

Shri Suresh Agrarwal, Indore vs. ITO5 (3) /ITA No. 251/Ind/2016/A: Y: 2011-12

आयकरअपीलीयअधिकरण ,इन्दौरन्यायपीठ ,इन्दौर
IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE
श्रीडी.टी.गरासिया ,न्यायिकसदस्य
तथा
श्रीओ.पी.मीना ,लेखासदस्यकेसमक्ष

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER
AND
SHRI O.P. MEENA, ACCOUNTANT MEMBER

आ.अ.सं / .I.T.A. No. 251 /Ind/2016		
निर्धारणवर्ष/ Assessment Year:2011-12		
Shri Suresh Agrawal 10 Ankur Hospital, Y N Road Indore	vs.	I.T.O.-5(3),Indore
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent
स्था.ले.सं./PAN:AFJPA 5130 R		
अपीलार्थी की ओर से/Appellant by		Shri Girish Agrawal, CA
प्रत्यर्थी की ओर से/Respondent by		Shri Mohd. Javed, Sr. DR
सुनवाई की तारीख/Date of hearing		17-01-2017
उद्घोषणा की तारीख/Date of pronouncement		17.01.2017

आदेश /O R D E R

PER O.P. MEENA, ACCOUTANT MEMEBR.

This appeal is filed by the assessee against the order of Id. Commissioner of Income tax (Appeals)-II, Indore [hereinafter referred to as the CIT (A)] dated 30.11.2005. This appeal pertains to Assessment Year 2011-12 as against appeal decided in respect of assessment order dated 07.02.2014 passed u/s. 143(3) of Income Tax Act, 1961(herein after referred to as "the Act) by the ITO Ward 5(3) Indore [hereinafter referred to as the AO]. The assessee has raised originally five number of grounds, which were subsequently revised to four as under:-

In the facts and circumstances of the case and in law, Ld. CIT (A)-II, Indore, Erred In-

01. *Justifying the action of the Ld.AO in not allowing the deduction to the appellant under part E of chapter IV of the Income Tax Act, 1961 (the Act) from the Long Term Capital Gain arising on sale of agriculture land at **Gram Jakhiya**.*
02. *Justifying the action of the Ld.AO in not allowing the deduction to the appellant under part E of chapter IV of the Income Tax Act, 1961 (the Act) from the Long Term Capital Gain arising on sale of agriculture land at Gram Buri Barlai.*
03. *not considering in the proper perspective, the submissions made relating to the impugned two agriculture land being not capital assets within the meaning of section 2(14) of the Act and holding that no specific ground has been filed on addition made towards long term capital gain.*
04. *not giving any finding on ground no. 06 before him relating to addition made by the Ld. AO of Rs.1,20,000/- on account of household expenditure.*

2. Ground no. 1 to 3 relates to denying the deduction u/s. 54B falling under Part E of Chapter IV of Income Tax Act,1961 on long term capital gains earned on sale of agriculture land
3. Succinctly, facts as culled out from the orders of lower authorities are that the assessee is a doctor by profession and has filed his return of income on 22.09.2011 declaring total income of Rs. 4,08,830/- and showing agricultural income at Rs. 1,00,594/-. The assessee along with his son Dr. Ankur Agrawal has sold land used for agricultural purpose for sale consideration of Rs. 77,94,000/- on 23.03.2011. This land was purchased on 01.04.2005 in the joint name of the assessee and his mother Smt. Bhagwatibai Agarwal for Rs. 3,51,140/- having ratio of 40:60 at village Jakhiya.. The assessee has shown long term capital gains of Rs. 31,17,600/- on the cost of acquisition of Rs. 1,38,560/-. The assessee along with his son has sold this land for total consideration of Rs. 77,94,000/- , but the AO noted that the son of the assessee has not filed any evidence to show that the impugned land is also owned by him. Therefore, the AO computed long term capital gains at Rs. 72,91,665/- by taking whole sale consideration of Rs. 77,94,000/- in the case of the assessee i.e. [sale consideration Rs. 77,94,000 less index cost of acquisition of Rs. 5,02,335(351140x711/497)] and taxed in the case of the assessee. Similarly, the assessee has also sold agriculture land situated at village Buri Barlai by executing registered Power of Attorney on 15.06.2010 in favour of Shri

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Nathulal for Rs. 8,70,411/- which was acquired by the assessee on 01.01.2004 for Rs. 1,71,487/- . However, the AO considered the sale consideration at Rs. 14,00,000/- on the basis of sale deed executed on 14.06.2011 by the assessee along with Power of Attorney holder Shri Nathulal in favour of purchaser Shri Dinesh. Accordingly, the AO computed long term capital gains at Rs. 12,28,513/- i.e. [14,00,000 – index cost of acquisition 1,71,487 i.e. (1,11,672x711/463)] and brought to tax in the hands of the assessee.

