

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "D" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 5784/MUM/2016  
Assessment Year: 2013-14**

Deepa Sachin Sankhe  
C/o M N Nandgaonkar,  
Chartered Accountant,  
1, Chandralok, Veer Savarkarm  
Marg, Tembhi Naka,  
Thane West-400601.

**PAN No. AWDPS2312J**

**Appellant**

Income Tax Officer, Ward-  
Vs. 1, BIDCO Road, Palghar  
West-401608.

**Respondent**

Assessee by : Mr. M.N. Nandgaonkar, AR  
Revenue by : Mr. V. Vinod Kumar, DR

Last Date of Hearing : 18/10/2019  
Date of pronouncement: 13/01/2020

**ORDER**

**PER N.K. PRADHAN, A.M.**

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-3, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the assessee read as under :

(1) On the facts and in the circumstances of the case & in law the Assessing Officer has erred in bringing to tax u/s. 45 the gains arising on transfer of land which was held by the appellant under adverse possession which was exchanged by her by the deed of exchange dated 02.04.2012 and learned CIT(A) has erred in confirming the same.

- (2) On the facts and in the circumstances of the case & in law the Assessing Officer has erred in bringing to tax u/s. 45 the consideration received by the appellant on account of transfer of her possessory rights vested in her on account of adverse possession of the land which was exchanged by her by deed of exchange dated 02.04.2012 and for acquisition of the possessory rights the appellant had not incurred any cost and the learned CIT(A) has erred in confirming the same.
- (3) On the facts and in the circumstances of the case & in law the Assessing Officer has erred in bringing to tax u/s. 45 the consideration received by the appellant on exchange of land which was in her possession by adverse possession though the computation provisions u/s. 48 are not workable in the case of the appellant and the learned CIT(A) has erred in confirming the same.
- (4) On the facts and in the circumstances of the case & in law the learned CIT(A) has erred in para 7.1 of the appeal order, in not allowing a claim of the appellant that the land exchanged by the appellant was held by her by adverse possession and for which she has not incurred any cost of acquisition.
- (5) On the facts and in the circumstances of the case & in law the learned CIT(A) has erred in para 6.0 (iv) in not considering the submissions of the appellant that the land was held by her by adverse possession and she has not incurred any cost of acquisition for the same on the ground that these factual position was not argued by the AO during the course of assessment.
- (6) Without prejudice to the above and as an alternative ground on the facts and in the circumstances of the case & in law, the AO has erred in and the learned CIT(A) has erred in confirming that the market value of the land exchanged by the appellant which was held by her under adverse possession was Rs.87,43,000/- on the basis of sale consideration for one flat sold by the appellant by agreement dated 12.07.2012 out of the 9 flats received by her in the exchange.

3. The additional grounds of appeal filed by the assessee on 22.06.2018 are as under :

1. Additional Ground of Appeal No. 1

- A. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not holding that the appellant had transferred agricultural land by transferring her possessory rights which she was holding in and over the said land as per deed of exchange registered on 20.04.2012.
- B. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not holding that the agricultural land transferred of which the appellant had held the possessory rights was a capital asset falling within the definition of section 2(14) of the Act.

2. Additional Ground of Appeal No. 2

Without prejudice to the grounds of appeal already taken in form 36 and additional ground of appeal No. 1 and on the facts and in the circumstances of the case and in law the AO has erred in adopting Rs.87,43,000/- as the full value of consideration received by the appellant for transfer of the agricultural land of which she held possessory rights and in ignoring the provisions of section 50C of the Act by not adopting the value adopted by the stamp duty authorities for levy of stamp duty and the CIT(A) has erred in confirming the action of the AO.

4. We find that at para 5(a) in page 8 of the order dated 25.07.2016 the Ld. CIT(A) has rejected the claim of the assessee that the land was not a capital asset u/s 2(14)(iii) on the ground that this plea was not taken before the AO at the time of assessment proceedings. Further, it is noted by the Ld. CIT(A) that the assessee filed before him the certificate given by the Talathi, Taluka-Palghar, which is dated 08.06.2016 but not produced before the AO. As these arguments were never argued before the AO at the time of assessment proceedings, the Ld. CIT(A) *inter alia* dismissed the appeal filed by the assessee.

We find that the additional ground filed by the assessee before the Tribunal are broadly the contentions taken by her before the Ld. CIT(A). But these were not adjudicated on the reason that it was not argued before the AO.

In view of the above facts, we admit the additional grounds filed by the assessee before the Tribunal for adjudication.

5. Briefly stated, the facts of the case are that the assessee was one of parties to the 'Deed of Exchange' entered on 20.04.2012 between M/s Sunirmiti Builders & Developers Pvt. Ltd. (in short 'SBDPL') of the first part ; Shri Vishram Barkya Gharat of the second part; and Smt. Deepa Sachin Sankhe (the assessee) of the third part. As per the said 'Deed of Exchange', the assessee was in physical possession of land and entitled to receive a total of 9 flats in exchange of her giving peaceful and vacant possession of the land. The total area in sq. mtr of the 9 flats was 373.61. The assessee has computed the Long Term Capital Gains (LTCG) at Rs.62,99,666/- and claimed exemption u/s 54F of the Act. However, the Assessing Officer (AO) observed that the assessee has two flats, one at flat No. 4, 1<sup>st</sup> floor, Bandra (West), Mumbai and second one at flat-2305, Grandeur BHD, Borivali (East), Mumbai. Apart from this, the assessee owned one more flat at 1-601, Kanakias Connty Park, Borivali-East, Mumbai. Therefore, the AO disallowed the claim of exemption u/s 54F made by the assessee. In turn, he computed the LTCG by adopting the market value at Rs.23,401.41 per sq. mtr. which comes to Rs.87,43,000/-.

6. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). It is found that *vide* order dated 25.07.2016, the Ld. CIT(A) observed that (i) in the return of income itself, the assessee herself had

considered the acquisition of flats in exchange of transfer of possession of the said land as LTCG and claimed exemption u/s 54F; (ii) the plea taken before him for the first time that it was not a capital asset u/s 2(14)(iii) is rejected as this plea was not taken before the AO at the time of assessment proceedings; (iii) the certificate given by the Talathi, Taluka-Palghar dated 08.06.2016 was not produced before the AO ; (iv) the AO has correctly calculated the LTCG by adopting the market value at Rs.23,401.41 per sq. mtr. as the assessee had sold one flat at the same rate during the year under consideration; (v) that the title of the land was acquired by way of adverse possession, the cost of acquisition is Nil and the land sold was agricultural and therefore, not liable to LTCG was never argued before the AO; (vi) the assessee had taken Rs.1,00,000/- as the cost of acquisition, however, the same was not allowed by the AO as the assessee failed to produce the documentary evidence.

With the above reasons, the Ld. CIT(A) observed that the cost of acquisition will be Nil as per the provisions of section 55(2) of the Act. Thus he dismissed the appeal filed by the assessee.

7. Before us, the Ld. counsel for the assessee files a Paper Book (P/B) and submits that the following documents were filed before the CIT(A) and not before the AO :

- A) Copy of certificate of Marathi from Talathi Village Saravali dated 08.06.2016 certifying that the land is agricultural land.  
B) Translation of the above certificate in English.
- Copy of registration summary of agreement registered on 20.04.2012 along with working of stamp duty in Marathi.
- Copy of survey notice dated 01.04.2011, in Marathi, for survey of the land.
- Copy of 7/12 extract of the agricultural land transferred in Marathi.

The Ld. counsel submits that the CIT(A) has rejected the above documents on the threshold by observing that these were not produced before the AO during the course of assessment proceedings. It is further stated that the CIT(A) before disposing the present appeal could have directed the AO to make further inquiry and report the result of the same to him. But the CIT(A) has rejected outright the above documents filed by the assessee. It is therefore submitted by the Ld. counsel that the above matter may be restored either to the AO or CIT(A) for a decision.

On the other hand, the Ld. Departmental Representative (DR) supports the order passed by the Ld. CIT(A).

8. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In *CIT v. Jai Parabolic Springs Ltd.* (2008) 306 ITR 42 (Del), a new claim was made by the assessee by filing an additional ground before the Tribunal, which was allowed by it. On further appeal by the Revenue, the Hon'ble High Court observed that the principal ground taken by the Revenue in the appeal was that if no claim for deduction of the amount was made in the return of income, then deduction would not be allowed. Section 254 says that the Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. There is no prohibition on the powers of the Tribunal to entertain an additional ground which according to it arises in the matter and for the just decision of the case. It was thus held by the Hon'ble High Court that the Tribunal has power to allow deduction of expenditure to the assessee to which it was otherwise entitled even though no claim was made by the assessee in its return of income. The above decision was rendered after the decision of the

Hon'ble Supreme Court in *Goetze (India) Ltd. v. CIT* (2006) 284 ITR 323 (SC). Similarly, in *CIT v. Pruthvi Brokers & Shareholders (P.) Ltd.* (2012) 349 ITR 336 (Bom), the Hon'ble Bombay High Court has held that even assuming that the Assessing Officer is not entitled to grant a deduction on the basis of a letter requesting an amendment to the return filed, the Appellate Authorities are entitled to consider the claim and adjudicate the same.

In the instant case, as mentioned earlier the Ld. CIT(A) has held (i) that the plea that a land was not capital asset u/s 2(14)(iii) was taken before him for the first time; (ii) that the certificate dated 08.06.2016 given by the Talathi, Taluka – Palghar was not produced before the AO; (iii) that the title of the land was acquired by way of adverse possession ; cost of acquisition is Nil ; the land sold was agricultural and therefore, not liable to LTCG were never argued before the AO during the assessment proceedings.

It is found that though the documents relating to the above were filed before the CIT(A), he dismissed it on the ground that those were not filed before the AO during the course of assessment proceedings. As mentioned earlier, in *Jai Parabolic Springs Ltd.* (supra) and *Pruthvi Broker & Shareholders (P.) Ltd.* (supra), it is held that there is no prohibition on the powers of the Tribunal to entertain an additional ground which according to it arises in the matter and for the just a decision of the case.

In view of the above factual scenario and position of law, we set aside the order of the Ld. CIT(A) and restore the matter to the file of the AO to make a *de novo* order, after giving reasonable opportunity of being heard to the assessee. We direct the assessee to file the relevant documents/evidence before the AO.

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

**Order pronounced in the open Court on 13/01/2020.**

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 13/01/2020

*Rahul Sharma, Sr. P.S.*

**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//

BY ORDER,

(Dy./Assistant Registrar)  
**ITAT, Mumbai**