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Court : Gujarat

Decided On : Sep-19-1995

Reported in : [1996]217ITR274(Guj)

Judge : M.B. Shah and; Rajesh Balia, JJ.

Acts : [Income Tax Act, 1961](#) - Sections 269UC, 269UD, 269UD(1), 269UD(1A), 269UD(1B) and 271(1)

Appeal No. : Special Civil Application No. 3853 of 1995

Appellant : Krishnakumar Agarwal and anr.

Respondent : Appropriate Authority and anr.

Advocate for Pet/Ap. : J.P. Shah, Adv.

Judgement :

ORDER

UNDER S. 269UD--Necessity of speaking order.

Ratio :

Since valuation made by the DVO was in confirmity of the sale consideration shown in agreement for sale, non-mentioning of reasons by the Appropriate Authority for differing therefrom and non-mentioning of intention to avoid tax, make

the purchase order invalid.

HELD

In order to arrive at the finding of fair market price of the property in question, the matter was referred to by the Appropriate Authority to the department's own valuer and according to the valuer's, report, the very premise of raising presumption of evasion was not there inasmuch as according to undisputed pleadings, the apparent consideration disclosed in the agreement was equal to fair market value of the property under consideration itself having been determined, what weighed with the Appropriate Authority to discard the fair market value of the property under consideration and to fall back on the consideration of sale instance property (SIP) and to substitute the consideration of SIP ipso facto without noticing all other material facts as to fair market value of property under compulsory purchase is not discernible. Thus, it is not only a case of not merely not giving an opportunity of hearing to the affected parties, but it is also a case of non-application of mind on existing material before the Appropriate Authority within the time framework permitted under law, which by itself is sufficient to vitiate the order on merit. The Appropriate Authority is directed to issue no objection certificate.

Case Law Analysis :

C. B. Gautam v. Union of India (1993) 199 ITR 530 (SC), CIT v. Vinaychand Hiralal (1979) 120 ITR 752 (Guj) and Addl. CIT v. Noormohammad (1974) 97 ITR 705 (Raj) applied. Anagram Finance Ltd. v. Appropriate Authority (1995) 129 Taxation 327 (Guj) followed.

Application :

Also to current assessment years.

Income Tax Act 1961 s.269UD

Rajesh Balia, J.

1. The petitioner challenges through this petition the order annexure-M, dated April 28, 1995, passed under section 269UD(1) of the Income-tax Act, 1961, by the appropriate authority for purchasing the property which was the subject-matter of agreement to sell between the vendor, respondent No. 2, and the petitioner on December 26, 1994.

2. As per the agreement to sell the property - plot No. 32 in Amarkunj Co-operative Housing Society Ltd. on R. S. No. 18 of Mouje Subhanpura, Taluka Baroda, is sold in favour of the petitioner for a lump sum consideration of Rs. 22,00,000. The land area is 8,374 sq. mts. The agreement to sell was furnished to the appropriate authority in Form No. 37-I in terms of section 269UC. The appropriate authority issued notice under section 269UD(1A) to show cause why the order under section 269UD(1) should not be made for purchasing the property by the Central Government. The notice (exhibit 3) was issued on April 21, 1995, fixing the date of appearance to be on or before April 26, 1995. According to the provisions of section 269UD, the limitation for making the order under it was to expire on April 30, 1995. According to the averments made in the petition and which have not been denied by the respondents, the notice was served on the petitioner on April 28, 1995, that is to say, two days after the date fixed for appearance in the show-cause notice exhibit C. The petitioner promptly submitted a reply dated April 28, 1995, on April 29, 1995, raising objections as to the insufficiency of notice as well as on the merits of the case for the purchase. However, the authority did not accept the same and the petitioner, therefore, sent the reply by speed post. Respondent No. 2 has pointed out the late receipt of the notice and requested for another date for submitting the reply. However, the fact was this that the appropriate authority had already passed the order on April 28, 1995 (annexure-M), which is under challenge in this petition.

3. Thus, there is no controversy that the impugned order has been passed without affording any opportunity to the petitioner against the proposed action of purchasing the properties, the subject-matter of the agreement to sell, by the Central Government. Affording a reasonable opportunity to affected parties against the proposed action is the mandatory requirement before taking any action under section 269UD. It may be noticed that even before the insertion of sub-section

(1A) in section 269UD for specifying the obligation to issue notices to the purchaser, the buyer, and the persons in occupation of the property, the apex court had an opportunity to examine the scheme of the provision in *C. B. Gautam v. Union of India* : [1993]199ITR530(SC) , and it was laid down in unequivocal terms that the requirement of a reasonable opportunity being given to the concerned parties particularly the intending purchaser and the intending seller must be read into the provisions of Chapter XXC. That the time frame within which the order for compulsory purchase has to be made is a fairly tight one is not such as would preclude a reasonable opportunity of being heard or to show cause being given. That being the position, this infirmity alone is sufficient to vitiate the impugned order and it deserves to be quashed on that ground alone.

