

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL,
JAIPUR BENCHES (SMC), JAIPUR

श्री भागचंद, लेखा सदस्य, के समक्ष
BEFORE: SHRI BHAGCHAND, ACCOUNTANT MEMBER

आयकर अपील सं./ITA No. 414/JP/2017
निर्धारण वर्ष / Assessment Year : 2012-13

Balwant Yadav, Village- Banbirpur, Khijuribas, Tijara, Alwar (Raj).	बनाम Vs.	I.T.O., Ward- Bhiwadi, Alwar.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AGBPY 0341 B		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ITA No. 415/JP/2017
निर्धारण वर्ष / Assessment Year : 2012-13

Satbir Yadav, Village- Banbirpur, Khijuribas, Tijara, Alwar (Raj).	बनाम Vs.	I.T.O., Ward- Bhiwadi, Alwar.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AGBPY 0342 C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Mahendra Gargieya (Adv.)
राजस्व की ओर से / Revenue by : Smt. Poonam Roy (DCIT)

सुनवाई की तारीख / Date of Hearing : 10/01/2018
उदघोषणा की तारीख / Date of Pronouncement : 06/02/2018

आदेश / ORDER

PER: BHAGCHAND, A.M.

Both are the appeals filed by two different assessees emanates
from the two separate orders of the Id. CIT(A), Alwar dated 24/03/2017

pertaining to the assessment year 2012-13. In both the appeals, the assessee has taken following grounds of appeal:

Grounds of ITA No. 414/JP/2017

- "1. The impugned addition made in the order u/s 143(3) dated 11.03.2015 is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be deleted.*
- 2.1 Rs.33,59,002/-: The Id. CIT(A) erred in law as well as on the facts of the case in confirming the additions of Rs.33,59,002/- made on account of Long Term Capital Gain. The addition so made and confirmed by the Id. CIT(A), is totally contrary to the provisions of law and facts on the record and hence the same kindly be deleted in full.*
- 2.2 The Id. CIT(A) erred in law as well as on the facts of the case in confirming the Cost of Acquisition claimed by the AO at Rs.10,000/- only (Indexed cost of Rs.78,500/-) as against Rs.95,000/- (approx) (Indexed cost of Rs.3,74,750/-) as per prevailing DLC rate in F.Y. 1991-92. The cost of acquisition so adopted and confirmed by the Id. CIT(A), is totally contrary to the provisions of law and facts on the record and hence the same may kindly be allowed.*
- 2.3 The Id. CIT(A) erred in law as well as on the facts of the case in denying the claim of deduction u/s 54B of Rs.20,23,837/- invested in purchase of new agriculture land and deduction u/s "54F" of Rs.12.50 Lakhs invested in the construction of a new residential house. The denial of deduction so claimed and confirmed by the Id. CIT(A), is totally contrary to the provisions of law and facts on the record and hence the same may kindly be allowed.*
- 3. The Id. AO further erred in law as well as on the facts of the case in charging interest u/s 234A, 234B, 234C & 234D of the Act and as also in withdrawing interest u/s 244A of the Act. The appellant totally denies its liability of charging and withdrawal of any such interest. The interest so*

charged/withdrawn, being contrary to the provisions of law and facts, kindly be deleted in full.”

Grounds of ITA No. 415/JP/2017

- “1. The impugned addition made in the order u/s 143(3) dated 11.03.2015 is bad in law and on facts of the case, for want of jurisdiction and various other reasons and hence the same kindly be deleted.*
- 2.1 Rs.13,51,056/-: The Id. CIT(A) erred in law as well as on the facts of the case in confirming the additions of Rs.13,51,056/- made on account of Long Term Capital Gain. The addition so made and confirmed by the Id. CIT(A), is totally contrary to the provisions of law and facts on the record and hence, the same kindly be deleted in full.*
- 2.2 The Id. CIT(A) erred in law as well as on the facts of the case in confirming the Cost of Acquisition claimed by the AO at Rs.10,000/- only (Indexed cost of Rs.78,500/-) as against Rs.95,000/- (approx) (Indexed cost of Rs.3,74,750/-) as per prevailing DLC rate in F.Y.1991-92. The cost of acquisition so adopted and confirmed by the Id. CIT(A), is totally contrary to the provisions of law and facts on the record and hence, the same may kindly be allowed.*
- 2.3 The Id. CIT(A) erred in law as well as on the facts of the case in denying the claim of deduction u/s 54F of Rs.12.50 Lakhs invested in the construction of a new residential house. The denial of deduction so claimed and confirmed by the Id. CIT(A), is totally contrary to the provisions of law and facts on the record and hence the same may kindly be allowed.*
- 3. The Id. AO further erred in law as well as on the facts of the case in charging interest u/s 234A, 234B, 234C & 234D of the Act and as also in withdrawing interest u/s 244A of the Act. The appellant totally denies its liability of charging and withdrawal of any such interest. The interest so charged/withdrawn, being contrary to the provisions of law and facts, kindly be deleted in full.*

