

**IN THE INCOME TAX APPELLATE TRIBUNAL
"SMC" BENCH, MUMBAI**

BEFORE SHRI N. K. CHOUDHRY, JM

I.T.A. No. 1582/Mum/2023
Assessment Year: 2009-10)

**Mrs. Rekha Nigam (Legal
Representative of Late Shri
Shashi Bhushan Bajpai),**
Building No. G-603, Zade
Gardens, Kala Nagar, Bandra
(East), Mumbai-400051.

Vs.

ITO-23(3)(1)
1st Floor, Matru Mandir,
Grant Road, Mumbai-400007.

PAN No. **AACPB9518L**

Appellant)	:	Respondent)
Appellant/Assessee by Assessee/Respondent by	:	Ms. Aarti Sathe Ld. Advocate Sh. Anurag Tripathi, Ld. DR
Date of Hearing	:	31.08.2023
Date of Pronouncement	:	26.09.2023

O R D E R

Per N. K. Choudhry, JM:

The Appellant/Assessee herein has preferred this appeal against the order dated 10.03.2023 impugned herein passed by Ld. Commissioner of Income Tax (Appeals)-34/National Faceless Appeal Centre (NFAC), Delhi {in short 'Ld. Commissioner'} u/s 250 of the Income Tax Act 1961 (in short 'the Act').

2. In this case, the case of the Assessee was re-opened under section 147 of the Act on the information received from ITO-23(2)(3), Mumbai, by recording following reasons:

"In this case, "Information has been received from the ITO-23(2)(3), Mumbai vide his letter dated 24.02.2016 that Middle Income Group III Co Op Housing Society Ltd had entered into a development agreement with M/s Suyog Happy Homes on 30.04.2008. It is further stated that members of the society have received payments from the Developer, M/s Suyog Happy Homes. The assessee Shri Shashi B Bajpai, being a member of the said society had received an amount of Rs. 46,98,063/- on 24.08.2008 from M/s Suyog Happy Homes. It is seen that the assessee has not filed the return of Income for assessment year 2009-10. Therefore, it is seen that the assessee has not offered this income arising out of transfer of development rights for taxation. Hence, I have reasons to believe that the income of the assessee has escaped assessment for AY 2009-10 within the meaning of the provisions of Section 147 of the I.T. Act, 1961."

3. Subsequently notice dated 14.03.2016 under section 148 of the Act was issued to the Assessee, in response to which the Assessee on dated 12.04.2016 by filing its return of income for the AY under consideration declared its total income of Rs. 1,33,234/-. The Assessee also filed its objection to the proceedings initiated under section 148 of the Act, which were disposed off by the AO vide order dated 26.09.2016 and thereafter statutory notices under section 143(2) and 142(1) of the Act were also issued and served upon the Assessee, in response to which the Assessee attended the proceedings from time to time and filed the details as called for.

3.1 The AO ultimately made the addition of Rs. 46,98,063/- as revenue receipts in the form of dividend under the head "Income from other sources" by concluding as under:

"During the course of assessment proceedings, the AR of the assessee submitted the development agreement dated 30.04.2008. It can be seen from the Development Agreement dated 30.04.2008 that the said agreement was entered into between Middle Income Group III Co. Op. Hsg. Society Ltd, as party of the first part and members being the parties of the second part and M/s Suyog Happy Homes the Developers being the party of the third part. The Middle Income Group III Co. Op. Hsg. Society was registered under Maharashtra Co-Op Housing Societies Act 1961. The said society is governed by its bye laws. It is mandatory to issue share certificate by the society to its members who pay consideration to purchase its shares and become member of the society. The ownership of the flat is with the society. The members get right to use & occupy the flat as he/she is member of the society which is a benefit derived for being a member. Whenever the flat is sold or purchased by any members the share certificate and shares are transferred in the records of society. The incoming member/ transferee member gets the right to use and occupy the flat and benefits which were enjoyed by the original member. It is very clear that the society in principal is the owner of the land & building and members merely get right to use the flat owned by the society. In the instant case the funds were received in the hands of the society as the developer was well aware of the fact that the members are merely beneficiaries being the members and hence the amount received by the members are merely benefits that the society transferred to its members in the form of income/dividend. To confirm the above facts the notice u/s 133(6) of the I.T. Act dated 04.11.2016 was issued to the Developers M/s Suyog Happy Homes. In reply to notice u/s 133(6) of the I.T. Act issued to M/s Suyog Happy Homes vide its letter dated 24.11.2016 being developers clearly stated as under.

