

**IN THE INCOME TAX APPELLATE TRIBUNAL,
“H” BENCH
MUMBAI**

**BEFORE SHRIPAVANKUMARGADALE, JUDICIALMEMBER
& SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

**ITA No.1011/MUM/2022
(A. Y.:2009-10)**

Hatkesh Co-operative Housing Society Ltd. 2 nd Floor, 51, Jain Co-op HsgSoc, N.S. Road 11, JVPD Scheme, Vile Parle (W) Mumbai-400049	Vs.	Income Tax Officer-25 (2) (4) KautilyaBhavan, BandraKurla Complex, Bandra East Mumbai-400051
Pan No.AAALH0017Q		
Appellant		Respondent

Appellant by	Shri.Rahul Hakani.AR
Respondent by	Shri.DineshChourasia.DR

Date of Hearing	29.09.2022
Date of Pronouncement	10.10.2022

ORDER

PER PAVAN KUMAR GADALE, JM:

The assessee has filed the appeal against the order of Commissioner of Income Tax Appeals(CIT(A)) National Faceless Appeal Centre, Delhi passed under

Section 143(3) and 250 of the Income Tax Act, 1961 (hereinafter in short “the Act”)

The assessee has raised the following grounds of appeal.

1. *The Learned National Faceless Appeal Centre (NFAC) erred in confirming the order of Learned Assessing officer making addition of TDR premium received by Assessee, transfer fees received by Assessee and addition of other expenses without considering the decision of Supreme Court in Assessee's own case on said additions.*
2. *The Learned National Faceless Appeal Centre (NFAC) erred in confirming the order of Learned Assessing officer holding that TDR premium received by the Assessee of Rs. 38,10,4447- is taxable without appreciating that TDR premium was received from the members and same was exempt from tax being covered by principle of mutuality and hence the addition of TDR premium of Rs. 38,10,4447- may be deleted.*
3. *The Learned National Faceless Appeal Centre (NFAC) erred in confirming the order of Ld Assessing officer holding that Transfer fees received by the Assessee of*

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Rs.90,91,0007- is taxable without appreciating that TDR premium was received from the members and same was exempt from tax being covered by principle of mutuality and hence the addition of Transfer fees of Rs. 90,91,0007- may be deleted.

- 4. The Learned National Faceless Appeal Centre (NFAC) erred in confirming the order of Learned Assessing officer making addition of various provisions of expenses made in previous years which were written back this year being Rs. 20,53,2717- without appreciating that same were not allowed as expenses in previous years and further in previous Assessment Years such expenses written back were disallowed and Hon'ble Commissioner appeals deleted such additions which has been accepted by the Department and hence the addition of Rs.20,53,271/- may be deleted.*
- 5. The Learned National Faceless Appeal Centre (NFAC) erred in confirming the order of Ld Assessing officer wherein Assessing Officer has wrongly adopted Net profit of Rs. 88,83,8967- for making the additions.*
- 6. The Learned National Faceless Appeal Centre (NFAC) erred in confirming the order of Learned Assessing*

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officer wherein he has miscalculated the total taxable income at Rs.2,52,38,3307-.

- 7. The Learned NFAC failed to appreciate that AO erred in giving credit for taxes paid of Rs.16,75,0007- instead of Rs.25,91,0007-.*
- 8. The Learned NFAC erred in not granting proper opportunity of hearing and also erred in not deciding the appeal on merits.*
- 9. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.*

At the time of hearing, the learned AR submitted that the assessee is not pressing the grounds of appeal No. 5 and 6 and made endorsement in the appeal memo. Accordingly, these two grounds of appeal are treated as withdrawn and dismissed.

