आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'A'

BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ ITA No. 315/Ahd/2016

निर्धारण वर्ष/Assessment Year: 2010-11

Shri Ambalal Somabhai (Kumbhar) Prajapati 1, Devi Annapurna Society Nr. Gurudwara, B/h. West & Park Thaltej, Bodakdev Ahmedabad 380058. PAN : ABGPK 5078 B	Vs	ITO, Ward-7(1)(2) Ahmedabad.

अपीलार्थी/ (Appellant)		**प्रत्यर्थी/** (Respondent)

Assessee by :	Shri P.F. Jain, AR
Revenue by :	Shri S.K. Dev, Sr.DR

सुनवाई की तारीख/Date of Hearing : 09/08/2018
घोषणा की तारीख /Date of Pronouncement : 18/09/2018

O R D E R

PER RAJPAL YADAV, JUDICIAL MEMBER : Assessee is in appeal before the Tribunal against order of the ld.CIT(A)-7, Ahmedabad dated 11.12.2015 passed for the assessment year 2010-11.

2. The assessee has taken ten grounds of appeal, which are argumentative and descriptive in nature. In brief, his grievance revolves around a single issue whereby he has disputed computation of long term capital gain assessable in his hands in re-opened assessment under sections 147/148 of the Income Tax Act, 1961.

3. At the time of hearing, the ld.counsel for the assessee did not advance arguments on the issue of reopening, therefore, we do not devote our energy to examine the issue whether reopening is justified or not.

4. The next issue relates to computation of capital gain assessable in his hand.

5. Brief facts of the case are that the assessee has filed his return of income on 19.7.2010 declaring taxable income at Rs.1,74,530/-. This return was accepted under section 143(1) on 16.5.2011. The AO got information that the assessee was co-owner in agriculture land bearing survey no.205, situated Shilaj, Thaltej. This land was sold on 26.2.2010 for a consideration of Rs.2,49,99,993/-. According to the AO, the share of assessee comes to Rs.83,33,331/-. He further observed that the assessee failed to offer net capital gain for taxation in his return of income, therefore, he recorded reasons and reopened the assessment. In the reopened assessment, notices under section 147/142(1) were issued upon the assessee. The assessee had contended that value of agriculture land sold by him as on 1.4.1981 was Rs.39,36,390/-. He submitted that if the benefit of indexation is being given to this value, then cost of acquisition would be Rs.2,48,77,353/- and net capital gain would be of Rs.1,22,640/- in which the assessee's share is one-third which comes to Rs.40,880/- only. The ld.AO was not satisfied with this computation of capital gain. He made reference to the DVO under section 55A of the Act. The DVO has submitted valuation report to the AO on 30.9.2014. He determined the fair market value of the agriculture land as on 1.4.1981 at Rs.3,15,000/- as against Rs.39,36,390- taken by the assessee on the basis of report of registered valuer, Shri B.H. Patel. By adopting the fair market value

determined by the DVO, the ld.AO computed the capital gain and made an addition of rs.76,69,731/-. Appeal to the CIT(A) did not bring any relief to the assessee.

6. Before us, the ld.counsel for the assessee took three fold submissions. In his first fold of submissions, he submitted that land in dispute was geographically situated beyond a distance of 8kms. from municipality and this distance was to be measured from the notification issued by the CBDT on 6.1.1994. The ld.AO failed to take note of geographical location of the land in dispute. If it is beyond 8kms then, being agriculture land, it is not to be construed as capital asset resulting in capital gain under section 2(14)(iii)(b) of the Act. In his second fold of contention, he submitted that reference under section 55A to the DVO for ascertaining value of land as on 1.4.1981 could only be made if the valuation adopted by the assessee is less than the fair market value. Here the ld.AO wants to reduce the value of acquisition cost as on 1.4.1981, hence reference to DVO itself is bad. In support of his contention, he relied upon judgment of Hon'ble Gujarat High Court in the case of CIT Vs. Gauranginiben S. Shodhan, 45 taxmann.com 356 (Guj).

