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

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI RATNESH NANDAN SAHAY, ACCOUNTANT MEMBER

ITA No.995/M/2024
Assessment Year: 2012-13

Abhay Shaligram Patil B-8/60, M I G Colony, Kalanagar, Bandra (East), Mumbai- 400051. **PAN: ABPPP1649G**	Vs.	**Income Tax Officer-23(1)(1),** 1st Floor, Room No. 106, Matru Mandir, Grant Mandir, Mumbai- 400007.
(Appellant)		(Respondent)

Present for :
Assessee by : Shri Yogesh Thar a/w. Shri Deep Chauchan, A.R.
Revenue by : Shri R. R. Makwana- SR. D.R.

Date of Hearing : 20 . 06 . 2024
Date of Pronouncement : 26 . 07 . 2024

O R D E R

Per :Ratnesh Nandan Sahay, Accountant Member:

1. This appeal has been filed by the appellant against the Order of the Ld. CIT (Appeals) passed u/s. 250 of the Income Tax Act [the 'Act' in short] vide DIN & Order No. ITBA/NFAC/S/250/2023-24/1059578034(1) Dated 10/01/2024 for the Assessment Year 2012-13.

2. Following grounds of appeal have been raised by the appellant:-

GROUND NO. 1: NOTICE ISSUED U/S. 148 IS VOID-AB-INITIO AND THE CONSEQUENTIAL REASSESSMENT PROCEEDINGS AND THE ORDER PASSED U/S. 143(3) RWS 147 IS BAD IN LAW:

1.1. On the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in upholding the action of the Id. AO in reopening the assessment u/s. 147 of the Act.

1.2. The Ld.CIT(A) failed to appreciate and ought to have held/considered that:

1.2.1. Since the AO of the Housing Society of which the Appellant is a member, having already taxed the said Society in respect of the impugned sums received/receivable by the members of the Society from the builder/developers under the development agreement and where the legal proceedings are pending in respect thereof, the AO of the Appellant ought not have issued notice u/s. 148 having a parallel reason to believe that the impugned sums have escaped tax in the hands of the Appellant as well;

1.2.2. Without prejudice to above, since the Id. AO has recorded reasons on the basis of so-called information received from the AO of the Housing Society of which the Appellant is a member, the same amounted to borrowed satisfaction' without application of mind on the part of the AO which is not

permissible and therefore bad in law;

1.2.3. Without prejudice to the above, the impugned notice u/s. 148 is invalid and bad in law.

1.3. The Appellant prays that the notice u/s.148 of the Act as well as consequent proceedings and the impugned reassessment order be quashed.

WITHOUT PREJUDICE TO GROUND NO 1;

GROUND NO. 2: ADDITION OF RS.18,48,739/- AS REVENUE RECEIPT IN THE FORM OF DIVIDEND:

*2.1. On the facts and in the circumstances of the case and in law, Id. CIT(A) erred in upholding the addition made by ld. AO amounting to Rs. 18,48,739/- under the head *Income from Other Sources' u/s 56 of the Act.*

2.2. The CIT(A) failed to appreciate and ought to have held / considered that:

2.2.1. The impugned sums received by the Appellant as a member of a housing society under the development agreement entered by the said housing society with the developer, represent hardship compensation and therefore are not taxable, the same being a capital receipt.

2.2.2. Without prejudice to the above and assuming without admitting that the impugned sum of Rs. 18,48,739/- is taxable, it has to be taxed under the head Long Term Capital gain u/s 45 of the Act and the Id. AO/CIT(A) be directed to consider the cost of acquisition of old flat and also grant consequential relief u/s 54 of the Act.

2.3. The Appellant prays that the addition of Rs. 18,48,739/- as revenue receipt made under the head Income from Other Sources' be deleted or appropriately reduced.

WITHOUT PREJUDICE TO GROUND NO 1;

GROUND NO. 3: LEVY OF INTEREST u/s. 234A & 234B OF THE ACT:

3.1. The Id. AO erred in levying the interest u/s. 234A & 234B of the Act.

3.2. The Appellant pray that the interest charged u/s 234A & 234B of the Act be deleted or appropriately reduced.

GENERAL

The Appellant craves leaves to add to, alter and/or amend any of the above grounds of appeal on or before the date of hearing.

3. The facts of the case, in brief, are that the assessee is a member of the middle income group co-operative hosing society. During the assessment year under consideration the information was received by the Ld. AO that the assessee, being a member of the MIG co-operative housing society, has received compensation of Rs.18,48,739/- from M/s. D. B. MIG Realtors and Builders Private Limited. The case was, therefore, reopened u/s. 147 of the Income Tax Act and notice u/s. 148 was issued to the assessee to file the return of income in response to that notice. Accordingly, the assessee filed its return of income on 29/04/2019 declaring total income at Rs.2,31,120/- Statutory notices u/s. 143(2) and 142(1) of the Act alongwith questionnaire were issued from time to time and served on the assessee. The reasons recorded by the AO for reopening of assessment are given as under:-

"In this case, information is received from the office of ITO 23(2)(3), Mumbai that the assessee has received Rs.18,48,739/- from M/s. DB MIG Realtors and Builders, Pvt. Ltd., during F.Y. 2011-12 being member of housing society as owner of flat no. 88/60.

In view of the above, it leads to the conclusion that the assessee has not fully declared income chargeable to tax for F.Y. 2011-12 relevant related to receipts from the developer."

4. During the assessment proceedings, when the assessee was asked to explain the nature of the payment received, the assessee submitted that this is the hardship compensation received by the assessee on account of hardship caused due to the redevelopment which is a capital receipt and hence not liable to tax. The Ld. AO then asked the assessee to showcause as to why this amount received from builder should not be assessed as income from other sources within a meaning of section 56 of the Income Tax Act. In response to that the assessee submitted asunder: -

"As regards the fund of Rs.18,48,739/- received from the Builder should not be assessed as "Income from other sources" within the meaning of section 56 of Income Tax Act, 1961 as we are furnishing the following facts and circumstances of our case, vis-à-vis the provisions of the Income Tax Act, 1961 supported by the relevant judicial pronouncements:

The assessee owns a residential premises in a registered Co-operative Housing Society in Bandra (East), Mumbai. The society entered into a Development Agreement & subsequently a Deed of Modification (DOM) on behalf of all members and Developers for undertaking the said Re-development, accordingly the assessee handed over the physical possession of his residential premises.

As per the terms and conditions of the Development Agreement, the assessee received a compensation for undergoing hardship as a result of the temporary displacement for enabling the Re-development work which in common parlance is known& understood as "Hardship Compensation.

This hardship compensation is received by the assessee on account of hardship caused due to Re-development, which is a "Capital RECEIPT, "& HENCE "not liable to tax".

FACTS & CITRCMSTANCES OF THE CASE:

WITH REGARD TO JUDUCIAL PRONOUNCEMENTS BASED ON PROVISIONS OF THE INCOME TAX ACT, 1961

COMPENSATION FOR REDEVELOPMENT NOT TAXABLE

Compensation received by a cooperative housing society flat owner from a redeveloper cannot be taxed in his hands, according to a recent order of the Income Tax Appellate Tribunal's (ITAT) Mumbai Bench. It noted that this compensation was towards the hardship which the flat owner would face owing to the redevelopment. It held that such compensation

should be in the nature of a "Capital Receipt". Which "is outside the scope of income that can be chargeable to tax."

In other words, such compensation cannot be subject to income tax.

5. The contention of the assessee was considered by the AO however, he didn't accept the same by holding as under:

"6. The assessee is a member of the Middle Income Group Co-operative Housing Society. The Society, who was the owner of property, entered into an agreement for development of the property and to achieve this, the society and its members awarded a contract to M/s. DB MIG Realtors and Builders Pvt. Ltd. vide Agreement dated 31-10-2010. As per the terms of the said agreement, the developer shall develop the property in such a manner that 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. It is further to be noted that the property and the additional FSI is in the name of the Society. Further, as per the said agreement all the expenses, costs and charges for the proposed project of re-development of the said property including for purchase of additional: FSI from MHADA etc. shall be borne by the Developers alone and the society and/or members shall not be liable to pay or, contribute any amount towards the same. The Developer, as per the agreement have paid to

the society being lawful owner of the property, and the members an aggregate monetary consideration of Rs.149,89,52,000/-. The said amount of Rs.149.89/- crores has been distributed among the members of the society being shareholders, depending upon the size of their old flat.

6.1.The assessee is one of the members of the said society by virtue of being shareholder. Thus, during the year under consideration i.e. F.Y.2011-12, the assessee has received an amount of Rs.18,48,739/- being consideration for surrender of his old flat.

6.2.It is pertinent to mention here 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. Thus the said amount of Rs.149.89 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 being shareholders. It is observed that the receipt of Rs.149.89 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. Hence, the activity of entering into an agreement for re-development of the property and receipt of consideration of Rs.149,89,52,000/- by the society and diverting of the same at source

to the Individual members is purely a commercial activity. It is, thus, a profit in the hands of the society which has been distributed among the individual members being shareholders and therefore is in the nature of dividends in the hands of the members/shareholders of the Society and therefore of revenue character. This is in conformity with the guidelines issued by the Hon'ble Karnataka High Court in the case of M/s. Bangalore Club v/s. CIT, 156 Taxman 323 which has been affirmed by the Hon'ble Supreme Court in Civil Appeal No. 124 of 2007 dated 14.01.2013. In this case, the Hon'ble Karnataka High Court held as under:

"On the facts of this case and in the light of the legal principles it is clear to us that what has been done by the club is nothing but what could have been done by a customer of a bank. The principle of 'no man can trade with himself' is not available in respect of a nationalized bank holding a fixed deposit on behalf of its customer.

The relationship is one of a banker and a customer"

6.3. In further appeal, the question before the Hon'ble Supreme Court for determination was that whether or not the interest earned by the assessee on the surplus funds invested in fixed deposits with the corporate member bank is exempt from levy of income tax, based on the doctrine of mutuality. The Hon'ble Supreme Court observed

that the assessee is an AOP. The concerned banks are all corporate members of the club. It is further stated that the assessee is already availing the benefit of the doctrine of mutuality in respect of the surplus amount received as contributions or price for some of the facilities availed by its members, before it is deposited with the bank. This surplus amount was not treated as income; since it was the residue of the collections left behind with the club. Accordingly, the Apex Court stated that "a façade of a club cannot be constructed over commercial transactions to avoid liability to tax. Such setups cannot be permitted to claim double benefit of mutuality." The Hon'ble Supreme Court held that unlike the aforesaid surplus amount itself, which is exempt from tax under the doctrine of mutuality, the amount of interest earned by the assessee from the afore noted four banks will not fall within the ambit of mutuality principle and will therefore, be exigible to income tax in the hands.

6.4. Hence, the activity of entering into an agreement for re-development of the property and receipt of consideration of Rs,149,89,52,000/- by the society and diverting of the same at source to the individual members is purely a commercial activity. It is, thus, a profit in the hands of the society which has been distributed among the individual members being shareholders and therefore, is in the

nature of dividends in the hands of the members/shareholders of the society and therefore of revenue character. Thus, the ratio of the decision of the Hon'ble High Court (supra) and as affirmed by the Hon'ble Supreme Court is found to be applicable to the facts of the present case so far as the principle of mutuality is concerned.

6.5. 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 akin to the dividend and is therefore eligible to income-tax in the hands of the assessee under the head Income from Other Sources'.

6.6. It may be mentioned here that the MIG Housing Society was constructed not on freehold land. The Society under consideration was lawful owner of only…..

