice appears to have been the limit to exemption available under Section 54EC of the Act coming into force with effect from Assessment Year 2007-08 onwards. This is evident not only from reasons recorded for issue of Notice u/s 148 of the Act as referred to herein above, but as also recorded by the Tribunal that the report received from the Deputy Director of Income Tax (Investigation), Surat essentially seeks to deny the exemption under Section 54EC of the Act in view of the amendment thereto. When the capital gains has been offered to tax in earlier assessment year and accepted by the Revenue in scrutiny proceedings, then a mere change in law in the subject assessment year with regard to extent of exemption will not give any reason to believe that income chargeable to tax in the subject assessment year had escaped assessment.

(i) In the above view, question (i) as proposed does not give rise to any substantial question of law. Thus, not entertained.

3. <u>Regarding question (2) :-</u>

(a) We have not interfered in the Tribunal's finding with regard to the reopening notice being without jurisdiction. In the above view, the Revenue's grievance with regards to the merits of the impugned order of the Tribunal is academic.

(b) In the above view, question (ii) as proposed does not give rise to any substantial question of law. Thus,not entertained.

4. Therefore, the appeal is dismissed. No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**