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

**BEFORE SHRI SANJAY ARORA, ACCOUNTANT MEMBER AND**
**SHRI SANJAY GARG, JUDICIAL MEMBER**

**ITA Nos.7810/M/2010 & 6599/M/2012**
**Assessment Years: 2007-08 & 2008-09**

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| Shri Chandrashekhar J. Bahirwani,<br>3G, Vijay Chambers,<br>Tribhuvan Road,<br>Opp. Dreamland Cinema,<br>Mumbai – 400 004<br>**PAN: AEQPB 7252R** | Vs. | ACIT-19(3), Ms. Smita Nair,<br>Room No.305, 3rd Floor,<br>Piramal Chambers, Parel,<br>Mumbai – 400 012 |
| (Appellant) | | (Respondent) |

**Present for:**
Assessee by : Shri Vipul Joshi, A.R. & Abhishek Tilak, A.R.
Revenue by : Shri Jeetendra Kumar, D.R.

Date of Hearing : 07.04.2015
Date of Pronouncement : 17.06.2015

## O R D E R

## Per Sanjay Garg, Judicial Member:

The above titled two appeals relevant to different assessment years have been preferred by the assessee against the order of the Commissioner of Income Tax (Appeals) [(hereinafter referred to as CIT(A)] dated 31.08.2010 & 02.07.2012 respectively. Since the facts and issues involved therein are identical in nature, hence the same are taken together for disposal by this common order. For the sake of convenience, the facts have been taken from ITA No.7810/M/2010 for A.Y. 2007-08. The assessee has taken the following grounds of appeal:

"1.1 The Learned CIT (Appeals)-30 erred in dismissing the appeal of the appellant as not maintainable.

1.2 On merits, the learned CIT (Appeals) erred in confirming the action of A.O. in taxing Rs.14,50,000/- as long term capital gain in the hands of the appellant.

1.3 Your appellant craves permission of the Honourable Appellate Tribunal to add to alter, to amend or to delete any ground of these appeals."

2. The brief facts of the case are that the assessee is engaged in the business of trading of tractors and machineries spare parts and accessories. For the year under consideration, the assessee declared the income under the head 'Business income', 'capital gains' and income from 'other sources'. In the assessment proceedings, the assessee submitted before the Assessing Officer (hereinafter referred to as the AO) that the income from capital gains was wrongly declared as the same was exempt in the hands of the assessee. The AO, however, assessed the returned income and thereby also taxed the capital gains. The assessee preferred appeal before the Ld. CIT(A).

3. It had been contended before the Ld. CIT(A) that the sum of Rs.14,50,000/- had inadvertently been shown as long term capital gains in the return of income and the same was therefore wrongly offered for taxation. The assessee had received the said amount from his housing society namely 'Land Bridge Co-operative Housing Society Ltd.' being its member as having a residential flat therein. The society and its members received certain amount from the builder for transfer of development rights/additional FSI. The said amount was distributed among the members of the society. Earlier, the AO had charged the society for the whole of the amount received by society from the builder on account of transfer of development rights/additional FSI. The society contested the said matter before the Ld. CIT(A) who confirmed the levy of capital gains tax against the society. It was therefore claimed that the said amount was not taxable in the hands of the assessee. The Ld. CIT(A), however, observed that the assessee himself had voluntarily offered the said amount as capital gains. The AO has not noted in the assessment order that the taxation on the said capital gains was contested by the assessee. The Ld.

CIT(A) thereafter observed that the assessee, if, was of the view that he had mistakenly offered the income for taxation, the proper course for him was to make the claim by way of filing a revised return of income. He further held that the AO cannot assess the income below the returned of income. Even on merits, he held that it was an afterthought version of the assessee that the amount of Rs.14,50,000/- was not taxable at all. He therefore upheld the action of the AO in subjecting the amount received by the assessee on transfer of the TDR rights to Capital Gains Tax. Aggrieved by the order of the CIT(A), the assessee has come in appeal before us.

4. We have heard the rival contentions. At the outset the Ld. AR of the assessee has submitted that the matter in relation to levy of capital Gains Tax on society had been taken to the Income Tax Appellate Tribunal by the society. The Tribunal vide order dated September 14, 2012 reported as (2013) 21 ITR Trib. 467 (Mum.) held that though the transferrable development right amounts to transfer of capital asset by the society, however, the same could not be subjected to tax under the head 'Capital Gains' for the reasons that there was no cost of acquisition in acquiring the right which had been transferred and therefore the computational mode given in section 48 thus fails. The Tribunal therefore deleted the addition made in the hands of the society in respect of the above stated capital gains. The matter was carried by way of appeal by the Revenue to the Hon'ble Bombay High Court. The Hon'ble jurisdictional High Court vide order dated 11.03.2015 passed in ITA No.334/2013 styled as "CIT vs. Land Bridge Co-operative Housing Society Ltd." while relying upon the another decision of the Hon'ble High Court in the case of "CIT vs. Shambaji Nagar Co-operative Housing Society Ltd." 370 ITR 325 upheld the order of the Tribunal.

