आयकर अपीलीय अधिकरण] पुणे न्यायपीठ "बी" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE MS. SUSHMA CHOWLA, JM AND
SHRI ANIL CHATURVEDI, AM

<u>आयकर अपील सं</u> / <u>ITA No.905/PUN/2017</u>
<u>निर्धारण वर्ष</u> / <u>Assessment year : 2008-09</u>

Shri Sunil Barry, D1/701, Lunkad Gold Coast, Viman Nagar, Pune – 411014. PAN : ANMPB6566F.	.... अपीलार्थी / Appellant

<u>बनाम</u> v/s

The Income Tax Officer, International Taxation – 1, Pune.	.... प्रत्यर्थी / Respondent

Assessee by : Shri Jayant G. Pendse.

Revenue by : Shri M.K. Verma.

सुनवाई की तारीख / Date of Hearing : 13.06.2019		घोषणा की तारीख / Date of Pronouncement: 20.06.2019

<u>आदेश / ORDER</u>

<u>PER ANIL CHATURVEDI, AM :</u>

1. This appeal filed by the assessee is emanating out of the order of Commissioner of Income Tax (Appeals) – 13, Pune dated 08.02.2017 for the assessment year 2008-09.

2. The relevant facts as culled out from the material on record are as under :-

Assessee is a non-resident of India, who filed his return of income for A.Y. 2008-09 on 25.07.2008 declaring total income at Rs. Nil. On the basis of information from the DDIT, Investigation Unit, Mumbai, it was noticed that assessee had sold property for Rs.1 crore and had deposited Rs.95.25 lakhs in capital gain account scheme. On the basis of the aforesaid information, notice u/s 148 of the Act was issued to assessee on 19.03.2015. Thereafter the case was taken up for scrutiny and assessment was framed u/s 143(3) r.w.s. 147 of the Act vide order dated 31.03.2016 and the capital gain chargeable to tax was determined at Rs.1,18,52,850/-. Aggrieved by the order of AO, assessee carried the matter before Ld.CIT(A), who vide order dated 08.02.2017 (in appeal No.PN/CIT(A)-13/TRO (IT-TP), Pune/04-2016-17) dismissed the appeal of assessee. Aggrieved by the order of Ld.CIT(A), assessee is now in appeal before us and has raised the following grounds :

> *"1. The reopening of assessment is bad in law as the reasons recorded for reopening are factually incorrect.*
>
> *2. The Ld. D.R. CIT(A) erred in holding that the relinquishment deed was a invented theory post assessment order. It may kindly be held that appellant had no interest in inherited property consequent, upon execution of relinquishment deed on 17th October 2005.*
>
> *3. In alternate and without prejudice, the amount received of Rs. 1 Cr. according to family settlement be held as consideration received for property by the appellant, and the excess amount retained by Tony Barry be held as cost of sale of property.*
>
> *4. Without prejudice to ground no 2, the Ld CIT(A) erred in confirming valuation of property as on 01-04-1981 at Rs. 72 per sq.ft which was circle rate for undeveloped land even though the land was declared as slum on 31-10-1977.*
>
> *5. Without prejudice to ground no. 2, the amount of Rs. 75 lakhs be held as cost of sale of the land being expenditure incurred by power of attorney holder Mr. Tony Barry.*

3. All the grounds being inter-connected are considered together.

4. Before us, Ld.A.R. pointing to the reasons for re-opening which is stated in the assessment order submitted that the reasons recorded by the AO states that in the return of income assessee had not disclosed the sale of property and thus it has escaped assessment. He submitted that the formation of belief was on the basis of the fact that assessee

