

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "C" : MUMBAI

**BEFORE SHRI D.MANMOHAN, HON'BLE VICE PRESIDENT  
AND  
SHRI R.K.PANDA, ACCOUNTANT MEMBER**

ITA. No. 2550/Mum/2008  
Assessment year 1999-2000

Om Shanti Cooperative society  
Ltd. Plot No. J/5-2, 16<sup>th</sup> Road,  
Santa Cruz (W)  
Mumbai - 054  
**PAN AAAAO-0088-K**  
(Appellant)

vs. The ITO, Ward 19 (2) (4)  
Piramal Chambers, Lalbaug  
Mumbai - 400 012.

(Respondent)

For Appellant : Shri Subhash S. Shetty  
For Respondent : Shri Verendra Ojha

**ORDER**

**PER SHRI D. MANMOHAN, V.P.**

1. This appeal, filed at the instance of the assessee-society, is directed against the Order dated 30<sup>th</sup> January, 2008 passed by the CIT (A)-XIX, Mumbai and it pertains to the assessment year 1999-2000. Though several grounds were raised, in the grounds of appeal annexed to Form 36, they all pertain to one issue i.e., taxability of the income earned by the society as well as its members, as long term capital gains.

2. The facts of the case revolve in a narrow compass. The assessee-society - a registered Cooperative Housing Society - is not engaged in any business activity. According to the assessee, the members owned a piece of land out of which 12 flats were constructed as per the maximum FSI available to them and formed themselves into a society. Since the assessee had no right to construct further structure on it, there was no question of exploiting any of its available right so as to earn income out of it. However, on 15-12-1998 M/s. Prime Property Developers Pvt. Ltd. approached the society to seek

permission to construct two floors and 8 flats on the existing building by exploiting the TDR/FSI available with it and in return the assessee-society was offered a lumpsum amount of Rs. 32lakhs and each member is offered a sum of Rs. 4 lakhs since they have to bear with the disturbance caused due to further construction and also certain modifications to the existing building which are necessary to enable construction of two additional floors. Thereafter another agreement was entered into between the developer and the assessee-society, along with its Members, on 3-7-2000 whereby, the developer agreed to restrict the payment to Rs. 26 lakhs to the society but, so far as the Members are concerned, the developer agreed to pay an additional sum of Rs.1.5 lakhs per head. Thus the society was to receive Rs. 26 lakhs and the Members became entitled to Rs. 66 lakhs (@ Rs.5.50 lakhs per head) and the total consideration for development of the said property works out to Rs. 92 lakhs.

3. According to the Assessing Officer, the assessee having agreed to receive consideration of Rs. 26 lakhs, the income earned thereon ought to have been declared as capital gains in the previous year relevant to the assessment year 1999-2000. Since the assessee declared NIL income on 2-8-1999, the Assessing Officer issued a notice under section 148 of the I.T. Act, 1961. In response to the notice, the assessee submitted that it merely permitted M/s. Prime Property Developers Pvt. Ltd. to exploit the TDR/FSI, purchased by M/s. Prime Property Developers Pvt. Ltd. from elsewhere at their cost, over the existing structure belonging to the society and hence it cannot be said to be a transfer of any right in respect of the land or part thereof. Thus the amount received by the assessee-society cannot be brought to tax.

4. The Assessing Officer observed that the assessee having entered into an agreement with M/s. Prime Property Developers Pvt. Ltd. for construction of additional floors on the existing structure there was performance on part of the assessee also which can be

equated to transfer by way of relinquishment of right i.e., "to load TDR and construct additional floors". On transfer of such right the amount received by the assessee has to be offered to tax under the head "Long term capital gains". Since there is no cost of acquisition, in the absence of details, the entire consideration received was brought to tax as long term capital gains.

5. On an appeal filed by the assessee, the learned CIT (A) affirmed the action of the Assessing Officer by observing that the assessee-society entered into a development agreement with M/s. Prime Property Developers Pvt. Ltd. for construction of additional floors for a consideration and hence there was transfer of a right available with the assessee. It may be noticed that the Assessing Officer merely brought to tax a sum of Rs. 26 lakhs receivable by the society, as per the revised agreement, whereas, the learned CIT (A) was of the view that the amount receivable by the Members of the society is also assessable to tax in the hands of the society in the event of transfer of the right available with the society with regard to permitting the other party i.e., M/s. Prime Property Developers Pvt. Ltd. to utilize the TDR for construction of additional two floors. He thus enhanced the assessment and directed the Assessing Officer to bring to tax total consideration of Rs. 92 lakhs.