It is pertinent to mention here that from the facts it emerges out that the compensation/consideration was paid by the builder to the society and its

member on transfer of TDR, as per the decree passed by the Hon'ble Bombay High Court in Civil Suit No.3414 of 2006 vide order dated 29.12.06, in terms of consent agreement between the original owner of the land, society, members of the society and the developer. Hence, the amount received by the assessee is required to be treated on the same footing as has been treated in the case of the society. Even otherwise, the entire amount has already been considered as receipt in the case of the assessee's society. Since the Hon'ble Bombay High Court has already held in the case of the society that the said receipt in lieu of transfer of TDR rights can not be subjected to capital Gains Tax, hence, the same analogy will also apply to the case of the assessee and no different treatment can be given to the amount received by the assessee because the same was received by way of a common agreement on the basis of which the court has passed the decree determining amount receivable by the society and its members individually.
Though the Ld. AR has contended that the entire receipt has already been considered at the hands of the society, however, irrespective of the above contention, even if, the income received by the assessee is considered in the hands of the assessee, still it can not be subjected Capital Gains Tax in view of the law laid down by the Hon'ble High Court in the case of housing society of the assessee i.e. in the case of "Land Bridge Co-operative Housing Society Ltd." (supra). The same proposition will apply in the case of the assessee also. Respectfully following the decision of the Hon'ble Bombay High Court, it is held that the TDR receipts in the hands of the assessee are not taxable.

5. Now coming to the finding of the Ld. CIT(A), that income cannot be assessed less than the returned income, the Ld. A.R. of the assessee has submitted before us that the action of the Ld. CIT(A) in rejecting the claim of the assessee on this ground was not justified. He has further relied upon the decision of the Hon'ble Gujarat High Court in the case of "Gujarat Gas Ltd. vs.

JCIT" (2000) 245 ITR 84. In the said case, the words of the Circular No.549, para 5.12, dt. 31st October, 1989, providing that the assessed income under section 143(3) shall not be less than the returned income was considered by the Hon'ble High Court and it was held that as per proviso to section 119 of the Act, the Board cannot issue instructions to the Income Tax Authority to make a particular assessment or to dispose of a particular case in a particular manner as well as not to interfere with the discretion of the Commissioner in exercise of his appellate functions. It was further held that the AO, while exercising his quasi judicial powers, was not bound by the said circular and should have exercised his powers independently. The Hon'ble High Court, therefore, directed the AO to make the assessment without keeping in mind the said circular. It may be further observed that the Hon'ble Bombay High Court in the case of 'Pruthvi Brokers & Shareholders Pvt. Ltd.' ITA No.3908 of 2010 decided on 21.06.12, while relying upon the various decisions of the Hon'ble Supreme Court and other Hon'ble High Courts has held that even if a claim is not made before the AO, it can be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim is not barred. The Hon'ble High Court has further observed that the decision of the Hon'ble Supreme Court in the case of 'Goetze (India) Limited v. CIT' (2006) 157 Taxman 1, relating to the restriction of making the claim through a revised return was limited to the powers of the Assessing Authority and the said judgment does not impinge on the power or negate the powers of the appellate authorities to entertain such claim by way of additional ground. Even otherwise, the Ld. CIT(A) ought to have considered the claim of the assessee in exercise of his appellate jurisdiction under section 250 of the Act. Moreover, if the assessee is, otherwise, entitled to a claim of deduction but due to his ignorance or for some other reason could not claim the same in the return of income, but has raised his claim before the appellate authority, the appellate authority should have looked into the same. The assessee cannot be burdened with the taxes which he otherwise is not liable to pay under the law. Even a duty has also been cast upon the Income Tax Authorities to charge the legitimate tax from the tax payers. They are not there to punish the tax payers for their bonafide mistakes. In view of our above observations, it is held that the assessee is not liable to pay Capital Gains Tax, though originally he had subjected himself to the said tax as per his return of income. The AO is directed to process the claim of refund in this respect as per provisions of the law.

**ITA No.6599/M/2012 for A.Y. 2008-09**

6. In this appeal, the income received by the assessee on transfer of TDR has been taxed by the lower authorities as income from other sources. In view of our above observations, the receipt on transfer of TDR and in terms of the consent terms decree of the Court is though capital receipt but can not be subjected to Capital Gains Tax as per the law laid down by the Hon'ble High Court in the case of the society (supra). The said receipt therefore can not be taxed even under the head 'Income from other sources'.

7. In view of our observations made above, both the appeals of the assessee are hereby allowed.

**Order pronounced in the open court on 17.06.2015.**

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| **Sd/-** | **Sd/-** |
| **(Sanjay Arora)** | **(Sanjay Garg)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

Mumbai, Dated: 17.06.2015.

* Kishore, Sr. P.S.

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

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.