(2010) 06 GUJ CK 0001

Gujarat High Court

Case No: Special Civil Application No. 10726 of 1996

Kalyan Ala Barot		APPELLANT
	Vs	
M.H. Rathod		RESPONDENT

Date of Decision: June 29, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1922 - Section 34
- Income Tax Act, 1961 - Section 139(2), 142(1), 143, 143(2), 144

Hon'ble Judges: H.N. Devani, J; D.A. Mehta, J

Bench: Division Bench

Advocate: Niyati K. Shah, for the Appellant; Mauna M. Bhatt and Manish R. Bhatt, for the Respondent

Final Decision: Allowed

Judgement

H.N. Devani, J.
This petition seeks the following substantive reliefs:

A. that this honble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioners case and after making inquiries and examining the legality thereof be pleased to quash and set aside the notice annexure C dated 7-8-1996, issued u/s 148 of the Act;

B. that this honble Court be pleased to issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction under Article 226 of the Constitution of India prohibiting the Respondent permanently from taking any action pursuant to the notice issued u/s 148 of the Act on 7-8-1996.

2. The Petitioner is an agriculturist. The Petitioner jointly purchased agricultural land at Mundra with one Shri Kanji Pethabhai, which was purchased by the Gujarat Sheep

Development Corporation for a sum of Rs. 5 lakhs. The Petitioner filed an application for issue of a certificate u/s 230A of the Income Tax Act, 1961 (the Act) on 17-6-1983. The assessing officer issued a notice u/s 139(2) on 18-6-1984 for the assessment year 1984-85, however, the Petitioner did not respond to the same. Hence, the assessing officer finalized the assessment u/s 144 of the Act on 30-3-1987 on a total income of Rs. 1,62,000, inter alia, taxing capital gain on sale of the said property. Against the said order, the Petitioner approached the Commissioner of income tax, Rajkot, u/s 264 of the Act. Vide order dated 22-3-1992, the Commissioner directed to reframe the assessment after giving the Petitioner an opportunity of being heard. Notices u/s 142(1) came to be issued on 6-10-1992 and 22-2-1993. The Petitioner filed a return on 12-3-1993 disclosing "nil" income. The assessment was completed on 30-3-1993 assessing long-term capital gain on sale of the subject land, at Rs. 1,62,000. The Petitioner carried the matter in appeal before Commissioner (Appeals). Before the Commissioner (Appeals), the main contention raised on behalf of the Petitioner was that where a sale deed is properly registered under the provisions of the Registration Act, the transaction takes effect from the date of the original sale deed. The transfer, therefore, stood completed on 8-3-1983 and hence, capital gain on the said transaction would not be taxable in the assessment year 1984-85. The Commissioner (Appeals) accepted the plea of the Petitioner and, vide order dated 16-2-1996, allowed the appeal holding that the long-term capital gain arising on the sale was liable to be taxed in the assessment year 1983-84 and not 1984-85 and accordingly deleted the addition. Liberty was, however, reserved for the assessing officer to bring the long-term capital gain to tax in the assessment year 1983-84 as per law.

3. In the light of the order made by the Commissioner (Appeals), the Respondent-assessing officer issued notice dated 7-8-1996 u/s 148 of the Act for reopening the assessment for the assessment year 1983-84. It is the case of the Petitioner that since the notice was barred by limitation, he did not file any return. The assessing officer issued notice dated 22-11-1996 u/s 143(2) of the Act for hearing the case on 29-11-1996. The Petitioner prayed for time contending that the notice was illegal. The assessing officer issued another letter dated 10-12-1996 fixing the hearing on 27-12-1996. At this stage, the Petitioner filed the present petition seeking the reliefs noted hereinabove.

4. Assailing the impugned notice, Ms. Niyati Shah, learned advocate for the Petitioner, reiterated the facts stated in the petition. It was submitted that having regard to the statutory provisions contained in Sections 147 to 153 of the Act as well as having regard to the decided cases on the issue, it was not open to the assessing officer to initiate assessment or reassessment proceedings for the assessment year 1983-84. Placing reliance upon the decision of the Andhra Pradesh High Court in the case of Commissioner of Income Tax Vs. G. Viswanatham, it was submitted that Section 147 of the Act provides for assessment and reassessment of income, which has escaped assessment. The reassessment is, however, subject to the provisions