4. Being, aggrieved the assessee filed an appeal before the Id. CIT (A). During the course of appellate proceedings, the assessee had filed additional evidences showing the evidence of ownership of land situated at Gram Jakhiya evidencing that the impugned land sold was belonged to the assessee and his son Dr. Ankur Agrawal in the ratio of 40:60. The assessee had also claimed deduction under section 54B of the Act in respect of previously mentioned sale of two-agriculture land. The Ld. CIT (A) had send the additional evidence to the AO for his comments and obtained a remand report from the AO. The CIT (A) noted that Smt. Bhagwati Rai (mother of the assessee) died on 27.04.2008 as per her death certificate. As per the Will of Smt. Bhagwati Rai , her the grandson Dr. Ankur Agrawal had becomes the 60% shareholder of land situated at Gram Jakhiya. The Ld. CIT (A) also found that Dr. Ankur Agrawal has also filed his return of income reflecting his share of sale consideration of Rs. 46,76,400/- of said land and claiming deduction u/s. 54B of the Act. Accordingly, the CIT (A) has directed the AO to consider sale consideration only of 40% in the hands of the assessee. The CIT (A) further observed that the assessee is not eligible for deduction u/s. 54B of the Act. The CIT (A) also noted that the assessee has been changing his stand of claim by claiming that said land is not asset within the meaning of section 2(14) , therefore, the AO was justified in rejecting the claim under Chapter IV of Income Tax Act,1961. Concerning another land situated at village Buri Barlai, the CIT (A) observed that the AO has computed

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long-term capital gains by taking sale consideration at Rs. 14 lakhs without considering deduction u/s. 54D and 54F for the detailed reasons discussed in the assessment order. The CIT (A) was of the view that the appellant has not filed specific ground on the point, hence, written submissions could not be taken into consideration on the issue, and accordingly the appeal was dismissed.

5. Being, aggrieved the assessee filed this appeal before the tribunal. The Ld. A.R. submitted that the assessee has sold land situated at village Jakhiya for Rs. 31,17,600/- (being 40% of his share as allowed by the CIT(A)) of which index cost was at Rs. 1,98,222/- . Thus, the assessee has earned long term capital gains of Rs. 29,19,378/- on sale of this agricultural land. Similarly, the assessee has also earned long term capital gains of Rs. 8,07,484/- (sale consideration of Rs. 8,70,411- index cost of acquisition 62,927) for the land sold at village Buri Barlai. The Ld. A.R. submitted that the assessee is eligible for deduction under section 54B of the Act, as he has made investment of Rs. 22, 41, 974 /- in purchase of land on 26.10.2010 at village Bardani and for Rs. 8, 96, 460 /- on 10.06.2010 by purchasing another land at village Alwasa. The assessee has also made investment of Rs. 25,50,000/- on 02.03.2012 in agriculture land situated at village Bhorsala. That the Ld. A.R. submitted that the assessee has made investment of Rs. 31,38,434/0 i.e. [22,41,974+8,96,460) period prior to date of filing of return of income i.e. 22.09.2011, hence, the assessee is eligible for deduction u/s. 54B of the Act of that amount. For the balance of Rs. 5, 88,484/- the assessee has made investment of Rs. 25,50,000/- within two years from the sale of agriculture land and before the completion of assessment. Therefore, the assessee is also eligible for deduction of that amount u/s. 54B of the Act. The Ld. A.R. further contended that the assessee has invested entire sale consideration of sale of original assets in new assets hence, he is eligible for deduction u/s. 54B of the Act. The Ld. A.R. submitted that by inadvertent