2. The brief facts of the case, the assessee is a Co-operative Housing Society of plot holders and is engaged in providing services to its members. The assessee as per decision of general body meeting collects various charges at the time of transfer of plot and availing of TDR by

members of the respective plots. The assessee has not filed the return of income and the assessment was reopened under Section 147 of the Act and notice u/sec148 of the Act was issued. Subsequently, notice under Section 142(1) of the Act was issued and in-compliance to the notice, the managing committee member of the society attended hearing and filed the details on 23.03.2015 referred at page 2 and 3 of the order. The Assessing Officer (A.O.) found that the assessee has received transfer fee/charges of Rs.90,91,000/- and also TDR Premium of Rs.38,10,441/- and the contentions of assessee that, these amounts are not taxable on the principal of mutuality and supported with the judicial decision of Hon'ble High Court and the Honble Tribunal decisions in the assessee's own case for earlier years. Further, in-compliance to notice issued by the AO, the assessee has filed the return of income on 09.08.2011 and has claimed refund.

3. The AO was not satisfied with the explanations in respect of transfer charges and the TDR premium amount received and dealt elaborately on the various facts and finally observed that the transfer charges received by the assessee of Rs.90,91,000/- is treated as

revenue receipt and is liable to tax. Similarly, that the AO has made an addition of TDR premium of Rs.38,10,444/- and the AO also made addition of excess provision written back of Rs.20,53,271/- and assessed the total income of Rs.2,52,38,330/- and passed the order under Section 143(3) r.w.s 147 of the Act.

4. Aggrieved by the order, the assessee has filed an appeal with the CIT(A) whereas, the CIT(A) considered grounds of appeal, findings of the scrutiny assessment and based on the statement of facts filed by the assessee has confirmed the action of the AO and dismissed the assessee appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal with the Hon'ble Tribunal.

5. At the time of hearing, the Ld. AR submitted that the CIT(A) has erred in dismissing the assessee appeal without considering the facts, legal decisions and overlooking the material information filed. The Ld.AR explained the transactions of transfer charges received and TDR premium concept and principle of mutuality. Further The Ld. AR submitted that, on these two issues in the assessee own case the Hon'ble tribunal has allowed the claim and supported the submissions with the judicial decisions. In respect of provision of expenses

written back and the assessee was not able to substantiate with evidences in the proceedings, the Ld.AR prayed for an opportunity of hearing before lower authorities and the AO has not granted the credit for tax payments. The Ld.AR substantiated the submissions with the paper book and judicial decisions. Per Contra, the Ld. DR relied on the order of the AO and the CIT(A).

6. We heard the rival submissions and perused the materials on record. Prima Facia, the Ld.AR has been emphasizing that the CIT(A) overlooked the various facts, material information and the Co-ordinate Bench of Tribunal decision in the assessee's own case on the issue of taxability of TDR premium and transfer fee received by the assessee and the Principal of mutuality. We considered it appropriate to refer to the decision of the Hon'ble Tribunal in assessee's own case, ITA No.66/M/2014 and ITA No.67/M/2014 dated 9.03.2016 at page 6 of the order read as under:

1. 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 TDK 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. 37,32,6507-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 1TR 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

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Bombay has dismissed the appeals filed by the revenue against the findings of the Tribunal. On the other hand the Id. 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 TDK 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

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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 anysubstantial question of law. The findings rendered by the tribunals are in consonance oath the functioning and administration of co-operative housing society that has been recognized by the Division. Bench of thus Court and the decision to that effect in Mittal Court Premises Cooperative 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 Cooperative 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 favor 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.

7. We respectfully follow the judicial precedence and the applicability of concept of Principal of mutuality to the present case in respect of Transfer fee and TDR premium and set aside the order of CIT(A) on these disputed issues and direct the Assessing officer to delete the additions. On the other disputed issues, with respect to provision of expenses written back, for limited purpose this disputed issue is restored to the file of Assessing officer for examination and verification of claims and further we direct the assessing officer to grant the credit for taxes

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paid as per law and allow these grounds of appeal for statistical purpose.

8. In the result, the appeal filed by the assessee is partly allowed for statistical purpose.

Order pronounced in the open court on 10th day October 2022.

Sd/-

(AMARJIT SINGH)

ACCOUNTANT MEMBER

Mumbai, Dated: 10/10/2022

M. Sonavane

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//

Sd/-

(PAVAN KUMAR GADALE)

JUDICIAL MEMBER

BY ORDER,
(Dy./Asstt.Registrar)ITAT,
Mumbai