6. Aggrieved by the order of the Ld. AO, the assessee filed appeal before the Ld. CIT(A) who dismissed the appeal of the assessee on the ground that the AO has clearly brought on record, in detail, alongwith judicial pronouncement that the appellant had wrongly claimed the compensation received upon surrendering his old residential flat is a capital asset. Since, no transfer of property took place and appellant had received compensation in lieu of surrendering the flat to the developer for redevelopment. Therefore, the Ld. AO has rightly added this amount of Rs.18,48,739/- under the head income from other sources u/s. 56 of the Act.

7. Aggrieved by the order of the Ld.CIT(A), the present appeal has been filed. During the appellate proceedings before us, the appellant submitted that in the case of the appellant himself the Coordinate Bench of ITAT, Mumbai in ITA No. 4760/Mum/2023 for the assessment year 2011-12 has already held as under: -

> 3. *"Being aggrieved, the assessee is in appeal before us. Learned counsel Shri Yogesh Thar along with Shri Deep Chauhan at the outset drew our attention to page No. 140 of the paper book and submitted that in an identical situation, in the case of similarly placed member of the society namely Pramila Roongta and other members of the society who also received similar compensation/receipt as involved in the instant case, the objections dated 30.7.2018 were filed against the initiation of the proceedings under section 147/148 of the Act, which were disposed of by the Assessing Officer by rejecting the same.*
>
> 4. *Against the dismissal of the Objections, Pramila Roongta and others have filed writ petition bearing No. 2762/2018 with Hon'ble Bombay High Court. The Hon'ble Bombay High Court vide its order dated 16.2.2024 quashed the order rejecting the objections by the Assessing Officer and remanded the matter to the Assessing Officer for passing fresh order on the objections filed by the allottees/residents of the society in view of the judgements passed by*

Hon'ble Coordinate Benches of the Tribunal at Mumbai and Indore respectively in the case of Smt. Delia Raj Mansul Vs. ITO-35(10)(3), Mumbai and Shri Lawrence Rebello Vs. ITO-1(3), Indore, wherein it was held that the amount which has escaped assessment as alleged in the reasons to believe, is not taxable.

5. *In compliance to the directions of Hon'ble High Court, the Assessing Officer i.e. ITO-23, Mumbai vide order dated 29.4.2024 disposed of the objections and accepted the contentions of the assessee raised therein and dropped the proposed addition/disallowance by following the decisions of Hon'ble Coordinate Benches of the Tribunal to the effect "that the receipt of the hardship compensation is held as capital receipt and not taxable". The Assessing Officer in Pramila Roongta's case also observed that though the aforesaid decision of the Tribunal has not accepted by the Department but further appeal under section 260A of the Act has also not been filed, as tax effect was below the monetary limit. The Assessing Officer in effect ultimately accepted the claim of the then assessee, qua receipt/compensation identical to the compensation/receipt as involved in the instant case, as capital receipt and not taxable.*
6. *Learned DR did not refute the aforesaid claim/submission made by the Advocate of the assessee. Hence, considering the peculiar facts and circumstances, as in identical situation and/or circumstances*

and/or issue as involved in the instant case, the revenue department has accepted the claim of the other members of the society and consequently made no addition qua receipt/compensation and the treated the same as capital receipt not taxable, therefore we are inclined to delete the addition under consideration. Consequently, the addition is deleted.

7. In the result, the appeal filed by the assessee stands allowed."

8. The CIT D.R. relied on the order of the Ld. AO and the Ld. CIT (A). We have considered the decision of the Coordinate Bench in the case of the appellant itself for the assessment year 2011-12, wherein the Coordinate Bench, by following the case of Shri Lawrence Rebello Vs. ITO-1(3) in ITA No. 132/Ind/2020 dated 29/11/2021 has already deleted the addition made by the AO. Thus, respectively following the order of the Coordinate Bench, we also delete the addition made by the AO and allow the appeal of the assessee.

9. In the result, the appeal is allowed.

Order pronounced in the open court on 26.07.2024.

Sd/-	**Sd/-**
AMIT SHUKLA	**RATNESH NANDAN SAHAY**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai, Dated: 26.07.2024.
Snehal C. Ayare, Stenographer

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

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.