

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

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA No.184/PUN/2016

निर्धारण वर्ष / Assessment Year : 2009-10

Bhima Dada Kharate,
H. No. 894/3, Gandharvawadi,
Near Forest Nursery Canal,
Makhmalabad, Nashik-422013

PAN : BCMPK7951D

.....अपीलार्थी / Appellant

बनाम / V/s.

Assistant Commissioner of Income Tax,
Circle – 1, Nashik

.....प्रत्यर्थी / Respondent

Assessee by : Shri Pramod Shingte
Revenue by : Shri Mukesh Jha

सुनवाई की तारीख / Date of Hearing : 26-04-2018

घोषणा की तारीख / Date of Pronouncement : 09-05-2018

आदेश / ORDER

PER VIKAS AWASTHY, JM :

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-1, Nashik dated 07-01-2016 passed u/s. 154 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for the assessment year 2009-10.

2. The brief facts of the case as emanating from records are: The assessee inherited land comprising in S. No. 150, Makhmalabad, Nashik admeasuring 9.83 Acres. The assessee jointly owned the land with other family members. The said land was sold for total consideration of Rs.1,80,00,000/-. The assessee's share in the land was 32.50%. Since, the land was ancestral property acquired prior to 01-04-1981, the assessee got the land valued from approved Government valuer. The value of land was determined as on 01-04-1981 at Rs.2,80,705/- per acre. The assessee computed his share of Long Term Capital Gain at Rs.6,30,729/- and offered the same to tax. During the course of assessment proceedings, the Assessing Officer for determining the value of said land as on 01-04-1981 made reference to Department Valuation Officer (DVO) u/s. 55A of the Act. Since, the assessment was getting time barred and the valuation report was not received from DVO, the Assessing Officer adopted valuation as on 01-04-1981 on the basis of report received from Joint District Registrar, Nashik. The Assessing Officer determined the Long Term Capital Gain at Rs.54,73,591/- and made addition of Rs.48,42,862/- i.e. the difference between Long Term Capital Gain determined by the Assessing Officer and the assessee.

Aggrieved by the assessment order dated 28-03-2014, passed u/s. 147 r.w.s. 143(3), the assessee filed appeal before the Commissioner of Income Tax (Appeals). Before the First Appellate Authority the assessee inter alia raised objection against making reference to DVO by Assessing Officer u/s. 55A of the Act. The Commissioner of Income Tax (Appeals) following the decision of Hon'ble Bombay High Court in the case of Commissioner of Income Tax Vs. Puja Prints reported as 360 ITR 697 allowed the ground raised against reference made to DVO and deleted the addition of Rs.54,73,591/-. The Revenue carried the matter in appeal

before the Tribunal in ITA No. 1582/PUN/2015. The Tribunal vide order dated 31-10-2017 upheld the findings of Commissioner of Income Tax (Appeals) and dismissed the appeal of Revenue.

In the meantime, the Assessing Officer filed letter u/s. 154 to rectify the mistake in the order before the Commissioner of Income Tax (Appeals). The Assessing Officer tried to distinguish the ratio laid down in Commissioner of Income Tax Vs. Puja Prints (supra). The Assessing Officer pointed that in the present case reference to DVO was made on 14-11-2013 i.e. after the date of amendment to section 55A i.e. 01-07-2012. Whereas, in the case of Commissioner of Income Tax Vs. Puja Prints (supra) reference was made to the DVO prior to amendment. The Commissioner of Income Tax (Appeals) accepted the proposition forwarded by Assessing Officer and vide impugned order held the reference made to DVO as valid. Now, the assessee is in appeal against the findings of Commissioner of Income Tax (Appeals).

