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

BEFORE SHRI S.S.GODARA, JUDICIAL MEMBER
AND DR. DIPAK P. RIPOTE, ACCOUNTANT MEMBER

आयकर अपीलसं. / ITA No.1777/PUN/2018
निर्धारणवर्ष / Assessment Year : 2008-09

Suresh Laxman Kamathe, Kondai Palace, Pandavand road, A/P Fursungi, Tal: haveli, Dist: Pune, PAN: ASFPK 0991 F	Vs.	The Income Tax Officer, Ward-14(4), Pune.
Appellant/ Assessee		Respondent /Revenue

Assessee by	Shri Pramod Shingte – AR
Revenue by	Shri S P Walimbe – DR
Date of hearing	11/08/2022
Date of pronouncement	29/08/2022

आदेश/ ORDER

Per S.S.Godara, JM:

This assessee's appeal for Assessment Year 2008-09 is directed against the Commissioner of Income Tax(Appeals)-7, Pune's order dated 03.08.2018 passed in case no.PN/CIT(A)-7/Wd-14(4)/11050/2016-17, in proceedings u/s.143(3) r.w.s 147 of the Income Tax Act, 1961 [in short "the Act"].

Heard both the parties. Case file perused.

2. The assessee raises the following substantive grounds in the instant appeal.

> *"1. On the facts and in the circumstances of the case and in law the learned Assessing Officer erred in initiating the reassessment proceeding u/s 147 of the Income Tax Act, 1961 thereby passing the order u/s. 143(3) r.w.s 147 of the Act and*

further erred in denying the exemption and cost of acquisition to the assessee.

2. *On the facts and in the circumstances of the case and in law the learned Assessing Officer erred in adopting a valuation as on 01/04/1981 by taking some average value and by rejecting appellant's valuation report without assigning any cogent reason whatsoever, therefore such action is bad in law and appellant prays that value adopted as on 01/04/1981 shall be taken as claimed by your appellant in the return of income.*

3. *On the facts and in the circumstances of the case and in law the learned Assessing Officer erred in not granting the deduction u/s. 54B of the Act on the agricultural land purchased by your appellant and your appe3llant is entitled for the same.*

Without prejudice to above grounds following grounds are taken on merit.

4. On the facts and in the circumstances of the case and in law the learned Assessing Officer erred in treating the agricultural land as capital asset and thereby taxing it under the head capital gain by ignoring the fact that, the limit of 8 km's the relevant date for checking the Municipal Limit shall be Municipal Limit as on 06/01/1994. (date on which notification for 8 kms is issued). In such case it is your appellants contention that, the land falls beyond the 8km's therefore entire transaction is outside the ambit of charging provision of Income Tax."

Learned counsel submits that the assessee does not wish to press for his instant first and fourth substantive grounds. Rejected accordingly.

3. We now advert to the assessee's second substantive ground raising the issue of cost of acquisition as on 01.04.1981. The CIT(A)'s detailed discussion rejecting his arguments in light of CIT Vs. Puja Prints [2014] 360 ITR 697 (Bom) reads as follows:

"6.3 I have carefully considered the facts of the case and law

apparent from records. The assessee has sold land and received a sum of Rs. 92,12,500/-. During the course of assessment proceedings the appellant submitted valuation Report from Mr. Amin Shaikh for valuation of land as on 01.04.1981 which has been sold to DSK Group. The AO obtained valuation Report from the DVO. The AO also obtained ready recknor rate from Joint District Registrar and Collector of stamps. Opportunity of being heard given to the appellant by the AO to determine the valuation of the land as on 01.04.1981 which assessee did not avail as no one attended on the date of hearing. The AO adopted valuation of the land as on 01.04.1981 @ 33.40 per sqmt. and computed capital gain at Rs. 79,65,046/-.

6.4 During the appellate proceedings the appellant has submitted the written submission dated 31/07/2018 as mentioned in para 6.2.