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mistake the section was mentioned as 54D of the Act, however, it was revised by filing revised calculation and claiming deduction u/s. 54B of the Act as could be seen from page No 63 of Paper Book. The Ld. A.R. further submitted that the issue relating to share in land sold by the assessee has been allowed by the Id. CIT (A) against which the Department has not filed any appeal before the tribunal. Therefore, it was urged before us that the issue required to be adjudicated is the allowance of deduction u/s. 54B of the Act. The Ld. AR submitted that the mentioning of wrong section for claim of deduction does not make the assessee disentitled of claim u/s. 54B. Therefore, the assessee is entitled for the claim of deduction u/s. 54B of the Act. The Ld. AR referred the CBDT Circular No. 14(XL-35) dated 11.04.1955 to contend that the officers of the department must not take advantage of ignorance of the assessee as to his rights. The officers should take the initiative in favour of the tax payers during the proceedings, where proceedings or other particulars before them indicate that some refund or relief is due to him. The Ld. AR also relied on the decisions of ITAT Indore Bench in the case of Paramjeet Singh Chhabra (2013) Taxpub (DT) 2001 (Ind Trib) as dealt with the similar issue wherein wrong section was mentioned by the assessee and relief was granted by referring to the CBDT Circular dated 11.04.1955. Similar decision was rendered by the ITAT Rajkot in the case of Rupam Impex (2016) 66 taxmann.com 181 (Rajkot). The Ld. AR also submitted that the Assessing Officer observed that since the impugned land are converted lands, hence, no deduction is permissible on the capital gains arising on their sale. However, the Ld. CIT (A) has not given any adverse findings on this aspect and has partly allowed the appeal. The Ld. AR further submitted that the assessee has demonstrated with ample documentary evidences on record that the impugned land were used for agricultural purpose before the sale and the assessee had regularly offered agricultural income in his returns of income as reflected at page 7 and 12 of appellate order

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of Ld. CIT(A) wherein agricultural income shown in earlier years is mentioned. It was submitted that for claiming deduction u/s. 54B, it is the use of the land for agricultural purpose irrespective of type of land holding. In support of this proposition the Ld. AR has relied in the case of Shri Bhagwanbhai Revabhai Prajapati (2015) 60 taxmann.com 219(Ahd.) wherein it was held that once it is established that land owned by the assessee has been used for agricultural purpose. He becomes entitle for claim u/s 54B on sale of land even if he is not a cultivator but gets it cultivated under his supervisions. The Assessing Officer has also placed reliance in the case of Asha George vs. Income Tax Officer (2013) 351 ITR 0123/(2013) 214 taxman 0236 (Ker) wherein it was held as under:

“ emphasis u/s 54B is use to which land is put- It is not necessary that land which is transferred, must be an agricultural land as such fact that land is located in an urban area, cannot by itself be relevant to deny benefit u/s 54B-Requirement of Section 54B is that assessee must establish that land was being used for agricultural purpose for a period of two year prior to date of transfer-finding of fact, at any rate, cannot be overturned based on re-appreciating material which was considered by tribunal which is final fact finding authority – finding of fact rendered u/s 54B is not perverse-At any rate, there can be no basis for invoking section 54B for deduction value of land purchased.

6. The Ld. AR further submitted that while computing capital gain on sale of agricultural land at Gram Budi Barlai took sale consideration of Rs.14 lakhs based on the registered sale deed. However, the assessee had completed his part performance of the contract and transferred the said land to one Shri Nathulal vide sale agreement and registered power of attorney for Rs.8,70,411/- on 15.06.2010 as reflected at paper book pages nos. 52 to 53. It was submitted that the assessee had received the agreed sale consideration and possession was duly handed over to Shri Nathulal. Thus, it was claimed that the sale was complete viz a viz

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the assessee within the meaning of section 53A of the Transfer of Property Act, 1882 R.W. Section 2(47) (v) of the Act. Therefore, it was contended that on a subsequent date i.e. 14.06.2011 Shri Nathulal entered into another sale transactions of Rs.14 lakhs and the registered sale deed was executed under the previously mentioned registered Power of Attorney. As reflected at page 54 to 60 of paper book by Shri Nathulal, power of attorney holder in favour of Shri Dinesh son of Nathulal. Therefore, considering these facts the Assessing Officer ought to have taken the sale consideration at Rs.8, 70,411/- as disclosed in the return of income by the assessee.

7. With regard to claim of deduction u/s. 54B of the Act, the Ld. AR submitted that out of total long term capital gain of Rs.37,26,862/- and Rs.31,38,434/- were invested prior to filing of return of income on 22.09.2011. Balance Rs. 5,88,428/- remained to be invested which was also done by the assessee when agricultural land was purchased on 02.03.2012 at gram Bhorasala for a sum of Rs.25,50,000/-. Thus remaining amount of Rs.5,88,428/- was invested within the period of two years from the date of sale of original assets and before the completion of impugned assessment. The AR submitted that the plain reading of (2) of section 54B, makes it clear that only section 139 is mentioned. In section 54B(2), in the context that the unutilized portion of the capital gain on the sale of land used for agriculture purpose should be deposited before the date of furnishing the return of the income u/s 139. Section 139 cannot mean only section 139(1) but it means all sub-sections of section 139. In support of this proposition the Ld. AR placed reliance in the case of Ashok Kapasiawala (2015) 63 taxmann.com 284 (Ahmedabad-Trib). Though, on section 54F(2), principal of which is equally applicable in the instant case of section 54B. Hon'ble Bench has followed the decision of Hon'ble Karnataka High Court in the case of K. Ramachandra Rao (2015) 56 taxmann.com 163(Kar) while giving relief to the assessee. It was submitted that section 54B

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is a beneficial provisions for an assessee who is otherwise liable to pay income tax under the head capital gains.

