IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

INCOME TAX APPEAL NO.6057 OF 2010

The Commissioner of Income Tax-21. ...Appellant.
Vs.
Jai Hind CHS Ltd. ...Respondent.

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Ms.Suchitra Kamble for the Appellant.
Mr.F.V.Irani with Mr.P.C.Tripathi i/b. Mr.Atul K.Jasani for the Respondent.

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CORAM : DR.D.Y.CHANDRACHUD AND
M.S.SANKLECHA, JJ.

March 21, 2012.

P.C. :

This appeal arises from the decision of the Income Tax Appellate Tribunal, dated 6 August 2009. The appeal relates to Assessment Year 2005-06. The Revenue has raised the following question of law:

> "Whether on the facts and circumstances of the case and in law, the ITAT is right in upholding the CIT(A) order that the case of the assessee is covered by principles of mutuality and hence, TDR premium received by the Society is not taxable, without appreciating that the TDR premium payment is made by only those members availing the additional FSI?"

2. In the present case, the facts are not in dispute. The assessee is a Co-operative Housing Society formed of plot owners, who had obtained a lease of land from the Maharashtra Housing Board. The Society in turn entered into sub lease agreements with its members. The Society looks after the maintenance and infrastructure. The Society passed a resolution by which it resolved that if any member desires to avail of the benefit of Transferable Development Rights (TDR) for carrying out construction or additional construction on his/her plot, the member should apply for a No Objection Certificate which could be granted on the payment of a premium calculated at the rate of Rs.250/- per sq.ft. This has been noted in the submissions which were recorded in the order of the Assessing Officer. The Society received a premium of Rs.18.75 lakhs from four members of the Society in the previous year relevant to Assessment Year 2005-06. The Assessing Officer was of the view that TDR premium is charged by the Society from its members to permit them to commercially exploit the potential for the development of the plot; Whereas in reality it was a profit sharing arrangement of the commercial nature. In appeal, the Commissioner of Income Tax (Appeals) deleted the addition

made by the Assessing Officer on the ground that the issue was covered by the judgment of the Tribunal in the case of the assessee for Assessment Years 1999-00 and 2000-01. Moreover, it was noted that the Commissioner of Income Tax (A) had granted relief for Assessment Year 2003-04.

3. The Tribunal relied upon its decision in the case of the assessee for Assessment Year 2002-03 in which it was held that the principle of mutuality would apply. The Tribunal held there that the Society is constituted of individual members and in the event that any member is desirous of developing his plot by utilizing extra F.S.I., TDR premium was payable to the Society. This option of availing additional FSI was available to each member of the Society and the payment is required to be made by only those members who are desirous of availing of additional FSI. In the order for Assessment Year 2002-03, the Tribunal also relied upon its decision in the case of the Society for Assessment Years 1999-00 to 2001-02.

4. The admitted facts would indicate that the TDR premium

is liable to be paid by a member of the Society who desires to utilize additional FSI in the form of Transferable Development Rights. The principle of mutuality would clearly apply to a situation as to the present. In the context of the payment of non-occupancy charges by a member of a Co-operative Housing Society to the Society, a Division Bench of this Court held in **Mittal Court Premises Co-operative Society Ltd. vs. Income Tax Officer**,[1] that the principle of mutuality would apply. The Division Bench noted that the object of the Society is to provide service, amenities and facilities to its members. Non-occupancy charges are payable by a member on account of the fact that the member is not in occupation of the premises. In our view, the same principle would apply to the present case. The TDR premium is a payment made by a member to the Society of which he is a member, as a consideration for being permitted to make an additional utilization of FSI on the plot allotted by the Co-operative Housing Society. The Society which looks after the infrastructure, requires the payment of the premium in order to defray the additional burden that may be cast as a result of the utilization of the FSI. The point

1 (2010) 320 ITR 414 (Bom)

however, is that there is a complete mutuality between the Co-operative Housing Society and its members.

5. Counsel appearing on behalf of the Revenue has drawn the attention of the Court to the fact that for Assessment Year 1999-2000, a Division Bench of this Court had by its order dated 14 November 2011,[2] remanded the proceedings back to the Tribunal. We have perused the judgment of the Division Bench dated 14 November 2011. From the judgment, it would appear that in the original return of income, the Society had offered TDR premium to tax and after deducting the expenditure incurred by it, computed the income chargeable to tax. The return was processed under Section 143(1). Thereafter, the assessment was reopened by a notice under Section 148. During the course of reassessment proceedings, the assessee contended that the TDR amount was not taxable on the principles of mutuality. The Assessing Officer rejected the contention of the assessee and held that the expenses claimed were not related to the transfer fees and were hence not allowable. The Assessing Officer computed the income chargeable

2 The Commissioner of Income Tax-21, Mumbai vs. The Jaihind Co-operative Housing Society Ltd. (Income Tax Appeal No.2275 of 2009)

to tax. The CIT(A) affirmed the reassessment order and held that once the assessee voluntarily offered TDR premium to tax, it was not open to the assessee to contend in the reassessment that it was not taxable by applying the principles of mutuality. On appeal, the Tribunal held that the TDR premium was not taxable on account of the principles of mutuality. The Tribunal, however, upheld the order of CIT(A) in disallowing the expenditure. In appeal before this Court, the argument of the Revenue was that the income assessed on reassessment cannot be less than the income originally assessed in view of the judgment of the Supreme Court in **CIT vs. Sun Engineering Works P.Ltd**.[3] In that context, the Division Bench held as follows :

> "In the present case, it is not in dispute that the income assessed on reassessment after giving effect to the order of ITAT becomes less than the income originally assessed. As held by the Apex Court in the case of Sun Engineering Works P.Ltd. (supra), the object and purpose of the proceedings under Section 147 of the Act is for the benefit of the revenue and not for the benefit of the assessee and, therefore, in the reassessment proceedings, the assessee cannot be permitted to convert the reassessment proceedings as his appeal or revision in disguise. Since the decision of the ITAT is contrary to the aforesaid decision of the Apex Court, the impugned decision of the ITAT is quashed and set aside and the matter is restored to the file of the ITAT for fresh decision in accordance with law."

3 (1992) 198 ITR 297 (SC)

In paragraph 10 of the judgment, the Division Bench made it clear that since the TDR premium received by the assessee had been voluntarily offered to tax, the question of considering the taxability of that amount by applying the principles of mutuality in the reassessment proceedings did not arise at all. It was only the expenditure claimed to have been incurred by the assessee, which was disallowed in the reassessment order which was required to be considered by the Income Tax Appellate Tribunal. The order of remand passed by the Division Bench would, therefore, make it clear that the issue of mutuality has not been decided and a remand was necessitated for other reasons. The order for Assessment Year 2000-01 which was passed on the same day in Income Tax Appeal 2275 of 2009, followed the earlier decision.

6. For the reasons that we have indicated earlier, we are of the view that in the present case, the consideration has flowed from the members of the Society to the Society which is a Co-operative Housing Society as consideration for allowing the use of extra FSI. The principles of mutuality would apply. Hence no

substantial question of law arises. The appeal is accordingly dismissed.

(Dr.D.Y.Chandrachud, J.)

(M.S.Sanklecha, J.)