

IN THE INCOME TAX APPELLATE TRIBUNAL 'A' BENCH, PUNE

SHRI S.S. GODARA, JM AND DR. DIPAK P. RIPOTE, AM

ITA No. 2315 and 2316/PUN/2016 :

A.Y. 2007-08 & 2008-09

Baban Genuji Kumbharkar
Rukmini Niwas, Sinhagad Road
Vadgaon Khurd,
Pune-411 041

PAN; AULPK 3261 G

Appellant

Vs.

Dy. CIT Circle 2(3) Pune

Respondent

Appellant by : Shri Ajay Singh Adv.

And C.A. Deepak S. Sasar

Respondent by : Shri S.P. Walimbe

Date of Hearing : 10-05-2022

Date of Pronouncement : 08-06-2022

ORDER

PER S.S. GODARA, JM :

These assessee's twin appeals for AYs 2007-08 & 2008-09 arise against the CIT(A) 12, Pune's common order dated 28-07-2016 passed in case Nos. PN/CIT (A)-12/DCIT Cent. Cir. 2(3)/241 & 242/2013-14 involving proceedings under Section 143(3) r.w.s. 148 of the Income Tax Act, 1961, (in short "the Act"), respectively.

Heard both the parties. Case files perused.

2. The assessee's identical and foremost substantive grounds in both these appeals read as under:

I. Disallowance of valuation claimed by the appellant as on 1-4-1981:

1) *The Id. CIT(A) erred in rejecting the claim of valuation made by the appellant as on 1-4-1981 of the property transferred by the appellant.*

II Disallowance of investment u/s 54F of the Act

2. *The Id. CIT(A) erred in disallowing the investment made by the assessee u/s 54F for construction of residential house.*

III Disallowance of long term capital gain u/s 45 of the I.T. Act, 1961

3) *The Id. CIT(A) erred in by not considering the cost of acquisition being not conceivable hence no capital gain is chargeable to the appellant.*

IV Procedural grounds

- 4) *The I. CIT(A) erred in not considering the ground regarding non-confirmation of record and material which was used against the assessee in the reopening proceedings.*
- 5) *The Id. CIT(A) erred in not considering the ground regarding non consideration of material, record and submission made during the course of assessment proceedings.*
- 6) *The appellant craves leave to add, amend, alter, or delete any or all the above grounds of appeal.*

3. Learned counsel stated at the Bar that once the assessee succeeds in his first and foremost substantive ground regarding the cost of acquisition claimed as "NIL" his substantive grounds No. 2 to 7 would be rendered academic. We proceed in this factual background and find that the CIT(A) has rejected the claim of valuation made by the assessee as on 1-4-1981 of the property transferred by him, by observing as under:

"10.3 I have considered the submissions filed by the appellant. In the return filed by the appellant for the first time in response to notice u/s 148,m it was accepted that land was acquired by the original owner prior to 1-4-1981 and therefore, exercising the option, the FMV of land as on 01/04/1981 was considered as cost of acquisition for purpose of computing long term capital gain. No such plea that land came into the possession of the appellant in the circumstances that cost of land was not conceivable was taken before the AO. During the course of appellate proceedings, it was claimed that appellant was in possession of land for a long period and therefore, owner of the land had requested the revenue authorities to delete their name and put the name of the appellant as owner in the land records. One report of advocate Mr. P. M. Khire dated 27.05.2009 regarding the investigation of the title of the property alongwith certified copy of mutation entry dated 12.09.1973 was furnished. The appellant had also relied on the decision of the courts where in case of adverse possession for a long period, cost to the encroacher was not found determinable, hence, on sale of property by such owners (encroachers) was not held liable to the capital gain tax. From the investigation of the title report, it is noted that original owner of the land was his Highness Shri Govind Balwant Patwardhan as per Mutation Entry dated 19.04.1935. On 25.04.1957, name of Shri Bhiwa Deoji Kumbharkar as tenant of Shri G. B. Patwardhan was mutated. In 1960, Shri Bhiwa Deoji Kumbharkar expired leaving the appellant as only heir and thereafter, name of the appellant was mutated as tenant on 13.03.1962. Later on 12.09.1973, heirs of Late Shri G. B. Patwardhan namely Shri Krishnaji Govind Patwardhan alongwith his brothers filed the application that the appellant was tilling the land for long period hence their name should be deleted from revenue record and name of the appellant be mutated from tenant to owner of the land. From the mutation entry dated 12.09.1973, it was seen that for the reason that appellant was tilling the land for a long period, the legal heirs of Late Shri G.B.Patwardhan through his legal representative Shri M.A. Patwardhan, Advocate requested the authorities to mutate name of the appellant from tenant to owner and name of Shri G. B. Patwardhan be deleted. In view of these facts, appellant was requested to bring copy of application filed by the legal representative of Shri Patwardhan before the revenue authorities to ascertain the nature of mutation entry. However, it was stated that revenue authorities are not able to lay hand on the same. Now the basic issue is whether the land was grabbed by the appellant or his grandfather Late Bhimji Deoji Kumbharkar from Late G. B. Patwardhan and the appellant continued his adverse possession on the land or due to long period of services in preservation and tilling of land by

