IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'B' MUMBAI

ITA No.674/Mum/2004
Assessment Year: 1997-1998

RAJ RATAN PALACE CO OP HSG SOCIETY LTD
PLOT NO 60, SHANKAR LANE, KANDIVILI (W)
MUMBAI-400067
PAN NO:AAATR3423Q

Vs

DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE-25(3), PRATYAKSHKAR BHAVAN
BANDRA KURLA COMPLEX, BANDRA (W)
MUMBAI-51

N V Vasudevan, JM and J Sudhakar Reddy, AM

Dated: February 25, 2011

Appellant Rep by: Shri S N Inamdar
Respondent Rep by: Shri Ajit Kumar Sinha

ORDER

Per: N V Vasudevan:

This is an appeal by the assessee against the order dated 24/4/2003 of CIT(A) 25, Mumbai relating to assessment year 1997-98. The grounds of appeal raised by assessee read as follows:

"1. The learned Commissioner of Income Tax (Appeals) erred both on facts and in law in sustaining the addition in respect of amounts paid by the builders to the members under an independent contract as income of the appellant, without even indicating the head under which it fall;

2. Having held that the developers paid amounts to members " to avoid further complications and with a view to smooth execution of the Project" the Learned Commissioner of Income Tax (Appeals) erred in holding that amount paid to the members for the aforesaid consideration is still income in the hands of the Society;

3. The learned Commissioner of Income Tax (Appeals) erred in holding that there was any transfer of Capital Asset and in any case consideration received by or accruing to the Society alone could be subjected to tax;

4. The learned Commissioner of Income Tax (Appeals) erred in holding that the sum of Rs. 3,02,16,828/- was liable to tax as Capital Gain, without specifying:-

a) Nature of capital asset transferred

b) Its date of acquisition

c) Cost of improvement, if any and most importantly

d) the cost of acquisition

5. He failed to deal with the contention that neither the cost of acquisition nor the cot of improvement is ascertained or was ascertainable, the machinery provisions failed and no charge could be levied;

6. Reasons assigned for sustaining the additions are wrong, insufficient, Self contradictory and contrary to law and facts;"

2. The assessee is a registered Company-operative Housing Society having 51 members and duly elected managing committee. The Society is the owner of the property bearing Plot No.60, and C.T.S. No.440-B of village Malad(North), situated at Shankar Lane, Kandivili (West), Mumbai 400 067 admeasuring 3316 sq.meters or thereabouts., together with Raj Ratan Palace building in front and a bungalow, garages and other structures standing thereon, and more particularly described in the Schedule hereunder written(hereinafter referred to as "the said property"). The said Raj Ratan Palace is a multistoried building consisting of the ground and six upper floors having residential flats in occupation of the members of the Society, and a Terrace. The bungalow on the said property consisting of ground floor of 72.45 Sq. Mtrs. Plinth area with tiled roof was is occupation of Kum. Vasantben daughter of Hiralal Motichand Shah, as a tenant of the society paying Rs.25/- p.m as rent to the society, and she has been in exclusive possession and use of the bungalow aforesaid. The entire F.S.I of the said property has already been fully consumed in the construction of the said multistoried building and the said bungalow/structure on the said property. The society invited offer from builders and developers for redevelopment of its property by construction of a new multi-storey building behind the raj Ratan Palace building, by means of T.D.R from elsewhere and by the consumption of available F.S.I of the said property, after demolishing the existing bungalow in occupation of Kum. Vasanten Hiralal Shah as tenant of the society, at the cost of the builders or developers. In pursuance of the above, M/s. New India Construction Co. submitted tender for development of the society's said property and at the Special General body meeting held on December 19, 1995, the said offer was accepted by the Society and a Sub- Committee was formed and appointed and authorized for the purpose of completing negotiations with and to enter into agreement with the developers M/s. New India Construction co. for re-development of and construction on the Society's said property.

3. In pursuance of the above, the Society agreed to grant to the Developers herein permission leave and licence to enter upon the Society's and said property and with the right to demolish the said bungalow and construct a new multi-storey R.C.C. building, on the terms and conditions mutually agreed upon by and on behalf of the society and the developers.