contained in Sections 148 to 153. Section 149 provides the time limit for issuance of notice, i.e., for initiation of proceedings u/s 147. Section 150 is in the nature of a proviso to Section 149. A reading of Sub-section (1) of Section 150 shows that where the reassessment proceedings are initiated in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Income Tax Act by way of appeal, reference or revision, the time limits prescribed in Section 149 shall not apply, and that notice u/s 148 can be issued at any time. Sub-section (2), however, is again in the nature of a proviso to Sub-section (1). It says that the provisions of Sub-section (1) shall not apply where, by virtue of any other provisions limiting the time within which action for assessment, reassessment, or recomputation is barred on the date of the order which is the subject-matter of the appeal, reference or revision in which the finding or direction is contained. Section 153 provides the time limits for completion of assessments and reassessments. It was contended that Explanations 2 and 3 to Section 153(3) merely illustrate and clarify the meaning of the words "in consequence of or to give effect to any finding or direction" contained in an appellate, revi-sional or any other order. Explanations 2 and 3 do not purport to obliterate or remove the restriction contained in Sub-section (2) of Section 150. They no doubt refer to Section 150, but for a limited purpose. Hence, initiation of reassessment proceedings would be bad, even when they are initiated in consequence of or to give effect to any finding or direction contained in the appellate order, if such initiation of reassessment proceedings is barred by any other provisions of the Act on the date of the order which was the subject-matter of appeal. It was submitted that the assumption of jurisdiction by the Respondent is void ab initio and contrary to the statutory provisions. It was contended that having regard to the statutory provisions contained in Sections 147 to 153 of the Act and also having regard to the decided cases on the issue, it was not open for the assessing officer to initiate assessment or reassessment proceedings for assessment year 1983-84 against the Petitioner.

5. Referring to the provisions of Section 150 of the Act, it was submitted that the said provision does not confer any fresh power on the assessing officer to make assessments in respect of escaped incomes without time limit. It only lifts the bar of limitation to give effect to orders that may be made by the appellate, revisional or reviewing the Tribunal within the scope of its jurisdiction. A finding in terms of Section 150 can only be that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. Reliance was placed upon a decision of the Supreme Court in Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri,

6. Next, it was submitted that the observation made by the Commissioner (Appeals) that the assessing officer will, however, be at liberty to bring the long-term capital gain on this transaction to tax in the assessment year 1983-84 cannot be described as a direction. The order of the Commissioner (Appeals) contains neither a finding

nor a direction in consequence of which or to give effect to which the reassessment proceedings could be said to have been taken, hence the provisions of Section 153(3)(ii) would not be attracted. Reliance was placed upon a decision of the Supreme Court in the case of Rajinder Nath and Others Vs. Commissioner of Income Tax , Delhi, It was further submitted that while considering an appeal in respect of an assessment year, a direction regarding another assessment year does not fall within the scope of Section 153(3) of the Act. The purpose of Section 153(3) is to lift the bar of limitation to make an effective order of assessment, consequent upon an appellate order. Section 153(3) does not create a new power or jurisdiction. In support of the said submission, reliance was placed upon a decision of the Karnataka High Court in the case of M.K. Thakker Vs. Commissioner of Income Tax, It was accordingly, submitted that the impugned notice is barred by limitation and is without jurisdiction or authority of law, and as such deserves to be quashed and set aside.

7. Opposing the petition, Mr. M.R. Bhatt, learned senior advocate appearing for the Respondent, submitted that as income chargeable to tax has escaped taxation, the notice has been issued u/s 148 read with Section 150 of the Income Tax Act which is well within the jurisdiction of the assessing authority. Inviting attention to the provisions of Section 150 of the Act, it was submitted that Sub-section (1) of Section 150 overrides the time limit for issuance of notice prescribed u/s 149. In so far as completion of assessment is concerned the limitation is provided u/s 153 of the Act. However, Sub-section (3) of Section 153 exempts certain assessments, reassessments and recomputations from the purview of limitation. Inviting attention to Clause (ii) of Section 153(3) as well as Explanation 2 thereto, it was submitted that in the light of the aforesaid statutory provisions, reassessment and recomputation proceedings, in the instant case, have been initiated within time and within the jurisdictional limits. Dealing with the contention that the Commissioner (Appeals) has neither recorded nor given any direction as contemplated under Sub-clause (ii) of Section 153(3), it was submitted that the Commissioner (Appeals) has recorded a finding of fact that the long-term capital gain arising on the sale was liable to be taxed in the assessment year 1983-84. Hence, it cannot be said that the Commissioner (Appeals) has not recorded any finding. Referring to the decisions on which the learned advocate for the Petitioner had placed reliance, it was submitted that none of the said decisions would come to the aid of the Petitioner in the facts and circumstances of the present case.