2. Since the certain issues involved in the appeals are common, therefore, both these appeals were heard together and for the sake of convenience and brevity, a common order is being passed.

3. ITA No. 414/JP/2017

The assessee Shri Balwant Yadav e-filed his return of income on 21/03/2014 declaring total income of Rs. 30,185/- and agricultural income of Rs. 25,500/-. The case was selected for scrutiny and the assessee filed revised return on 21/3/2014 wherein TDS credit of Rs. 4,467/- was claimed. The Assessing Officer held that since the original return was not furnished U/s 139(1) of the Income Tax Act, 1961 (in short the Act), therefore, revised return is void ab initio. During the year under consideration, the assessee has sold immovable property held in joint names located at Banbeerpur, Tehsil- Tijara, district- Alwar vide sale deed dated 25/4/2011 and received sale consideration of Rs. 34,37,502/- out of the total consideration of Rs. 2,06,25,000/-. No deduction U/s 54 of the Act was claimed in the return of income. In the assessment proceedings, the assessee has claimed that agricultural land was situated beyond 8 KM from the municipal limit of Bhiwadi, therefore, there is no capital gain as per definition of capital asset. Alternatively, it was also claimed that the assessee has invested Rs. 20,07,946/- in the purchase of agricultural land and eligible for

exemption U/s 54B of the Act to that extent. The Assessing Officer did not accept both the claim of assessee and assessed long term capital gain in the hands of the assessee at Rs. 33,59,002/- after adopting the cost of acquisition at Rs. 10,000/- as on 01/4/1981 and indexed cost worked out at Rs. 78,500/-.

4. The issue regarding agricultural land whether it is capital asset as per definition U/s 2(14) of the Act or not, has been decided by the Id. CIT(A) by holding as under:

"5.2 I have perused the assessment order and find that the A.O. has brought irrefutable facts on records which proves that the land in question is a capital asset and is not covered under exemptions clause U/s 2(14) of the Act. Therefore, the appellant's ground of appeal on this issue is devoid of any merit and hence dismissed."

5. The issue regarding claim U/s 54B of the Act was decided by the Id. CIT(A) by holding as under:

"6.5 I have perused the assessment order as well as remand report of the AO, submissions and cross reply of the appellant including judicial citations given therein. Following facts have emerged;

- 1. That the assessee had inherited land at Banbirpur Distt. Alwar from his uncle Sh. Mangal by way of a will dated 23/05/1991.*
- 2. That during the year under consideration the assessee had sold his part of land to M/s Star City Buildhome Pvt. Ltd. and got his share of consideration at Rs. 34,37,502/-.*

3. *That the assessee had filed his regular return of income for the year under consideration declaring total taxable income of Rs. 30,185/- and agricultural income of Rs. 25,500/-.*
4. *That the appellant had not declared capital gain on the property sold during the year under consideration claiming that the land sold is not a capital asset as defined u/s 2(14) of the Act.*
5. *That during the course of assessment proceedings the appellant has claimed deduction under section 54B and 54F of the Act against the capital gain arisen out of sale of the land.*
6. *That during the assessment proceedings the assessee could not file evidence in support of his claim about the land being covered under section 2(14) of the Act. The A.O has given a very reasoned order citing evidences that the land in question does not fulfill conditions too claim of it being not a capital asset as per the provision of section 2(14) of the Act.*
7. *That the A.O has further contended that the assessee has not claimed any deduction u/s 54B and 54F of the Act in the regular return filed by him and he has also nor filed revised return within stipulated time, hence the claim cannot be entertained during assessment proceedings. The A.O has cited the decision of Apex court in the case of M/s Goetze India Limited.*