4. The terms and conditions so agreed upon by the Assessee, its members and the Developer were put in the form of an agreement dated 18/5/1996. By the aforesaid agreement the builder was allowed to carry out the development subject to several terms and conditions. Clause 12 & 13 of the agreement is relevant for the present appeal and it reads as follows:

"12. It is agreed between the Society and the Developers that the area of the said property shall be deemed to be 1300 sq. meters and the monetary consideration or compensation payable to the Society and, the members of the society shall be at the rate of Rs. 1,431/- (Rupees One though four hundred thirty one) per sq. ft. of ne proposed builtup area (F.S.I) as would be sanctioned, by B.M.C and on the basis that the Developers shall procure and use T.D.R to the extent of 40% of the net area of the said property. However, in consideration of the society having agreed to allow the Developers to consume 40% of T.D.R as stated above the Developers shall pay to the Society the sum of Rs. 2,51,000/-(Rupees two lacs fifty one thousand) as compensation out of the total consideration of Rs.2,00,16,828/- (Rs. Two crores sixteen thousand eight hundred twenty eight only) payable to the society and members.

13. It is also agreed between the society and the Developers that in case the Developers desire to utilize more T.D.R than to the extent of the aforesaid 40% of the net area of the said property as provided in clause 12 above but not exceeding 80% of the total area of the said property in any case, in such event, the Developers shall pay to the society and the individual members of the society proportionately additional compensation at the rate of Rs.1341/-(Rs. One thousand three hundred forty one) per sq. ft. of net proposed built up area which shall be paid by the Developers to the society and the individual members in the same manner as provided in their individual agreement."

5. It is not in dispute that the assessee society was paid only a sum of Rs. 2,51,000/- . The consideration mentioned in clause 12 of the agreement of Rs. 2,00,16,828/- was later revised to a sum of Rs. 3,02,16,828/- because of the additional FSI that the builder had constructed. It is also not in dispute that this sum of Rs. 3,02,16,828/- was paid by the developer to the individual members of the society totaling in all about 51. It is also further not in dispute that some of the members had offered the money received from the developer to tax in the individual return of income filed by them. The assessee has field before us a chart showing the amount received by the society and 51 of its members from the developer and as to how the members have offered the same to tax. This is available in compilation No.3 pages 1 to 3.

6. The assessee filed its return of income for A.Y 1997-98. The assessee did not offer any sum to tax in respect of the agreement dated 18/5/1996. The assessee was called upon by the Assessing Officer to show cause as to why the sum of Rs. 3,02,16,828/- should not be brought to tax in the hands of the assessee. A summons under section 131 of the Act had also been issued to the development M/s. New India Construction Company. The developer had confirmed that the monies were paid to the individual members of the society and individual agreements were entered into with them. They also confirmed that except Rs. 2,51,000/- no amount was paid to the assessee.

7. Before the Assessing Officer the assessee submitted that no income can be brought to tax in its hands by virtue of the agreement dated 18/5/96. The Assessing Officer however, was of the view that the society i.e. the assessee was the owner of the land and by virtue of clause 12 & 13 of the agreement dated 18/5/1996 it was entitled to the entire compensation of Rs. 3,02,16,828/-. He was of the view that the assessee held a capital asset and allowed the developer namely M/s.New India Construction Company to construct the multistoried building on the surplus land

belonging to the society and received compensation. The Assessing Officer held that the said receipt of compensation was taxable as per the provisions of section 2(24) of the Act. He also held that the agreement between the developer M/s. New India Construction Company and the individual 51 members of the society was only to facilitate payment by the developer and does not absolve the society from the taxability of the entire proceedings. Thus a sum of Rs. 3,02,16,828/- was added by the Assessing Officer.

8. Before CIT(A) the assessee submitted:

(1) That the entire TDR available on the land owned by the society was already exhausted and that the developer M/s.New India Construction Company was allowed to use TDR to be purchased by them from outside parties.

(2) The consideration was paid by the developer for granting consent to consume TDR purchased by the developer from third parties. The society continued to be the owner of the land and no change in legal ownership of land had taken place.

(3) The Assessing Officer brought the entire receipt to tax as income and in any event what he could have brought to tax was only the capital gain after allowing due indexation and other benefits.

(4) The developer paid amounts 51 individual members under separate agreements and that payment was made only to ensure that the members company-operated in the process of development without raising any objection at any point of time.

(5) Thus, if at all there were receipts only in the hands of the members of the society and if at all any incidence of taxation could be only in the hands of the members and not in the hands of the society.

