

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI

BEFORE SHRI PRASHANT MAHARSHI (ACCOUNTANT MEMBER) &
SMT. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA No. 1168/MUM/2018 (A.Y.2014-15)

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| Shri Shankar Rama Ghorpade Shiv Parvati Bangalow Katrap Gaon, Kulgaon, Badlapur (East)-421 503 PAN : AEHPG5210M | vs | Income-tax Officer, Ward 2(4), Kalyan, 2 nd Floor, Mohan Plaza, Wayale Nagar, Khadakpada, Kalyan (W), 421 301 |
| APPELLANT | | RESPONDENT |

ITA No. 7985/MUM/2019 (A.Y.2013-14)

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| Dnyaneshwar Shankar Ghorpade (L/H of late Shankar Rama Ghorpade), Shiv Parvati Bangalow Katrap Gaon, Kulgaon, Badlapur (East)-421 503 PAN : AEHPG5210M | vs | Income-tax Officer, Ward 2(4), Kalyan, 2 nd Floor, Mohan Plaza, Wayale Nagar, Khadakpada, Kalyan (W), 421 301 |
| APPELLANT | | RESPONDENT |

ITA No. 6948/MUM/2019 (A.Y.2013-14)

ITA No.1167/MUM/2018 (A.Y. 2014-15)

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| Shri Subhash Maruti Ghorpade House No.34, Kulgaon, Katrap Gaon, Kulgaon, Badlapur (East)-421 503 PAN : AKDPG1155H | vs | Income-tax Officer, Ward 2(4), Kalyan, 2 nd Floor, Mohan Plaza, Wayale Nagar, Khadakpada, Kalyan (W), 421 301 |
| APPELLANT | | RESPONDENT |

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| Assessees represented by | Shri V.G. Ginde / Kumar Kale |
| Department represented by | Shri Hoshang B Irani – (DR) |

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| Date of hearing | 31/05/2022 |
| Date of pronouncement | 25/08/2022 |

ORDER**Per Kavitha Rajagopal (JM):**

The captioned appeals have been filed by the assessee as against the independent orders of Ld.Commissioner of Income-tax (Appeals)-3, Thane, passed under section 250 of the I.T. Act, 1961 pertaining to assessment years 2013-14 and 2014-15.

2. As the facts of the case are identical, we hereby pass a consolidated order in all these appeals.

3. The grounds of appeal in all the appeals are same which are against the addition made on account of capital gain on sale of part of TDRs received by the assessee from Kulgaon-Badlapur Municipal Council (KBMC) as compensation on compulsory acquisition of assessee's agricultural land has been challenged. And that the lower authorities have rejected the contention that the said short term capital gain was exempt under section 10(37) of the Act. Assessee also raised an additional ground in ITA No.7985/Mum/2019 on the ground that the assessment order under section 143(3) r.w.s. 147 of the I.T. Act dated 20/12/2018 was passed in the name of the deceased person.

ITA 1168/Mum/2018 – Shri Shankar Rama Ghorpade

4. The brief facts are that the assessee filed his returns of income for A.Ys. 2013-14 and 2014-15 declaring total income at Nil. The assessee, an individual engaged in agricultural activities having source of income from agricultural land only. The assessee's case was selected for scrutiny and order under section 143(3) r.w.s. 147 of the I.T. Act was passed. At the time of assessment

proceedings, it is observed that the assessee had sold TDR of 10,000 sq.mtr against surrender of land at Kulgaon – Badlapur Municipal Corporation (KBMC) dated 09/08/2011 and 13/09/2011. The assessee owned 10,000 sq.mtrs of TDRs by virtue of this transfer. It was observed that the assessee has sold TDR of 2,684.74 sq.mtrs in assessment year 2013-14 for a total consideration of Rs.1,41,62,000/-. It was alleged that the assessee failed to offer the same for short term capital gain for the impugned land. The Assessing Officer had stated that upon perusal of the certificate of transfer of development rights issued by KBMC vide KBMC/TPP/TDS/155 dated 30/09/2011 for land vide survey No.57, H.No 10/2 at Katrak, Badlapur, the land which was transferred was not classified as an agricultural land. The Assessing Officer alleged that the assessee has not disclosed the sale of the said TDR and upon reason to believe that the income has escaped assessment as per provisions of section 147 of the I.T. Act. The Assessing Officer made addition of Rs.1,24,97,449/- as short term capital gain rejecting the claim of the assessee that the same was exempt from tax under section 10(37). The Assessing Officer had made the said addition on the ground that the assessee had acquired 10,000 sq.mtrs of TDR on 30/09/2011 for a consideration of Rs.62 lakhs out of which 2,684.62 sq.mtr was sold during assessment year 2013-14 where the holding period of TDR was less than 3 years thereby attracting short term capital gain on the said sale. Aggrieved by this, the assessee was in appeal before the Ld.CIT(A), who confirmed the said addition made by the Assessing Officer. The assessee is in appeal before us on the said addition and also on the additional ground filed on May 27,2022 that the assessment order was passed in the name of the deceased person.

