

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "J" MUMBAI**

**BEFORE SHRI C. N. PRASAD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 653/MUM/2016
Assessment Year: 2005-06**

Parag S. Daki
Waghbil, Kasarvadavali
G. B. Rd. Thane.
(w) 400615

Vs.

ITO(HQ)(CIB)
6th Floor R. No. 4
Ambika Nagar, Wagle
Thane-400604

PAN No. AJNPD4508L

(Appellant)

(Respondent)

Assessee by : Shri Kishore K. Poddar
Revenue by: Shri Kailash Gaikwad

Date of Hearing : 05/10/2016
Date of pronouncement: 26/10/2016

ORDER

PER N.K. PRADHAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2005-06. The appeal is directed against the order of the Commissioner (Appeals)-2 Mumbai and arises out of the assessment completed u/s 144 of the Income Tax Act, 1961 (the 'Act').

2. The sole ground of appeal filed by the assessee is that the Id. CIT(A) has failed to appreciate that once the Assessing Officer (AO) has exercised his option and adopted the sale price for calculating the value of LTCG, he cannot re-visit the same. Also it is stated that the Id. CIT(A) has failed to appreciate that u/s 250 of the Act, he cannot set aside an assessment order under appeal.

3. It is pertinent to mention here the proceedings so far. The ITAT “F” Bench Mumbai in the case of the assessee for the same assessment year (ITA No.5608/Mum/2009) have condoned the delay of six months in filing the appeal before the CIT(A) and held the following:

“5.1 Since the Commissioner of Income Tax (Appeals) has not adjudicated the appeal of the assessee on merits; therefore, we remand the matter to the record of the Commissioner of Income Tax (Appeals) for adjudication on merits as per law.”

4. The ld. CIT(A), then passed an order on 26/11/2015 and in the conclusion held:

“7.2 In view of the above facts, the ld. AR has requested to adopt the taxable LTCG at Rs.57,802/-, for entire plot and Rs.28,901/-, for appellant having 50% share, therein. The ld. AR, however, did not offer any comment for the provision of section 50C of the Act, therefore, the AO is hereby directed to examine this aspect as stated above & accordingly determine the value of LTCTG, after giving credit to the cost of land as determined by the AVO. With above remarks, the set aside proceedings of the appellant, is disposed off and the AO directed accordingly.”

5. The ld. Counsel of the assessee submits , before us, that in the present case the ld. CIT(A) has set aside the proceedings of the appellant which is not permissible as per section 251 of the Act.

6. Per contra, the ld. DR submits that the ld. CIT(A) has not set aside the proceedings of the assessee, rather he has given a direction to examine the matter as stated in his appellate order.

7. After considering the rival submissions and perusing the relevant material on record, we find that the ld. CIT(A) has set aside the proceedings of the assessee. The same is evident from Para 7.2 of his appellate order extracted here – in –above. Such setting aside of the proceedings of the assessee is beyond the powers of Commissioner (Appeals). Section 251 (1) (a) reads as under:

“251. (i) In disposing of an appeal, the Commissioner (Appeals) have the following powers-

- (a) in an appeal against an order of assessment, he may confirm, reduce, enhance or annul the assessment .”

The portion beginning with the words “ or he may set aside ” and ending with the words “on the basis of such fresh assessment” was omitted by the Finance Act, 2001 w.e.f. 1-06-2001.

8. In view of the above facts, the order passed by the Id. CIT(A) dated 26/11/2015 is set aside and the case is restored to him to pass an order afresh as per the provisions of the Act after giving reasonable opportunity of being heard to the assessee.

9. In the result, the appeal filed by the assessee is allowed for statistical purposes.

Order pronounced in the open court on 26/10/2016

Sd/-

(C. N. PRASAD)
JUDICIAL MEMBER

Sd/-

(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai; Dated: 26 /10/2016

AKV(On Tour)

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

Registrar)

BY ORDER,

(Dy./Asstt.

ITAT, Mumbai