3. Shri Pramod Shingte appearing on behalf of the assessee submitted that once the Tribunal has confirmed the order of Commissioner of Income Tax (Appeals) dated 14-09-2015, the subsequent rectification order passed u/s. 154 wherein the Commissioner of Income Tax (Appeals) has taken diagonally opposite view reversing its own findings is liable to be set aside. The ld. AR submitted that the Tribunal in assessee's own case in ITA No. 1582/PUN/2015 has held that the ratio laid down by the Hon'ble High Court in the case of Commissioner of Income Tax Vs. Puja Prints (supra) squarely covers the issue raised by the Department in appeal. The Tribunal has observed that reference could be made to DVO only when the value adopted by the assessee is less than the fair market value. It was further clarified that the amendment brought to section 55A w.e.f. 01-07-

2012 by substituting the words “is less than the fair market value” by the words “is at variance with its fair market value” is not retrospective, hence, the amended provisions of section 55A would not apply to assessment year under appeal.

3.1 The ld. AR further submitted that the Commissioner of Income Tax (Appeals) has erred in taking a contrary view in an order u/s. 54 against the assessee, particularly when issue regarding power of Assessing Officer to refer the valuation as on 01-04-1981 to the DVO is debatable. The Pune Bench of the Tribunal in the case of Arjun Dada Kharate Vs. ACIT in ITA No. 185/PN/2016 for assessment year 2009-10 and in the case of Parvatabai Dada Kharate Vs. ACIT in ITA No. 186/PN/2016 for assessment year 2009-10 decided on 19-08-2016 after placing reliance on the decision of Hon'ble Supreme Court of India in the case of T.S. Balaram Vs. Volkart Brothers & Ors. reported as 82 ITR 50 has held that the issue as to whether the Assessing Officer can make reference to the DVO u/s. 55A(a) of the Act after the amendment w.e.f. 01-07-2012 is highly debatable. The Commissioner of Income Tax (Appeals) was not justified in passing the order u/s. 154 of the Act taking a view contrary to what was taken in original proceedings. The ld. AR prayed for setting aside the impugned order being against the law laid down by the Jurisdictional High Court.

4. On the other hand Shri Mukesh Jha representing the Department vehemently defended the order of Commissioner of Income Tax (Appeals) passed u/s. 154 of the Act. The ld. DR submitted that at the time of passing of the original order the Commissioner of Income Tax (Appeals) failed to take note of the vital aspect i.e. the date on which reference is made to DVO. The amendment to section 55A was made on 01-07-2012, whereas, the reference to the DVO was made on 14-11-2013 i.e. after the

amendment. In the case of Commissioner of Income Tax Vs. Puja Prints (supra), the reference was made to DVO prior to the amendment. Therefore, the ratio laid down in the case of Commissioner of Income Tax Vs. Puja Prints (supra) would not apply to the facts of the present case.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The issues that have emerged from the facts of the case and the submissions made by both sides in present appeal are :

- (i) Whether the Commissioner of Income Tax (Appeals) is justified in reversing its own order u/s. 154 when the original order of Commissioner of Income Tax (Appeals) has been upheld by the Tribunal; and
- (ii) Whether the Assessing Officer can make reference to DVO u/s. 55A in assessment year prior to the amendment to section 55A of the Act where the value declared by assessee is more than the fair market value.

6. The facts narrated above are not in dispute. The Revenue had filed appeal in ITA No. 1582/PUN/2015 before the Tribunal against the order of Commissioner of Income Tax (Appeals) dated 14-09-2015, whereby the reference made to DVO u/s. 55A of the Act was held to be bad in law. The Co-ordinate Bench of the Tribunal confirmed the findings of Commissioner of Income Tax (Appeals) by holding as under :

