

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI**

BEFORE SHRI RAJENDRA (AM) AND SHRI RAM LAL NEGI (JM)

**ITA No. 66/MUM/2014
Assessment Year: 1995-96
&
ITA No. 67/MUM/2014
Assessment Year: 2008-09**

Hatkesh Co-op. Hsg. Society Ltd. Jaihind Recreation Club, Plot No. 51, N.S.Road.11, JVPD Scheme, Vile Parle (W), Mumbai- 400049. PAN- AAALH0017Q	Vs.	The Asstt. CIT 21(1). Mumbai
(Appellant)		(Respondent)

Appellant by : Shri. Rahul Hakani.
Respondent by : Shri. Vachaspati Tripathi

Date of Hearing: 27/01/2016
Date of Pronouncement: 09/03/2016

ORDER

PER RAM LAL NEGI, JM

These appeals have been preferred by the appellant/assessee against order dt. 27/09/2013 and order dt. 24/09/2013 passed by Ld. CIT (Appeals)-32 for the A.Y. 1995-96 and 2008-09 respectively.

2. Since both these appeals pertain to the same assessee, the same were heard together and are being disposed of by this common order for the sake of convenience.

3. The appellant/assessee has also moved an application along with an affidavit for condonation of delay of 23 days in filing of the appeal pertaining to the A.Y. 1995-96 and 34 days in filing of the appeal pertaining to the A.Y. 2008-09.

ITA 66/M/14 for A.Y. 1995-96

3.1 The appellant has challenged the impugned order on the following effective ground:-

“The Learned CIT(A) erred in confirming order of Assessing Officer considering consideration received of Rs. 23,69,000 being the share of sale of common Plot of 14 society as Business Income and not treating the same as being sale of Fixed Asset and the same is to be considered for Capital Gain and accordingly the gain there of is to be taxed as Long term Capital Gain”.

3.2. Brief facts of the case that the assessee, being co-operative housing society, filed its return of income for A.Y. 1995-96 on 27/10/1996 declaring the total of income Rs. 16,19,160/- from Long Term Capital Gains. The case was selected for scrutiny and after assessment proceeding order u/s 143(3) of the Income tax Act (in short the Act.) was passed on 05/01/1998 determining the total income at Rs. 1,50,22,950/-.

3.3. Aggrieved by the assessment order, the assessee preferred an appeal before the CIT(A). In appeal, the CIT(A) enhanced income of the assessee to Rs. 1,60,07,900/- as against the income determined by the AO at Rs. 1,50,22,950/-. The assessee challenged the impugned order passed by the CIT(A) before the ITAT. The ITAT following the decision of the co-ordinate Bench passed in the case of *Vithalnagar co-operative Housing Society Ltd. v. DCIT*, ITA No 4241/Mum/2000 for the A.Y. 1995-96 and *Vallabh Nagar cooperative Housing Society Ltd. v. DCIT*, ITA No 2728/Mum/1999 for the A.Y. 1995-96,

restored the ground pertaining to sale consideration of Rs. 23,69,000/- offered by the assessee as Long term Capital Gain, to the AO with the direction to decide the issue afresh keeping in view the final decision taken in other 11 cooperative societies after giving adequate opportunity of being heard to the assessee.

3.4 In terms of the directions of the ITAT the matter was processed and after hearing the assessee, the A.O. again treated the sale consideration of Rs. 23,69,000/- aforesaid, received by the assessee, as income under the head business on the basis of information received from M/s Jai Hind Cooperative Housing Society.

3.5 The assessee challenged the said order before the Ld. CIT(A). The Ld. CIT(A) after hearing the assessee *inter alia* dismissed the ground regarding determination of the nature of income of Rs. 23,69,000/-.

4. Aggrieved by the impugned order passed by the Ld. CIT(A), the assessee is in appeal before the Tribunal. The only grievance of the assessee is that the Ld. CIT (A) has wrongly confirmed the questioned addition of Rs. 23,69,000/- made by the AO treating the same as business income without complying with the directions of the Tribunal.

5. Since the assessee had filed an application for condonation of delay of 23 days in filing the present appeal on the ground that Mr. Gajanan Rahate an employee of the society forwarded the CIT(A) order after expiry of limitation period under the impression that the limitation period for filing appeal before the ITAT is 90 days, the Ld. counsel for the assessee submitted that the delay was cause inadvertently, therefore, the application may be allowed in the interest of justice. The Ld. counsel placed reliance on the ratio laid down by the

Hon'ble Supreme Court in *Collector Land Acquisition V. Mst. Katiji & others (1987) 167 ITR 471(SC)*. Having heard the rival submissions, we allowed the application of the assessee and condoned the delay in the interest of justice and allowed the Ld. Counsel to argue the case on merits.

