आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
(Conducted through E-Court, Rajkot)

BEFORE Ms. SUCHITRA KAMBLE, JUDICIAL MEMBER
And
SHRI WASEEM AHMED, ACCOUNTANT MEMBER,

आयकर अपील सं./**ITA No. 240/Rjt/2017**
निर्धारण वर्ष/Asstt. Years: 2007-2008

Shri Jay Atulbhai Mody, "Pankaj", Jalaram-3, Street No.2, Near Indira Circle, University Road, Rajkot. **PAN: ADOPM4697C**	Vs.	I.T.O., Ward-2(2)(3), Rajkot.

Assessee by	:	Shri R.M. Rindani, A.R
Revenue by	:	Shri Sanjay Punglia, CIT. D.R

सुनवाई की तारीख/**Date of Hearing : 24/08/2022**
घोषणा की तारीख **/Date of Pronouncement: 16/11/2022**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax (Appeals)-1, Rajkot, dated 24/10/2018 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2007-08.

2. The assessee has raised the following grounds of appeal:

1.0 The grounds of appeal mentioned hereunder are without prejudice to one another.

2.0 The learned Commissioner of Income Tax (Appeals)-2, Rajkot [hereinafter referred to as the "CIT(A)" erred on facts as also in law in rejecting the ground of appeal related to validity of notice issued u/s 148 of the Income tax Act, 1961.

2.1 The learned CIT(A) erred on facts as also in law in confirming initiation of action u/s. 147 of the Act. Initiation of action u/s. 147 of the Act being invalid, the assessment deserves to be quashed and may kindly be quashed,

3.0 The learned CIT(A) erred on facts as also in law in retaining addition of ?6,77,105/- out of total addition made of f 7,31,600/- u/s. 50C of the Act on the alleged ground that FMV of the plot of land determined by the Stamp Valuation Authority is higher than the sales consideration recorded in sales. The addition retained in total disregards to the substance and essence of the transaction is totally unjustified on facts as also in law and may kindly be directed to be deleted.

4.0 Your Honor's appellant craves leave to add, amend, alter or withdraw any or more grounds of appeal on or before the hearing of appeal.

3. The only effective issue raised by the assessee is that the learned CIT (A) erred in upholding the validity of notice issued under section 148 of the Act and assessment framed under section 147 of the Act and thereby confirming the addition of Rs. 7,31,600/- under section 50C of the Act.

4. The facts in brief are that the assessee is an individual and not filed return of income for the year under consideration. The AO received an information that the assessee has sold immovable property vide sale deed no. 3852 dated 13-04-2006 having document value of Rs. 5 lakh and Jantrai value of Rs. 7,31,600/- only. Therefore, the AO reopened the assessment by issuing notice under section 148 of the Act dated 11-03-2014. But the assessee has not filed any return of income in response to the notice issued under section 148 of the Act. Thereafter, several notices under section 142(1) of the Act were issued and final show cause notice was issued on 16-02-2015 but not complied with by the assessee. Thus, the AO finalized the assessment ex-party under section 144 r.w.s. 147 of the Act by making addition of Rs. 7,31,600/- being Jantari value of immovable property transferred by the assessee.

5. The aggrieved assessee preferred an appeal before the learned CIT(A) and challenged the validity of reason recorded for initiating the proceedings under section 148/147 of the Act by contending that the AO relied only on the information received from third party without having any other material on record. Hence the same is borrowed satisfaction.

6. The assessee further submitted due to crisis in personal life, he left his ancestral home for unknown location. When notice under section 148 of the Act was issued the same was received by a bicycle repairing shopkeeper. Thus, the prima facie notice under section 148 of the Act was not served on assessee, hence the same was invalid. Subsequent notices were also served on his father and not the assessee. However, his father vide letter dated 16-10-2014 informed the office of the AO that the assessee left the home long ago and his whereabouts is not known and requested to extended some time to collect the information relevant to the proceedings. However, the AO without considering the aforesaid fact framed the assessment under section 144 r.w.s. 147 of the Act which is invalid as the same is based on illegal service of notice.

6.1 On merit the assessee submitted that he was in the business under the name and style of M/s Jay Corportaion till FY 2002-03 and was regularly filling return of income. However, due marriage crisis, he separated from family and incurred huge losses in the business and in this process became highly indebted. The impugned land was originally purchased by his sister in the year 1996 for construction of family house and ultimately inherited by him on untimely death of his sister. However, his father in order to protect the property from the creditor of the assessee, made a proposal to the transfer the impugned property in the name of his (assessee's) mother Smt. Ilaben A. Modi. Accordingly, the impugned property was transferred to his mother through sale deed instead of gift deed as advised by the civil advocate. Thus, the assessee claimed that there was no actual transfer of property falling under the ambit of section 45 of the Act.

