

आयकर अपीलीय अधिकरण, सुरत न्यायपीठ, सुरत
IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT BENCH, SURAT
श्री सी.एम.गर्ग, न्यायिक सदस्य तथा
श्री ओ.पी.मीना, लेखा सदस्य के समक्ष
BEFORE SHRI C.M.GARG, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER

आ.अ.सं./I.T.A No.1335/Ahd/2016	निर्धारण वर्ष/A.Y.:2011-12
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Late Manishbhai Nagindas Gajjar through L/H Illaben Manishbhai Gajjar, 316KH Luhar Mohhallo , Palgam, Chaurasi Surat 359009 PAN: AOVPK 1860K	Vs.	Income Tax Officer, Ward- 6(3) Surat
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

आ.अ.सं./I.T.A No.1336/Ahd/2016	निर्धारण वर्ष/A.Y.:2011-12
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Shri Kiritbhai Naginbhai Gajjar 316KH- Luhar Mohhallo , Palgam, Chaurasi Surat 359009 PAN: ALYPG 3055E	Vs.	Income Tax Officer, Ward- 6(3) Surat
अपीलार्थी Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से /Assessee by	Shri Saurabh Soparkar, SAr. Advocate and Shri Nishit Shah CA
राजस्व की ओर से /Revenue by	Shri Vinod Kumar, Sr. D.R.

सुनवाई की तारीख/ Date of hearing:	26.10.2018
उद्घोषणा की तारीख/Pronouncement on:	18.12.2018

आदेश /O R D E R

PER O. P. MEENA, ACCOUNTANT MEMBER:

1. These are two appeals by the Assessee `s are directed against the order of learned Commissioner of Income tax (Appeals)-1, Surat (in short "the CIT (A)") dated 21.03.2016 and 22.03.2016 pertaining to Assessment Year 2011-12, which in turn has arisen from the order passed by the Income Tax Officer, Ward- 6(3) Surat (in short "the AO") under section 143 (3) of Income Tax Act, 1961 (in short 'the Act').

I.T.A.No. 1335/Ahd/2016 for A.Y.2011-12 by Late Manishbhai :

2. Ground no. 1 to 3 relates to estimate of fair market value as on 01.04.1981 which reads as us under:-

1. *Ld. CIT (A) erred in law and on facts in confirming reference to Valuation Officer u/s. 55A of the Act by the AO to estimate Fair Market Value (FMV) as on 01.04.1981 of agricultural land despite value adopted by the appellant was much more than FMV determined by the DVO. Ld CIT (A) ought to have quashed such action of the AO beyond the mandate of the section.*
2. *Ld. CIT (A) erred in law and on facts in holding that amendment to the section 55A though made effective from 01.07.2012 is retrospective in nature and applicable to the pending assessment also. Ld. CIT (A) ought to have assessment year under consideration was applicable in the case of the appellant.*
3. *LD. CIT (A) erred in law and on facts in estimating FMV of the impugned land as on 01.04.1981 @150 per sq. meter and directing AO to work out taxable LTCG after allowing index cost of acquisition. Ld. CIT (A) ought to have confirmed FMV @ 700 per sq. meter adopted by the appellant as per report of Registered Valuer and submissions of sale instances."*

3. The above grounds of appeal are interconnected, hence, being considered together.

4. Brief facts are that the late assessee has shown sale consideration at Rs.61,34,998/- and index cost of acquisition at Rs.43,64,829/-. The AO has information that the assessee has sold an immovable property (along with co-owners) being a piece of land at R.S. 396/1, T.P. No. 14, F.P. No. 877/12, Mouje- Pal, district Surat for Rs. 3,68,10,000. The assessee was having 1/6th share in the said property which worked out to Rs.61,34,998/-. The Assessing Officer noticed that while working out taxable long-term capital gain, the assessee has claimed index cost of acquisition at Rs.43,64,829/- on the basis of value of land taken as on 01.04.1981 at Rs.6,13,900/- @ 700 per sq. meter based on Registered Valuer report. The Assessing Officer found that fair market value of land taken as on 01.04.1981 was on higher side , therefore, the AO referred the matter to DVO on 17.01.2014 for determination of fair market value of land as on 01.04.1981. The assessee has raised objection for reference. The DVO has determined the fair market value as on 01.04.1981 at Rs.1,57,800/- @ 30 per sq. meter. The assessee `s share was worked out at Rs. 26,300 of which index cost of acquisition was