8. The facts are not in dispute. It is an accepted position that pursuant to the order dated 16-2-1996 made by the Commissioner (Appeals) for the assessment year 1984-85, the assessing officer has issued notice u/s 148 of the Act for reopening assessment for the assessment year 1983-84 in respect of income that had escaped assessment. The principal contention of the Petitioner that the said notice is barred by limitation is required to be examined in the light of the provisions of Chapter XIV of the Act, which makes provision for the "procedure of assessment". Under the

scheme of the Income Tax Act, 1961, Section 147 defines the power and jurisdiction for making an assessment or a reassessment of escaped income. It categorises the different contingencies and circumstances where an assessment or a reassessment may be made. Section 148 provides for initiation of reassessment proceedings. Section 149 prescribes the time limit within which a reassessment notice may be issued by the assessing officer on the Assessee concerned. Section 150 which provides for issuance of notice u/s 148 at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Act by way of appeal, reference or revision, is by way of exception to the rules of limitation laid down in Section 149. If a case falls within the circumstances mentioned in Section 150, the time limits stipulated u/s 149 do not have application. Section 153 of the Act provides for the time limit for completion of assessments and reassessments. Sub-section (1) of Section 153 prescribes the time limit for making an order of assessment u/s 143 and Section 144 of the Act, and Sub-section (2) thereof prescribes the time limit for making an order of assessment, reassessment or recomputation u/s 147. Sub-section (3) of Section 153 which is by way of an exception to Sub-sections (1) and (2) of Section 153 provides for the classes of assessments, reassessments and recomputations which may, subject to the provisions of Sub-section (2A) be completed at any time. Such classes are enumerated under Clauses (i) to (iii) thereunder. Clause (ii) thereof which is relevant for the present purpose, provides for assessment, reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order, u/s 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under the Act.

9. In the facts of the present case, it is the case of revenue that notice u/s 148 has been issued for the purpose of making a reassessment to give effect to the finding contained in the order dated 16-2-1996 passed by the Commissioner (Appeals). Hence, in view of the provisions of Section 150 read with Section 153(3) of the Act and Explanation 2 thereto, the notice has been issued within the period of limitation. The question that, therefore, arises for consideration is as to whether the impugned notice satisfies the requirements of Section 150 read with Section 153(3) of the Act.

10. Section 150, as was in force at the relevant time, reads thus:

(1) Notwithstanding anything contained in Section 149, the notice u/s 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision.

(2) The provisions of Sub-section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that Sub-section relates to an assessment year in respect of which an assessment, reassessment or

recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken.

11. On a plain reading of the provisions of Section 150, it is apparent that under Sub-section (1) thereof, the time limit stipulated u/s 149 is removed in case notice for reassessment is issued in consequence of or to give effect to any finding or direction contained in any order passed by any authority by way of appeal, reference or revision. Sub-section (2) thereof makes it clear that the reassessment permissible under Sub-section (1) of Section 150 cannot be made by the department, where the period of limitation for assessment or reassessment had expired at the time when the order, which was the subject-matter of appeal, etc., for another assessment year had been originally made.

12. Section 153 provides for time limit for completion of assessments and reassessments. Sub-section (1) thereof provides that no order of assessment shall be made u/s 143 or Section 144 at any time except as specified therein. Sub-section (2) thereof provides for the period of limitation within which an order of assessment, reassessment or recomputation shall be made u/s 147. Sub-section (2A) thereof provides that in relation to the assessment year 1971-72 and subsequent years, a fresh assessment u/s 146 or in pursuance of an order u/s 250, Section 254, Section 263 or Section 264, setting aside or cancelling an assessment, may be completed at any time before the expiry of two years from the end of the financial year in which the order u/s 146 was made by the Income Tax Officer or the order u/s 250 or Section 254 is received by the Commissioner, or the order u/s 263 or Section 264 is passed by the Commissioner. Sub-section (3) of Section 153, as is relevant for the present purpose, reads thus:

(3) The provisions of Sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputa-tions which may, subject to the provisions of Sub-section (2A), be completed at any time--

where a fresh assessment is made u/s 146;

where the assessment, reassessment or recomputation is made on the Assessee or any person in consequence of or to give effect to any finding or direction contained in an order, u/s 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act;

where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm u/s 147....

Explanation 2.--Where, by an order referred to in Clause (ii) of Sub-section (3), any income is excluded from the total income of the Assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the

purposes of Section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.