7. However, the learned CIT(A) dismissed the ground of appeal of the assessee by observing as under:

> *In these grounds the assessee has challenged validity of notice u/s.148 and assessment u/s.144. it is contended that notice u/s.148 is invalid on the ground that it is based on borrowed satisfaction and that the notice was not validly served upon assessee. As regards the satisfaction, I find that when the AO came in possession of information that assessee had sold immovable property and had not declared capital gains on such sale as no income tax return had been filed by assessee, the issuance of notice u/s 148 on basis of such uncontroverted information cannot be said to be on borrowed satisfaction. This contention is not tenable.*
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> *As regards the service of notice u/s 148 and 144, I find that the notice had been served on the given address and assessee's father was aware of these notices. Simply because the assessee was statedly absconding, does not invalidate service of notice. Therefore I do not find the contentions of assessee to be tenable. Grounds of appeal are rejected.*
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> ***5.3 Ground of appeal; V***
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> *In this ground assessee has contended that the transfer of land was by way of family arrangement and provisions of Section 50C do not apply. I find that the said land has been transferred through a registered sale deed and the payments too have been received largely by cheque (Rs. 4,50,000 by cheque and Rs. 50,000 by cash).*
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> *Such a transfer cannot be said to be a family arrangement so as to keep it out of capital gain taxation. The fact of transfer through sale deed, the fact of sale consideration being received through cheque and the valuation for stamp duty at Rs. 7,31,600/- are proven facts. In these facts, the assessee is liable for capital gain tax as per provision of Section 50C. Ground of appeal is rejected.*
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> ***5.4 Ground of appeal: VI***
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> *In this ground, the assessee has contended that he should have been allowed indexed cost of acquisition. I find merit in contention of assessee. On my behest the assessee produced copy of necessary evidence in form of letter of administration issued by Hon'ble 2nd Joint Civil Judge (SD), Rajkot dated 24/12/2001 and copy of will of Ms.Meena C. Modi dated 14/01/1996 to prove that impugned property was acquired by will. Copy of purchased deed dated 23/04/1991 shows the property to have been purchased for Rs.21,000/- and assessee's share us ½ of the property purchased. Therefore, AO is directed to recomputed the capital gains after allowing indexed cost of acquisition taking the value as on 01/04/1981 to be Rs.10,500/-. Ground of appeal is allowed.*

8. Being aggrieved by the order of the learned CIT(A), the assessee is in appeal before us.

9. The learned AR before us challenged the validity of the assessment framed under section 147 of the Act. On merit, it was contended by the learned AR that there was no transfer of the immovable property by the assessee to his mother. As

such it was the nature of the gift and therefore such transaction cannot be made subject to the capital gain under the provisions of section 45 of the Act.

10. Without prejudice to the above, the learned AR also contended that the matter can be referred to the DVO to determine the consideration for working out the capital gain.

11. On the other hand, the learned DR vehemently supported the order of the authorities below.

12. We have heard the rival contention of both the parties and perused the materials available on record. The facts of the case have been elaborated in the previous paragraph, hence we are not inclined to repeat the same for the sake of brevity. Admittedly, the assessee has challenge the order of the learned CIT(A) on merit as well as on technical ground i.e. validity of assessment framed under section 144 r.w.s. 147 of the Act.

12.1 First, we proceed to decide the appeal of the assessee on technical ground. We note that the assessee before the learned CIT(A) has challenged the validity of assessment on two count. In the first fold of argument it was submitted that the AO was not having any material other than an information that the assessee has transferred immovable property, hence the reason to believe of the AO for escapement of income was based on borrowed satisfaction. In this regard, it is pertinent to note that the assessee had not filed the return of income for the year under consideration. Subsequently the AO received an information from the land Revenue authority that assessee has transferred immovable property. Thus, in the absence of the return of income, the AO had no alternate to verify the veracity of the information received from the land revenue authority whether the assessee has disclosed any income on the transfer of the property. Accordingly, we are of the considered opinion that it cannot be said that the reopening proceedings were initiated on borrowed satisfaction. Thus on this count, the assessee fails.