taken at Rs.1,89,993/- [26300 x 711/100] as against the fair market value taken by the assessee at Rs.6,13,900/- @ 700 per sq. meter as index cost of acquisition at Rs.43,64,829/-. Accordingly, the AO worked out long-term capital gain at Rs.59,48,005/- [Rs.61,34,998 - Rs.1,86,993)and made addition accordingly.

5. Being aggrieved, the assessee filed an appeal before the Id. CIT (A). Wherein on the basis of strength of decision in the case of CIT-13 v. Puja Prints [2014] 360 ITR 697 (Bombay)/ 43 taxmann.com 247(Bombay) and ITO v. Smt. Lalitaben B. Kapadia [2008] 115 TTJ(Mum) 938 and others as mentioned in appellate order, it was contended that the reference to DVO is not valid where the fair market value as on 01.04.1981 is higher than in the opinion of the AO. However, Ld. CIT (A) held that the reference was made on 17.01.2014, the date which falls after the date of amendment of 01.07.2012 hence, reference was perfectly in order as per provision of section 55A of the Act. However, the CIT (A) observed that market value as on 01.04.1981 adopted @ 80 per sq. meter by the DVO is on lower side based on three sale instances , whereas the assessee could locate sale instances showing composite value of land and building at Rs.193 per sq. meter. Considering these facts, the Id.CIT(A) has considered the fair

market value at Rs.150 per sq. meter as fair and reasonable and directed the AO to adopt the same for working out index cost of acquisition as on 01.04.1981 and worked out taxable long-term capital gain accordingly. Accordingly, appeal of the assessee was partly allowed.

6. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted that the action of the AO in rejecting the report of Registered Valuer and making reference to DVO is not valid. The Registered Valuer has considered the value as on 01.04.1981 at Rs. 700 per sq. meter whereas the DVO has estimated value @80 per sq. meter. Therefore, the action of the AO in replacing the same with the value determined by DVO is not correct. The CIT (A) further, considered the estimated value at Rs.150 per sq. meter. As such the AO cannot reduce the fair market value as on 01.04.1981 as held by the Hon`ble Jurisdictional High Court of Gujarat in the case of Hiaben Jayantilal Shah v ITO [2009] 310 ITR 31 (Guj)/ 181 Taxman 191 (Gujarat) wherein it has been held as under:

“Under clause (a) of section 55A, the Assessing Officer is entitled to make the reference to the Valuation Officer in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by the registered valuer and the Assessing Officer is of the opinion that the value so claimed is less than the fair market value. In any other case, as provided under clause (b) of section 55A, the Assessing Officer has to record an opinion that : (i) the fair market value of the asset

exceeds the value of the asset as claimed by the assessee by more than such percentage or by more than such an amount as may be prescribed; or (ii) having regard to the nature of the asset and other relevant circumstances, it is necessary to make such a reference. [Para 10]

In the instant case, the assessee had claimed the value of property as per the registered valuer's report. Therefore, under clause (a) of section 55A, the Assessing Officer was required to form an opinion that the value claimed by the assessee as per the registered valuer's report was less than the fair market value. The estimated value proposed by the DVO was less than the fair market value shown by the assessee as on 1-4-1981. Therefore, clause (a) of section 55A could not be made applicable. Clause (b) of section 55A can be invoked only in any other case, namely, when the value of the asset claimed by the assessee is not supported by an estimate made by a registered valuer. In the facts of the instant case, clause (b) of section 55A also could not be invoked. Therefore, there was no question of having recourse to sub-clause (ii) of clause (b) of section 55A. [Para 11]"

7. Since in this case, the assessee has submitted a valuation report of fair market value as on 01.04.1981, from Government Registered Valuer, hence, the AO can make a reference to the Valuation Officer under section 55A(b) only in a case where the assessee has not furnished a valuation report. The AO cannot ignore the value adopted by the assessee on the basis of government Registered Valuer. In the instant case, since the value as on 1 April 1981 was taken by the assessee on the basis of the report of a registered valuer, the AO did not have the power to make a reference under section 55A(b) of the Act. Accordingly, the AO's reference to the DVO is invalid even under section 55A(b) of the Act.