5. The Ld.AR for the assessee contended that the assessee passed away on 28/07/2018 and prayed that the assessment order be quashed on the ground that the assessment order was passed on the deceased person.

6. The Ld.DR stated that there has been no record that the legal heirs of the assessee had intimated the demise of the assessee to the Assessing Officer and alleged that the said ground was not raised before the Ld.CIT(A). The Ld.DR further stated that the additional ground was raised at the later stage only with a malafide intention on the part of the legal heirs of the assessee.

7. On merits of the case, the Ld.AR for the assessee argued that the assessee was covered under section 10(37) of the I.T. Act as the land that was surrendered to KBMC was an urban agricultural land and further stated that as it was compulsory acquisition by KBMC, short term capital gain would not attract in the case of the assessee. The Ld.AR also stated that the assessee had not incurred any cost to acquire the TDR and that capital gain was not chargeable to tax and prayed for deletion of the addition made on account of Short Term Capital Gain.

8. The Ld.DR relied on the orders of the lower authorities.

9. Having heard both the learned representatives and perused the materials on record, it is observed that on the legal ground raised by the assessee that assessment order was passed on the deceased person, we find that the assessee has not produced any evidence to prove that the legal heirs have intimated the Assessing Officer about the demise of the assessee except for an affidavit dated 20th December, 2019 which authorises one of the legal heirs of the assessee, Shri Dnyaneshwar Shankar Ghorpade to represent the appeals before the ITAT on behalf of the other legal heirs of the assessee.

Apart from this, the assessee has failed to substantiate the fact that inspite of intimation, the Assessing Officer has erred in passing the assessment order on the deceased person. In this case, during assessment proceeding, assessee was alive, notices were served on him and he replied, but before passing of the order, assessee has passed away. So it is not the case that notices have not been served on assessee. This ground of appeal warrants no merit and is hereby dismissed.

10. On the merits of the case, it is evident that the assessee has acquired the TDRs of 10,000 sq.mtrs against surrender of land to KBMC dated 30/09/2011 for which no capital gain tax was attracted. It was only on the subsequent sale of the said TDR that the lower authorities have made the addition on short term capital gain tax for the impugned assessment year. We find no absurdity in charging of short term capital gain on the sale consideration of TDR. With regard to the issue pertaining to applicability of section 10(37) which is reproduced hereunder for ready reference :-

"10(37) : An individual or Hindu Undivided Family (HUF) can claim exemption in respect of capital gain arising on transfer of agricultural land situated in an urban area by way of compulsory acquisition. This exemption is available if the land was used by the taxpayer (or by his parents in the case of an individual) for agricultural purpose for a period of 2 years immediately preceding the date of its transfer."

It is pertinent to point out that the ingredients of the provision manifest that the land which is transferred should have been used for agricultural purpose two years immediately preceding the date of transfer and that the acquisition by the government bodies should have been compulsory acquisition. In the present case in hand, the assessee has failed to produce any documentary evidence to show that the land was used for agricultural purpose nor has he proved that the acquisition was compulsory. The assessee has also failed to prove the same before us as well as before the lower authorities. We do not

find any justification in holding that the assessee is eligible for exemption as per the provisions of section 10(37) of the I.T. Act. Therefore, we do not find any infirmity in the decision of the lower authorities. The grounds raised by the assessee is dismissed.

11. The additional ground 2 raised by the assessee that the Ld.AO has erred in adopting the assessable value of land over value of stamp duty, i.e. Rs.62 lakhs as cost of acquisition of TDR received by the assessee in consideration of the surrender of the said land to KBMC instead of fair market value of the TDR while computing capital gain on sale of TDR. The assessee prays that the AO be directed to determine the cost of acquisition of TDR and to adopt the same as cost of acquisition thereby and to recompute the capital gain.

12. We hereby direct the Assessing Officer to calculate the cost of acquisition for the purpose of deduction by following the decision of Mumbai Bench "A" in the case of Atul G Puranik vs ITO, 12(1(1) (2011) 11 taxmann.com 92 (Mumbai). Additional ground No.2 is partly allowed.

ITA No.1168/Mum/2018

13. The grounds of appeal in this appeal are as follows:-

Being aggrieved by the order dated 27.11.2017 passed by the learned Commissioner of Income Tax (Appeals)-3, Thane ["Ld. CIT(A)"] u/s 250 of the Income-tax Act, 1961 ("Act"), your appellant prefers this appeal, among others, on the following grounds of appeal, each of which is without prejudice to, and independent of, the other:

I. Disallowance of exemption claimed u/s.10(37) of the Act:

(a) On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in confirming the disallowance of the appellant's claim for exemption of capital gains on transfer of urban agricultural land allowable u/s. 10(37) of the Act.