8. On the other hand, Ld. DR has relied on the orders of Assessing Officer as well as Ld. CIT(A).

We have considered rival submission perused the facts on record. We find that the assessee and his son Dr. Ankur Agarwal have sold agricultural land situate at Gram Jakhiya on 23.03.2011 for a sale consideration of Rs.77,94,000/-. The Assessing Officer has considered the entire sale consideration in the case of assessee whereas the Ld. CIT(A) on the basis of Additional evidences and Will of mother of the assessee, held that the assessee had 40% share in the impugned land sold by the assessee with his son Dr. Ankur Agrawal, therefore, the assessee has shown sale consideration at Rs.31,17,600/- (being 40% share) on which index cost is considered at Rs.1,98,222/- on which long term capital gains has been computed at Rs.29,19,378/- so for the share of assessee in the lands sold is not disputed as of now as the department has not filed any appeal against the order of Ld. CIT(A) on this issue. Thus, the assessee has earned long term capital gains of sale of land situated at village Jakhiya at Rs.29,19,378/- out of his share of sale consideration of Rs. 31,17,600 being 40% of total sale consideration. Similarly, as regards sale of land situated at Budi Barlai village, the assessee has shown sale consideration of Rs.8,70,411/- whereas the Assessing Officer has considered the same at Rs.14 lakhs on the basis of registered sale deed executed on 14.06.2011 by Shri Nathulal. We have pressed the register power of attorney holder as appearing to page no.46 to 49 of the paper book which shows that the assessee has already sold said this land to Shri Nathulal on 15.06.2010 for sale consideration of Rs.8,70,411/- as per registered power of attorney executed in favour of Shri Nathulal. Since the assessee has received the agreed sale consideration (reflected at page No 49A of paper book) the sale agreement to sale as per Power of Attorney executed is appearing at page No 46 to 49 of

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paper book. We also find the assessee has disclosed the sale consideration in his return of income for the assessment year under consideration at Rs. 8,70,411/-. We also find that the assessee has handed over physical possession of the agriculture land and his rights therein, therefore, there is transfer of immovable property within the meaning of section 53A of the Transfer of Property Act 1882, r.w. section 2(47)(v) of the Income Tax Act,1961. Considering these circumstances we are of the considered opinion that the AO should have taken sale consideration at Rs. 8,70,411/- on sale of this land and not Rs. 14 Lakh which otherwise does not fall under the assessment year under consideration. Therefore, we direct the Assessing Officer to consider the sale consideration at Rs. 8,70,411/- and consider the capital gain at Rs.8,07,484/- after allowing index cost of Rs.62,927/-in the case of the assessee. In view of these facts, we find that the assessee has earned long term capital gains from these two transfers of agricultural land at Rs.37,26,862/- as against the which the assessee has made investment of Rs.31,38,434/- prior to filing return of income on 20.09.2011 towards purchase of land at Bardari and Alwasa Land on 26.10.2010 and 10.06.2011 respectively. Therefore, the assessee is entitled to deduction u/s. 54B to that extent. The assessee has further made investment of Rs.25,50,000/- in purchase of land at Bhorasla on 02.03.2012. Further, we find from the record of the assessee appearing at page no.13 to 19 and from the appellate order at page 7 & 12 that the impugned land were used for agricultural purpose and the assessee has shown agricultural income in his return of income prior to sale of agricultural land. Therefore, subsequent conversion of land is immaterial for the purpose of applicability of section 54B of the Act. This view also supported the decision of Hon'ble Kerala High Court in the case of Asha George vs. Income Tax Officer (supra) as relied by the Ld. AR. Wherein catch note read as “ *emphasis u/s 54B is use to which land is put- It is not necessary that land which is transferred, must be an agricultural land as such fact that land*