12.2 With respect to the contention of the learned AR that there was no valid service of notice under section 148 of the Act, we note that the notice under section 148 of the Act was issued well in time at the address available on record with the revenue Department. The fact that the assessment proceeding initiated was known to the assessee's father. Merely for the fact that the assessee left home without informing anyone to unknown location the notices issued and duly served on last given address cannot held as illegal/invalid service of notice. In this regard we find support and guidance from the judgment of Hon'ble jurisdictional High court of Gujarat in case of Atulbhai Hiralal Shah vs. DCIT reported in 73 taxmann.com 320 where it was held as under:

> ***12.*** *The issue, therefore, can be narrowed down. It had come on record that the department had sent the notice for service to the petitioner through postal department on 26.03.2015 which was duly returned by the department with a remark "left". The question of wrong address is virtually given-up by the petitioner. In fact, the petitioner contends that at that very address, the petitioner has received multiple communications and, therefore, the endorsement "left" was totally wrong. For multiple reasons, the stand of the petitioner cannot be accepted.*
> *Firstly, as noted, the postal dispatch has nothing to do with attempted personal service by the department. Secondly, the petitioner does not dispute that the notice was in fact, dispatched through the postal department on or around 26.03.2015. Thirdly, the petitioner does not at least now dispute the correctness of the address. Lastly, the petitioner has not joined the postal department to question why and under what circumstances, the remarks "left" was made. So far as the Income Tax department is concerned, it was entitled to proceed on the basis of official remark of the Government of India Department that the service could not be effected since the addressee had left the place.*
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> ***13.*** *Only on the ground of non-issuance of service of notice, we are not inclined to terminate the reopening proceedings since no other contention regarding the validity of the notice was raised.*

12.3 Respectfully following the principle laid down by the Hon'ble High Court in case cited above we hold that the service of notice under section 148 of Act and other subsequent notices cannot held as invalid service of notice, for the reason that the revenue has issue notices on last known address of the assessee. Revenue cannot be held guilty for the fact the assessee has left that place without informing anyone for unknown location. Thus on this count also, the assessee fails.

12.4 On merit of the case, we note that the property was transferred by the assessee to his mother by way of sale deed no. 3852 dated 13-04-2006 wherein the consideration on the transfer of the property in dispute was duly recorded. There was nothing mention in the sale deed justifying the stand of the assessee i.e. the transfer was in the nature of the gift or without consideration. Accordingly, we hold that there was a valid transfer of the property in the given facts and circumstances within the meaning of the provisions of section 45 of the Act. In holding so we draw support and guidance from the judgment of Hon'ble Punjab and Haryana High Court in case of Paramjit Singh vs. ITO reported in 195 Taxman 273 wherein it was held as under:

> *4. We have thoughtfully considered the submissions made by the learned counsel and are of the view that they do not warrant acceptance. There is well-known principle that no oral evidence is admissible once the document contains all the terms and conditions. Sections 91 and 92 of the Indian Evidence Act, 1872 (for brevity 'the 1872 Act') incorporate the aforesaid principle. According to section 91 of the Act when terms of a contracts, grants or other dispositions of property has been reduced to the form of a documents then no evidence is permissible to be given in proof of any such terms of such grant or disposition of the property except the document itself or the secondary evidence thereof. According to section 92 of the 1872 Act once the document is tendered in evidence and proved as per the requirements of section 91 then no evidence of any oral agreement or statement would be admissible as between the parties to any such instrument for the purposes of contradicting, varying, adding to or subtracting from its terms. According to illustration 'b' to section 92 if there is absolute agreement in writing between the parties where one has to pay the other a principal sum by specified date then the oral agreement that the money was not to be paid till the specified date cannot be proved. Therefore, it follows that no oral agreement contradicting/varying the terms of a document could be offered. Once the aforesaid principal is clear then ostensible sale consideration disclosed in the sale deed dated 24-9-2002 (A.7) has to be accepted and it cannot be contradicted by adducing any oral evidence. Therefore, the order of the Tribunal does not suffer from any legal infirmity in reaching to the conclusion that the amount shown in the registered sale deed was received by the vendors and deserves to be added to the gross income of the assessee-appellant.*

12.5 From the above, there remain no ambiguity that the impugned property transferred by the assessee to his mother for consideration of Rs. 5 Lakh is liable to be brought under the ambit of capital gain. However, the question arise for determination of sales consideration. As the AO has taken consideration as per section 50C of the Act whereas the AR before us has challenged the value adopted by the AO and subsequently sustained by the learned CIT(A). In the interest of justice and fair play, we set aside the issue to the file of the AO to refer the matter

to the DVO to determine the value of the property in pursuance to the provisions of section 50C of the Act. Hence the ground of appeal of the assessee is partly allowed.

13. In the result appeal of the assessee is hereby partly allowed.

Order pronounced in the Court on 16/11/2022 at Ahmedabad.

Sd/-	**Sd/-**
(SUCHITRA KAMBLE)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 16/11/2022
Manish