4. This leaves the question whether the appropriate authority be left free now to proceed in the matter afresh or the chapter should come to a close. Counsel appearing for the petitioner, Mr. Shah, contends that looking to the time limit prescribed under the provision before which the order for purchase must come into existence, the matter cannot be sent back for getting over that difficulty. Learned counsel for the Revenue, on the other hand, submits that the order being invalid for want of compliance with the principles of natural justice, the authorities may be left free to proceed further in accordance with law notwithstanding that the period for passing such an order has expired. For that necessary discretion vests in the court.

5. We do not wish to decide this controversy in the present case. Though prima facie it appears to us that it is in the domain of the discretion of the court to pass appropriate orders looking to the facts and circumstances of each case whenever such situation arises.

6. In the present case, we find that the order is not otherwise sustainable; even assuming that the notice was served in time and the petitioner did not submit his reply before time and the authority was left to pass an order in absentia the petitioner cannot be placed in the situation worse than that. The undisputed facts before the court are that on receiving Form No. 37-I, the appropriate authority by referring the matter for ascertaining the fair market value of the property under

consideration to the valuation officer of the Income-tax Department, Baroda. The Valuation Officer had issued notice to the parties to appear in pursuance of that notice to the petitioner as well as the vendor. In response to that it was pointed out to the Valuation Officer that the property is situated on plot No. 32 in the Amarkunj Co-operative Housing Society, which society's byelaws are applicable, according to which a party cannot construct any commercial floor on the plot in the society. That also goes to show that the property is not freehold land. It was pointed out that the property is in bad shape and it needs heavy repairs and renovation for reuse by any intending buyer and in view of the family circumstances it was decided to be sold as it was. It is also apparent from the agreement that the expenses of transfer were to be borne by the transferee. According to the averments made in the petition, the Valuation Officer of the Department has opined that the fair market price is not different from the sale consideration disclosed in the agreement which averment has also not been disputed by the Revenue. At least this material was before the appropriate authority when it was considering to pass the order under section 269UD if not the facts about the locational difference given in the reply dated April 29, 1995, though it must be said that so far as the locality is concerned it is a matter of physical existence at site. The appropriate authority who has undertaken the enquiry in finding out the market price of the property under consideration by having resort to a method of enquiry into the price of two allegedly comparable properties, namely, the property under consideration and the sale instance property, it must at least be presumed to note the difference between the physical surroundings existing on the site of both the properties to treat the comparability.

7. Section 269UD(1B) enjoins a duty on the appropriate authority to specify the grounds on which it decides to pass an order under section 269UD(1). That includes within it an obligation to consider all the relevant materials which are before the appropriate authority in deciding two cardinal premises before it can decide to purchase the property. The foundational facts on which the appropriate authority must be satisfied had been succinctly stated by their Lordships of the Supreme Court in *C. B. Gautam v. Union of India* : [1993]199ITR530(SC) .

8. It was said that the provisions of Chapter XXC can be resorted to only where there is a significant undervaluation of the property. Undervaluation to the extent of 15 per cent. or more in the agreement of sale, as evidenced by the apparent consideration being lower than the fair market value by 15 per cent. or more, as spelt out in the Bard's circular has been considered to be fair. Secondly, it was held that the very historical setting in which the provisions of this Chapter were enacted indicates that it was intended to be resorted to only in cases where there is an attempt at tax evasion by significant undervaluation of the immovable property agreed to be sold.

