आयकर अपीलीय अधिकरण, मुंबई

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES 'B' MUMBAI

सर्वश्री आय.पी. बंसल, न्यायिक सदस्य एवं श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।

BEFORE SHRI I.P. BANSAL, JUDICIAL MEMBER /AND

SHRI SANJAY ARORA, ACCOUNTANT MEMBER

ITA NO.7942/MUM/2010(A.Y.2002-03)
ITA NO.7943/MUM/2010(A.Y. 2004-05)

The Income Tax Officer 12(3)(1) Aaykar Bhavan, MK Road, Mumbai 400 020 (Appellant)	Vs.	M/s. Maker Chamber VI, Premises Co-op. Soc. Ltd., Jamnalal Bajaj Marg, Nariman Point, Mumbai 400021 PAN: AAATM1425F (Respondent)

C.O. NO.56/MUM/2012(Arising out of ITA NO.7942/MUM/2010,A.Y.2002-03)
C.O. NO.57/MUM/2012(Arising out of ITA NO.7943/MUM/2010,A.Y.2004-05)

M/s. Maker Chamber VI, Premises Co-op. Soc. Ltd., Jamnalal Bajaj Marg, Nariman Point, Mumbai 400021 PAN: AAATM1425F (Cross Objector)	Vs.	The Income Tax Officer 12(3)(1) Aaykar Bhavan, MK Road, Mumbai 400 020 (Appellant in appeal)

Assessee by	:	Shri Ashok J. Patil
Revenue by	:	Shri Pavan Kumar Beerla

Date of hearing	:	30/09/2014
Date of pronouncement	:	30/09/2014

ORDER

PER BENCH:

These appeals are filed by the Revenue and Cross Objections by the assessee and are directed against two separate orders passed by Ld. CIT(A)-23, dated

26/08/2010 for assessment years 2002-03 and 2004-05 respectively. The grounds raised in the appeals as well as Cross Objections read as under:

1. Grounds of Appeal in ITA No.7942/Mum/2010:

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in deleting the non occupancy charges of Rs.24,59,560/- relying on the decision dtd. 17/07/2009 of the Bombay High Court in Writ Petition No.527 of 1996 in assessee's own case and in Income Tax Appeal No.999 of 2004 in the case of Mittal Court Premises Co-Op. Soc. Ltd., ignoring the fact that the departmental has not accepted the said decision and sent a proposal for filing SLP in Supreme Court."

2. Grounds of Cross Objection No.56/Mum/12:

1. The Commissioner of Income Tax (A) erred in confirming the reporting of assessment proceedings u/s. 147 of the Income Tax Act, 1961.

2. Commissioner of Income Tax (A) failed to appreciate the fact that the assessment proceedings was reopended for escapement of income of NOC of Rs.24,59,560/- which have been deleted by her and yet erred in holding that reopening proceedings are valid.

3. Commissioner of Income Tax (A) failed to appreciate the facts that the Assessing Officer has taken the shelter and or pretext of the provisions of re-opening and made the regular assessment.

3. Grounds of Appeal in ITA No.7943/Mum/2010:

"1.On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the non occupancy charges of Rs. 21,62,617/- relying on the decision dtd. 17/07/2009 of the Bombay High Court in Writ Petition No. 527 of 1996 in assessee's own case and in income Tax Appeal No. 999 of 2004 in the case of Mittal Court Premises Co-Op. Soc.Ltd. Ignoring the fact that the department has not accepted the said decision and sent a proposal for filing SLP in Supreme Court."

2. On the facts and in the circumstances of the case and in law, the Id. CIT(A) has erred in deleting the transfer fees of Rs. 3,31,250/- relying on the decision dtd. 17/07/2009 of the Bombay High Court in Writ Petition No. 527 of 1996 in assessee's own case and in Income Tax Appeal No. 999 of 2004 in the case of Mittal Court Premises Co-Op. Soc.Ltd. Ignoring the fact that the department has not accepted the said decision and sent a proposal for filing SLP in Supreme Court.

3, "The appellant prays that the order of the order of the CIT(A) on the above ground(s) be set aside and that of the Assessing Officer be restored".

2. Grounds of Cross Objection No.57/Mum/12:

1. The Commissioner of Income Tax (A) erred in confirming the reporting of assessment proceedings u/s. 147 of the Income Tax Act, 1961.