7. In the next fold of contention, he submitted that Shri Dasrathbhai S. Prajapati is one of the co-owners. In his case, the AO has given effect to the order of ld.CIT(A) on 12.4.2018. The ld.AO has accepted the value of the property as on 1.4.1981 at Rs.39,36,290/- on the basis of Shri B.H.Patel, Registered valuer's report. There could not be any discrimination *qua* other co-owners on similar transaction. He placed on record copy of the order passed by the AO under section 154 r.w.s. 250 of

the Act. On the other hand, the ld.DR relied upon the order of the ld.CIT(A).

8. We have duly considered rival contentions and gone through the record carefully. As far as first fold of grievance is concerned, the ld.CIT(A) has taken into consideration the report obtained by the AO in the case of other co-sharer. This report was obtained on remand from the ld.CIT(A) in the case of Shri Dashrathbhai Sombhai Prajapati. According this latest report, distance of 8kms. was measured form municipal limit of Ahmedabad Municipal Corporation as on 6.1.1994. The ld.CIT(A) has held that land of the assessee is situated within 8kms. Hence, on transfer of this capital asset, capital gain is assessable in the hands of the assessee. We do not find any merit in this fold of contentions raised by the ld.counsel for the assessee. We have specifically gone through the finding of the ld.CIT(A) wherein the ld.CIT(A) has reproduced on page no.8 of his order, order of the AO dated 2.9.2014 giving effect to the CIT(A)'s order. It is pertinent to note that in the order dated 12.4.2018, the ld.AO again reiterated geographical locations of this land within 8kms.

9. As far as next fold of contention is concerned, whether reference under section 55A for ascertaining fair market value of the land as on 1.4.1981 is justified or not is concerned, we find that the assessee has disclosed value of the land as on 1.4.1981 at Rs.39,36,290/-. This estimated value adopted by the assessee was on the basis of registered valuer's report. As against this, the ld.AO ought to adopt the value at Rs.3,15,000/- on the basis of DVO's report. Somewhat similar circumstance was considered by the Hon'ble Gujarat High Court in the case of Gauranginiben S. Shodhan (supra). The relevant fact in this case

was that, assessee was a co-owner of a house property in Jai Shri Swaminarayan Commercial Co-operative Society Ltd. This was sold by two sale deeds executed on 14.7.2005 for Rs.4,25,50,000/-. The ld.AO was of the opinion that considering the market trend in that period assessee must have got more than the amount stated in the sale deed. Therefore, he made reference for determining fair market value of the property as on the date of sale as well as on 1.4.1981. Since, we are not concerned with FMV on the date of sale deed, the facts relevant for the controversy in our hand is with regard to the value taken as on 1.4.1981. In that case, the assessee had adopted Rs.1,03,00,000/- as the value of the property as on 1.4.1981. The DVO has determined this value at Rs.94,00,000/-. Benefit of indexation was taken by the AO on the basis of DVO's report. The question before the Hon'ble High Court was, whether a reference under section 55A could be made in a case where FMV adopted by the assessee on the basis of registered valuation report is more than the one intended to be achieved by the AO. Hon'ble Court has held that such reference is not permissible according to the scheme of Act prior to 1.7.2012. The discussion made by the Hon'ble High Court reads 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 Hiraben Jayantilal Shah vs. Income-tax Officer and another reported in [2009] 310 ITR 31(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."

10. Similarly, Hon'ble High Court has considered this aspect in the case of CIT Vs. Manulaben M. Unadkat, 55 taxmannc.om 62 (Guj). The discussion made by the Hon'ble High Court reads as under:

"5. We have heard learned advocates for both the parties and perused the material on record. While deciding the Appeal, the Tribunal in paragraph No.6 of its order observed as under:-

"6. We have duly considered the rival contentions. A reference to the Valuation Officer is to be made under section 55A of the Act. Clause(A) of Section 55A has a bearing on making such a reference. It reads as under:

"55.A. With a view to ascertaining the fair market value of a capital asset for the purposes of this Chapter, the Assessing Officer may refer the Valuation of capital asset to a Valuation Officer:

