



IN THE INCOME TAX APPELLATE TRIBUNAL

"F BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER

ITA no. 4257/Mum./2014
(Assessment Year : 1995-96)

The Vallabh Nagar Co-operative Housing
Society Ltd., 51, N.S. Road no.11
Jai Hind Club, JVPD Scheme
Vile Parle (W), Mumbai 400 056
PAN - AAAAV0288J

..... Appellant

v/s

Income Tax Officer
Ward-21(2)(4), Mumbai

..... Respondent

ITA no. 4256/Mum./2014
(Assessment Year : 1995-96)

The Vithalnagar Co-operative Housing
Society Ltd., 51, N.S. Road no.11
Jai Hind Club, JVPD Scheme
Vile Parle (W), Mumbai 400 056
PAN - AAAAV0288J

..... Appellant

v/s

Income Tax Officer
Ward-21(2)(4), Mumbai

..... Respondent

Assessee by : Shri Shalin S. Divatia
Revenue by : Miss Deepika Arora

Date of Hearing - 09.01.2019

Date of Order - 23.01.2019

ORDER

PER SAKTIJIT DEY, J.M.

These appeals have been filed by two different assesseees challenging two separate orders dated 23rd April 2014 and 25th April 2014, passed by the learned Commissioner (Appeals)-32, Mumbai, pertaining to the assessment year 1995-96.

2. The first issue, which is common in both the appeals, relates to taxability of amount received by the assesseees towards their shares in sale of common plot of land as business income.

3. Brief facts relating to this issue which are identical in both the appeals are, the assesseees hitherto are part of 14 Co-operative Housing Societies formed in the year 1947 for providing housing to middle class persons in the suburbs of Vile Parle, Mumbai. The Government of Bombay Province (Housing Board) allotted Plots to these Housing Societies in the year 1960. Out of the Plots allotted to the Housing Societies, the Housing Board earmarked certain Plots for amenities and public utilities and share of each Housing Society in the said Plot was also specified. The area comprising the various amenities plots and the purpose thereof was also specified by the Government while conveying the land to the Societies. Since, a part of amenities plot was encroached by some people and the Co-operative Housing Societies could not evict them, all the 14 Co-operative Housing

Societies decided to dispose off the said Plot on "as is where is" basis in the previous year relevant to assessment year 1995-96. The sale proceeds received from sale of the said plot was divided amongst all the 14 Co-operative Housing Societies in the ratio of their respective shares in the said land. The income received by each Co-operative Society towards their respective shares in the sale proceeds of the land was offered to tax under the head Capital Gain. However, the Assessing Officer while completing the assessment treated the income received from sale of land as business income of the assessee. The dispute was carried in appeal before the learned Commissioner (Appeals) and thereafter to the Tribunal and in the process the assessment order passed by the Assessing Officer assessing the income offered by the assessee as business income was restored by the Tribunal on two occasions with a direction to examine the issue afresh after considering the stand taken in case of other Housing Societies. As observed by the Assessing Officer in Para-6 of the assessment order, in case of three Housing Societies assessment was completed by bringing to tax the income as business income and in some other cases the issues have been remanded back to the Assessing Officer by the Tribunal. Further, the Assessing Officer observed, some of the Societies could not specifically give proof of Plot allotted to the 14 Co-operative Societies or furnish any document

which could specify area allotted to them to claim the ownership right on the lease hold land given by the Bombay Housing Board in the year 1960. Alleging that the assessee could not furnish the area and the actual Plot serial number, the Assessing Officer held that the income received from sale of land is to be assessed as business income. Accordingly, he brought to tax the assessee's share in the sale proceeds received from sale of land to tax as business income. Being aggrieved of such addition, though, the assessee preferred appeals before the first appellate authority, however, he also confirmed the action of the Assessing Officer.

4. The learned Authorised Representative submitted, a common Plot held by all 14 Housing Societies was sold in the previous year relevant to assessment year 1995-96. He submitted, the income received by the Housing Societies towards their respective shares in the sale proceeds was offered to tax under the head Capital Gain. However, the Assessing Officer assessed such income under the head Business & Profession. He submitted, while deciding identical issue in case of two other housing Societies, the Tribunal in ITA no.4255/Mum./2014 and ITA no.4802/Mum./2014, dated 7th September 2018, has held that receipts from sale of plot has to be assessed under the head Capital Gain. Thus, he submitted, facts being identical in the present appeals, the decision of the Tribunal will squarely apply.

5. The learned Departmental Representative fairly agreed that the issue in dispute is covered by the decision of the Tribunal cited by the learned Authorised Representative.

6. We have considered rival submissions and perused material on record. Insofar as the factual aspect of the issue is concerned, there is no dispute that the present assessee along with 12 other Co-operative Housing Societies were owners of certain land provided to them by the Bombay Housing Board as far back as in the year 1960. There is also no dispute that a part of the land was sold by the aforesaid Housing Societies in the previous year relevant to the assessment year under dispute. While the Co-operative Housing Societies offered the income received by them towards their respective shares in the sale proceeds of the land sold as income under the head Capital Gain, the Assessing Officer assessed it as business income. After several rounds of litigation, when identical dispute came up for consideration before the Tribunal in case of two of the Housing Societies viz. The Nutan Laxmi Co-operative Housing Society Ltd. and the Swarna Nagar Co-operative Housing Society Ltd. in ITA no.4255/Mum./2014 and ITA no.4802/Mum./2014, the Tribunal vide order dated 7th September 2018, accepted the claim of the assessee holding as under:—

"9. We heard the parties on this issue and perused the record. There is no dispute with regard to the fact these are housing co-operative societies and they have been formed to acquire plots from the Bombay Housing Society and to allot the same to its members. As per the scheme of Government, certain plots were allotted in common for the purpose of creating common amenities. The individual plots allotted to each of the societies have been, in turn, allotted to its members. During the course of hearing, the Ld A.R also showed us that the societies herein have allotted plots to its members at Cost Price only, i.e., without making any mark up. Accordingly the Ld A.R contended that there is absence of profit motive and hence the activities of the assessee cannot be considered as business. We find merit in the said contentions. The Ld A.R also submitted that, at some point of time, one of the common plots was allotted to School at nominal rate of Re.1/- per sq.ft. Be that as it may, we notice that the AO has mainly treated the impugned receipts as Business Income for the reason that the object clause mentions that they are involved in trading in plots. Another reason cited is that these societies could not prove their ownership rights.