(b) On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) also erred in holding that the subject land was not agricultural land.

(c) On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) also erred in holding that the transfer of the subject land was not by way of 'compulsory acquisition'.

Your appellant, therefore, prays that the exemption u/s. 10(37) of the Act be allowed for the aforesaid capital gains.

B. Assessment of Short Term Capital Gains on sale of TDR:

(a) On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in confirming assessment of short term capital gains of Rs. 1,86,24,724/- on sale of Transferable Development Rights (TOR").

(b) The Ld. CIT(A) failed to appreciate, and ought to have, held that the appellant did not incur any cost to acquire these TDR, and therefore, the resultant capital gain was not chargeable to tax.

Your appellant, therefore, prays that the addition of Rs.1,86,24,724/- made on account of the short-term capital gains be deleted."

We find that the facts and circumstances of this appeal are identical to that of the appeal which we have already decided above in ITA 1168/Mum/2018, except for the figures; therefore, the decision arrived at therein shall apply mutatis mutandis to this appeal also.

ITAs No.6948/Mum/2019 & ITA No.1167/Mum/2018

14. The grounds of appeal in ITA No.1167/Mum/2018 are as under:-

"Being aggrieved by the order dated 27.11.2017 passed by the learned Commissioner of Income Tax (Appeals)-3, Thane ["Ld. CIT(A)"] u/s 250 of the Income-tax Act, 1961 ("Act"), your appellant prefers this appeal, among others, on the following grounds of appeal, each of which is without prejudice to, and independent of, the other:

I. Disallowance of exemption claimed u/s. 10(37) of the Act;

(a) On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in confirming the disallowance of the appellant's claim for exemption of capital gains on transfer of urban agricultural land allowable u/s. 10(37) of the Act.

(b) On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) also erred in holding that the subject land was not agricultural land.

(c) On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) also erred in holding that the transfer of the subject land was not by way of 'compulsory acquisition' . . .

Your appellant, therefore, prays that the exemption u/s. 10(37) of the Act be allowed for the aforesaid capital gains.

n. Assessment of Short Term Capital Gains on sale of TDR;

(a) On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in confirming assessment of short term capital gains of Rs.65,55,427/-] on sale of Transferable Development Rights (TDR').

(b) The Ld. CIT(A) failed to appreciate, and ought to have, held that the appellant did not incur any cost to acquire these TDR, and therefore, the resultant capital gain was not chargeable to tax.

Your appellant, therefore, prays that the addition of Rs.65,55,427/- made |on account of the short-term capital gains be deleted."

Whereas the grounds of appeal in ITA No.6948/Mum/2019 are as under:-

"Being aggrieved by the order dated 22.08.2019 passed by the Ld. Commissioner of Income Tax (Appeals)-3, Thane ["Ld. CIT(A)"] u/s 250 of the Income-tax Act, 1961 ("Act"), your appellant prefers this appeal, among others, on the following grounds of appeal, each of which is without prejudice to, and independent of, the other:

1.1 On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in confirming the addition of Rs. 1,49,42,069/- of short-term capital gain on sale of part of Transferable Development Right (TDR'), which the appellant had received from Kulgaon-Badlapur Municipal Council ('KBMC') as compensation on compulsory acquisition of his urban agricultural land.

1.2 On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in rejecting the appellant's contention that the aforesaid gain was exempt u/s. 10(37) of the Act. The Ld. CIT(A) erred in holding that the subject land was not agricultural land.

1.3 On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) erred in not admitting the crucial additional evidence sought to be produced by the appellant to establish that the subject land was agricultural in nature and it was compulsorily acquired by KBMC.

1.4 On the facts and in the circumstances of the case, and in law, the Ld. CIT(A) failed to appreciate, and ought to have, held that the appellant did not incur any cost to acquire these TDR, and therefore, in any event, the resultant capital gain was not chargeable to tax.

Your appellant, therefore, prays that the addition of Rs.1,49,42,069/- made on account of the short-term capital gains be deleted."

We find that the facts and circumstances of these appeals are identical to that of the appeal which we have already decided above in ITA 1168/Mum/2018,

except for the figures; therefore, the decision arrived at therein shall apply mutatis mutandis to these appeals also.

15. In the result, all the appeals are dismissed.

Order pronounced in the open Court on 25th August, 2022.

Sd/-

sd/-

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| (PRASHANT MAHARSHI) | (KAVITHA RAJAGOPAL) |
| ACCOUNTANT MEMBER | JUDICIAL MEMBER |

Mumbai, Dated: 25/08/2022

Pavanan

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./Asstt. Registrar), ITAT, Mumbai