had not disclosed the sale of property in the return of income filed by the assessee and thus there was an escapement of income within the meaning of Sec.147 of the Act. Ld.A.R. submitted that the aforesaid reasons recorded by the AO are factually incorrect and in support of which he pointed to the copy of return of income that was filed by the assessee which is placed at Pages Nos. 41 to 43 of the Paper Book. From the aforesaid return, he pointed to the fact of disclosure of long term capital gains which is disclosed by the assessee. He therefore submitted that since the very foundation on which the re-opening is based being on incorrect premise, the re-opening of the assessment does not survive and in support of which he placed reliance on the decision of Hon'ble Gujarat High Court in the case of Vijay Harichandra Patel Vs. ITO reported in (2018) 400 ITR 167. He therefore relying on the aforesaid decision submitted that when the very basis for re-opening of assessment was on wrong factual premise, the assumption of jurisdiction by the AO was without the authority of law and therefore re-assessment be set aside. Ld. D.R. on the other hand did not controvert the submissions made by Ld.A.R. but however supported the order of lower authorities.

5. We have heard the rival submissions and perused the material on record. The issue in the present ground is with respect to re-opening the assessment u/s 148 of the Act. The perusal of the reasons for re-opening of the assessment order passed u/s 143(3) r.w.s. 147 of the Act reveals that the case was re-opened for the reason that the sale of the property was not disclosed by the assessee in the return of income that was filed by the assessee. The aforesaid reason for re-opening is factually incorrect in view of the fact that in the return of income for

A.Y. 2008-09 which has been filed by the assessee and which is placed on record by the assessee it can be seen that the long term capital gains has been disclosed by the assessee. It has thus seen that the AO had formed the belief of escaping assessment on factually incorrect premise. A notice u/s 148 of the Act is a jurisdictional notice and existence of a valid notice u/s 148 of the Act is a condition precedent for exercise of jurisdiction by the AO to assess or re-assess u/s 147 of the Act. It is a settled position of law as held by the Hon'ble Bombay High Court in the case of Anitha A. Choksy Vs. ITO reported in (2019) 411 ITR 207 that the AO acquires jurisdiction to issue a re-opening notice only when he has reason to believe that income chargeable to tax has escaped assessment. The reason to believe that income chargeable to tax has escaped assessment must be on correct facts. The condition precedent of reason to believe that income chargeable to tax has escaped assessment on correct facts must be satisfied by the AO so as to have the jurisdiction to issue the reopening notice. In the present case, the reasons recorded by the AO for issuing notice for re-opening that the assessee had not disclosed capital gains in the return of income that was filed by the assessee is factually incorrect and therefore the reasons lacks validity. In such circumstances, we are of the view that AO was not justified in proceeding to re-issue the re-assessment notice and for which we also draw support from the decision of Hon'ble Gujarat High Court in the case of Vijay Harichandra Patel Vs. ITO (supra) wherein the Hon'ble High Court has held that when the very foundation on which reopening was based on the reasons recorded by AO for re-opening assessment collapses and was formed on factually incorrect premise, the assumption of jurisdiction u/s 147 of the Act by the AO by issuing notice u/s 148 of the Act was without the authority of law and could not be sustained.

6. Before us, Revenue has not controverted the submissions made by Ld.A.R. nor has placed any contrary binding decision in its support. Considering the totality of the aforesaid facts and relying on the decisions cited herein above, we hold that the assessment order passed by the AO to be bad in law and thus set it aside. Since we have set aside the assessment order passed by the AO, the grounds raised by the assessee on merits requires no adjudication as they have been rendered academic. **Thus, the appeal of the assessee is allowed.**

7. **In the result, the appeal of the assessee is allowed.**

Order pronounced on 20th day of June, 2019.

Sd/-	**Sd/-**
(**SUSHMA CHOWLA**)	(**ANIL CHATURVEDI**)
न्यायिक सदस्य / JUDICIAL MEMBER	**लेखा सदस्य / ACCOUNTANT MEMBER**

पुणे Pune; दिनांक Dated : 20th June, 2019.

Yamini

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. CIT(A)-13, Pune.
4. The CIT (IT/TP), Pune.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" / DR, ITAT, "B" Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER

// True Copy //

वरिष्ठ निजी सचिव / Sr. Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune.