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

BEFORE SHRI NARENDER KUMAR CHOUDHRY, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No.2762/M/2024
Assessment Year: 2009-10

Mr. Laxmikant Hulgappa Renuke, G-602 Jade Garden, MIG III CHS Ltd., Bandra East, Mumbai – 400 051 Maharashtra **PAN: AABPR0675B**	Vs.	**Income Tax Officer 23(2)(1),** Matru Mandir, Tardeo Road, Mumbai, Maharashtra- 400 007
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Mehulle V. Choksi, C.A.
Revenue by : Shri Manoj Kumar Sinha, Sr. DR.

Date of Hearing : 22 . 07 . 2024
Date of Pronouncement : 31 . 07 . 2024

O R D E R

Per : Narender Kumar Choudhry, Judicial Member:

This appeal has been preferred by the Assessee against the order dated 20.03.2024, impugned herein, passed by the National Faceless Appeal Center (NFAC)/ Ld. Commissioner of Income Tax (Appeals) (in short Ld. Commissioner) under section 250 of the Income Tax Act, 1961 (in short 'the Act') for the A.Y. 2009-10.

2. In this case, the Assessee is a consultant in garment business and filed its return of income on 25.05.2009 declaring total income at Rs.2,45,890/-. Subsequently the case of the Assessee was reopened u/s 148 of the Act mainly on the ground that the Assessee is a member of MIG cooperative housing society and has received

compensation of **Rs.40,75,302/-** from **M/s. Suyog Happy Homes** during the year under consideration. Consequently, the notice u/s 148 of the Act was issued the Assessee on 30.03.2016. The Assessing Officer (AO) ultimately made the addition of **Rs.53,88,045/-** by considering as revenue receipt in the form of dividend under the head "income from other sources" instead of capital gain as claimed by the Assessee.

3. The Assessee, being aggrieved, challenged the aforesaid addition before the Ld. Commissioner, who by dismissing the appeal of the Assessee affirmed the aforesaid addition. The Assessee, being aggrieved, is in appeal before us.

4. Heard the parties and perused the material available on record. We observe, as demonstrated by the Ld. A.R. that the Hon'ble co-ordinate Bench of the Tribunal in the case of co owner of the society, who also received similar amount from the same developer i.e. **M/s. Suyog Happy Homes**, dealt with the identical issue and ultimately deleted the identical addition, vide order dated 01.11.2023 ITA No.2864/M/2022 titled as Mrs. Pushpa P. Chawla vs ITO-Ward-23(2)(5). For clarity, the relevant part of the order is reproduced herein below:

> *"2. Brief facts of the case are, assessee is an individual and she has filed her return of income for A.Y. 2009-10 on 31.07.2009 declaring total income at ₹.9,47,976/-. The Assessing Officer received information from Income Tax Officer - 23(2)(3), Mumbai vide Letter Number 23(2)(3)/ sharing of information/ 2015-16 dated 24.02.2016, that the assessee is a member of Middle Income Group III Co-operative Housing Society Ltd. The above said society had entered into an agreement dated 30.04.2008 with* ***M/s. Suyog Happy Homes*** *for redevelopment of the society and as per the terms of the said agreement, the assessee has received an amount of ₹.52,88,045/- from the above said developer, but the assessee has filed return of income declaring total income of ₹.9,47.976/- for the current Assessment Year. Accordingly, the case of the assessee was reopened and notice u/s 148 of Income-tax Act, 1961 (in short "Act") was issued and served on the assessee. In response assessee filed return of income, subsequently notices u/s. 143(2) and 142(1) of the*

Act were issued and served on the assessee. In response, authorised representative of the assessee attended and submitted the relevant information as called for.

3. After considering the submissions of the assessee, the assessee was asked why the amount received from the developer should not be added to the total income of the assessee. In response, assessee has submitted as under: -

> *".......1. As per the Return of Income (ROI) filed by me on 31.07.2016 vide acknowledgement number 82182630310709, out of Rs.52,88,045, though the Corpus amount of Rs.21,77,069 is not taxable, the same is offered to tax in the ROI to avoid litigation and hence, the question of taxing to the extent of Rs.21,77,069 does not arise.........*
>
> *2. ....*
>
> *Accordingly, based on the facts and relevant judgements, consideration received from the Developer as Corpus, shifting/reshifting personal belongings to/from alternative accommodation, damage or loss of existing furniture, acquisition of new furniture and fittings and compensation for hardship and inconvenience to the members and compensation for Temporary Transit Accommodation during the period of construction would not be taxable....."*

4. After considering the submissions of the assessee, the Assessing Officer has rejected the same and observed that MIG-III Co-op. Hsg. Society is the lawful owner of property consisting of 9 buildings with 80 members entered into contract with M/s. Suyog Happy Homes vide Agreement Dated 30.04.2008. As per the terms of the said agreement, the developer shall develop the property and each member of the Society shall receive a new flat in exchange of surrender of old flat depending upon the size of the old flat along-with interest in the additional FSI allotted by MHADA. As per the agreement, the Developer, has paid to the society being lawful owner of the property and the members an aggregate monetary consideration of ₹.39,10,00,000/-. The above said amount of ₹.39.10 crores has been distributed among the members of the society being shareholders, depending upon the size of their old flat. The assessee being one of the member of the society, the assessee has received an amount of ₹.52,88,045/- being consideration for surrender of her old flat along with her interest in the additional FSI allotted by MHADA.

5. The Assessing Officer observed that the developer has issued cheques in the names of the individual members which were handed over to the Society and in turn the society diverted the same at source to the members/shareholders. He observed that the said amount of ₹.39.10 crores was never routed through the books of accounts of the Society though these cheques were in the custody of the society before handing over to the individual members. Further, he observed that the receipt of ₹.39.10 crores by the society is not generated out of a regular activity of the society and there is no concept of mutuality as the same is received from the third party i.e.

the Developer. Accordingly, he held that the transaction of redevelopment and receipt of consideration by the individual members is purely a commercial activity and he also held that it is in the nature of dividends in the hands of the members/shareholders of the Society. Therefore, he held that it has revenue character by applying the decision of the Hon'ble Karnataka High Court in the case of M/s Bangalore Club v. CIT, 156 Taxman 323. Accordingly, he held that it is in the nature of dividend and is therefore exigible to the income tax in the hands of the assessee under the head "income from other sources".

6. Further, he rejected claim of the assessee, as the above receipt is also capital receipt with the observation that the society under consideration was lawful owner of only leasehold rights by virtue of MHADA as Lessor had demised unto Society, for a period of 99 years w.e.f. 01.06.1978 at specified annual rent. The assessee, acquired additional FSI, the society/Developer had to pay lease premium to MHADA, with the above observation Assessing Officer treated the amount received from the developer as "income from other sources"

7. Aggrieved, assessee preferred an appeal before the Ld.CIT(A) and filed the detailed submissions before him, after considering the detailed submissions, Ld.CIT(A) rejected the same by observing as under: -

> *"In this case the appellant received Rs.52,88,045/- from M/s Suyog Happy Homes. This was provided to the appellant being a member of a MIG-III society which had agreed to be developed by M/s Suyog Happy Homes. As per the agreement, the developer is supposed to provide the appellant a flat of carpet area of 94.85 square meter (as against carpet area of 57.15 square meter held by her) and secondly cash compensation in the name of corpus fund, cost of transit accommodation and cost of shifting etc. The appellant offered Long Term Capital Gain of Rs.4,25,249/- only out of corpus amount (as claimed) received of Rs.21.77,069/- and it was claimed that the rest amount was capital asset.*
>
> *The Ld. AO in his order treated the whole amount received by appellant as income distributed by the cooperative society and treated the entire sum as revenue receipt. It is noted that the agreement was between the MIG-III Society and M/s Suyog Happy Homes (the developer) but the benefit of such agreement was directly transferred to the appellant and other members of the society. Since there was no agreement between the appellant and the developer, the entire amount which should have been appeared in the books of accounts of the society had been bye- passed and credited in the accounts of the appellant. It is clearly a diversion of fund and treatment of the Ld. AO rightly taxed it as revenue receipt by assessee from the Cooperative society.*

The appellant further received a flat which was almost double in size of her previous property. Therefore, it is clear that the entire sum beside the flat is nothing but income in the hands of the appellant. Even the value of flat is also required to be taken into consideration by the Ld. AO for taxation purpose. The agreement of society with the developer did not justify any reason for such compensation (as claimed), it is clearly nothing but a colorable device to avoid the taxation.

In view of the above discussion, the order of the Ld. AO is hereby, confirmed and the appeal of the appellant is dismissed."

8. Aggrieved assessee is in appeal and raised following grounds in its appeal: -

"1. The Ld. Commissioner of Income-tax (Appeal), NFAC, erred in upholding the action of Ld. Assessing Officer in adding INR 52,88,045/-.

2. The Ld. Commissioner of Income-tax (Appeal), NFAC, erred in upholding the action of Ld. Assessing Officer in adding INR 52,88,045/-, as income from other sources.

3. The Ld. Commissioner of Income-tax (Appeal), NFAC, erred in upholding the action of Ld. Assessing Officer in adding INR 52,88,045/-, without reducing the amount of compensation already offered to tax of Rs. 21,77,069/- offered to tax under the head capital gains.

4. The notice u/s 148 of the Act dated 29.03.2016 is bad in law and without jurisdiction and consequently entire reassessment proceedings are bad in law.

5. The Ld. AO has erred in levying interest u/s 234B and 234C of the Act.

6. The grounds of appeal raised are independent and without prejudice to each other.

7. The Appellant craves leave to add, to amend, alter/delete and/or modify the above grounds of appeal on or before the final hearing."

9. At the time of hearing, Ld. AR of the assessee submitted that the assessee has received certain sum from the developer as the shifting compensation and he brought to our notice findings of the Assessing Officer at Para No. 4.1 of the Assessment Order and he also brought to our notice findings of the Ld.CIT(A) at Page No. 16 of the appellate order. In this regard, he brought to our notice Page No. 33 of the Paper Book which is the supplemental agreement which is Tripartite Agreement with the Developer by the Assessee and the Cooperative Society and he also brought to our notice types of compensation received by the assessee which is the corpus amount payable by the developer to the extent of ₹.21,77,069/-, a compensation of ₹.9,50,000/- payable by the developer to the individual members to meet the expenses for shifting / re-shifting and compensation to the individual members to meet the cost for temporary transit accommodation to be arranged by the individual members during the

period of construction of the proposed building at ₹.21,60,976/- for an initial period of 24 months. In this regard, he relied on the decision of the ACIT v. IGE India ltd., [2013] 33 taxmann.com 405 (Mumbai – Trib.).

10. On the other hand, Ld. DR objected to the above submissions and submitted that funds were routed through the society, therefore he supported the findings of the Assessing Officer that the assessee has received dividend in cash. Therefore, he relied on the findings of the Ld.CIT(A) at Page No. 17 of the order.

11. In rejoinder, Ld. AR brought to our notice Para No. 3.2 of the Assessment Order and submitted that it is not the dividend income received from the society, assessee has received by entering tripartite agreement and assessee has received as compensation from the developer. In this regard he relied on the decision of the Coordinate Bench in the case of Shri Lawrence Rebello v. ITO in ITA.No. 132/IND/2020 dated 29.09.2021. Further, Ld. AR submitted that relating to additional FSI, he relied on the decision of the Hon'ble Bombay High Court in the case of CIT v. Sambhaji Nagar Co-op. Housing Society [2015] 54 taxmann.com 77 (Bombay) wherein it is held as under:

> *"In the instant case, additional FSI/TDR is generated by change in the DC. A specific insertion would therefore be necessary so as to ascertain its cost for computing the capital gains. Therefore, the Tribunal was in no error in concluding that the TDR which was generated by the plot/property/land and came to be transferred under a document in favour of the purchaser would not result in the gains being assessed to capital gains. The factual backdrop is noted by the Tribunal and thereafter the rival contentions. The Tribunal concluded and relying upon its order passed in two other cases that what the assessee sold was TDR received as additional FSI as per the DC. It was not a case of sale of development rights already embedded in the land acquired and owned by the assessee. The Tribunal concluded that the assessee had not incurred any cost of acquisition in respect of the right which emanated from 1991 Rules, making the assessee eligible to additional FSI. The land and building earlier in the possession of the assessee continued to remain with it. Even after the transfer of the right or the additional FSI, the position did not undergo any change. The revenue could not point out any particular asset as specified in sub-section (2) of section 55. The conclusion of the Tribunal in imminently possible and in the given facts. That is also possible in the light of the legal position as noted by language of section 55(2) and the judgment of the Supreme Court in CIT v. B.C. Srinivasa Shetty [1981] 128 ITR 294/5 Taxman 1, which is in the field. [Para 11]"*

12. Further, with regard to the compensation received by the assessee, he submitted that the compensation is only towards

hardship compensation, in this regard he relied on the decision of the Coordinate Bench in the case of Ajay Parasmal Kothari v ITO in ITA.No. 2823/Mum/2022 dated 03.04.2023.

13. Considered the rival submissions and material placed on record, we observe from the record that assessee has entered into a development agreement which is placed on record. From the agreement, we observe that it is a tripartite agreement between developer, society and the assessee being the one of the member of the society. It clearly shows that assessee is one of the party and consigning party for development of the society. In compensation assessee has received new flat with additional FSI and certain compensations which includes corpus funds, compensation towards shifting/re-shifting personal belongings and compensation towards cost for temporary transit accommodation, initially for a period of 24 months. The Ld. AR submitted the development agreement to submit that the additional FSI in new flats are allotted to all the members of the society.

14. The case of the revenue is that the society has entered into a development agreement and received the compensation and distributed the same to the individual members being part of the society. Since the compensation is no doubt paid to the individual members, however, same were routed through the society. Therefore, the compensation received by the assessee will fall as an additional income earned through the society. Therefore, it has a character of the revenue in nature which will fall under the category of dividend, which is chargeable to tax under the head "income from other sources".

15. From the record, we observe that the Assessing Officer has merely made an observation on the additional FSI received by the assessee, however, he proceeded to make the addition only to the extent of the compensation received by the assessee from the developer. Therefore, we are restricting ourselves to adjudicate on the compensation received by the assessee whether it is in the form of compensation or the additional income in the nature of dividend.

16. It is fact on record that assessee has entered into development agreement through the society and only due to the fact that the assessee being member and consigning party to the re-development Agreement, assessee was compensated with the shifting compensation for personal belongings as well as accommodation for an initial period of 24 months including corpus amount. It clearly shows that the above payments made by the developer only to compensate the assessee towards the shifting as well as the additional burden on the corpus funds. Therefore, it clearly shows that it is a compensation towards hardship faced by the assessee. We observe that Coordinate Bench has considered the similar issue and adjudicated the same in the case of Smt Delilah Raj Mansukhani v. ITO in ITA.No. 3526/Mum/2017 dated 29.01.2021 and observed as under: -

"5. After hearing the rival submissions and perusing the material on record, we find that compensation received by the assessee towards displacement in terms of Development Agreement is not a revenue receipt and constitute capital receipt as the property has gone into redevelopment. In such scenario, the compensation is normally paid by the builder on account of hardship faced by owner of the flat due to displacement of the occupants of the flat. The said payment is in the nature of hardship allowance / rehabilitation allowance and is not liable to tax. The case of the assessee is squarely supported by the decision of the Co-ordinate Bench in the case of Shri Devshi Lakhamshi Dedhia vs. ACIT in ITA No.5350/Mum/2012 wherein similar issue has been decided in favour of the assessee, the relevant operative portion is reproduced hereunder:-

> *15. We have considered the rivals submissions and perused the materials on records. We note that the assessee received compensation of Rs. 19,50,873/- from the developer when the building in which the assessee owned flat went for re-development as per the agreement between the developers and flat owners dated 28.03.2008. The said compensation was paid towards hardship Rs, 13,45,278/-; rehabilitation Rs, 5,90,625/- and for shifting Rs. 15,000/-. We also note that the assessee paid Rs. 18,63,000/- to Joys Developers for acquiring additional area of 138 Sq Ft. It was also noted that the assessee shifted to his own house when the building went for re-development. Now the question before is whether the compensation upon re-development of property towards hardship, rehabilitation and shifting received by the assessee is taxable if the potential TDR/FSI is available to the land owner or society which owns the (and depending upon the terms of the de-development agreement without transferring the land. In the present case the assessee who was flat owner in the building was member of the society, As per the agreement each member of the society including the assessee was to be given a flat in lieu of the old one and the each member including the assessee was given compensation. We also note that In the decisions in 1TA No 72/Mum/2012 assessment year 2008- 09 Bench E and ITA No 5271/Mum/2012 assessment year 2008-09 Bench "D" the Tribunal held that the amounts received as compensation for hardship , rehabilitation and for shifting are not liable to tax We, therefore , respectfully , the above decisions are of the considered view that the amounts received by the assessee as hardship compensation, rehabilitation compensation and for shifting are not liable to tax and*

the order passed by the first appellate authority cannot be sustained. Thus the order of CIT(A) is reversed and ground is allowed in favour of the assessee.

16. In the result, appeal of the assessee is partly allowed, as above.

6. Respectfully following the co-ordinate Bench decision, we set aside the findings of the ld. CIT(A) on this issue and direct the AO to delete the addition made of Rs.2,60,000/-. Accordingly, the ground No.6 is allowed."

17. Respectfully following the above said decision, we are inclined to agree with the submissions of the Ld. AR of the assessee and hold that the above receipt of compensation for hardship is in the nature of capital receipt. Further, we observe that assessee has submitted that the corpus fund received by her was already declared as additional income subsequently on receipt basis in A.Y. 2015-16. Therefore, we direct the Assessing Officer to verify the same and if it is found proper, the addition on corpus fund may be deleted. Accordingly, the addition made by the Assessing Officer is deleted. Ground raised by the assessee is allowed."

5. Admittedly, the Hon'ble co-ordinate Bench of the Tribunal in the aforesaid case has dealt with the identical addition/issue, as involved in the instant case and ultimately deleted the similar addition as involved in the instant case, hence respectfully following the aforesaid decision we are inclined to delete the addition under consideration, hence the same is deleted.

6. In the result, the appeal filed by the Assessee stands allowed.

Order pronounced in the open court on 31.07.2024.

Sd/- **(GAGAN GOYAL)** **ACCOUNTANT MEMBER**	**Sd/-** **(NARENDER KUMAR CHOUDHRY)** **JUDICIAL MEMBER**

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai

The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.