6.5 Ostensibly, the AO did not agree with the valuation Report given by the Mr.Amin Shaikh for value of the land as on 01.04.1981. He has taken value @ Rs. 37 per sqmt. The AO pointed out defect that no sale instance were taken into consideration by the valuer and NA use (Non-agricultural) potential as on 01.04.1981 taken by him is contrary as the area is not in Municipal limits given in January 2016. The AO referred the issue to the DVO and DVD gave sale instances for survey Nos. in the same area which were from Rs. 33.40 per sqmt. to Rs. 66.5 per sqmt. The DVO has given sale instance for survey No. 43 at Rs. 33.40 and the land which has been sold by the appellant is proximate to that. The AO computed capital gain at Rs.79,65,046/- and issued show cause on 15.02.2016 to reply by 22.02.2016 which assessee did not comply. Adverse inference has to be drawn against the appellant for non production of necessary evidences. Reliance has been placed on the decision of the Delhi High Court in case of CIT vs. Motor General Finance Ltd. reported in 254 ITR 449(Del) wherein the Delhi High Court has held that:

> *"Section 36 (1)(iii), read with section 2346 of the Income-tax Act, 1961 and section 114 of the Indian Evidence Act, 1872 – Interest on borrowed capital – Assessment year 1990-91 – Assessing Officer, while making assessment, noticed that assessee had advanced interest-free loans to sister concern while it had itself borrowed money and paid interest Assessing Officer/ therefore, disallowed interest liability on amount advanced to sister concern - Tribunal did not take into account that assessee had failed to furnish bank statements and yet it deleted disallowance of interest – Whether since assessee had not produced material despite opportunities given by Assessing Officer, an adverse inference in terms of section 114 of the Indian Evidence Act was to be drawn - Held, yes - Whether Tribunal was wrong in deleting disallowance of interest - Held, yes"*

Under the given circumstances, the AC has rightly drawn adverse inference for non-compliance to show cause notice.

6.6 The AO referred the matter of valuation of the land sold to the DVO u/s. 55A and DVO submitted report on 28.12.2015. The appellant objects to valuation of the property sold by the DVO that the DVO has no power u/s.55A to determine FMV on 01.04.1981 in case of appellant. The AO has referred to estimate the FMV as on 01.04.1981 to the DVO and notice u/s. 148 issued on 20.03.2015. The appellant objected to valuation relying on the decision of the jurisdictional High Court in case of Puja Prints(supra). The decision relied upon by the appellant does not support the case of the appellant as the provisions of section 55A(a) has been amended by Finance Act, 2012 w. e. from 01.07.2012. The memorandum explaining amendment reads as:

> *"Reference to a Valuation Officer Under the provisions of section 55A, where in the opinion of the Assessing Officer value of asset as claimed by the assessee is less than its market value, he may refer the valuation of a capital asset to a Valuation Officer. Under section 55 in a case where the capital asset became the property of the assessee before 1st April, 1981, the assessee has the option of 33 http://indiabudget.nic.in substituting the fair market value of the asset as on 1st April, 1981 as the cost of the asset. In such a case the adoption of a higher value for the cost of the asset as the fair market value as on 1st April, 1981, would lead to a lower amount of capital gains being offered for tax. Accordingly, it is proposed to amend the provisions of section 55A of the Income-tax Act to enable the Assessing Officer to make a reference to the Valuation Officer where in his opinion the value declared by the assessee is at variance from the fair market value. Therefore, in case where the Assessing Officer is of the opinion that the value taken by the assessee as on 1.4.1981 is higher than the fair market value of the asset as on that date, the Assessing Officer would be enabled to make a reference to the Valuation Officer for determining the fair market value of the property. This amendment will take effect from 1st day of July, 2012. [Clause 20]"*

The memorandum clearly explains that amendment is to enable AO to make a reference to valuation officer where higher value of the FMV as on 01.04.1981 has been adopted. The provision has become effective from 01.07.2012 and apparently reference has been made after 20.03.2015. Therefore, the reference made by the AO is valid as empowered u/s. 55A.

6.7 In case of Puja Prints (supra) the ITAT, Mumbai passed order on 18.02.2011. Therefore, even on date of delivering order by the ITAT, no specific power were given to the AO u/s. 55A as the

amendment effective from been made after 01.07 2012, therefore, the reference made by the AO u/s. 55A is valid.