6. Aggrieved by the Order of the Assessing Officer as well as the enhancement made by the learned CIT (A), the assessee-society is in appeal before us. Learned Counsel submitted that assessee-society was originally permitted to construct only 12 flats and thus there was no further right available with the society or its Members to construct additional floors nor was any such right provided to the assessee on account of additional space available with it. M/s. Prime Property Developers Pvt. Ltd. is an independent entity which acquired TDR / FSI and thus became eligible to construct two floors on any existing building and in turn, requested the assessee-society and its members to permit him to construct additional two floors and for the

inconvenience caused to the parties, it had agreed to pay Rs. 32 lakhs to the society and Rs. 48 lakhs to the Members by virtue of first agreement. But, thereafter, the agreement was revised whereby, payment to the Members was enhanced @ Rs.5.50 lakhs per head totaling to Rs.66 lakhs and Rs. 26 lakhs was agreed to be paid to the society. The entire sum of Rs. 92 lakhs was paid to the society and its members in order to seek their permission to construct additional floors, without transfer of any of the rights available with the society or its Members, and even if the so-called right available with the society or its Members is said to be transferred, it has no cost of acquisition and hence, in the light of decision of the Hon'ble Supreme Court in the case of CIT vs. B.C.Srinivasa Setty (1981) 128 ITR 294 (SC) it is not a case where capital gains is chargeable to tax under section 45 of the Act. Learned counsel relied upon following case wherein the JTAT, Mumbai Bench, in the case of individual Members as well as in the case of a Society, though under slightly different circumstances, observed that they are not assessable to capital gains tax with regard to amount received from a developer for permitting developer to construct additional floors.

- i) Deepak S. Shah vs. ITO (2009) 29 SOT 26 (Mum.)
- ii) M/s. New Shailaja CHS Ltd. vs. ITO ITA.512/M/2007 dated 2<sup>nd</sup> December, 2008.
- iii) Maheshwar Prakash-2 Co-op. Hsg. Society Ltd. vs. ITO (2009) 118 ITD 223 (Mum.)

7. The learned counsel appearing on behalf of the assessee also submitted that in one of the cases cited above, the assessee-society became entitled to construct additional floors by virtue of enactment of the Development Control Regulation Act, 1991 and such entitlement was sold to a concern for a fixed consideration and the issue arose as to whether the amount received is assessable to tax either as adventure in the nature of trade or as capital gain. The Bench agreed with the contention of the assessee that it was not

assessable to tax as capital gains since there was no cost of acquisition in obtaining the development rights certificate. Similarly in the case of Deepak Shah, a society entered into an agreement with the developer whereby it granted permission to the developer for construction of additional floors since the developer was in possession of transferable development rights (TDR). The amount received by the individual member was sought to be taxed by the Assessing Officer whereas the assessee (individual member) contended that he was not holding a capital asset so as to consider the receipt as relating to transfer of such asset. On an appeal filed by the assessee, the Appellate Tribunal accepted the contention of the assessee. Placing strong reliance upon the aforesaid decisions learned counsel submitted that the learned CIT (A) was not justified in bringing to tax either the amount payable to the society or the amount payable by the developer to the individual Members, since there is no cost of acquisition in the instant case.

8. On the other hand learned D.R. strongly relied upon the Orders of the tax authorities. He however, could not distinguish the case law cited before us.

9. We have heard the rival submissions and carefully perused the record. It is not in dispute that the assessee-society and its Members were not having any right to construct additional floors on the existing building since they have already exhausted the right available with it while constructing the existing 12 flats. It is not the case of the Revenue that the TDR was obtained by the assessee and sold to the third party i.e., developer. In the light of these facts, it is clear that the assessee has not transferred any existing right to the developer nor any cost was incurred/suffered prior to permitting the developer to construct additional two floors. In the absence of any cost at the time of granting permission to the developer to construct additional floors, the computation provisions of section 45 fail in the light of the Apex Court decision in the case of B.C. Srinivasa Shetty

(supra) and also in the light of decisions of the ITAT cited (supra). Therefore, we are of the view that the amount received by the assessee and its Members is not assessable to tax under the head "Long term capital gains". We direct the Assessing Officer accordingly.

10. In the result, appeal filed by the assessee is allowed.

Order pronounced in the open Court, on this the 28<sup>th</sup> day of August, 2009.

Sd/-

**(R.K. PANDA)**  
**ACCOUNTANT MEMBER**

Sd/-

**(D. MANMOHAN)**  
**VICE PRESIDENT**

MUMBAI, dated 28<sup>th</sup> August, 2009

VBP/-

Copy to:

- (1) The Appellant,
- (2) The Respondent,
- (3) The CIT(A)-concerned
- (4) The CIT, concerned
- (3) The DR, 'C' Bench, ITAT, Mumbai.
- (4) Guard File

BY ORDER

**ASSISTANT REGISTRAR**  
**ITAT, Mumbai Benches, Mumbai**