6. Before us, the Ld. Counsel for the assessee submitted that the Ld. CIT(A) has wrongly confirmed the findings of the Assessing Officer passed without complying with the directions of the ITAT. The ITAT had sent the matter back to the AO with the specific direction to decide the issue afresh keeping in view the final decision taken in other 11 other co-operative societies, following the decisions passed by the Tribunal in *Vithalnagar cooperative Housing Society Ltd. v. DCIT and Vallabh Nagar cooperative Housing Society Ltd.*(supra)

7. On the other hand the Ld. DR relying upon the order passed by the Assessing Officer and CIT(A) submitted that the order of the CIT(A) does not suffer from any legal infirmity. Therefore, present appeal deserves dismissal.

8. The Ld. Counsel referring the common order dt. 25/11/2011 passed by Mumbai Tribunal in *M/s. Suvarna Nagar Coop. Hsg. Society Ltd. vs. ITO- Mumbai ITA No. 7168/M/08, for A.Y. 1995-96, Nutan Laxmi Co-op Hsg. Society Ltd. vs. ITO ITA 6369/M/09 for A.Y. 1995-96, Vallabhangar Co-op. Hsg. Society Ltd. Vs. ITO, ITA 5863/M/08 for A.Y. 1995-96 and Vithalnagar Coop. Hsg. Society Ltd. vs. ITO, ITA 5864/M/08 of for A.Y. 1995-96*, pointed out that the similar common issue was in dispute in the aforesaid cases and the ITAT Mumbai restored the issue to the Assessing Officer for deciding the same fresh as per the direction given by the tribunal in the first round vide order dt. 17/11/2005.

9. In the said case the plot marked for public amenities and public utilities, owned by 14 societies, were sold in the year under consideration and their shares of sale consideration was offered by societies to tax under the head "capital gains" however, the AO held that the sale consideration received by the societies as business income. During the course of assessment proceeding in terms of the order dtd.17/11/2005 of the ITAT, the assessee could not furnish any details about the final decision rendered in the case of other co-operative housing societies which had received similar amount against the sale of plot jointly owned. Therefore, the Assessing Officer brought the amount of sale consideration of plot to tax in the hands of the assessee societies again under the head "Profit & Gains of Business profession". On appeal, the Ld. CIT(A) upheld the action of the Assessing Officer following the orders of his predecessor, passed in assessee's case in the first round of litigation.

10. The co-ordinate bench of Mumbai Tribunal after hearing the parties restored in ground no. 2 of the file of the Assessing Officer for deciding the same as per the direction given by the Tribunal in the first round vide its order dt. 17/11/2005 observing as under:-

"5. The other issue which is involved only in ITA No. 7168/M/08 as raised in ground No. 2 relates to the chargeability of the amount of Rs. 2,50,000/- received by the assessee societies from its members on account of contribution incidental to sale of plot.

6. after considering the rival submissions and perusing the relevant material on record, it is observed that this issue was also restored by the Tribunal vide its order dt. 17th Nov, 2005(supra) passed in first round to the file of the Assessing Officer for deciding the same afresh as per the same direction as given on the issue involved in ground No. 1. As already hold by us while deciding the issue raised in ground No. 1, the direction of the Tribunal has not been followed by the Assessing Officer while deciding the issue restored to his file. Accordingly, following our decision rendered while disposing of ground no.1, we

restore the issue involved in ground No.2 to the file of the Assessing Officer for deciding the same afresh as per the direction given by the Tribunal in the first round vide its order dt. 17th Nov, 2005 (supra).”

11. Respectfully following the order passed by the co-ordinate bench of Mumbai Tribunal in ITA 7168/M/08, ITA 6369/M/09, ITA 5863-64/M/08(supra), we restore the issue to the file of the Assessing Officer for deciding the same afresh as per the direction given by the tribunal vide its order dt. 17/11/2005.

12. In the result, appeal of the assessee for the A.Y. 1995-96 is allowed for statistical purpose.

ITA 67/M/14 for A.Y. 2008-09

The assessee filed its return of income for the A.Y. 2008-09. The case was selected for scrutiny and after completion of assessment proceedings, assessment order u/s 143(3) of the Act was passed. Since the Assessing Officer had made addition of Rs. 37,32,560/- to the income of the assessee, collected by the assessee society by way of TDR premium, disallowing the assessee's claim that the same is exempt on the principles of mutuality, the assessee filed an appeal before the Ld. CIT(A) *inter alia* on the ground that the Assessing Officer has erred in considering the TDR premium at Rs. 37,32,560/- as taxable and coming to the conclusion that same does not enjoy the exemption on the doctrine of principle of mutuality.

