

आयकर अपीलिय अधिकरण पुणे न्यायपीठ "SMC" पुणे में
IN THE INCOME TAX APPELLATE TRIBUNAL
SMC BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य के समक्ष
BEFORE SHRI D. KARUNAKARA RAO, AM

आयकर अपील सं. / ITA No.74/PUN/2017
निर्धारण वर्ष / Assessment Year : 2009-10

Laxman Maruti Shitole,
Sus. 402, Shitole Wasti,
Tal. Mulshi, Dist. Pune – 411 021
PAN : CBLPS2626E

.... अपीलार्थी/Appellant

Vs.

ITO, Ward-4(4),
Pune

.... प्रत्यर्थी / Respondent

आयकर अपील सं. / ITA No.75/PUN/2017
निर्धारण वर्ष / Assessment Year : 2009-10

Anil Maruti Shitole,
Sus. 402, Shitole Wasti,
Tal. Mulshi, Dist. Pune – 411 021
PAN : CBLPS2767L

.... अपीलार्थी/Appellant

Vs.

ITO, Ward-4(4),
Pune

.... प्रत्यर्थी / Respondent

अपीलार्थी की ओर से / Appellant by : Shri Deepak Sasar
प्रत्यर्थी की ओर से / Respondent by : Shri Pankaj Garg

सुनवाई की तारीख / Date of Hearing : 17.05.2018	घोषणा की तारीख / Date of Pronouncement: 30.05.2018
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आदेश / ORDER

PER D. KARUNAKARA RAO, AM :

There are two appeals filed by two different assesseees under consideration involving Assessment Year 2009-10. They are filed against the separate orders of the CIT(A)-3, Pune commonly dated 07-09-2016.

I shall take up the appeal filed by **Shri Laxman M. Shitole first.**

ITA No.74/PUN/2017 – Shri Laxman M. Shitole
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2. Before me, at the outset, Ld. Counsel for the assessee mentioned that Ground Nos. 4 and 5 of the appeal are not pressed. Accordingly, the said grounds are dismissed as such.

3. Referring to Ground Nos.1 and 2, Ld. Counsel for the assessee submitted that the issue raised in these grounds relate to validity of the referral by the AO to DVO u/s.55A of the Act. Ld. Counsel submitted that this issue should be remanded to the file of AO for deciding the issue afresh after considering the facts as well as the ratio laid down by the Hon'ble Bombay High Court in the case of CIT Vs. Puja Prints 360 ITR 697. The same is relevant for the legal proposition that the referral u/s.55A of the Act to the DVO should be made only when the value adopted by the assessee was less than that of the fair market value.

4. After considering the binding judgment of Hon'ble Bombay High Court in the case of CIT Vs. Puja Prints (supra), the issue raised by the assessee vide Ground Nos. 1 and 2 is remanded to the file of AO for fresh adjudication. AO is directed to grant reasonable opportunity of being heard to the assessee in accordance with set principles of natural justice. Accordingly, Ground Nos. 1 and 2 raised by the assessee are allowed for statistical purposes.

5. Ground Nos. 7 and 8 raised by the assessee are general in nature. Therefore, the said grounds are dismissed as such. That leaves Ground Nos. 3 and 6 for adjudication and the same are extracted as under :

"II. Disallowance of expenditure in connection with Transfer of Land.

3. *The Ld.CIT(A) erred in disallowing the expenditure claim in connection with agricultural land.*

6. *The Ld.CIT(A) erred in confirming the decision of A.O. regarding permission from the Administrative Commissioner in respect of assessment of issues other than CASS notice."*

6. Ground No.3 relates to allowability of claim of exemption u/s.54B of the Act when the amount paid to the buyer of the land subsequent to the transfer of the said land to the assessee. Relevant facts include that the assessee owns a share in a land and the same was sold for a consideration of Rs.96 lakhs (rounded off) and the assessee's share is 33.33%. Assessee reinvested a sum of Rs.56 lakhs (rounded off) in purchase of (a new asset) a land and got it registered on 18-03-2009 as per the procedure. Assessee incurred Rs.18,40,350/- towards brokerage too. Thus, Rs.33,98,453/- is left for capital gains tax. Subsequently, on 12-11-2011, (Para No.14 of the assessment order), i.e. two and half years nearly, the assessee had to enter into a written agreement on a non-judicial stamp form and paid a sum of Rs.15 lakhs to Mr. Chandrakant Yelwande, the seller of the land on 11-02-2009 and 12-03-2009 and claimed the same as eligible for deduction. The said agreement is an unregistered one. AO did not allow the claim of deduction for want of sufficient evidence. AO discussed his issue in Para No.14 of his order. In the First Appellate proceedings, CIT(A) confirmed the decision of the AO in this regard.