8. The learned counsel for the assessee further submitted that the finding of the CIT (A) that amendment made on 01.07.2012 in section 55A would apply where reference is made after 01.07.2012 is also not correct. The CIT(A) opined that reference has been made on 17.01.2014 which is obviously after 01.07.2012 hence, reference so made under section 55A is valid. However, the learned counsel for the assessee relying on the decision of Hon`ble Bombay High Court in the case of CIT-13 v. Puja Prints [2014] 360 ITR 697 (Bombay)/ 43 taxmann.com 247(Bombay) and Shri Devendra Rasiklal Shah v. DCIT Circle 9 Ahmedabad [I.T.A.No.2027/Ahd/2015 A.Y. 08-09 dtd. 01.06.2018] (PB-28) and Sonali Roy vs. Pr. CIT (ITA No.1329/Kol/2017 for A.Y.2012-13 dated 28.02.2018) of Kolkata Tribunal (Page 8, Para 5) submitted that amendment in section 55A is applicable from A.Y. 2013-14 and not from A.Y. 2011-12 under consideration.

9. We have heard the rival submissions and perused the relevant material on record. As per provisions of section 55A, the AO can make reference to DVO only when he is of the opinion that the fair market value estimated by the Registered Valuer is lesser than the fair market value. In this case, the

fair market value estimated by the Registered Valuer was more than the value estimated made by the DVO.

10. The Hon`ble Bombay High Court gave similar finding in the case of CIT-13 v. Puja Prints [2014] 360 ITR 697 (Bombay)/ 43 taxmann.com 247(Bombay) wherein the Hon`ble High Court has held as under:

"6. We have considered the rival submissions. We find that the impugned order dated 18 February, 2011 allowing the respondent-assessee's appeal holding that no reference to the Departmental Valuation Officer can be made under Section 55A of the Act, only follows the decision of this Court in the matter of Daulal Mohta HUF (supra). The revenue has not been able to point out how the aforesaid decision is inapplicable to the present facts nor has the revenue pointed out that the decision in Daulal Mohta HUF (supra) has not been accepted by the revenue. On the aforesaid ground alone, this appeal need not be entertained. However, as submissions were made on merits, we have independently examined the same.

7. We find that Section 55A(a) of the Act very clearly at the relevant time provided that a 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 the present case, it is an undisputed position that the value adopted by the respondent-assessee of the property at Rs.35.99 lakhs was much more than the fair market value of Rs.6.68 lakhs even as determined by the Departmental Valuation Officer. In fact, the Assessing Officer referred the issue of valuation to the Departmental Valuation Officer only because in his view the valuation of the property as on 1981 as made by the respondent-assessee was higher than the fair market value. In the aforesaid circumstances, the invocation of Section 55A(a) of the Act is not justified.

8. The contention of the revenue that in view of the amendment to Section 55A(a) of the Act in 2012 by which the words "is less than the fair market value" is substituted by the words "is at variance with its fair market value" is clarifactory and should be given retrospective effect. This submission is in face of the fact that the 2012 amendment was made effective only from 1 July 2012. The Parliament has not given retrospective effect to the amendment. Therefore, the law to be applied in the present case is Section 55A(a) of the Act as existing during the period relevant to the Assessment Year 2006-07. At the relevant time, very clearly reference could be made to Departmental Valuation

Officer only if the value declared by the assessee is in the opinion of Assessing Officer less than its fair market value.