13. On a plain reading of Sub-section (3) of Section 153 of the Act, it is apparent that the same lifts the bar of limitation laid down under Sub-section (1) and Sub-section (2) thereof in respect of the classes of assessments, reassessments or recomputations enumerated thereunder. Thus, in the light of the provisions of Section 153(3)(ii) the normal time limit for completion of assessments or reassessments, as contained in Section 153(1) or Section 153(2), shall have no application where the assessment is made on the Assessee or any person in consequence of or to give effect to any finding or direction contained in an order under Sections 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under the Act.

14. The language employed in Explanation 2 to Section 153 makes it abundantly clear that under the said provision, when an order in appeal, revision or reference is made whereby any income is excluded from the total income of an Assessee for an assessment year, then an assessment of such income for another assessment year shall be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order for the purpose of Section 150 or Section 153. Thus, for the purpose of resorting to the exception provided under Sub-section (3)(ii), it is not necessary that there should be any specific finding or direction contained in the said order with regard to assessment of income for another assessment year in the light of the deeming provision in Explanation 2 below Section 153 of the Act. The very fact that income has been excluded from the total income of the Assessee for an assessment year by virtue of an order referred to in Clause (ii) of Sub-section (3) would be sufficient for the purpose of making an assessment of such income in another year and for the purpose of Section 150 and Section 153, the same would be deemed to have been made in consequence of or to give effect to any finding or direction contained in the said order.

15. The reasons recorded by the assessing officer for issuing notice u/s 148, read thus:

Reasons for issuing notice u/s 148 in the case of Shri Kalyan Ala Barot, Zarapara--Assessment year 1983-84.

The case is covered by Sections 150(1) and 153(3)(ii) read with Explanation 2 to Section 153 of the Act. The Assessee has claimed before the Commissioner (Appeals)-II that his income from capital gain is taxable in the assessment year 1983-84. The Commissioner (Appeals)-II has allowed the plea with findings to that effect.

I have therefore reason to believe that an amount of capital gain of Rs. 1,62,000 arising on account of sale of land has escaped assessment and the same is to be

taxed in the assessment year 1983-84.

Issued notice u/s 148 on the findings of the Commissioner (Appeals)-II.

16. Thus, as per the reasons recorded by the assessing officer, the notice has been issued in the light of the finding of the Commissioner (Appeals). However, on behalf of the Petitioner it has been contended that the order of the Commissioner (Appeals) does not contain any direction or finding inconsequence of which or to give effect to which the reassessment proceedings could be said to have been taken so as to attract the provisions of Section 153(3) of the Act. The Commissioner (Appeals) in his order dated 16-2-1996 has held as follows:

It has to be held that the transfer of the property in question took place on 6-3-1983. The long-term capital gain arising on the sale was, therefore, liable to be taxed in the assessment year 1983-84 and not in the assessment year 1984-85. The addition made by the assessing officer in this regard in the assessment year 1984-85 is therefore, deleted. The assessing officer will, however, be at liberty to bring the long-term capital gain on this transaction to tax in the assessment year 1983-84 as per the law keeping in view the time limit prescribed in Explanation 2 below to Section 153 read with Section 153(3).

17. It is not disputed that the order made by the Commissioner (Appeals) has been made in exercise of appellate jurisdiction. The operative part of the order indicates that the Commissioner (Appeals) has held that the long-term capital gain arising on the sale was liable to be taxed in the assessment year 1983-84 and not in the assessment year 1984-85. Consequently, the addition made by the assessing officer for the assessment year 1984-85 came to be deleted. Liberty has also been reserved for the assessing officer to bring the long-term capital gain on the transaction to tax in the assessment year 1983-84 keeping in view the time limit prescribed in Explanation 2 below Section 153 read with Section 153(3). On behalf of the Petitioner, it has been contended that reservation of liberty does not amount to a direction as envisaged u/s 150(1) and Section 153(3) of the Act. However, the said contention is misconceived inasmuch as, it is apparent that the Commissioner (Appeals) has recorded a specific finding that the transfer of the property in question took place on 8-3-1983 and that the long-term capital gain arising on the sale was, therefore, liable to be taxed in the assessment year 1983-84. The Commissioner (Appeals) has consequently left it open to the assessing officer to bring the capital gain to tax in the assessment year 1983-84.

18. Another contention raised on behalf of the Petitioner is that a finding in terms of Section 150 of the Act can only be that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The expressions "finding" as well as "direction" can be only in the context of a finding necessary for giving relief in the assessment of the year under consideration. That an order made in relation to a particular assessment year cannot be made the basis for reopening the concluded

assessment of an earlier assessment year. However, the said contention loses sight of Explanation 2 below Section 153 which provides that where, by an order referred to in Clause (ii) of Sub-section (3), where any income is excluded from the total income of the Assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of Section 150 and Section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.

