

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर

IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल रॉव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM AND SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1100/JP/2016

निर्धारण वर्ष/Assessment Year : 2011-12.

Shri Rakesh Garg, 140, Jai Jawan Colony, Jaipur.	बनाम Vs.	The Income Tax Officer, Ward 5(4), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. AEOPG 1922 P		
अपीलार्थी /Appellant		प्रत्यर्थी /Respondent

निर्धारिती की ओर से/ Assessee by : Shri P.C. Parwal (CA)

राजस्व की ओर से/ Revenue by: Shri J.C. Kulhari (JCIT)

सुनवाई की तारीख/ Date of Hearing : 29.08.2018.

घोषणा की तारीख/ Date of Pronouncement : 13/09/2018.

आदेश / ORDER

PER VIJAY PAL RAO, JM :

This appeal by the assessee is directed against the order dated 24th October, 2016 of Id. CIT (A)-2, Jaipur for the assessment year 2011-12. The assessee has raised the following grounds :-

1. The Id. Commissioner of Income Tax (Appeals) has erred on facts and in law in dismissing the assessee's ground of appeal that the agricultural land sold by him is not a capital asset u/s 2(14) of the IT Act, 1961 on the ground that the assessee himself has declared capital gain on sale of agricultural land in the return filed, no submission has been made before the AO to this effect and that this issue does not emanate from the order of the AO ignoring that this being a legal ground, the Id. CIT (A) ought to have decided the same as per law when assessee has filed the evidences that the agricultural land sold by him is not a capital asset u/s 2(14) of the Act.

2. The Id. Commissioner of Income Tax (Appeals) has erred on facts and in law in confirming the action of AO in allowing deduction u/s 54F of the Act with reference to investment in one constructed residential property only at Rs. 14,67,670/- as against investment of Rs. 54,08,560/- in three properties made by the assessee.
- 2.1. The Id. Commissioner of Income Tax (Appeals) has erred on facts and in law in incorrectly taking the amount of investment in the said property at Rs. 14,67,670/- as against investment of Rs. 19,77,450/- made by the assessee, thereby reducing the claim of deduction u/s 54F to Rs. 12,05,554/- as against Rs. 16,24,290/-.
3. The assessee craves to amend, alter and modify any of the grounds of appeal.
4. The appropriate cost be awarded to the assessee.

Ground No. 1 is regarding the claim of the assessee of agricultural land sold by him is not a capital asset under section 2(14) of the IT Act was rejected by the authorities below.

2. The assessee is an Individual and derives income from jewellery business. During the year under consideration, the assessee sold agricultural land situated at Bhankrota, Tehsil Sanganer, Jaipur vide Sale Deed dated 28th April, 2010 with his two brothers for a consideration of Rs. 1,62,00,000/-. Thus the assessee's 1/3rd share in the sale consideration was Rs. 54,00,000/-. The assessee in its return of income declared income of Rs. 3,05,840/- after claiming deduction under section 54F of the Act in respect of three new assets purchased by the assessee at three different locations. The AO allowed the deduction under section 54F of the Act only in respect of one new asset of Rs. 12,05,554/- as against claim of the assessee of Rs. 54,08,560/- the total investment made by the assessee in three separate

housing plots. The assessee challenged the action of the AO before the Id. CIT (A) and also raised a ground that the agricultural income in question does not fall in the definition of capital asset as per the provisions of section 2(14) of the Act as the agricultural land in question is situated beyond 8 KM of Municipal limits of Jaipur. The Id. CIT (A) did not accept this objection of the assessee and held that when the assessee himself has declared the capital gain in the return of income arising from sale of agricultural land in question and no submission whatsoever has been made before the AO to this effect, then this issue does not emanate from the order of the AO.