the appellant and his-grandfather, the Patwardhan family gifted the land to the appellant. No material whatsoever has been brought on record to show that appellant was in forcible possession of the land and there was any litigation Civil or Criminal between the heirs of G. B. Patwardhan and the appellant. It was a simple case where his highness Sardar G. B. Patwardhan out of his sweet will made Late grandfather of the appellant as tenant of the land in 1957 and thereafter in same capacity name of the appellant was mutated as tenant in 1962. It was the benevolence of the family of his highness that they had requested the revenue authorities to delete their name as owner and mutate the name of appellant from tenant to owner of the land in view of long period of services by the appellant. There is no evidence to hold that it was forcible and adverse possession in the hands of the appellant. Therefore, it is held that land was gifted to the appellant on 12.09.1973 and accordingly, cost of acquisition in the hands of appellant can be taken at the option of the appellant either the cost in hands of late G. B. Patwardhan or the FMV as on 01.04.1981. The appellant had exercised the option of considering FMV as on 01.04.1981 being the cost of acquisition. Therefore, acceptance by the appellant in his return of income and the acceptance by the AO that long term capital gain are chargeable by considering FMV of 01.04.1981 as cost of acquisition to the appellant is valid and as per law. No interference is called for on this issue and the ground raised by the appellant is hereby dismissed.”

5. The sole dispute between the parties is admittedly regarding the cost of acquisition of the land/capital asset. The assessee has claimed the same at Rs. “nil” all along which stands rejected in lower proceedings. We find in this factual backdrop that section 49(1)(i) to (iv) prescribing cost; with reference to certain modes of acquisition wherein if it is found that the capital asset in issue has been acquired under the specified mode; gift herein is to be taken for which the previous owner had acquired the same for valuation consideration followed by Explanation thereto inserted by Finance Act, 1965 w.e.f. 1-4-1965. Mr. Walimbe fails to rebut the clinching fact that the learned lower authorities could not find the actual cost of acquisition paid by way of valuable consideration. We therefore, find merit in the assessee's case in the light of CIT Vs. Sambhaji Nagar Co-op. Hsg. Society Ltd. (2015) 370 ITR 325 as well as CIT Vs Markapakula Agamma (1987) 165 ITR 386 (AP) and direct the Assessing Officer to frame his consequential computation after adopting the cost of the asset's acquisition in issue as “NIL”. Once the assessee succeeds in his first and foremost substantive ground, all other grounds have become infructuous in light of his statement in para 3 hereinabove. Ordered accordingly.

6. The assessee's instant twin appeals are allowed in above terms. A copy of the common order be placed on the respective case files.

Order pronounced in the open court on 08th June, 2022.

Sd/-

sd/-

(D.R. DIPAK P. RIPOTE)
ACCOUNTANT MEMBER

(SATBEER SINGH GODARA)
JUDICIAL MEMBER

Pune; Dated, this 08th day of June 2022
Ankam

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT (A)-12, Pune.
4. The Pr. CIT – III Pune
5. The D.R. ITAT A' Bench, Pune.
5. Guard File

BY ORDER,

Sr. Private Secretary
ITAT, Pune.

		Date	
1	Draft dictated on	09-05-2022	Sr.PS
2	Draft placed before author	30-05-2022	Sr.PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS		Sr.PS
6	Kept for pronouncement on	08-06-2022	Sr.PS
7	Date of uploading of order	08-06-2022	Sr.PS
8	File sent to Bench Clerk	08-06-2022	Sr.PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		