19. On a combined reading of Sub-section (1) of Section 150 and Sub-section (3) of Section 153, it is apparent that in cases falling under Clause (ii) of Sub-section (3) of Section 153 read with Explanation 2 thereunder, the provisions of Sub-section (1) of Section 150 would be applicable and the bar of limitation u/s 149 would not be applicable. While Section 150(1) and Section 153(3) contemplate issuance of notice u/s 148 and completion of assessment, reassessment and recomputation respectively, in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Act by way of appeal, reference or revision, Explanation 2 to Section 153(3) contains a deeming provision which provides that where by an order referred to in Clause (ii) of Sub-section (3) any income is excluded from the total income of an Assessee for an assessment year, then an assessment of such income for another assessment year shall for the purposes of Section 150 and Section 153 be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.

20. In the circumstances, though notice has been issued u/s 148 of the Act in the light of the findings recorded by the Commissioner (Appeals), considering the language of Explanation 2 to Section 153, it is apparent that the very fact that income for the year 1984-85 has been excluded from the total income of the Assessee for the said year would be sufficient for the assessing officer to make assessment of such income for another assessment year, which for the purposes of Section 150 and Section 153 would be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, albeit provided such income is otherwise taxable for the said year. If the transaction in question was for any reason, say non-applicability of the taxing provision, not taxable operation of Sections 150(1), 153(3)(ii) read with Explanation 2 thereunder would not make the transaction taxable. In the circumstances, even in the absence of any finding or direction specifically stating that the said income may be brought to tax in another assessment year, in the light of the provisions of Explanation 2, it is permissible for the assessing officer to issue notice u/s 148 for assessment of such income for another assessment year.

21. As regards the contention that a finding in terms of Section 150 can only be that which is necessary for the disposal of an appeal in respect of an assessment of a particular year by reference to the decision of the Supreme Court in Income Tax

Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri, the same is misconceived. In the said decision, the court in the context of the proviso to Section 34 of the Indian Income Tax Act, 1922 has held that a finding can be only that which is necessary for the disposal of appeal in respect of an assessment of a particular year; that the Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the Assessee is not the income for the relevant year and thereby exclude that income from the assessment of the year under appeal. The finding in that context is that the income does not belong to the relevant year. He may incidentally find that the income belongs to another year but that is not a finding necessary for the disposal of appeal in respect of the year of assessment in question. However, Explanation 2 to Section 153 of the Act obviates the said decision of the Supreme Court, inasmuch as the same specifically provides for a deeming element whereby exclusion of the total income of an Assessee for an assessment year by an order referred to in Clause (ii) of Sub-section (3) is for the purposes of Section 150 and Section 153 deemed to have been made in consequence of or to give effect to any finding or direction contained in the said order. In the circumstances, the said decision does not come to the aid of the Petitioner.

22. In so far as reliance placed upon the decision of the Karnataka High Court in the case of M.K. Thakker Vs. Commissioner of Income Tax, is concerned, it is apparent that in the said case, the court has not considered the provisions of Explanation 2 to Section 153. The decision of the Supreme Court in the case of Rajinder Nath and Others Vs. Commissioner of Income Tax , Delhi, also does not carry the case of the Assessee any further inasmuch as on a plain reading of the order of the Commissioner (Appeals), it is apparent that the finding recorded by the Commissioner (Appeals) is to the effect that the long-term capital gain is liable to be taxed and that the sale in question took place in the assessment year 1983-84. Thus, the contention that there is no finding or direction within the meaning of Section 153(3)(ii) of the Act is contrary to the facts of the case.

23. From the facts noted hereinabove, it is apparent that in consequence of and with a view to give effect to the finding contained in the order made by the Commissioner (Appeals) in appeal for the assessment year 1984-85, the assessing officer has issued notice u/s 148 for assessing the income which was excluded from the total income of the Petitioner for the assessment year 1984-85, to assess such income for the assessment year 1983-84. Thus, the case at hand clearly falls within the ambit of the provisions of Section 150 as well as Section 153(3)(ii) read with Explanation 2 to Section 153 of the Act and as such there is, no infirmity in the action of the Respondent in initiating the reassessment proceedings, the same being in consonance with the provisions of law and within the prescribed time limit.

24. In view of the aforesaid discussion, no infirmity can be found in the action of the assessing officer in issuing notice u/s 148 of the Act for the reasons recorded for the assessment year 1983-84. The petition, therefore, fails and is accordingly rejected.

Rule is discharged. Interim relief stands vacated.