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is located in an urban area, cannot by itself be relevant to deny benefit u/s 54B-Requirement of Section 54B is that assessee must establish that land was being used for agricultural purpose for a period of two year prior to date of transfer-finding of fact, at any rate, cannot be overturned based on re-appreciating material which was considered by tribunal which is final fact finding authority –finding of fact rendered u/s 54B is not perverse-At any rate, there can be no basis for invoking section 54B for deduction value of land purchased. In the light of ratio to this decision we are of the view that the land transferred must be an agricultural land and used for the purpose of agricultural prior to two years on date of transfer. These facts are applicable in the case of the assessee. Therefore, provisions of section 54B are applicable in this case. As regards quantum of deduction u/s. 54B is concerned, We find that the assessee has invested Rs. 31,38,434/- prior to filing of return of income. Therefore, the deduction of Rs. 31,38,434/- is available to the assessee u/s. 54B of the Act from the long term capital gain of Rs.37,26,862/- with regard to balance long term capital gains of Rs.5,88,428/- (37,26,862- 31,38,434), We find that the assessee though made investment within two year of sale, but the assessee has not deposited the unutilized long term capital gains in specified capital gains scheme as per provision of section 54B(2) of the Act read with section 139(1) of the Act. The unutilized portion of the capital gain was required to be deposited in the bank or institution as specified by the Central Government before furnishing of income u/s 139(1) as prescribed under the provisions of section 54B (2) of the Act. Since the assessee has failed to deposit the same in the capital gain scheme or account, therefore, in our considered view, the assessee is not entitle to deduction to the extent of Rs.5, 88,428/- . This view of us is also supported by the decision of Hon'ble Bombay High Court in the case of Humayan Sulemane Merchant Vs. CCIT (2016) 387 ITR 421 (Bom) wherein it was held that *failure to deposit the amount of consideration not*

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utilized towards the purchase of new flat in the specified bank account before the due date of filing return of income u/s 139(1) is fatal to the claim for exemption. The fact that the entire amount has paid to the developer/builder before the last date to file the return of income as irrelevant. The contrary view taken in the case of K. Ramachandra Rao 277 CTR 522(Kar) is sub-silintio in the said decision. Since the assessee has invested the amount of Rs.31,38,434/- in purchase of new asset before the due date of filing of return hence same is allowable as deduction u/s 54B and balance amount of Rs.5,88,428/- has not been utilized towards deposit in capital gains scheme and hence, same is not allowable as deduction u/s. 54B of the Act. In the light of these facts, the ground no. 1 to 3 is partly allowed.

9. Ground No.4: Relates to addition made by the Assessing Officer of Rs.1,20,000/- on account of household expenditure, which is not decided by the Ld. CIT(A). even though submissions of the assessee and ground were reproduced in appellate order.
10. The Assessing Officer observed that the assessee has shown house hold withdrawals at Rs.48,350/- therefore the assessee was asked to explain the details of expenses incurred for house hold, it was explained by the assessee that all family member are separately assessed and bear the household expenses for the family, therefore, household withdrawal as shown by the assessee and family members are reasonable and should be considered as a whole for the family members. However, Assessing Officer did not consider these facts and made addition of Rs. 1,20,000/- on this account.
11. Before Ld. CIT(A) the assessee has submitted that it was explanation to the AO during the assessment proceedings that all the members having sufficient drawing which are as under:

Name of Person	Drawing (Rs.)
Ankur Agarwal	1,21,280
Suneeta Agarwal	40,350

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Sunila Agarwal	55,560
<u>Suresh Agarwal</u>	<u>48,530</u>
	2,65,540

Thus, the aggregate household expenses of the all the family members comes to at Rs. 2, 65,540/- and the family members have incurred expenses at Rs. 2,32,247/-separately for LIC. The House of the assessee is self-owned and there are no rental expenses, there are school neither going kids nor the Assessing Officer as pointed out any specific material or point or defects. Thus, the assessee has shown higher expenses incurred by the assessee, therefore estimated addition of Rs.1,20,000/- is without any basis or pointing out any defects.

12. The Ld. DR relied on the order of the Assessing Officer.
13. We have considered the facts and find that the assessee and his family members separately earning income are also assessed to tax and have shown aggregate household withdrawal at Rs.2,65,540/- for four members family which appears to be reasonable. We also note that the assessee was not required to incur any expenses on school, rent etc. therefore, the estimated addition of Rs.1,20,000/- made by the AO is without any basis. Accordingly, same is deleted. This grounds of appeal is allowed.
14. In the result, appeal filed by the assessee is partly allowed.
15. The order pronounced in the open court on 17.01.2017

Sd/-
(डी.टी.गरासिया)
न्यायिक सदस्य
(D.T.GARASIA)
JUDICIAL MEMBER

Sd/-
ओ.पी.मीना)
लेखा सदस्य
(O.P.MEENA)
ACCOUNTANT MEMBER

दिनांक /Dated : 17th January, 2017/opm