10. The Hon'ble Supreme Court has held in the case of *Raj Dadarkar & Associates (supra)* that the object clause is not determining factor and the circumstances of each case should be examined to determine the nature of receipt. We notice that these Societies have sold the plot as its owner and the buyer has also accepted the same as owner. According to the societies, these common amenity plots have been owned by them jointly for about 15 years or more. When there is no dispute on this aspect, we are unable to understand as to how the AO was questioning the ownership. We also notice that the AO has not conducted any enquiry with any of the authorities to disprove the claim of the societies. We have noticed that these societies have sold another plot in the year relevant to AY 2004-05 to Indian Police Service, in which police quarters were proposed to be constructed. It can be noticed that the above transaction has taken place with a Government Agency. Had these societies were not the owners of the plots, a Government agency, which is a part of Police department, would not have acquired the plot from these Societies. Hence we do not find any reason to suspect the ownership claim of the plots.

11. We also notice that the AO himself has assessed the income arising on sale of plot to Indian Police Service as Capital Gains in AY 2004-05. Further our foregoing discussions would show that the reasoning given by the AO fails. There is no

other instance to show that these societies were indulging in purchase and sale of plots. Accordingly we are of the view that there is no reason to assess the impugned receipts on sale of plot as Business income of the assessee. Accordingly we set aside the orders passed by tax authorities in the hands of both the assessee herein and direct the AO to compute the income under the head Capital Gains as provisions of the Act."

7. Material facts on the basis of which the Tribunal rendered the aforesaid decision being identical in the case of the present assessee, respectfully following the aforesaid decision of the Co-ordinate Bench we direct the Assessing Officer to compute the income received by the assessee from their respective shares in the sale proceeds of the land sold under the head Capital Gain. Grounds relating to this issue in both the appeals are allowed.

8. The next common issue which arises in both the appeals relates to taxability of transfer fees received from Members on account of sale of Plot.

9. Brief facts are, the present assessee in the relevant previous year received transfer fees of different amounts for giving no objection certificate to Members who sold their Plots / structures to incoming Members. The assessee claimed the amount received towards transfer fee to be exempt from taxation under the principle of mutuality. However, the Assessing Officer rejecting the claim of the assessee assessed the amount received towards transfer fee to tax.

10. Though, the assessee challenged the aforesaid additions made before the first appellate authority, however, the learned Commissioner (Appeals) sustained the additions made by the Assessing Officer.

11. The learned Authorised Representative submitted, identical issue arising in case of other Housing Societies has been decided in favour by the Tribunal. In this context he drew our attention to order dated 7th September 2018, passed in ITA no.4255/ Mum./2014 and ITA no.4802/Mum./2014, dated 7th September 2018.

12. The learned Departmental Representative agreed that the issue is covered by the decision of the Tribunal in respect of other Co-operative Housing Societies.

13. We have considered rival submissions and perused material on record. As could be seen, while deciding identical issue in case of some other Co-operative Housing Societies, the Tribunal in ITA no.4255/ Mum./2014 and ITA no.4802/Mum./2014, dated 7th September 2018, has deleted the addition observing as under:–

"12. The next common issue urged by the assessee relate to the taxability of Transfer fees received from the incoming members. These assessee claimed the same as exempt under Mutuality Principles and the same was rejected by the tax authorities on the reasoning that the transfer fees received from incoming member is not covered by mutuality principles. In this regard, the AO had placed reliance on the decision

rendered by Special bench in the case of Walkeshwar Triveni Co-op Hsg. Society Ltd.

13. We heard the parties on this issue. The Ld A.R placed reliance on the decision of Venkatesh Premises Co-op Hsg. Society Ltd (402 ITR 670)(SC) rendered by Hon'ble Supreme Court and contended that these receipts are exempt under mutuality principles. The Ld A.R also submitted that the new members have been admitted as Joint/associate members. Accordingly she submitted that the impugned receipt is exempt under mutuality principles.

14. On the contrary, the Ld D.R placed reliance on the orders passed by Ld CIT(A).

15. Since the Principle of mutuality is applicable to these co-operative societies and since the new members have been admitted as Joint/Associate members, we are of the view that the decision rendered by Hon'ble Supreme Court in the case of Venkatesh Premises Co-op Hsg. Society shall be applicable to these assesseees. Accordingly we set aside the orders passed by Ld CIT(A) and direct the AO to delete the addition relating to Transfer fees in both the cases."

14. There being no material difference in facts in case of the present assesseees, respectfully following the aforesaid decision of the Co-ordinate Bench we delete the addition made by the Assessing Officer. These grounds are allowed.

15. In the result, both the appeals are allowed.

Order pronounced in the open Court on 23.01.2019

**Sd/-
RAMIT KOCHAR
ACCOUNTANT MEMBER**

**Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER**

MUMBAI, DATED: 23.01.2019

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

*Pradeep J. Chowdhury
Sr. Private Secretary*

True Copy
By Order

(Sr. Private Secretary)
ITAT, Mumbai