9. The contention of the revenue that the reference to the Departmental Valuation Officer by the Assessing Officer is sustainable in view of Section 55A(a) (ii) of the Act is not acceptable. This is for the reason that Section 55A(b) of the Act very clearly states that it would apply in any other case i.e. a case not covered by Section 55A(a) of the Act. In this case, it is an undisputable position that the issue is covered by Section 55A(a) of the Act. Therefore, resort cannot be had to the residuary clause provided in Section 55A(b)(ii) of the Act. In view of the above, the CBDT Circular dated 25 November 1972 can have no application in the face of the clear position in law. This is so as the understanding of the statutory provisions by the revenue as found in Circular issued by the CBDT is not binding upon the assessee and it is open to an assessee to contend to the contrary.

10. The contention of the revenue that the Assessing Officer is entitled to refer the issue of valuation of the property to the Departmental Valuation Officer in exercise of its power under Sections 131, 133(6) and 142(2) of the Act is entirely based upon the decision of the Guwahati High Court in Smt. Amiya Bala Paul (supra). However, the Apex Court in Smt. Amiya Bala Paul (supra) has reversed the decision of the Guwahati High Court and held that if the power to refer any dispute with regard to the valuation of the property was already available under Sections 131(1), 136(6) and 142(2) of the Act, there was no need to specifically empower the Assessing Officer to do so in circumstances specified under Section 55A of the Act. It further held that when a specific provision under which the reference can be made to the Departmental Valuation Officer is available, there is no occasion for the Assessing Officer to invoke the general powers of enquiry."

In view of the above and particularly in view of clear provisions of law as existing during the period relevant to Assessment Year 2006-07, we are of the view that questions (a) and (b) do not raise any substantial question of law

11. We further rely on the decision of Co-ordinate Bench in the case of Shri Devendra Rasiklal Shah v. DCIT Circle 9 Ahmedabad [I.T.A.No. 2027/Ahd/2015 A.Y. 08-09 dtd. 01.06.2018] wherein after discussion the decision of Hon`ble Jurisdictional High Court in the case of Gaurangiben S. Shodhan Indl [2014] 367 ITR 238 (Gujarat) / [2014] 45 taxmann.com 356 (Gujarat) it was held that

no reference under section 55A can be made for the assessment year under consideration. The Hon`ble High Court has observed as under:

"15. Coming to the question of reference to DVO for ascertaining the fair market value as on 1.4.1981 also, we find that such reference was not competent. We have noticed that prior to the amendment in section 55A with effect from 1.7.2012 in a case, the value of the asset claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer was of the opinion that the value so claimed was less than its fair market value as on 1.4.1981. It would not be the case of the Assessing Officer that the value of the asset shown as on 1.4.1981 was less than the fair market value. Such clause, therefore, as it stood at the relevant time, had no application to the valuation as on 1.4.1981. We are conscious that with effect from 1.7.2012, the expression now used in clause (a) of section 55A is "is at variance with its fair market value". The situation may, therefore, be different after 1.7.2012. We are, however, concerned with the period prior thereto. Clause (b) of section 55A is in two parts and permits a reference to DVO if the Assessing Officer is of the opinion that (i) the fair market value of the asset exceeds the value of the asset so claimed by the assessee by more than such percentage of the value of the asset so claimed or by more than such amount as may be prescribed in this behalf; or (ii) that having regard to the nature of the asset and other relevant circumstances, it is necessary so to do. Sub-clause(i) of clause (b) also for the same reasons recorded above, would have no bearing on the fair market value as on 1.4.1981. The Assessing Officer had not resorted to sub-clause(ii) of clause (b). In any case, clause (b) would apply where clause(a) does not apply since it starts with the expression "in any other case". In other words if assessee has relied upon a Registered Valuer's Report, Assessing Officer can proceed only under clause (a) and clause (b) would not be applicable.