9. The CIT(A) however did not agree with the submissions of the assessee and he held as follows"

"2.6 The above submissions of the appellant have been considered by me carefully. I have also gone through the assessment order. The appellant is a registered housing co-op society having 51 members. The society was the owner of the surplus land for which an agreement dated 18/05/1996 was entered into by the society and the members together to allow the said developer to develop the property. As per clause 12 and 13 of the said agreement the society alongwith members received a consideration of Rs.3,02,16,828/-. Admittedly the society is the owner of the land. The society is a legal entity and capable of entering into legal documents with the developers. Without the consent of the society, the individual members have not say in the matter. It is the society who invited the bids for allotment of contract for development of the property. It is therefore noticed that the said society is involved at every step in this transaction. The role played by the society is as per the law. The developer i.e. M/s. New India Construction Co. as a abundant precaution has also made separate agreements with each of the members of the society so as to avoid any future complications in the matter and with a view to smooth execution of the project which the said developer has taken into hand. The separate payment to each members of the society made by the developer was with the consent of the society. There is no doubt that the whole receipts in the hands of society is a capital in nature as the society has agreed to get its land/rights title etc. transfer to the builder to

develop and sell the same. The appellant's contention that no transfer of capital asset has taken place is not acceptable. The appellant has knowingly or unknowingly not taken into account the tax implications in the transaction. Thus this is a fact that transfer of land/rights has taken place; the receipts are in the nature of capital receipts and provisions of I.T. Tax are therefore attracted. The appellant society was therefore under obligation to make the payment of tax and after paying the taxes the net receipts could have been distributed amongst the members. Instead of that the society has allowed the builder to pay each member separately ignoring the tax implications. In this situation neither the society has paid the taxes which was legitimately due from it nor the members have paid the taxes. I therefore, hold that the receipt of Rs. 3,02,16,828/- is a capital receipt in the hands of the society and capital gain tax is exigible in the hands of the appellant society. The addition made by the AO is therefore confirmed subject to the condition that indexation may be allowed if otherwise allowable and after due verification. It has also been brought to my notice that a few members have paid the capital gain tax individually. In case the members have paid the taxes, credit to that extent may be allowed against the tax liability of the society after due verification."

9. Aggrieved by the order of the CIT(A) the assessee has filed the present appeal before the Tribunal.

10. We have heard the submissions of the ld. Counsel for the assessee, who reiterated the stand of the assessee as was put forth before revenue authorities. The ld. D.R relied on the orders of the revenue authorities. The ld. Counsel for the assessee has field before us certain judicial pronouncements for the proposition that in any even that the consideration received for assigning of rights to receive TDR was not liable to tax. He also filed before us copies of decision of the Tribunal in the case of 21 members of the assessee society in whose hands the amount received from the developer were brought to tax. The ld. Counsel for the assessee also filed before us a copy of the decision of the ITAT Lucknow Bench in the case of *Jyoti Patra vs. ITO 92 ITD 423*, wherein it was held that where the capital asset which subject matter of transfer does not have cost of acquisition no capital gain can be computed. It was his contention that the right to use TDR, even assuming was a capital asset, did not have any cost of acquisition.

11. We have considered the rival submissions. In our view the entire approach adopted by the revenue authorities was erroneous. We have already seen that under the agreement dated 18/5/1996 the society gave permission to the developer to construct on the society's land. No part of the land was ever transferred by the society. The society merely gave permission to the developer to carry out development in the rear side of the existing building Raj Ratan Palace after demolishing a small bungalow which was in existence. Clause 12 & 13 of the agreement dated 18/5/96 clearly mentions that the developer will pay compensation at Rs. 1431/- to the society and members. The sum was quantified at Rs. 2,00,16,828/-. Out of this only a sum of Rs. 2,51,000 was paid to the society. Admittedly the remaining sum and the additional sum payable under clause 13 of the agreement dated 18/5/96 was paid to the individual members of the society under 51 different agreements. Thus it is clear that the assessee did not part with any rights and did not receive any consideration except a sum of Rs.2,51,000. In such circumstances, we fail to see as to how there could be any incidence of taxation in the hands of the assessee. Besides the above, we also find that the order of the Assessing Officer is vague. It is not clear as to whether the sum in question is

brought to tax as capital gain in the hands of the assessee or as income under section 2(24) of the Act. In our view neither of the above provisions can be pressed into service for bringing the sum in question to tax in the hands of the assessee. We have already seen that there was no receipt by the assessee except a sum of Rs.2,51,000/-. The sum so received was for merely granting consent to consume TDR purchased by the Developer from a 3rd party. The Society continues to be the owner of the land and no change in ownership of land had taken place. Mere grant of consent will not amount to transfer of land/or any rights therein. Besides the above it is also seen that the some of the individual members had offered the receipts from the developer to tax and the same has also been brought to tax in the hands of the individual members. In this scenario, we are of the view that the addition made in the hands of the assessee society is without any basis. Consequently the addition made in the hands of the society is directed to be deleted. In view of the above conclusion on facts of the case, we have not discussed the decisions which were cited before us by the learned counsel for the Assessee.

11. In the result, the appeal of the assesee is allowed.

(Order pronounced in the open court on the 25.2.2011.)