2. Commissioner of Income Tax (A) failed to appreciate the fact that the assessment proceedings was reopended for escapement of income of NOC of Rs.21,62,617/- and

Transfer fee of Rs.3,31,250/- which have been deleted by her and yet erred in holding that reopening proceedings are valid.

3. Commissioner of Income Tax (A) failed to appreciate the facts that the Assessing Officer has taken the shelter and or pretext of the provisions of re-opening and made the regular assessment.

2. At the outset it was submitted by Ld. AR that Hon'ble Bombay High Court in assessee's own case has decided both the issues in favour of assessee. It was submitted that vide order dated 17/07/2009 in Writ Petition No.527 of 1996 in the case of assessee and others Hon'ble High Court has decided this issue as follows:

"1. In so far as these writ petitions are concerned what is being challenged are the re-opening of the assessments pursuant to the notice issued under Section 148 or notice issued under Section 142(1) as also in one case notice issued under section 133(6).

2. Notices basically have been issued on the ground that the transfer fees received by the petitioners from incoming members was assessable to tax considering the judgment of this Court in the case of C.I.T v. The Presidency Co-operative Housing Society, 216 ITR 321 (Bom).

3. We have in the judgment delivered today in Income Tax Appeal No.931 of 2004 and other connected appeals distinguished the same on the ground that the issue of mutuality had not at all been in issue before the learned Bench when it decided the reference. Once we have held the transfer fee even paid by incoming members is not assessable to the tax applying the doctrine of mutuality, the notice issued would be without jurisdiction and consequently will have to be set aside.

4. We have also in Income Tax Appeal No.999 of 2004 in the case of Mittal Court Premises vs. Income Tax Officer decided on 17.7.2009 have also decided that in respect of non-occupancy charges that is also subject to the principle of mutuality and not subject to tax.

5. Rule made absolute in terms of prayer clause (a) in each of the petitions.

Copy of the order has been filed at pages 28 to 37 of the paper book.

3. It was submitted that Hon'ble Bombay high Court has held that transfer fee as well as non-occupancy charges would be governed by principle of mutuality, therefore, could not be taxed. Thus, it was submitted by Ld. AR that the Departmental appeals should be dismissed as the relief has been given by Ld. CIT(A) following the aforementioned decision of Hon'ble Bombay High Court.

4. On the other hand, Ld. DR submitted that since Department has not accepted the decision of Hon'ble Bombay High Court and has filed SLP, therefore, these appeals have been filed for keeping alive the issue.

5. On Departmental appeal we have heard both the parties. The appeal of the Department in respect of A.Y 2002-03 is regarding non-occupancy charges and appeal for A.Y 2004-05 is with regard to non-occupancy charges as well as transfer fee. Both these receipts have been held to be governed by the principle of mutuality by Hon'ble Bombay High court in the case of assessee itself. Therefore, we hold that there is no infirmity in the relief given by Ld. CIT(A) in respect of grounds raised by the Revenue and there is no merit in the appeals filed by the Revenue. We dismiss both the appeals filed by the Revenue.

6. Now coming to the cross objections filed by the assessee, it is seen that the only grievance of the assessee in the cross objections is regarding re-opening of the assessment as there is no other grievance of the assessee. Since on merits we have held that additions have rightly been deleted by Ld. CIT(A), therefore, consideration of the cross objections of the assessee on merits would be an academic exercise which need not to be gone into in the present facts and circumstances of the case. We, therefore, we dismiss the cross objections filed by the assessee on the ground of having become academic.

7. In the result, the appeals filed by the Revenue as well as cross objections filed by the assessee are dismissed in the manner aforesaid.

Order pronounced in the open court on 30/09/2014
आदेश की घोषणा खुले न्यायालय में दिनांकः 30/09/2014 को की गई ।

Sd/-	Sd/-
(संजय अरोड़ा /SANJAY ARORA)	(आय.पी. बंसल **/ I.P. BANSAL**)
लेखा सदस्य **/ ACCOUNTANT MEMBER**	न्यायिक सदस्य **/ JUDICIAL MEMBER**

मुंबई Mumbai; दिनांक Dated 30/09/2014

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**

व.नि.स./*Vm*, Sr. PS