7. On this issue, Ld. Counsel for the assessee submitted that the payment of Rs.15 lakhs subsequent to the reinvestment was the requirement for getting full powers of the land. This issue was examined by the CIT(A) in Para No.7.3.1.

8. After hearing both the sides on this issue and on perusing the order of CIT(A), I find it relevant to extract the finding given by the CIT(A) on this issue and the same reads as under :

"7.3.1 In regard to disallowance of Settlement Fees for consent of Rs.15,00,000/- made by the AO to the Sale Deed dated 18-03-2009 wherein consideration was written at Rs.50,00,000/-, the AO observed that on the said consideration only stamp duty and registration charges were paid. Nowhere in the Registered Deed the aforesaid payments of Rs.15,00,000/- to Mr. Chandrakant Yelwande on 11-02-2009 and 12-03-2009 was mentioned. It was also stated that the above payments were made prior to the Registration of Deed and nowhere in the Deed such settlement fees paid were mentioned. The contention of the assessee that the notarized Deed executed (not registered) on 12-11-2011 was during the course of assessment proceedings and in the said deed the reference of the settlement fees payment were mentioned stating that the same was part and parcel of consideration in respect of purchase of land for which Sale Deed was made. The AO also found that all the parties mentioned in the agreement dated 18-03-2009 were not reflected in the notarized deed dated 12-11-2011. Against the aforesaid decision of the AO, the appellant has stated that the agreement between Chandrakant Yelwande and the assessee was made for getting consent of the said person to avoid litigation in the purchase of land and hence payment was made of Rs. 15,00,000/-. The appellant contended that the name of Mr. Yelwande was provided in the agreement along with address and the AO could issue summons u/s.131 of the Act to verify the same before disallowing the aforesaid amount.

I find the submission of the appellant is bereft of any merit. What was the reason and for what such payments were made is not at all conspicuous from the submission of the appellant. Why such payment detail were not mentioned in the original sale Deed executed on 18-03-2009 could also not been explained by the appellant. Why such a claim was required to be made only vide a notarized deed executed on 12-11-2011, far after the Registration of the Sale Deed and that too during the course of scrutiny assessment proceeding also remained unexplained. The inference can be drawn from the whole exercise of the appellant in this regard that the amount of Rs.15,00,000/- was claimed to have been paid to Shri Chandrakant Yelwande only to reduce the gains arising out of sale of the aforesaid land. It can simply be stated as an afterthought of the appellant, without any reason whatsoever in nature. The appellant could not furnish any details / evidences to ensure either before the AO or before the undersigned that such payment to Mr. Yelwande was necessitated in connection with sale of the land. For the aforesaid reasons and also in view of the facts stated in detail by the AO, I hold that there was no infirmity in the findings of the AO and no interference on the same is called for accordingly the disallowance so made of Rs.15,00,000/- is hereby confirmed."

From the above, it is evident that the assessee paid the sum to litigant in connection with earlier sale transaction of his land. If the same is not paid, the litigant is likely to cancel the sale transaction. Further, CIT(A) ignored the

judgment in the case of Anant Chunilal Kate Vs. ITO 187 CTR 93 (Bom.) and also the judgment in the case of CIT Vs. Vithalbhai Patel 148 CTR 61. These judgments affirm that the capital gains do not arise in case the sale transactions are void. In my view, the CIT(A) is under obligation to address to the applicability of the said judgments to the facts of this case. It is the argument of the Ld. Counsel that in case said amount of Rs.15 lakhs is not paid, the litigant is likely to go for cancellation of the sale agreement, which gave rise to the generation of the capital gains. In my considered view, the CIT(A) is not correct in not giving a view on the applicability of the said judgments. Therefore, I restore this issue also to the file of CIT(A) for fresh adjudication after granting reasonable opportunity of hearing to the assessee in accordance with set the set principles of natural justice. Accordingly, Ground No.3 raised by the assessee is allowed for statistical purposes.

9. Ground No. 6 by the assessee relates to manner of making additions in cases selected for scrutiny under CASS. Explaining that the facts relating to the issue, Ld. Counsel for the assessee submitted that the referral made by the AO to the DVO is outside the scope of guidelines issues to the AO for scrutiny. Stating that this is a limited scrutiny case and the same relates to the examination of the claim of deduction u/s.54B of the Act, AO exceeded the limit and referred the matter to the DVO, for determining the full value consideration of the sale transaction. According to the assessee, this issue is unconnected to the claim of deduction made u/s.54B of the Act. According to the assessee, this issue was undertaken by the AO without obtaining the approval of Administrative CIT. Therefore, the issue raised in Ground No.1 should be quashed considering the absence of any administrative approval by the CIT and converting the limited scrutiny to the complete scrutiny. However, when the

issue is pointed out and the action of invoking the provisions of section 55A of the Act to the claim of deduction u/s.54B is established. Ld. Counsel relied on the submissions made by him during the CIT(A).