9. Thus, the necessary concomitants of exercise of the powers under section 269UD(1) are that firstly, the appropriate authority must arrive at a decision that there is significant undervaluation of the property by 15 per cent. or more and, secondly, such undervaluation is an attempt at tax evasion. It is only on the existence of the second indicia and not merely in the case of undervaluation that the authority has been empowered to resort to the power of pre-emptive purchase. It is true that in a case of significant undervaluation of the property to the extent of 15 per cent., the appropriate authority may draw a presumption about undervaluation having been done with a view to evading tax, a presumption which is rebuttable. However, such presumption is not an obligation under the statutory provision. It is for the appropriate authority to raise presumption or not on the basis of the estimated valuation. Whether such presumption has in fact been resorted to and has not been rebutted must in our opinion be reflected in the order which is finally passed by the appropriate authority disclosing application of mind to all available material on record. From the very fact that the presumption is rebuttable, the appropriate authority is not absolved of the duty to apply its mind to all available material before it, to find whether the presumption raised of understatement with intention to evade tax has not been rebutted and arrive at its satisfaction about the twin requirements referred to above. As this exercise of the power depends upon the satisfaction of the appropriate authority and the appropriate authority is under an obligation to pass a speaking order by specifying the reasons for purchasing the property, its satisfaction about the facts must be reflected in the order and cannot be left to guess work or for raising the presumption by the court in favour of the appropriate authority, if the order is

challenged. The order must speak for itself. The impugned order, in our opinion, does not even whisper about the satisfaction of the appropriate authority about the undervaluation being with an intention to evade tax. It must be noticed that the presumption is a rebuttable one and what evidence is required to rebut it depends upon the facts and circumstances of each case. The presumption may even be rebutted, without leading evidence, on the basis of material already available on record. The position regarding discharging the burden to displace the rebuttable presumption has been succinctly explained in CIT v. Vinaychand Harilal : [1979]120ITR752(Guj) . That was a case where there was a statutory provision for raising a presumption against the assessee under the Explanation to section 271(1)(c) about concealment of particulars of income by the assessee. The court said (at page 758) :

'In order to rebut the presumption raised by the Explanation to section 271(1)(c), it is open to the assessee to point to the record of the case and point to materials on the record which would enable him to show that he had not concealed the particulars of his income or furnished inaccurate particulars of his income.'

The court further observed (at page 762) :

'It is also not necessary that any positive material should be produced by the assessee in order to discharge this burden which rests upon him. The assessee may claim to have discharged the burden by relying on the material which is on record in the penalty proceedings.'

10. A somewhat similar view was expressed by the Rajasthan High Court in Addl. CIT v. Noor Mohd. and Co. :

'What quantum of evidence would rebut a legal presumption in a given set of facts does not admit of any rigid rule.'

In the present case, on undisputed facts we find that in order to arrive at the finding of the fair market price of the property in question, the matter was referred to by the appropriate authority to the Department's own valuer and according to the valuer's report, the very premise of raising a presumption of evasion was not

there inasmuch as according to undisputed pleadings, the apparent consideration disclosed in the agreement was equal to the fair market value of the property determined by the official valuer. In the face of a fair market value of the property determined by the official valuer. In the face of a fair market value of the property under consideration itself having been determined, what weighed with the appropriate authority to discard the fair market value of the property under consideration and to fall back on the consideration of SIP and to substitute the consideration of SIP ipso facto without noticing all other material facts as to the fair market value of PUC is not discernible. Thus, it is not only a case of not merely not giving an opportunity of hearing to the affected parties, but it is also a case of non-application of mind on existing material before the appropriate authority within the time framework permitted under law, which by itself is sufficient to vitiate the order on the merits.

11. The order also does not conform to the norms required of an order under section 269UD(1) as per the decision of this court in Anagram Finance Ltd. v. Appropriate Authority : [1996]217ITR22(Guj) (Special Civil Application No. 869 of 1995, decided on March 30, 1995) which said (at page 28) :

'A combined reading of section 269UD(1A) and (1B) of the Act leaves no room for doubt that it is a question of objective decision-making process by taking into consideration all the relevant materials which have come before the hearing authority and considering the rival aspects of the matter. Moreover, the requirement of law is to specify the grounds on which the order of pre-emptive purchase is made. That obligation does not stop by merely rejecting the submissions made before it. The rejection of submissions made by the vendors or the transferee or the persons interested in the property, does not lead to consequence that grounds for making pre-emptive purchase exists. The sine qua non is that the reasons must exist on the material placed before it, for supporting the action taken for pre-emptive purchase under section 269UD of the Act. The order clearly falls short of this requirement.'

12. In the above facts and circumstances of the present case, we are not inclined to refer the matter back to the appropriate authority. The petition accordingly

succeeds. The impugned order dated April 20, 1995 (annexure-M), is quashed. Respondent No. 1 will issue the necessary certificates including the no objection certificate within six weeks, from the date of furnishing the certified copy of the order or writ reaching the appropriate authority, whichever, is earlier. Rule made absolute with no order as to costs.

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