

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND
SMT. MADHUMITA ROY, JUDICIAL MEMBER**

ITA Nos.762 & 763/Bang/2023
Assessment Year: 2012-13

The BEML Employees Co-Op. Society Ltd. M/s. BEML Complex New Thippasandra Bengaluru 560 075 PAN NO : AAALT0689E	Vs.	ITO Ward-4(2)(1) Bangalore
APPELLANT		RESPONDENT

Assessee by	:	Shri Sandeep Chalapathi, A.R.
Revenue by	:	Shri V. Parithivel, D.R.

Date of Hearing	:	14.12.2023
Date of Pronouncement	:	14.12.2023

O R D E R

PER MADHUMITA ROY, JUDICIAL MEMBER:

These two appeals by assessee are directed against two different orders of NFAC for the assessment year 2012-13, both are dated 28.7.2023, one is emanated from the assessment order passed u/s 144 r.w.s. 147 of the Income Tax Act, 1961 (in short “The Act”) dated 7.12.2019, which is on quantum addition and the other is emanated from the penalty order passed u/s 271(1)(c) of the Act dated 24.7.2021 passed by Id. AO. Since the issue in both the appeals is common, these are heard analogously and are disposed of by a common order for the sake of convenience.

ITA No.762/Bang/2023 (AY 2012-13):

2. This appeal is time barred by 14 days. The assessee has filed a condonation petition stating that the assessee was busy in carrying out the audit under Karnataka Co-operative Society Act, 1959 and

tax audit under Income Tax Act, 1961. The tax consultants are also busy in filing individual returns and tax audit during this period for the Assessment Year 2022-23. Hence, prayed that the short delay of 14 days be condoned. The ld. D.R., has however, not raised any serious objections to that effect.

3. We have heard the rival submissions made by the respective parties and perused the materials available on record. We have gone through the condonation petition filed by the assessee. We have found good and sufficient cause in filing the appeals belatedly by 14 days before this Tribunal. Accordingly, the delay of 14 days is condoned and the appeals are admitted for adjudication.

4. The assessee has raised following grounds of appeal:

1. *“That the order of the learned Commissioner of Income Tax (Appeals) is in so far it is prejudicial to the interests of the appellant, is bad and erroneous in law and against the facts and circumstances of the case.*
2. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts not confirming the action of the assessing officer in holding that the proceedings u/s 147 of the Act are valid in law.*
3. *That the learned Commissioner of Income Tax (Appeals) ought to have held that the proceedings u/s 147 of the Act are bad in law and without jurisdiction.*
4. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in confirming the addition of Rs. 85,00,800 made by the assessing officer and holding that the same is liable as income under the head "Capital gains".*
5. *That the learned Commissioner of Income Tax (Appeals) ought to have held that the income of the appellant is eligible for exemption under principles of mutuality.”*

5. Ground No.1 is too general which do not require any adjudication.

6. At the time of hearing, the ld. A.R. has not pressed ground Nos.2, 3 & 6. Hence, these grounds are dismissed as not pressed.

7. Ground Nos.4, 5 & 7 are with regard to addition of Rs.85,00,800/- being capital gain arising out of transfer of immovable property for the assessment year under consideration. According to the assessee, the total consideration is Rs.85,00,800/- has been brought to tax by ld. AO vide ex-parte order passed u/s 144 of the Act. The ld. A.R. submitted that the capital gain cannot be brought to tax in view of the concept of mutuality in case of Co-operative Societies and on this reason, addition is to be deleted. Without prejudice to the above, he submitted that even if it is to be taxable, only net capital gain is to be brought to tax and not the entire sale consideration.

8. On the other hand, ld. D.R. submitted that there was no ground with regard to applicability of concept of mutuality before lower authorities and the assessee cannot urge this ground before this Bench without any additional ground or bringing all facts on record. Further, he submitted that assessee has not furnished any details of cost of acquisition or other details of development expenses incurred by assessee before the lower authorities. Hence, entire sale consideration of Rs.85,00,800/- was brought to tax as capital gain.

9. We have heard the rival submissions and perused the materials available on record. The main contention of ld. A.R. is that the assessee is not liable to capital gain as the assessee is a Co-operative Society governed by principles of mutuality. For this purpose, he relied on the order of the Coordinate Bench in the case of Poornaprajna House Building Co-operative Society Ltd. in ITA No.2025/Bang/2016 for the assessment year 2012-13 vide order dated 15.11.2017. In our opinion, cardinal requirement for applicability of concept of mutuality is that all the contributors to common funds must be entitled to participate in the surplus and all the participators must have contributed to the common funds. The ld. A.R. has not brought on record all the facts to show that the purchaser of the housing property is also entitled to participate in

the surplus and also not brought on record whether he has contributed to the common funds. Admittedly, as rightly pointed out by the Id. D.R., the assessee has not raised the ground with regard to applicability of concept of mutuality in case of assessee. Though the assessee has raised ground before us on this issue, it has not brought on record all the facts relating to this issue. Even otherwise assessee has not demonstrated how the purchaser participating in the common funds and entitled to participate in the surplus of the assessee society. In such circumstances, we are not in a position to uphold this argument of assessee's counsel and the same is dismissed.

9.1 The other contention of the Id. A.R. is that entire sale consideration has been considered as capital gain in the hands of assessee instead of considering the net capital gain arising out of transfer of immovable property in the hands of assessee. We find force in the argument of assessee's counsel and only net capital gain arising out of the transfer of immovable property is to be taxed in the hands of assessee and not the gross sale consideration as per law. Accordingly, in the interest of justice, we remit this issue for limited purpose for recomputing the capital gain arising out of transfer of impugned immovable property. Ordered accordingly.

9.2 These grounds of assessee are partly allowed for statistical purposes.

10. In the result, appeal of the assessee in ITA No.762/Bang/2023 is partly allowed for statistical purposes.

ITA No.763/Bang/2023 (AY 2012-13):

11. In this appeal, the assessee has submitted that levy of penalty on the sale consideration amounting to Rs.85,00,800/- by holding that there is a concealment of income is unjustified. On merit, Id. A.R. submitted that even otherwise, there is an applicability of concept of mutuality in house building society as argued in quantum appeal as above and submitted that no penalty should be levied.

- 12.** The ld. D.R. relied on the order of lower authorities.
- 13.** In our opinion, assessee has not returned capital gain arising out of transfer of immovable property. As such, assessment has been reopened and addition has been made to the tune of Rs.85,00,800/- , which is being total sale consideration received by assessee on transfer of immovable property. As we discussed in quantum appeal as above, total sale consideration cannot be considered as a capital gain in the hands of assessee in which net capital gain arisen on transfer of immovable property is to be considered. Accordingly, we direct the ld. AO to recompute the penalty after passing the assessment order, which has been remitted to the file of ld. AO for fresh consideration. Accordingly, the ld. AO has to recompute the penalty as observed above. With reference to applicability of principles of mutuality, as we discussed in earlier para in quantum appeal, it cannot be said that assessee is protected by the principles of mutuality. Accordingly, this argument of the assessee is rejected.
- 14.** In the result, appeal of the assessee in ITA No.763/Bang/2023 is partly allowed for statistical purposes.

Order pronounced in the open court on 14th Dec, 2023

Sd/-
(Chandra Poojari)
Accountant Member

Sd/-
(Madhumita Roy)
Judicial Member

Bangalore,
Dated 14th Dec, 2023.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5. Guard file

By order

**Asst. Registrar,
ITAT, Bangalore.**