“9. We have heard the rival contentions and perused the record. The issue which arises in the present appeal is against the determination of cost of acquisition of plot of land as on 01.04.1981. The assessee during the year under consideration had sold piece of land and the issue which arose in the present appeal was the cost of acquisition to be adopted as on 01.04.1981 in order to compute the income from long term capital gains on sale of said land, in the hands of assessee. The assessee in this regard furnished the valuation report as on 01.04.1981 and claimed the cost of plot as on 01.04.1981 at Rs.68,71,658/- and declared the indexed cost of acquisition at Rs.1,60,59,301/-. The Assessing Officer on the other hand, was of the view that the cost of acquisition declared by the assessee as on 01.04.1981 was higher and reference was made to the DVO in order to compute the value of the property. Though the draft valuation report was issued to the

assessee i.e. during the course of proceedings before the DVO, but no final report was received by the Assessing Officer from the DVO. Since the assessment was getting time barred, the Assessing Officer made reference to the Stamp Valuation Authority in this regard and relying on the report of the Stamp Valuation Authority, adopted the cost of acquisition as on 01.04.1981 at Rs.64,675/- and worked out the indexed cost of acquisition at Rs.3,76,409/-. The CIT(A) on the other hand, has relied on the ratio laid down by the Hon'ble Bombay High Court in CIT Vs. Puja Prints (supra). The dictate of the Hon'ble Bombay High Court is that reference could be made to the Departmental Valuation Officer only when the value adopted by the assessee was less than the fair market value. In case the value adopted by the assessee of any property was more than the fair market value as determined by the DVO, then such invocation of provisions of section 55A(a) of the Act was held to be not justified. Reference was also made to the amendment to section 55A(a) of the Act in 2012, wherein for the words "is less than the fair market value" was substituted by the words "is at variance with its fair market value", was held to be clarificatory and it was categorically held that where the amendment was made effective only from 01.07.2012; the Parliament has not given retrospective effect to the amendment. The Hon'ble High Court thus, held that the law to be applied in the facts of the present case was the section as existing during the period relevant to assessment year 2006-07.

10. Now, coming to the facts of the present case, the year under reference is assessment year 2009-10 and since the amendment was made effective from 01.07.2012 and the Hon'ble High Court has held that law which is to be applied in such cases is as existing during assessment year 2009-10, then the preamended provisions of section 55A(a) of the Act are to be applied. In such scenario, there is no merit in the order of Assessing Officer in adopting the cost of acquisition as on 01.04.1981 at the value less than the value shown by the assessee, which in turn, is based on the report of the approved Valuer. Accordingly, we uphold the order of CIT(A) and dismiss the grounds of appeal raised by the Revenue."

7. In proceedings u/s. 154 the Commissioner of Income Tax (Appeals) reversed its stance on the ground that reference was made to DVO after the amendment to section 55A effective from 01-07-2012. We do not find merit in the reasoning given by the Commissioner of Income Tax (Appeals) to reverse its finding and taking a divergent view from the decision earlier taken in the light of Commissioner of Income Tax Vs. Puja Prints (supra).

8. The Co-ordinate Bench of the Tribunal while dismissing the appeal of Revenue in ITA No. 1582/PUN/2015 by placing reliance on the decision of Commissioner of Income Tax Vs. Puja Prints (supra) has categorically

observed that the amended provisions of section 55A would be effective from 01-07-2012 and the same would have no application on the assessment year 2009-10. In other words unamended provisions of section 55A would apply to the period prior to 01-07-2012 including the assessment year under appeal i.e. assessment year 2009-10. Making reference to the DVO by Assessing Officer after amendment would not alter the position for assessment year 2009-10. In the assessment year under consideration the provisions of section 55A as they existed in the period relevant to assessment year would apply.

9. In the result, both the questions are answered in negative. The impugned order is set aside and the appeal of assessee is allowed.

Order pronounced on Wednesday, the 09th day of May, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 09th May, 2018

RK

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

1. अपीलार्थी / The Appellant.
 2. प्रत्यर्थी / The Respondent.
 3. आयकर आयुक्त (अपील) / The CIT(A)-1, Nashik
 4. The Pr. CIT-1, Nashik
 5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "बी" बेंच,
पुणे / DR, ITAT, "B" Bench, Pune.
 6. गार्ड फ़ाइल / Guard File.
- //सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

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