6.5.2 *I have considered the above mentioned facts of the case. Although the A.O has rightly rejected the claim of deductions u/s 54B and 54F of the Act as the same was not claimed in the regular return of income and the appellant has also not filed revised return u/s 139(4) of the Act. The A.O has taken into consideration Apex court in the case of M/s Goetze India Limited. However, the said judgment is applicable for the assessing officer and the assessee can raise legitimate issues before the appellate authorities. In this regard the additional evidences were filed under Rule 46A of I T Rules, 1962. The additional evidences were forwarded to the A.O for his examination and comments. The remand report from the A.O has been received*

vide letter dated 24/01/2017. Copy of remand report was provided to the AR and the cross reply was submitted vide letter dated 10/02/2017. Remand report and the cross reply have been taken into consideration.

6.5.3 I have considered the remand report where it is submitted that so far as applicability of section 54B of the Act is concerned, following conditions should be satisfied to claim the benefit of section 54B.

- 1. The benefit of section 54B is available only to an individual or a HUF*
- 2. The asset transferred should be agricultural land. The land may be a long-term capital asset or short-term capital asset.*
- 3. The agricultural land should be used by the individual or his parents for agricultural purpose at least for a period of two years immediately preceding the date of transfer. In case of HUF the land should be used by any member of HUF.*
- 4. Within a period of two years from the date of transfer of old land the taxpayer should acquire another agricultural land.*
- 5. In case of compulsory acquisition the period of acquisition of new agricultural land will be determined from the date of receipt of compensation.*
- 6. However, as per section 10(37), no capital gain would be chargeable to tax in case of an individual or HUF if agricultural land is compulsorily acquired under any law and the consideration of which is approved by the Central Government or RBI and received on or after 01-04-2004.*

In this case following facts have been noticed;

- 1. the A.O has decided on the basis of evidences that the land in question is a capital asset and is not covered under section 2(14) of the Act.*

2. *The appellant has filed Girdwari/Khasra record showing use of the land for agricultural purposes for the last 2 years.*
3. *The registry of the land has taken place on 25/04/2011.*
4. *The agricultural land was purchased in the hand Sh. Ajit Singh and Sh. Pop Singh on 22/03/2011.*

As per section 54B of the Act the purchase of another agricultural land has to be in the name of the seller of the old land. Here in this case, the new agricultural land was purchased in the name of Sh. Ajit Singh and Sh. Pop Singh. Therefore, the appellant is not entitled to claim deduction u/s 54B of the Act.

Therefore, in view of the provisions of the Act and the factual matrix of the case, it is my considered view that the appellant is not entitled to avail deduction under section 54B of the Act. I have also taken note of the remand report and find that no cogent evidences have been produced in support of claims for deduction under section 54F of the Act, hence the claim of deduction u/s 54B and 54F of the Act is dismissed.

6. While pleading on behalf of the assessee, the Id AR has submitted as under:

On the issue of land is not a Capital Asset:

- 1.1 At the outset, it is submitted that the subjected land is situated at Village Bandipur, Tehsil Tijara, District Alwar which is clearly beyond 8 km by road distance from the limits of the Municipal Corporation, Bhiwari (i.e. 8.8 km) and this was duly submitted even before the Assessing Officer himself vide reply dated 10.03.2015 (AO pg 4). The AO however, rejected this factual

contention without bringing any contrary material on record (except the case of Ramavtar discussed later).