"Please note that Shri Shashi Bhushan Bajpai is not our purchaser and he was the owner of Flat no. C-394 and holding five shares of the society as per Share Certificate No. 42 issued by MIG III CHS Ltd."

The above facts as confirmed by the M/s Suyog Happy Homes as developers who had given amount of Rs. 46,98,063/- by cheque to the assessee at the instance and direction of the society.

As stated above, the activity carried out by the Society is in the nature of commercial activity, the monetary consideration arising out of it is directly distributed to its members being shareholders is a kin to the dividend and is therefore eligible to income-tax in the hands of the 01.06.1978 at specified annual rent. In the case of the

assessee, to acquire additional FSI, the society/Developer had to pay lease premium to MHADA.

The assessee has claimed the above receipts under the head capital gains but Considering the above facts and as discussed above the receipt of Rs. 46,98,063/- is considered as revenue receipt in the form of dividend under the head 'Income from other Sources'. It may be noted here that no expenditure can be allowed to be deducted against the said receipt/income as the assessee has not furnished any details and documentary evidence for having incurred such expenditure to earn the said dividend income."

4. The Assessee being aggrieved challenged the said addition before the Ld. Commissioner and filed its responses on three occasions i.e. on 16.09.2022, 07.10.2022 and 09.01.2023. The Ld. Commissioner affirmed the addition by mainly holding as under:

"That the Assessee has not submitted any authentic evidence or any verifiable information during the appellate proceeding to enable him to take a different stand from the one taken by the A.O. The Assessee and his counsels have indulged in mere rhetoric rather than to produce evidence. Therefore in the absence of any records or evidence additions made by the A.O is sustained. Therefore, these grounds are dismissed."

5. The Assessee being aggrieved is in appeal before this bench.

6. I have heard the parties and perused the material available on record. Though the Assessee has raised various grounds of appeal, however, at the time of argument mainly focused on Ground No.1 which pertains to non-grant of opportunity of hearing through video-conference facility. The Assessee claimed that by filing written submissions dated 09.01.2023, the Assessee specifically requested the Ld. Commissioner for grant of an opportunity of hearing over

video-conference facility but he failed to provide the opportunity sought and violated principle of audi alteram partem. The Ld. Counsel Ms. Aarti Sathe on this context also relied upon the judgment passed by the Hon'ble Co-ordinate Bench of the Tribunal in the case of Bank of India Vs. ACIT, Circle-2(1)(1) [2022] 140 taxmann.com 41 (Mum. Trib.).

7. At the outset, I observe that the Assessee being one of legal heirs of Late Shri Shashi Bhushan Bajpai, has filed the instant appeal without impleading other legal heirs as parties to the instant appeal. On being asked about non-making the other legal heirs as parties, the Ld. Counsel submitted that some of the legal heirs are settled outside India and may not be willing to be party to the instant appeal and even otherwise are out of the control and direction of the Assessee and therefore the Assessee is helpless to provide their no-objections and/or to implead them as parties to the instant appeal, however, the Assessee is ready to give the details of all legal heirs for taking appropriate action in accordance with law.

8. I further observe that the Ld. Commissioner passed the order in cryptic manner and even neither rejected the request for video-conferencing nor mentioned anything in the impugned order, hence, for the just decision of the case and for the ends of Justice, I am inclined to remand the instant case to the file of the Ld. Commissioner for decision afresh, suffice to say by affording reasonable opportunity of being heard through video-conferencing as well, as requested by the Assessee as per the provisions of Rule 12(3) of Faceless Scheme 2021.

9. The Assessee is also directed to file the requisite details including present addresses and PAN Numbers of the other legal heirs before the Ld. Commissioner, who can take appropriate action for bringing on record the other legal heirs for the appeal proceedings.

10. In the result, appeal filed by the Assessee stands allowed for statistical purposes.

Order pronounced in the open court on 26-09-2023.

Sd/-
(N. K. CHOUDHRY)
Judicial Member

SK, Sr.PS.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

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

Sr. No.	Details	Date	Initial	Designation
1	Draft dictated on (dictation sheets are attached with main file)	18.09.23		Sr.PS/PS
2	Draft dictated on PC	20.09.23		Sr.PS/PS
3	Draft Placed before author			Sr.PS/PS
4	Draft proposed & placed before the Second Member			JM/AM
5	Draft discussed/approved by Second Member			JM/AM
6	Approved Draft comes to the Sr.PS/PS			Sr.PS/PS
7	Order pronouncement on			Sr.PS/PS
8	File sent to the Bench Clerk			Sr.PS/PS
9	Date on which the file goes to the Head clerk			
10	Date on which file goes to the AR			
11	Date of Dispatch of order			