10. On this issue, before the Tribunal, Ld. Counsel for the assessee filed the following written submissions and the same are extracted here as under :

"The appellant case was selected under the CASS. The CASS selection of cases is type of compulsory scrutiny. These cases is selected on the basis of particular financial criteria and selected through computer selection procedure..

There is difference between "Compulsory Scrutiny" and Comprehensive Scrutiny. In comprehensive scrutiny selection the assessing officer can verify entire return of income without any limited or particular aspect. In case of comprehensive scrutiny it is a complete scrutiny of the case.

The case of the appellant is selected under category compulsory scrutiny on the basis of CASS for verification of deduction u/s 54B,C,D,G,GA. In case of appellant the assessing officer without taking the permission of Administrative CIT had verified the other aspects like reference vi] s 55A of the Act to the Valuation officer and Cost of Acquisition u/s. 48(ii) of the Act. The assessing officer has not adhered the binding circular of CBDT. The circular is attached in Paper Book No. I Page No. 194. Also we are giving with this letter the copy of instruction no. 7 of 2004 dated 26/9/2014 in which comprehensive scrutiny (Complete Scrutiny) is referred. Thus Your Honour will be able to make out the difference between Compulsory Scrutiny and Comprehensive (Complete) scrutiny. In this matter the Commissioner of Income Tax Appeals has also not considered appellant grounds raised before him. The CIT -Appeals in his order para no. 5.3 page no. 4 & 5 observed that this is procedural laps and can be rectified u/s. 292BB of the Act. But in this connection we want to mention that we have taken the objection before the completion of the assessment vide letter dated 14/11/2011. This letter is attached in Paper Book No. I Page no. 44. Hence the provision of section 292BB will not be applicable to the appellant case.

In support of our claim we have submitted various case laws regarding Binding nature circular on the income tax authority. This cases are as follows.

- 1 *Union of India Vs. Azadi Bachao Andolan*
- 2 *CIT Vs. Sheth (VH) (Born.)*
- 3 *ACIT Vs. Geno Pharmaceutical Ltd.*

11. On hearing both the sides on this issue, I find the issue of verification under CASS relates to the claim of deduction u/s.54B,C,D,G,GA Of the Act qua the re-investment of capital gains earned by the assessee on sale of the land.

Now I have to examine if the issues relating to referral u/s.55A of the Act for determining the cost of acquisition/full value consideration is connected to the claim of deduction u/s.54B of the Act or not. As discussed in the open court, I find the referral is an integral part of the issue of claim of deduction u/s.54B of the Act which is generic in nature. Unless the actual cost of acquisition of asset or the full value consideration is known, it is difficult to determine the expenditure of capital gains earned by the assessee which is eventually re-invested for claim of deduction u/s.54B of the Act. From this point of view, I am of the opinion that the objections raised by the assessee in Ground No.6 are not sustainable. Accordingly, Ground No.6 raised by the assessee is dismissed.

12. In the result, the appeal of the assessee is partly allowed for statistical purposes.

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13. Grounds raised by the assessee in this appeal, facts, arguments and the decision of the CIT(A are identical to that of appeal filed by Shri Laxman M. Shitole vide ITA No.74/PUN/2017. Infact, the property in question is owned jointly by these assessees. Therefore, our decisions in connection appeal ITA No.74/PUN/2017 shall apply to this appeal too. Consequently, the ground Nos. 1 & 2 are allowed for statistical purposes, Grounds No. 3 is allowed for statistical purposes and Ground No.6 is dismissed. Ground Nos. 4, 5, 7 and 8 are dismissed as either not pressed or general.

14. In the result, the appeal of the assessee is partly allowed for statistical purposes.

15. To sum up, both the appeals of the assesseees are partly allowed for statistical purposes.

Order pronounced on this 30th day of May, 2018.

Sd/-
(D.KARUNAKARA RAO)
लेखा सदस्य / ACCOUNTANT MEMBER

पुणे / Pune; दिनांक Dated : 30th May, 2018.
Satish

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

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent;
3. आयकर आयुक्त(अपील) / The CIT(A)-3, Pune
4. The Pr.CIT-2, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, पुणे "SMC" /
DR 'SMC', ITAT, Pune;
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे / ITAT, Pune