- 1.2 It is evident from the assessment order that the AO has perhaps taken the picture (AO pg 3) with the help of Google Map and on that basis only, an aerial distance has been measured whereas, the law at the relevant point of time required the AO to measure the distance by road only and not to consider flight/aerial distance. It is only of late by the Finance Act, 2013, w.e.f. 01.04.2014 [i.e. for & from A.Y. 2014-15 & onward only], such distance is now required to be measured based on aerial distance (though aerially also it comes to 8.02km). However, prior to this such distance was to be measured having regard to the road distance only. Thus, the authorities below have completely proceeded on a misconception of law and had incorrectly appreciated the legal position prevailed at the relevant time. In fact, they have not even referred to this amendment at all therefore, even it cannot be said that the authorities below wanted to apply the law retrospectively and hence, there was no dispute on this aspect at all. Thus, the contention of the assessee that in A.Y.2012-13 such distance was to be measured based on the road only and aerial distance was to be considered, is fully established. Measured by road it comes to 8.8 km, as also confirmed by AO's finding where distance between Kaaroli (Ramavatar) and outer limit of Bhiwadi Nagar palika is 8km (aerial)/ 12.7 (by road) and reducing therefrom distance of 4km (by road) between Kaaroli (industrial area where there is no nagar palika) and Banbeerpur, will come to 8.7 km (approx.)

1.3 The CBDT has also come out with a Circular dated 06.10.2015 No. 17/2015 (DPB 23) accepting the decision in the case of Smt. Maltibai R kadu in ITA No. 151/ 2013 of Nagpur Bench, Bombay High Court dated 30.03.2015 (DPB 1-22). Accordingly, in Para 3, the departmental officers have been directed, even to the extents that appeals already filed on this issue must be withdrawn/ not pressed upon.

1.4 In the case of Maltibai R kadu (Supra), it was held that

"15. Insofar as relevance of Section 11 of the General Clauses Act is concerned, it needs to be noted that here the relevant amendment prescribing distance to be counted must be aerial has come into force w.e.f. 1st April, 2014. The need of amendment itself shows that, in order to avoid any confusion, the exercise became necessary. The Parliament noticed the Judgments being delivered and therefore, emphatically pointed out aerial distance as the relevant norm. This exercise to clear the confusion, therefore, shows that benefit thereof must be given to the assessee. It is settled law that, in such matters, when there is any doubt or confusion, the view in favour of the assessee needs to be adopted. The Circular No.3/240, dt.24.1.2014 shows vide clause no.4 amendment in definition of 'Capital Asset' and clause 4.5 dealing with applicability expressly stipulates that it takes effect from 1.4.2014 and therefore, prospectively applies in relation to the assessment year 2014-15 and subsequent assessment years. Hence, the question whether prior to the said assessment year 2014-15 the Authorities erred in computing the distance by road does not arise at all. The IT cannot be questioned on that ground. For these reasons, Section 11 of the General Clauses Act also has no application in the present matter where the ITAT was concerned with the assessment year 200910 or prior to the time when amendment took effect."

2. Covered Issue:

2.1 It is not denied that the subjected property was owned by 4 persons jointly and the entire land was sold also jointly. The entire land of 0.775 hectare situated at Banbeerpur, Tehsil Tijara, District Alwar was sold for Rs.2,06,25,000/- on

25.04.2011 vide the said registered sale deed. One of the co-owners Late Shri Deep Chand was accountable for the sale consideration of Rs.1,03,12,500/-. However, that assessee did not file his return of income. The AO of Late Shri Deep Chand referring to these very facts and the fact that the AO of other co-owners (i.e. the present appellants Shri Satbir Yadav and Balwant Yadav), had found that the "immovable property which was sold was a capital asset and sale consideration received against sale of that asset is liable to be taxed under the head of capital gain" Therefore, a notice u/s 148 was issued in case of Late Shri Deep Chand in response to which that assessee filed a written submission dated 25.11.2006 contending that the subjected land was situated outside the limit of Bhiwari Nagar Palika. Hence, the AO of Late Shri Deep Chand got the enquiry conducted and obtained information u/s 133(6) of the Act directly from the Commissioner, Municipal Corporation, Bhiwari and held that the sole property was not a capital assets. Consequently, the proceedings initiated u/s 147 were dropped in that case vide Assessment order dated 27.12.2016 passed u/s 143(3)/147. Consequently, the proceedings initiated u/s 147 were dropped in that case vide Assessment order dated 27.12.2016 passed u/s 143(3)/147 (PB 93-94).