16. In the present case, admittedly the assessee had relied on the estimate made by the Registered Valuer for the purpose of supporting its value of the asset. Any such situation would be governed by clause (a) of section 55A of the Act and the Assessing Officer could not have resorted to clause (b) thereof as held by the Division Bench of this Court in the case of Hiaben Jayantilal Shah v. ITO [2009] 310 ITR 31/181 Taxman 191 (Guj.). In the said decision, it was held and observed as under:—

"10. Under clause(a) of sec. 55A of the Act under the Assessing Officer is entitled to make the reference to the Valuation Officer in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by the Registered Valuer, if the Assessing Officer is of the opinion that the value so claimed is less than the fair market value. In any other case, as provided under clause(b) of Sec. 55A of the Act, the Assessing Officer has to record an opinion that (i) the fair market

value of the asset exceeds the value of the asset as claimed by the assessee by more than such percentage or by more than such an amount as may be prescribed; or (ii) having regard to the nature of the asset and other relevant circumstances, it is necessary to make such a reference."

17. In the result, we see no reason to interfere. However, we have given our independent reasons and should not be seen to have confirmed the reasonings adopted by the Tribunal in the impugned judgment. Tax Appeal is dismissed."

12. Thus, the Hon`ble High Court in Gaurangiben S. Shodhan Indl [2014] 367 ITR 238 (Gujarat) / [2014] 45 taxmann.com 356 (Gujarat) has specifically held that amendment in section 55A with effect from 01.07.2012 in a case , the value of assets claimed by the assessee is in accordance with the estimate made by the Registered Valuer , if the AO was of the opinion that the value so claimed was less than the fair market value as on 01.04.1981 then reference can be made. In the case of Sonali Roy vs. Pr. CIT (ITA No.1329/Kol/2017 for A.Y.2012-13 dated 28.02.2018) the Tribunal held that amendment in section 55A is effective from A.Y.2013-14 hence, no reference u/s.55A for assessment year under consideration can be made in this case. In the light of citation, the value adopted by the assessee on the basis of Registered Valuer was not less than fair market value rather it was on higher side. The AO wants to reduce the value i.e. cost of acquisition as on 01.04.1981. It is not permissible prior to amendment carried out in section 55A of the Act. Whether this amendment can be taken

into consideration for the assessment year under consideration, it has been covered by decision of Hon`ble Bombay High Court. Therefore, considering the ratio as laid down in aforesaid judicial pronouncements, we are of the opinion that the AO cannot brush aside the report of the Registered Valuer. The report of Registered Valuer is a valid piece of evidence in deciding the matter of valuation. Such report cannot be modified or questioned or rebutted by the AO. In view of these facts and circumstances, respectfully following the aforesaid judicial decision of Hon`ble High Courts and Co-ordinate Benches as discussed above, we hold that the findings recorded by the AO are not sustainable in law. Therefore, the AO is directed to adopt the rate of Rs. 700 per sq. meter for computation of fair market value as on 01.04.1981, as estimated by the Government Registered Valuer and worked out long-term capital gain accordingly. In view of these facts and law, ground no.1 to 3 of appeal of the assessee is allowed.

13. Ground no.4 : is not pressed by the learned counsel for the assessee, in the hearing before us, Ex-consequenti, it is treated as dismissed as not pressed.

14. Ground No.5 relates to disallowance of deduction under section 54B of the Act in respect of land purchased at village Bhesan ignoring the facts that land was purchased for consideration received against sale of ancestral land.

15. The AO disallowed the claim of deduction under section 54B on the ground that investment in land was made on 03.07.2010 prior to sale of old assets on 20.08.2010. The CIT (A) has also confirmed the same.

16. Being, aggrieved the assessee filed this appeal before the Tribunal. The learned counsel for the assessee submitted the Revenue's contention is that the land was sold after purchase of new asset, hence, deduction of Rs.20,15,784/- under section 54B is not available. The learned counsel for the assessee submitted that land was sold on 20.08.2010 and new asset was purchased on 03.07.2010 prior to 20.08.2010. Proviso provides that new agricultural land should be purchased after 2 years of transfer. It was contended that investment in new assets was made out of the sale consideration received as earnest money of sale of old asset. It was submitted that the issue is covered by decision of Kolkata Tribunal in the case of Gautam Jhunjunwala vs. ITO [2018] 98

taxmann.com 220 Kolkata Tribunal, (PB-14 to 20) and decision of Supreme Court in the case of Fibre Board 367 ITR 596 (SC) and Raesh Narhari Jakhadi v. ITO [1992] 41 ITD 368 (Pune) (PB- 21 to 24) wherein it was held that where investment made prior to date of transfer out of earnest money or advanced money would also be eligible and should be considered as investment made out of sale proceeds for the purpose of section 54B of the Act.

17. The ld. Sr. D.R. supported the order of CIT (A).

18. We have heard the rival submissions and perused the relevant material on record. We find that the agreement for new assets was entered in to on 18.06.2010 and registered sale deed was executed on 03.07.2010. The investment in this asset is made out of sale consideration received from sale of old assets. The learned counsel for the assessee has placed reliance in the case of Fibre Boards (P) Ltd. v. CIT [2015] 62 taxmann.com 135 (SC) wherein it was laid down that advances paid for the purpose of purchase and /or acquisition of plant/machinery , and ln / building amount to utilization by assessee of capital gains under section 54G of the Act. Therefore, on same analogy, the amount utilized for investment in land would be eligible for deduction under

section 54B of the Act. Further, the Co-ordinate Bench of Pune Tribunal in the case of Ramesh Narhari Jakhadi v. ITO [1992] 41 ITD 368 (Pune) held that where investment made prior to date of transfer out of earnest money or advanced money would also be eligible for deduction and should be considered as investment made out of sale proceeds for the purpose of section 54B of the Act. Similar finding were given by the Co-ordinate Bench of Kolkata Tribunal in the case of Gautam Jhunjunwala v. ITO [2018] 98 taxmann.com 220 [Kolkata-Trib]. Therefore, respectively following the same, we allow the appeal on this grounds of appeal.

19. Ground No. 6 relating to charging of interest us 234A/B/C and D which are consequential in nature.

20. Ground No. 7 relating to initiation of penalty proceedings under section 271(1)(c) is premature at this stage.

21. In the result, the appeal of the assessee is partly allowed for A.Y. 2011-12.

I.T.A.No. 1336/Ahd/2016/A.Y. 11-12/ By Kiritbhai N Gajjar :

22. Ground No. 1 to 3 relates to making reference under section 55A and estimating fair market value as on 01.04.1981.

23. We have heard the rival submissions and perused the relevant material on record. Both parties have agreed that the facts of this case are identical as in respect of Late Shri Manishbhai Gajjar discussed above. As we have allowed the appeal of the assessee in Ground No. 1 to 3 above, in the case of late Manishbhai Gajjar. The same finding would mutatis mutandis apply to these grounds of appeal. Accordingly, on same reasoning Ground No.1 to 3 of appeal are allowed.

24. Ground no.4 : is not pressed by the learned counsel for the assessee, in the hearing before us, Ex-consequenti, it is treated as dismissed as not pressed.

25. Ground No. 5 Relates to not allowing deduction under section 54B of Rs.18,03,704/-.

26. This ground of appeal is covered by Ground No. 5 in the case of late Manishbhai Gajjar. Hence, same finding would apply to this ground also. This grounds of appeal is accordingly, allowed.

27. Ground No. 6 and Ground No. 7 in respect of charging of interest under section 234A, B, C and D and penalty proceedings

under section 271(1)(c) same are being consequential in nature and no adjudication is required.

28. In the result, the appeal of the assessee for in ITA No.1336/Ahd/2016 for A.Y. 2011-12 is partly allowed.

29. In the result, the appeal in the case of Late Manishbhai Gajjar I.T.A. No.1335/Ahd/2016 for A.Y.2011-12 and Shri Kiritbhai Gajjar in I.T.A.No.1336/Ahd/2016 for A.Y. 2011-12 are partly allowed.

30. The order pronounced in the open Court on 18.12.2018.

Sd/-
(C.M. GARG)
JUDICIAL MEMBER

Sd/-
(O.P.MEENA)
ACCOUNTANT MEMBER

Surat: Dated: 18th December, 2018 /opm

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / TRUE COPY / /

Assistant Registrar, Surat