3. Before us, the Id. A/R of the assessee has submitted that the issue whether the agricultural land sold by the assessee is a capital asset or not is legal in nature which can be raised even before the appellate authority and once it is raised before the appellate authority, it ought to have decided this issue as per law. In support of his contention, he has relied upon the decision of Hon'ble Bombay High Court in the case of CIT vs. Pruthvi Brokers & Shareholders (P) Ltd., 349 ITR 336 (Bom.) and submitted that the jurisdiction of the appellate authorities to consider a fresh or new ground or claim is not restricted to cases where such a ground did not exist when the return was filed and the assessment order was made. He has also relied upon the decision of Hon'ble Gujarat High Court in case of CIT vs. Mitesh Impex & Ors., 104 DTR 169 (Guj.) and submitted that the Hon'ble High Court has held that any ground, legal contention or even a claim would be permissible to be raised for the first time before the appellate authority when the facts necessary to examine such ground, contention or claim are already on record. The Id. A/R has also relied upon the Third Member decision of Jabalpur Bench of the Tribunal in case of DCIT vs.

Vishwanath Prasad Gupta, 57 DTR 89. Hence, the Id. A/R has submitted that the Id. CIT (A) ought to have decided the issue raised by the assessee instead of rejecting the same without entertaining.

4. On the other hand, the Id. D/R has submitted that this is not a question which can be decided on the basis of the facts and material on record but a proper investigation and enquiry is required regarding the fact whether the land is situated beyond the 8 KM limits from the Jaipur Municipality or within 8 KM of the Municipal limits. Thus the issue requires consideration of the fact to be ascertained through conduct of enquiry and, therefore, the case of the assessee does not fall in the category of a legal issue which can be decided on the basis of the facts and material already available on the assessment record.

5. We have considered the rival submissions as well as the relevant material on record. The issue raised by the assessee whether the agricultural land in question is capital asset or not involves both factual as well as legal question. Whether the land situated in any area within the distance not more than 8 KM from the local limits of Jaipur Municipality or in the area beyond 8 KM from the local limits of Municipality is a question of fact and only once this question of fact is decided then the question of law comes into play. There is no dispute that the assessee himself has declared the capital gain arising from the sale of agricultural land in question and claimed deduction under section 54F of the Act. However, before the Id. CIT (A) the assessee raised this issue of not chargeable to capital gain due to the reason that the land in question situated in the area which is beyond 8 KM from the local limits of Jaipur Municipality. Thus for considering the issue whether the agricultural land in question situated in the area which is beyond 8 KM from the local limits, a proper

enquiry and investigation is required. The assessee filed certain documents in support of the claim before the Id. CIT (A). However, there was no further verification and enquiry conducted by any authority as the Id. CIT (A) rejected the claim of the assessee as not maintainable on the ground that the same was not raised before the AO. We find that though the issue raised by the assessee involves question of fact as well as law, however, the Id. CIT (A) having the coterminous power as that of Assessing Officer, could have verified the facts by calling a remand report from the AO and, therefore, the issue could have been decided on merits. Further, we find that the documents produced by the assessee are not sufficient to adjudicate the issue as the assessee has filed only a Google map as well as certain reports of the Municipal Corporation which are not directly on the point of distance. Further, the assessee has claimed the distance of particular land from the Municipal limits whereas as per the provisions of section 2(14)(iii)(b) of the Act the distance has to be measured from the Municipal limits and the area in which the agricultural land situate. For ready reference, we quote the provisions of section 2(14)(iii)(b) with explanation as under :-

“ 2 (14) [“ capital asset” means -

(iii) agricultural land in India, not being land situate –

(a) Xxxxx

(b) in any area within the distance, measured aerially, -

(1) not being more than two kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten thousand but not exceeding one lakh; or

- (II) not being more than six kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than one lakh but not exceeding ten lakh; or
- (III) not being more than eight kilometres, from the local limits of any municipality or cantonment board referred to in item (a) and which has a population of more than ten lakh.

Explanation.—For the purposes of this sub-clause, "population" means the population according to the last preceding census of which the relevant figures have been published before the first day of the previous year;]]”

Thus it is clear from the clause (iii) and sub-clause (b) of section 2(14) of the Act that the agricultural land will be excluded from the definition of capital asset if the same is situated in an area which is beyond 8 KM from the local limits of the Municipal/Cantonment Board. Therefore, for determining the issue of the land in question is not falling in the definition of capital asset but falling in the exclusion clause of section 2(14) of the Act, the distance from the Municipal limits to the area in which the land is situated is to be taken into consideration. It is pertinent to note that the phrase 'agricultural land' not being land situate in any area 'within the distance' is purposefully used in this provision to avoid the confusion and a situation where one part of a land can fall within the distance of 8 KM and another part can be beyond 8 KM and, therefore, in case when the assessee is selling the land by division in different parts, then one part of the land will be excluded from the definition of capital asset and other part of the same land will be treated as capital asset. Therefore, instead of a particular land, the distance from the Municipal limit to the area in which the land is situated is to be taken into consideration. Accordingly, we find that the issue raised by the assessee requires a proper

investigation of facts and also determination of the fact whether the particular land is situated in the area which is beyond 8 KM from the Municipal limits. Hence, in the facts and circumstances of the case and in the interest of justice, we set aside this issue to the record of the AO for proper verification and giving the finding about the distance from the Municipal limits to the area in which the land is situated. We may clarify that the terms used in the provision refers to the particular revenue state in which the agricultural land is situated and, therefore, the distance from the Municipal limit to the particularly revenue state has to be considered for the purposes of deciding the issue.

Ground No. 2 is regarding restricting the deduction under section 54F in respect of only one residential property as against three claimed by the assessee.

6. The assessee claimed a deduction of Rs. 54,08,560/- for investment made in three properties. The details of the properties have been given by the AO in para 3.1 as under :-

- “ (i) Constructed House, Plot No. 79, Vivek Vihar, Jagatpura, Jaipur dated 20.7.2011 – Rs. 14,67,670/-
- (i) Residential Plot – 160, Oriental Arcade Yojna Mahal, Jagatpura, Jaipur – dated 14.3.2011 – Rs. 15,74,340/-.
- (ii) Residential Plot – C-285, Sidarth Nagar Yojna, Near Jawahar Circle Jaipur – dated 14.3.2011 – rs. 15,73,770/-

The total investment of Rs. 54,08,560/- has been shown whereas as per documents the total investment made by the assessee come to Rs. 46,15,780/-. The assessee vide his letter dated 17.12.2013 stated that the deduction under sec. 54F has been claimed wrongly instead of 54

of the I.T. Act, 1961 due to ignorance about the nature of deductions as permissible u/s 54 and 54F of the Act.”

The AO allowed the claim of the assessee only in respect of one residential constructed house i.e. at sl. No. 1 of the above details and rejected the claim in respect of other two residential plots. The assessee challenged the action of the AO before the Id. CIT (A). However, the Id. CIT (A) has upheld the order of the AO.

7. Before us, the Id. A/R of the assessee has submitted that prior to the amendment with effect from 01.04.2015 a residential house was considered as more than one house if the same constitute a single dwelling house as per the needs of the family members of the assessee. Further, the residential house consists of several independent units cannot be taken as an impediment to allow the exemption under section 54F of the Act. Hence, the Id. A/R has submitted that in view of the various decisions on this issue, more than one independent unit can be considered as a residential house in terms of section 54F of the Act. Thus the investment made by the assessee in different units is eligible for deduction under section 54F of the Act. In support of his contention he has relied upon the judgment of Hon'ble Supreme Court in the case of CIT vs. Vatika Township Pvt. Ltd., 367 ITR 466 (SC) and submitted that the Hon'ble Supreme Court has held that legislations which modify accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect. Thus the Id. A/R has submitted that the amendment in the provision whereby it has been specified 'one residential house in India' is treated as prospective. As regards the term 'a residential house' defined

and interpreted by the various decisions, the Id. A/R has relied upon the following decisions :-

Gita Duggal vs. CIT
357 ITR 153 (Delhi)

D. Anand Basappa vs. ITO
309 ITR 329 (Kar.)

and submitted that the Hon'ble High Court have held that the phrase 'a residential house' would mean one residential house does not appear to be correct understanding. A residential house should be understood in a sense that building should be of residential in nature and it should not be understood to indicate a single number.