6.8In view of the above adopting a valuation as on 01/04/1981 on the basis of sale instance for survey No.42 @ Rs. 33.40 per sqmt. is upheld. ***Accordingly, Ground No. 2 of the appeal is dismissed****."*

4. Suffice to say, it has come on record that hon'ble jurisdictional high court's decision has indeed settled the issue in assessee's favour and against the department that section 55A(a) amendment in the Act vide in Finance Act, 2012 w.e.f.01.07.2012; enabling an Assessing Officer to make reference to the DVO inspite of the fact that the assessee has already submitted its registered valuer's report, is only prospective in nature. Learned DR invited our attention to the CIT(A)'s detailed discussion in para 6.7 hereinabove that the Assessing Officer's reference herein is very much after the amendment. He fails to dispute that it is not the date of reference under section 55A(a) but the assessment year date of transfer of the capital asset which forms the clinching factor for the purpose of computation of capital gains in light of the corresponding cost of acquisition as on 01.04.1981. We thus accept the assessee's instant third substantive ground in light of foregoing settled legal proposition.

5. The factual position turns out to be entirely different so far as the assessee's third substantive ground claiming 54B deduction for having re-purchased the land(s) in issue to the tune of Rs.75,73,022/-

in the name of his wife Smt.Sobha and Shri Rajiv(son). The CIT(A) has followed hon'ble jurisdictional high court's decision whilst deciding the instant issue in department's favour as follows:

"7.3 I have carefully considered the facts of the case and law apparent from records. The AO has computed capital gain of Rs.79,65,050/- and rejected claim of exemption u/s. 54B of Rs.75,73,000/-. The AO observed that purchase agreement for agricultural land dated 03.09.2007 for Rs. 2,00,68,000/- includes name of wife & son. Further, the land purchase agreement dated 12.07.2007 for Rs. 45,00,000/- includes name of wife. The AO rejected claim of the appellant relying on the judicial pronouncement.

7.4 During appellate proceedings the appellant submitted bifurcation of investment in agriculture land to tune of Rs. 75,73,022/- and relied on judicial pronouncement mentioned in para 7.2.

7.5Ostensibly, the agriculture land purchase is not in name of appellant. In case of land purchased at Bori Pardhi on 03.09.2007 Smt. Shobha (wife) and Shri. Rajiv (son) are co-owners with others. In case of land purchase at Kedgaon on 12,07.2007 Smt. Shobha is co-owner The appellant claims that investment has been made from sale proceeds of the land sold on which capital gain has arisen. The only issue is that whether appellant 'is eligible for exemption u/s 54B for agricultural land purchase in name of wife & son.

7.6The decision of the Bombay High Court in case of Prakash Vs. ITO reported in 312 ITR 40 has held that the investment should be in name of the assessee. It has been held that:

"Section 54F of the Income-tax Act, 1961 - Capital gains - Exemption of, in case of investment in residential house - Assessment year 1983-84 - Whether for qualifying for exemption under section 54F, it is necessary and obligatory to have investment made in residential House in name of assessee only and not in name of any other person - Held, yes - Whether investment of sale proceeds of agricultural land by assessee in purchasing plot and constructing residential house thereon in name of his only adopted son. would qualify for exemption under section 54F - Held, no"

7.7 The Bombay High Court in case of Prakash Vs. ITO reported in 312 ITR 40 did not follow the case of Late Mir Gulam Ali Khan (Supra) relied upon by the appellant and held that the new property must by the owned by the assessee. Therefore, the issue in respect of claim of deduction u/s 54/54F/54B on purchase of residential house/ purchase of agricultural land in name of relative(son/wife) are

debatable.

7.8 Respectfully, following the decision of the Bombay High Court in case of Prakash (supra) the claim deduction u/s 54B on purchase of agriculture land in name of wife and son are not allowable. Therefore, action of the AO in not granting deduction/ exemption u/s 54B of Rs.75,73,022/- is upheld and Ground No.3 of the appeal is dismissed."

6. We thus find no merit in assessee's instant latter substantive ground once the issue stands settled in hon'ble jurisdictional high court. This third substantive ground is rejected. Necessary computation shall follow as per law.

7. This assessee's appeal is partly allowed in above terms.

Order pronounced in the open Court on 29th August, 2022.

Sd/-	**Sd/-**
(DR. DIPAK P. RIPOTE	**(S.S.GODARA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

पुणे / Pune; दिनांक / Dated : 29th Aug, 2022/ *SGR**

<u>आदेशकीप्रतिलिपिअग्रेषित / Copy of the Order forwarded to :</u>

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(A), concerned.
4. The Pr. CIT, concerned.
5. विभागीयप्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच, पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्डफ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

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