- 2.2 Similar was the situation in case of the other joint owner namely Shri Bahadar s/o Late Shri Deep Chand who also shared the sales consideration of Rs.34,37,500/- on the sale of the same very land wherein also the facts are exactly similar. There also the return of income was accepted without any variation vide the Assessment Order dated 14.12.2016 passed u/s 143(3)/147 (PB 88-89).

- 2.3 The Id. CIT(A) however, did not pay attention to ascertain as to what happened in the case of the two other joint owners of the same very land but he blindly relied upon what the AO said even ignoring such facts & submissions brought in his notice during the appellate proceedings.

Thus, the same AO (i.e. the same assessing officer having jurisdiction over all the 4 joint owners) having held in the cases of 2 joint owners that the subjected land was not capital asset being beyond 8 kms, it has to be held that in the cases of the two joint owners (present appellant), also that it was not a capital asset. Hence, there was no capital gain at all liable to be taxed.

3. The AO has vaguely referred to the case of one Shri Ramavtar and concluded that the present land was also situated within 8kms only. Firstly, such evidence could not have been relied upon by the AO as was never confronted to the assessee and therefore, must be ignored being in violation of Sec.142(3). Also kindly refer Vimal Chandra Golecha v/s ITO & Anr. (1982) 134 ITR 119 (Raj), ITO & Anr. v/s Gargidin Jawla Prasad Maholi & Ors. (1980) 124 ITR 203 (All), followed in Sunil Khan & Party ITA NO. 804/JP/03 dated 08.11.2005. Hence any addition based on the basis of such material collected and not confronted to the assessee, has to be deleted altogether on this short ground alone. Secondly, the measurement has been taken aerially which is incorrect hence, the same deserves to be ignored.

7. On the other hand, the Id DR has relied on the orders of the authorities below.

8. The Bench have heard both the sides on this issue. In both these appeals, the assessee has challenged that the land which was sold by these assesses was not a capital asset as per definition provided in Section 2(14) of the Act. The assessee has claimed that the land was situated beyond 8 k.m. from the municipal limit of Bhiwadi. A google map was also placed on record where the distance comes of 8.02 k.m.. It is pertinent to note that prior to amendment in Section 2(14) by Finance Act, 2013 w.e.f. 01/4/2014 wherein item (b) in clause (iii) of sub-Section (14) of Section 2 read as under:

“(b) in any area within such distance, not being more than eight kilometers, from the local limits of any municipality or cantonment board referred to in item (a), as the Central Government may, having regard to the extent of, an scope for, urbanization of that area and other relevant considerations, specify in this behalf by notification in the Official Gazette.”

The last notification in official Gazette is dated 06/01/1994. Bhiwadi was not a municipality nor a cantonment Board as on 06/1/1994. The notification No. 9447 dated 06/01/1994 was notified in supersession of notification No. SO 77(E) dated 06/2/1973. There is no further notification with regard to distance from the local limits of municipality in case of Bhiwadi municipality. Such notifications are issued by the Central Government having regard to the extent of and, scope for urbanization of that area and other relevant considerations. Therefore, the agricultural land situated outside the municipal limit of Bhiwadi shall

not be covered by the definition of 'capital asset' prior to amendment from 01/4/2014. In this view of the matter, the agricultural land sold by the assessee is not covered by the definition of 'capital asset' as provided in Section 2(14) of the Act. Therefore, the levying the capital gain tax on the sale of the agricultural land situated outside the municipal limit of the Bhiwadi was not justified.

6. Since the asset, which was sold, was not a 'capital asset' and no capital gain tax is leviable, therefore, the issues raised in other grounds of appeals regarding claim U/s 54B and 54F of the Act are not required to be adjudicated. Hence, both the appeals of the assessee are allowed.

7. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open court on 06/02/2018.

Sd/-
(भागचंद)
(BHAGCHAND)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 06th February, 2018

*Ranjan

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellants- (i) Shri Balwant Yadav, Alwar &
(ii) Shri Satbir Yadav, Alwar.
2. प्रत्यर्थी / The Respondent- The I.T.O., Ward- Bhiwadi, Alwar.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)

5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 414 & 415/JP/2017)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar