

IN THE INCOME TAX APPELLATE TRIBUNAL, SURAT BENCH, SURAT

BEFORE SHRI PAWAN SINGH, JM & DR. A. L. SAINI, AM

आयकरअपीलसं./ITA Nos.1686, 1687, 1688, 1293 & 1294/AHD/2017

(निर्धारणवर्ष / Assessment Year: (2012-13)

(Virtual Court Hearing)

Baldevbhai T. Patel, Plot No.2, Hari Om Niwas, Opp: Sunlight Complex, Anand Mahal Road, Surat.	Vs.	The ITO, Ward-1(3)(6), Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACIPP3610K		
Jayantibhai T. Patel, Plot No.2, Hari Om Niwas, Opp: Sunlight Complex, Anand Mahal Road, Surat.	Vs.	The ITO, Ward-1(3)(7), Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACIPP3613L		
Dineshbhai T. Patel, Plot No.2, Hari Om Niwas, Opp: Sunlight Complex, Anand Mahal Road, Surat.	Vs.	The ITO, Ward-1(3)(6), Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACIPP3614P		
Balvantbhai N. Patel, 327, Kandi Faliya, Dumas, Surat-395007.	Vs.	The ITO, Ward-2(3)(1), Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: ACKPP5075C		
Keshiben N. Patel, 231, Dumas, Surat-394550.	Vs.	The ITO, Ward-2(3)(2), Surat.
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: CKYPP7019Q		
(Appellant)		(Respondent)

Assessee by : Shri Mehul Patel, Advocate.

Revenue by : Ms Anupama Singhla, Sr. DR

सुनवाईकीतारीख/ Date of Hearing : 19/05/2021

घोषणाकीतारीख/Date of Pronouncement: 14/06/2021

आदेश / O R D E R

PER DR. A. L. SAINI, ACCOUNTANT MEMBER:

These five appeals filed by different assessees, pertaining to assessment year (AY) 2012-13, are directed against the separate orders passed by the Learned Commissioner of Income Tax (Appeals), Surat [in short “the ld. CIT(A)”], which in turn arise out of separate assessment orders passed by the Assessing Officer under section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “the Act”).

2. Since, the issues involved in all the appeals are common, identical, therefore these appeals have been clubbed and heard together and a consolidated order is being passed. For the sake of convenience, the grounds as well as facts narrated in ITA No.1686/AHD/2017 for AY.2012-13, in the case of Baldevbhai T. Patel have been taken into consideration for deciding these appeals *en masse*.

3. The grounds of appeals raised by the assessee in lead case in ITA No.1686/AHD/2017, for AY.2012-13 are as follows:

“(1) That on facts and in law, the learned CIT (A) ought to have held that the AO has erroneously invoked the provisions of section 50C of the Act while making the addition to capital gains.

(2) That on facts, and in law, the learned CIT (A) ought to have held that the appellant was not provided the material gathered and relied by AO to make addition to Capital Gains, and thereby not providing reasonable and sufficient opportunity to rebut the same.

(3) That on facts and in law, it ought to have been held that the cost of acquisition and FMV as on 01/04/1981, could not have been varied by simply relying on case of another assessee.

(4) That on facts and in law, the learned CIT (A) has grievously erred in confirming the addition to Capital Gains by directing the AO to adopt the FMV as on 1/4/1981 @ Rs.71.60 per sq. mt. adopted by the DVO in case of another assessee, as against Rs.1,400/- per sq.mt. adopted by the appellant on the basis of Approved Valuer’s Report.

(5) That on facts, evidence on record, and in law, the learned CIT(A) ought to have deleted the entire addition made towards computation of capital gains, as prayed for.

(6) The appellant craves leave to add, alter, amend any ground of appeal.”

4. The relevant material facts, as culled out from material on record are as follows: During the assessment proceedings, the assessing officer found that as per the valuation report submitted by the assessee, of the Registered Valuer Shri P.K.Desai, the land was valued as on 01/04/1981 at a very high rate of Rs.1400/- per sq.meter who had determined the value of the property at Rs.55,75,500/-. The AO referred the property to the DVO to ascertain the FMV as on 01/04/1981. The DVO vide his order dated 20/03/2015 calculated the FMV @ Rs.71.60 per sq.meter as on 01/04/1981. The AO rejected report of the registered valuer and adopted the DVO's FMV @ Rs.71.60 per sq.meter. and calculated the long term capital gains of Rs.20,51,553/- (12.5% Share).Regarding the validity of reference to the DVO under section 55A of the Act, we note that amendment in section 55A of the Act is effective from 01.07.2012, which is applicable for AY.2013-14, however the assessee's case under consideration is for AY 2012-13, therefore the amended provisions are not applicable to the assessee under consideration. We note that at the relevant time, that is, AY 2012-13, the Assessing Officer can make a reference to the DVO under section 55A of the Act only if the value so adopted by the assessee under section 48 is not supported by the Valuation Report and Government Approved Valuer and if the AO is the opinion that the value of capital asset claimed by the assessee is **"less than its fair market value"** and not when **"it is more than its fair market value"**. We note that none of the conditions got fulfilled, hence Id. Assessing Officer is not legally competent to make reference to the DVO. As explained above the amended provisions under section 55A is not applicable to all those documents which got registered before 1st July, 2012, therefore we note that the Assessing Officer has (with its fair market value) misinterpreted the provisions and erroneously applied it retrospectively. We note that with effect from 1st July, 2012, the expression now used in Clause (a) of Section 55A is **"at variance"** the situation may therefore, be different after 1st July, 2012, which is applicable for assessment year 2013-14, whereas the assessee's case under consideration relates to assessment year 2012-13, hence amended provisions are not applicable to the assessee under consideration.

5. Therefore, in the light of the above facts, the Learned Counsel for the assessee invited our attention to the order dated 27.11.2020, passed by the Division Bench of this Tribunal in the case of Jagrutiben V. Patel in ITA Nos. 650 & 651/AHD/2017, for AY 2012-13, whereby the issue of fair market value in the context of the provisions of section 55A of the Act have been discussed and adjudicated in favour of assessee. Learned Counsel for the assessee submitted that these five appeals are squarely covered by the aforesaid order of the Tribunal, a copy of which is also placed before the Bench.

6. The Learned Senior Departmental Representative (in short “the ld. Sr. DR”) for the Revenue relied on the order of the Assessing Officer.

7. We see no reason to take any other view of the matter then the view so taken by the Division Bench of this Tribunal in the case of Jagrutiben (supra) vide order dated 27.11.2020. In this order the Tribunal has *interalia* observed as follows:

“6. We heard both the parties and carefully gone through the submission put forth on behalf of the assessee along with the documents furnished and the case laws relied upon, and perused the fact of the case including the findings of the ld. CIT(A) and other materials brought on record. We note that the impugned piece of land bearing Block No.31, R.S. No.22+23 situated at Village: Karadva, Tal. Choryasi, Dist. Surat, was sold, which was jointly held by her with other co-owners and assessee is holding 1/5th share therein which works out to Rs.69,35,220/- as her share in sale consideration. In the return of income filed by the assessee after claiming deduction for Indexed Cost of Acquisition and deduction u/s.54EC of the Act, the assessee has shown chargeable long term capital gain (LTCG) at Rs.1,28,317/-. The only dispute which has survived between the assessee and the Department is relating to determination of Fair market Value (FMV) as on 01.04.1981 of the impugned land admeasuring 38579 sq. meter, which the assessee has valued at Rs.100/- per sq. meter as against value estimated by the DVO @Rs.19/- per sq. meter. We note that the valuation adopted by the assessee is supported by report from Govt. Approved Valuer, whereas the Ld. AO has based his estimation on value determined by the DVO. The assessee has adopted the FMV as on 01.04.1981 at Rs.38,57,900/- @Rs.100/-per sq. meter as against Rs.7,32,050/- estimated by the DVO @Rs.19/- per sq. meter for entire land. This is the precise issue of dispute between the assessee and the Department, as noted by ld. CIT(A).

7. Regarding the validity of reference to the DVO u/s.55A of the Act, first of all, it is to be noted that amendment in section 55A of the Act is effective from 01.07.2012, that is, applicable for assessment year 2013-14 and assessee's case under consideration is for assessment year 2012-13, therefore, the amended provisions are not applicable to the assessee under consideration. We note that at the relevant time, i.e. A.Y. 2012-13, the Assessing Officer can make a reference to the DVO u/s.55A of the

Act only if the value so adopted by the assessee u/s.48 is not supported by the Valuation Report of Govt. approved valuer or if the AO is of the opinion that the value of capital asset claimed by the assessee is **"less than its fair market value"** and not when **"it is more than its fair market value"**. We note that none of the condition got fulfilled, hence Ld. AO is not legally competent to make reference to the DVO. As explained above the amended provision of Sec. 55A is not applicable to all those documents which got registered before 01.07.2012, therefore, we note that the AO has (with its fair market value) misinterpreted the provision and erroneously applied it retrospectively. We note that with effect from July 1, 2012, the expression now used in clause (a) of Section 55A is 'at variance' the situation may, therefore, be different after July 1, 2012 which is applicable for assessment year 2013-14 whereas the assessee's case under consideration relates to assessment year 2012-13 hence amended provisions are not applicable to the assessee. Taking into account, the facts narrated above we note that the issue under consideration is fully covered in favour of the assessee by the judgement of the Divisional Bench of ITAT, Surat in the case of Shri Mahdevbhai Mohanbhai Naik in ITA No.820/AHD/2016 for AY.2010-11 dated 11.07.2018 wherein it was held as follows:-

"9. Thus reference to DVO can be made in two situations; first, the value is adopted based on report of resisted valuer and second, in any other case. In assessee's case, fair market value adopted as on 01.04.1981 is based on valuation report of registered Valuer. Therefore, Assessing Officer should. have applied the provisions of 55A(a) and according to said provision, fair market value claimed by assessee can be rejected only if fair market value is less than fair market value as per Assessing Officer. As fair market value claimed by assessee as on 1st April, 1981 is higher than that estimated by Assessing Officer provisions of 55A should not be invoked. The provisions of Section 55A(b)(ii) as resorted by Assessing Officer for referring the matter to DVO can be invoiced only in case the valuation report is not submitted by assessee. Thus, reference made by Assessing Officer u/s.55A(b)(ii) was not correct. We find that Hon'ble Bombay High Court in case of CIT vs. Daulal Mohta (HUF) [2014] 360ITR 680 (Bom.) the Hon'ble Bombay High Court wherein respondent had adopted fair market value of property as on 01.04.1981 at Rs.2,13,31,000/- based on the valuation report of Government approved Valuer and Assessing Officer determined the fair market value as on 1st April 1981 at Rs.1,35,40,000/- based on Valuation report of DVO. Hon'ble Bombay High Court upheld the order of Tribunal by observing as under:

"3. We have perused the judgment of the Tribunal. It is explicitly clear that the questions sought to be raised are with regard to the quantum of valuation which is only a finding of fact and there is absolutely no question of law involved in the above appeal.

4. The Tribunal in its order dated 23rd July, 2008 has categorically observed thus:

"5. The first issue that arises for our consideration is whether the reference made by the Assessing Officer to the DVO u/s 55A is bad- in- law under the facts and circumstances of the case. This issue, in our considered opinion, is covered in favour of assessee and against the Revenue by the judgment, in the case, of Rubab M. Kazerani reported in 91 ITD 429 (Mum(TM)). Further the assessee also covered by the Third Member decision of the Tribunal, the case of Krishnabhai Tingore Vs. ITO reported in 101 ITD 317 (Pune)(TM) wherein it has been held. that reference to DVO can only be made in cases where the value of capital asset shown by the assessee is less than its fair market value of land as on 1st April, 1981 shown by the assessee on the basis of

approved Valuer's report being more than its fair market value, reference under s.55A was not valid. Respectfully following the propositions laid down these two cases by the coordinate benches we uphold. the contention of the assessee and hold. that the reference made by the Assessing Officer to the DVO u/s 55A in the peculiar facts and circumstances of the case in bad in law. Thus, on the sole grounds of appeal of the assessee has to be allowed.

10. Further, where the fair market value of property is shown more than the Fair Market Value, the AO¹ cannot refer the same to valuation relating to assessment year failing before the date of 01.07.2012. Since the assessment made is for the assessment year 2010-11, the AO cannot make reference to DVO for the valuation of property, where value of property is not less than the value of "fair market value. This view is supported with decision of Hon'ble Bombay High Court in the case of CIT vs. Puja Prints [2014] 360 ITR 697 (Bom.) wherein it was held. that Assessing Officer referred the issue of valuation to the Departmental Valuation Officer only as on 1981 as made by the assessee was higher than the fair market value. Therefore, invocation of section 55A (a) was not justified.

11. We find that the Hon'ble Jurisdictional High Court of Gujarat in the case of CIT v. Gauragiben S Shodhan [2014] 108 DTR 442 (Gujarat) wherein it was observed "Coming to the question of reference to DVO for ascertaining the fair market value as on 1st April, 1981 also, such reference was not competent. Prior to the amendment in section 55A with effect from 1st July, 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 AO was of the opinion that the value so claimed was less than its fair market value as on 1st April, 1981. It would. not be the case of the AO that the value of the asset shown as on 1st April, 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 1st April, 1981. Therefore, respectfully following the same the reference made by the AO to DVO is not justified hence, findings recorded by the CIT(A) are not proper. Similarly, the Pune Tribunal in the case of ACIT V. Bhima Dada Kharate I.T.A.No. 1582/PUN/2015 dated 31.10.2017, observed in para 10 as follows: "10. Now, coming to the facts of the present case, the year under reference is assessment year 2009-10 and since the amendment was made effective from 01.07.2012 and the Hon'ble High Court has held. that law which is to be applied in such cases is as existing during assessment year 2009-10, then the pre- amended provisions of section 55A(a) of the Act are to be applied. In such scenario, there is no merit in the order of Assessing Officer in adopting the cost of acquisition as on 01.04.1981 at the value less than the value shown by the assessee which in- turn, is based on, the report of the approved Valuer.", Therefore, The AO was not justified in referring to DVO for valuation as on 01.04.1981. Similarly, the Mumbai Tribunal in the case of Pradeep G. Vora 58 taxmann.com 110 (Mum-Trib) / [2015] 154 ITD 118 (Mum) has observed in para 4.2 as "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 its 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 July 1, 2012. 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 dearlly reference could be made to Departmental DVO only if the value declared by the assessee is in the opinion of AO less than its fair market value.

12. Thus, the contention of the Learned Departmental Representative that reference was made after 01.07.2012 is not tenable in law as the amendment made in section is substantive in nature which is relevant to assessment year commencing after the date of amendment i.e. F.Y. 2012-13 relevant to A.Y. 2013-14, hence, it is not applicable for the assessment year 2010-11, as the assessment involved is prior to period of 01.07.2012, In view of these facts and circumstances, we are of the considered opinion that the law has been settled by the decision of Hon'ble Bombay High Court, Hon'ble Gujarat High Court, Mumbai Tribunal and Pune Tribunal. Therefore, the AO was not justified in referring to DVO or adopting valuation based on valuation report. The amendment in section 55A was qua prior period to 01.07.2012 and not qua proceeding prior to 01.07.2012. Hence, respectfully the following the ratio laid down in above judgments of Hon'ble High. Courts and Tribunal as referred above, hence, Ground No.1(1) to (5) of the appeal are allowed.”

8. As the issue is squarely covered in favour of assessee by the decision of the Coordinate Bench in the case of Jagrutiben V. Patel (supra), and there is no change in facts and law and the Revenue is unable to produce any material to controvert the aforesaid findings of the Division Bench (supra). Therefore respectfully following the above binding precedent, we allow appeal of assessee.

9. Since we have allowed the assessee's appeal in ITA No.1686/AHD/2017 for AY.2012-13 and we note that identical and similar issues are involved in other appeals of the assessee viz ITA No.1687 to 1688/AHD/2017 for AY.2012-13, ITA No.1293 to 1294/AHD/2017 for AY.2012-13. Accordingly, our observations made in ITA No.1686/Ahd/2017 for A.Y. 2012-13 shall apply *mutatis mutandis* to the aforesaid appeals.

10. In the result, appeals filed by the assessee (in ITA No.1686/AHD/2017, 1687/AHD/2017, 1688/AHD/2017, 1293/AHD/2017 & 1294/AHD/2017, for AY.2012-13) are allowed.

Order is pronounced on 14/06/2021 by placing result on Notice Board.

Sd/-
(PAWAN SINGH)
JUDICIAL MEMBER

Sd/-
(Dr. A.L. SAINI)
ACCOUNTANT MEMBER

lwjr /Surat

दिनांक/ Date: 14/06/2021

SAMANTA

Copy of the Order forwarded to

1. The Assessee
2. The Respondent
3. The CIT(A)
4. CIT
5. DR/AR, ITAT, Surat
6. Guard File

By Order

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Assistant Registrar/Sr. PS/PS
ITAT, Surat