2. The Ld. CIT(A) partly allowed the appeal of the assessee. However, dismissed the aforesaid grounds and confirmed the additions made by the Assessing Officer to the tune of Rs. 37,32,560/- in respect of TDR premium. Hence, the assessee is in appeal before the tribunal against the impugned

order passed by the CIT(A). The assessee has raised the following ground of appeal against the impugned order:-

“1. The learned CIT(A) erred in confirming of assessing officer considering TDR premium of Rs. 37,32,650/- as taxable without appreciating that TDR premium is exempted as it is governed by the principles of mutuality and hence the addition of TDR premium of Rs. 37,32,650/- may be deleted.

2. Without prejudice to above, the learned Assessing officer erred in treating TDR premium as income from other sources and consequently erred in not allowing expenses claimed by the assessee. ”

3. The assessee had filed an application for condonation of delay of 34 days in filing of the present appeal on the ground that Mr. Gajanan Rahate an employee of the society forwarded the CIT(A) order after expiry of limitation period under the impression that the limitation period for filing appeal before the ITAT is 90 days, the Ld. counsel for the assessee submitted that the delay was cause inadvertently, therefore, the application may be allowed in the interest of justice. The Ld. counsel placed reliance on the ratio laid down by the Hon'ble Supreme Court in *Collector Land Acquisition V. Mst. Katiji & others (1987) 167 ITR 471(SC)*. Having heard the rival submissions, we allowed the application of the assessee and condoned the delay in the interest of justice and permitted the Ld. Counsel to argue the case on merits.

4. The Ld. Counsel for the assessee submitted that the CIT has wrongly confirmed the additions made by the Assessing Officer as the issue involved in this case has already been decided in favour of the assessee in assessee's own cases pertaining to the assessment years 2003-04, 2004-05 and 2005-06 by the ITAT Mumbai and the Hon'ble High Court of Bombay has dismissed the appeals filed by the revenue against the findings of the Tribunal. On the other

hand the Ld. DR relying on the findings of the authorities below submitted that there is no merit in the case of the assessee.

5. We have heard the rival submissions and gone through the material placed before us. The 'H' Bench of the ITAT Mumbai has already decided the identical issue in favour of the assessee in appeals ITA No 6346/M/2009, 6347/M/2009 and 6348/M/2009 filed by the revenue against the CIT(A) order for the assessment years 2003-04, 2004-05 and 2005-06 respectively by following the decision of the coordinate Bench passed in ITA No 7452/M/03 filed by the revenue against the CIT(A) order in assessee's own case for the assessment year 2002-03, holding as under:-

"9. In the present assessment year, the CIT(A) following the aforesaid order of the ITAT held that assessing officer was not justified in treating the receipt on account of TDR premium as income of the assessee and that the said receipt is not income in the hands of the assessee on the principle of mutuality.

10. We are of the view that in the light of the decision of the Tribunal referred to above there is no merit in the grievance projected by the revenue in these appeals regarding taxability of TDR premium received. We, therefore, reject the claim of the revenue in this regard."

6. Against the order aforesaid of the Tribunal passed in the assessee's case for the assessment year 2003-04, 2004-05 and 2005-06 the revenue filed three appeals before the Hon'ble High Court of judicature at Bombay. The Bombay High Court dismissed all the three appeals holding as under:-

".....,we are of the opinion that the appeals do not raise any substantial question of law. The findings rendered by the tribunals are in consonance with the functioning and administration of co-operative housing society that has been recognized by the a Division Bench of

this Court and the decision to that effect in Mittal Court Premises Co-operative Housing Society Ltd. V/s Income tax officer reported in (2010) 320 ITR 414 concludes the issue. In the light of this Division Bench Order and which has been followed in the cases of Jai Hind Co-operative Housing Society Ltd., Suprabhat Co-operative Housing Society Ltd that we are of the opinion that appeals deserve to be dismissed.”

7. In view of the fact that the issue in question has already been decided in favour of the assessee by the ITAT Mumbai and the same has been upheld by the Hon'ble High Court in Income Tax Appeal No 427 of 2012,590 of 2012 and 428 of 2012, there is no merit in the contention of the revenue. We, therefore, allow this ground of the appeal of the assessee.

So far as the second ground of appeal is concerned, since we have allowed the first ground of the appeal of the assessee, there is no need to adjudicate the alternative ground taken by the revenue as ground No 2.

8. In the result, appeal filed by the assessee for the assessment year 2008- 09 is allowed.

Order pronounced in the open court on 9th March, 2016

Sd/-

(RAJENDRA)

ACCOUNTANT MEMBER

Sd/-

(RAM LAL NEGI)

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 09/03/2016

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai

Pramila