(a) in a case where the value of the asset as claimed by the assessee is in accordance with the estimate made by a registered valuer, if the Assessing Officer is of opinion that the value so claimed is less than its fair market value;

The provision specifically provides that if the Assessing Officer is of the opinion that the value disclosed by the assessee is less than the fair market value only, then he can make a reference to the DVO. Now the moot question is as to how the opinion is to be formed by the Assessing Officer. Whether this opinion is subjective or guided by some judicious actions. The formation of opinion should have rational connection with the material brought on record. It should not be based on extraneous or irrelevant reasons. In the present case, the Assessing Officer before making a reference to the Valuation Officer has not brought anything on the record indicating that the assessee has disclosed lesser sale price. There is nothing on the record which can suggest to ignore the report of the registered valuer and to adopt the report of the Valuation Officer. Both these

persons are technical persons and before accepting the evidence of an expert, there should be corroboration of some other material. Taking into consideration the overall facts and circumstances of the case, we are of the opinion that the Id. Assessing Officer ought to have not made a reference to the DVO for determination of the fair market value of the property in dispute. The report of the DVO alone is not sufficient for estimating the capital gains at Rs. 12,28,907/-."

6. In view of the above, we are in complete agreement with the view taken by the Tribunal. The Tribunal has given cogent and convincing reasons in arriving at the conclusion. Therefore, the present appeal is dismissed. Accordingly, the question posed in this appeal is answered in favour of the assessee and against the revenue."

11. Since the value disclosed by the assessee was more than the FMV as on 1.4.1981, reference is bad in law. In the absence of reference, it has to compute capital gain on the basis of value adopted by the assessee. In other words, the value of the property ought to be taken at Rs.39,36,290/- as on 1.4.1981 after giving benefit of indexation, which value would come to Rs.2,48,77,353/- and capital gain come in the share of the assessee would be only Rs.40,880/-. Apart from the above, we have been appraised ourselves with the latest order of the AO computing the capital gain in the hands of a co-sharer. This relevant part of the order reads as under:

"Since it has been established that the land in question was capital asset which lull within the 8 kms of municipal limit the assessee's request for indexation can hp considered. The assessee has furnished Valuation Report dated 03.11.2012 obtained from B.H. Patel. Registered Valuer. As per his report the value of the property in question as on 01.04.1981 is at Rs.39,36,290/-. Accordingly, capital gain chargeable to tax is worked as under:

Sale consideration of the property	*Rs.2,49,99,993/-*

Assessee's share- l/3rd	*Rs. 83,33,331/- (A)*
Indexed cost of the property 3936290x632+100	*Rs.2,48,77,353/-*
Assessee's share on indexed cost	*Rs. 82,92,451/- (B)*

Taxable Capital Gain [A)-(B)   Rs. 40.880/-

Considering the above working of the capital gain the total income of the assessee is re-computed as under:

Total Income as per order giving appeal effect dated 02/09/2014	*Rs.84,78,290/-*
Assessee's share- 1/3" of indexed cost.	*Rs.82,92,451/-*
Revised total on rectification i.e. Total income returned + taxable capital gain (144960-140880)	*Rs.1,85,840/-*

Rectified u/s. 154 r.w.s. 250 of the IT Act. Give credit for taxes paid if any. after due verification. Issue demand notice/challan/Refund Order accordingly."

12. Two co-owners cannot be treated differently for the same transaction. Therefore, we are of the view that addition made by the AO in the hands of the assessee is not sustainable. We allow the appeal of the assessee partly and direct the AO to take taxable capital gain in the hands of the assessee at Rs.40,880/- equivalent to the one assessed in the hands

of Shri Dashrathbhai Somabhai Prajapati, the other co-sharer. In view of the above discussion, appeal of the assessee is partly allowed.

13. In the result, the appeal of the assessee is partly allowed.

Pronounced in the Open Court on 18th September, 2018.

Sd/-	Sd/-
(WASEEM AHMED)	**(RAJPAL YADAV)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**