8. On the other hand, the Id. D/R has submitted that there is no dispute that the assessee has invested in three different properties and only one was a constructed house and two others are only the residential plots and, therefore, are not falling in the definition of residential house. Further, the three properties in which the assessee invested are situated in different parts of the city and cannot be considered as a single residential house. He has relied upon the orders of the authorities below.

9. We have considered the rival submissions as well as the relevant material on record. As per the details of the three properties in which the assessee has claimed to have invested sale consideration of the land in question, only one property i.e. at sl. no. 1 of the list reproduced in para '6' above is a constructed house and two others are only the plots of land. Further, as it is evident from the details that these three properties are situated in different parts of the Jaipur City and are not adjoining to each other. Therefore, even otherwise all three residential plots cannot be used as a single residential house as these are not contiguous or can be

conveniently used by treating the single residential house as per the needs of the assessee. Even otherwise, assessee has not claimed that separate properties were purchased as per the requirement of the family as the assessee has constructed only one structure of a house and the other two properties are only the plots of land. Though the assessee has erected a boundary wall on one of the plots but the same would not constitute the construction of a house. Therefore, when these three separate properties cannot be regarded as a single residential house in view of their locations at different parts of the city and two of which are only the plots of land, therefore, the decisions relied upon by the assessee will not help the case of the assessee so far as the treatment of three different properties as a single residential house. The Id. CIT (A) has considered this issue in para 3.3 as under :-

“ 3.3. I have perused the facts of the case, the assessment order and the submissions of the appellant. As regards investments made under section 54F of the I.T. Act, 1961 the assessee has given a list of three properties in three different areas of Jaipur. The Assessing Officer held that the deduction was admissible on one residential house and restricted the same to the property at plot No. 79, Vivek Vihar, Jagatpura since it was the only constructed house and the other two properties were only plots. Further the Authorized Representative placed reliance on a number of judgments but the same are distinguishable because in all those cases the asset purchased was a constructed residential house and the issue was regarding whether two or more units in the same complex could be considered for the deduction. In the assessee's case there is only one constructed house and the other two are plots and that two in different areas, therefore, the deduction has been correctly arrived at by the Assessing Officer. Assessing Officer has placed reliance on the decision of Hon'ble Punjab

& Haryana High Court in the case of Pawan Arya vs. CIT 2011-ITOL-01-HC-P&T IT. This ground of appeal is dismissed.”

Thus the Id. CIT (A) has followed the decision of Hon'ble Punjab & Haryana High Court in case of Pawan Arya vs. CIT (supra) which is directly on the issue. Further, the incentive for granting the deduction under section 54F of the Act is for investment in the residential house of the assessee which means that the investment is made for own residential requirement of the assessee and not future investment in the property. Therefore, in the absence of any material to show that the three different properties were purchased to meet the residential requirement of the family of the assessee, the claim of the assessee cannot be accepted. It is against the scheme and object of the section 54F of the Act which provides the deduction in respect of the investment made for purchase of residential house for assessee's own requirement. In view of the above facts and circumstances of the case, we do not find any error or illegality in the orders of the authorities below, qua this issue.

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

Order is pronounced in the open court on 13/09/2018.

Sd/-
(विक्रम सिंह यादव)
(VIKRAM SINGH YADAV)
लेखा सदस्य / Accountant Member

Sd/-
(विजय पाल राँव)
(VIJAY PAL RAO)
न्यायिक सदस्य / Judicial Member

Jaipur

Dated:- 13/09/2018.

Das/

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- Shri Rakesh Garg, Jaipur.
2. The Respondent – The ITO Ward 5(4), Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 1100/JP/2016)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar

