

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI
BEFORE SHRI H.S.SIDHU, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No.4024/Del/2012
(Assessment Year: 2009-10)

ADIT (E), Inv. Circle-I, New Delhi	Vs.	India Habitat Centre, Lodhi Road, New Delhi PAN:AAATI0499M
(Appellant)		(Respondent)

Assessee by :	Sh. Amit Jain, Sr. DR
Respondent by:	Sh. Suresh Anantharaman, CA
Date of Hearing	25/02/2016
Date of pronouncement	29/04/2016

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is appeal filed by the revenue against the order dated 14.05.2012 of the Id CIT(A)-XXI, New Delhi for the Assessment Year 2009-10.
2. The revenue has raised the following grounds of appeal:-
 - “1. *On the facts and in the circumstances of the case and in law the Ld. CIT(A) has erred in accepting the assessee's claim of principle of mutuality lo income earned as interest from bank.*
 2. *On the facts and in the circumstances of the case and in law the Ld. CIT(A) has failed to appreciate that acceptance of applicability of mutuality clause to hank interest income on deposits made out of the funds contributed by members of society is in contravention of the first principle of mutuality i.e. "The identity of the contributors to the fund and the recipients from the funds" which has also been held to be the first condition for applicability of mutuality clause by the Apex Court in her decision rendered in the case of Chelmsford Club (2000) 243 ITR 89 and the Bank is neither a member contributor to the funds nor has am rights in the funds or assets of the society in the instant case.”*
3. Brief facts of the case is that assessee is an association of person which is registered u/s 12A of the Income Tax Act and also registered u/s 80G of the Act. Assessee is purportedly existing for charitable purpose as defined u/s 2(15) of the Income Tax Act. Therefore, the assessee filed its return of income showing NIL income on 30.09.2009. The Id Assessing Officer passed an assessment order holding that assessee is not entitled to exemption

provided u/s 11, 12 and 13 of the Income Tax Act however it was held that assessee is entitled to benefit of mutuality principal for its income. Based on this Id Assessing Officer held that the bank interest income of Rs. 4440871/- is not covered by the principles of mutuality and hence assessed the assessee on that sum. Appeal was filed before the Id CIT(A) by the assessee against this order challenging the denial of deduction u/s 11, 12 and 13 of the act as well as the taxation of bank interest . Ld. CIT (A) relying on the order of coordinate bench in the assessee's own case in ITA No.4771/Del/2011 allowed the appeal of the assessee on all the grounds. Therefore, now revenue is in appeal before us.

4. Ld. DR relied on the orders of assessing officer and submitted that in case of bank interest principal of mutuality cannot be applied.
5. The Id AR pointed out that this issue is now squarely covered by the decision of the ITAT in assessee's own case in ITA No.4771/Del/2011 In AY 2008-09 where the decision of Hon'ble Supreme Court cited in the grounds of the appeal is also considered.
6. We have carefully considered the rival contentions. We have perused the order of the coordinate bench in the case of the assessee for AY 2008-09 and we find that identical issue has been decided by the coordinate bench as under:-

"2. Facts, in brief, as per relevant orders are that return declaring nil income filed on 29.09.2008 by the assessee, a society registered u/s 12A of the Income-tax Act, 1961 (hereinafter referred to as the Act) was selected for scrutiny with the service of notice u/s 143(2) of the Act . During the course of assessment proceedings, after analyzing the primary aims and objects of the society as also activities undertaken by it, the Assessing Officer (A.O. in short) rejected the claim of the assessee for exemption u/s 11 & 12 read with section 2(15) of the Act. As regards assessee's claim for exemption of its interest income under the principle of mutuality in the light of decisions in the case of DIT Vs. All India Oriental Bank of Commerce Welfare Society, 130 Taxman 575 (Del.); CIT Vs. Karnataka Urban Infrastructure, Development and Finance Corporation, 315 ITR 301 (Karn) and that CIT Vs. Arbindo Memorial Fund Society, 247 ITR 93 (Mad), the AO concluded that receipts or income which were attributable to outside or third parties, were not covered by the principle of mutuality and accordingly, brought to tax the entire amount of interest of Rs39,72,025/- received from bank.

3. On appeal, the Id. CIT(A), following the decision of Hon'ble jurisdictional High Court in the case of CIT Vs. Delhi Gymkhana Club (2011) TIOL-41-High Court-DEL-IT, allowed the claim of the assessee while holding that the principle of mutuality will apply to the interest income amounting to Rs39,72,025/-.

4. The Revenue is now in appeal before us against the aforesaid findings of the ld. CIT(A). The ld. DR supported the order of the AO while the ld. AR on behalf of the assessee relied upon the findings of the ld. CIT(A).

5. We have heard both the parties and gone through the facts of the case as also the aforesaid decision followed by the learned CIT(A). We find that Hon'ble Delhi High Court in their judgment in the case of DIT v. All India Oriental Bank of Commerce Welfare Society [2003] 184 CTR (Delhi) 274 held that principle of mutuality applies to interest income received from the deposits made out of contribution by the members. In taking this view, the Hon'ble Delhi High Court took a cue from the decision of the Hon'ble Supreme Court in Chelmsford Club v. CIT, 243 ITR 89, wherein the Hon'ble Supreme Court had laid down the principle that where a number of persons combine together to a common fund for financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus generated cannot in any sense be regarded as profits chargeable to tax. The decision of Hon'ble Delhi High Court in All India Oriental Bank of Commerce Welfare Society (supra) was followed by the Hon'ble jurisdictional High Court in their decision dated 11.5.2007 in the case of Country Club . Hon'ble Karnataka High Court in the case of Canara Bank Golden Jubilee Staff Welfare Fund v. Dy. CIT, 308 ITR 202 (Kar.) held that

“2.8 Taking into consideration the objects of the assessee, the source of funds during the relevant years and the applicability of the funds for the benefit of its members, and keeping in mind the interest on investments and dividend earned on shares was only a small portion of the total earned by investment of the surplus funds wholly contributed by the members of the assessee, the Karnataka High Court held that the interest earned on investment and dividend received on shares was deemed income from the property of the assessee contributed by its members, and was governed by the principle of mutuality and was therefore exempt.”

5.1 In the case of CIT Vs. Standing Conference of Public Enterprises, 319 ITR 179 (Del.), the AO declined to accept the contention of the assessee that principle of mutuality was applicable ,inter alia, to interest income. The Tribunal, however, accepted that principle of mutuality would apply. On appeal by the Revenue regarding applicability of principle of mutuality to receipt from members and interest earned from surplus funds deposited with the banks, the Hon'ble Jurisdictional High Court following the view taken in Bankipur Club Ltd. (supra) ,Chelmsford Club vs. CIT,243 ITR 89 (SC) and Dalhousie Institute Vs. AC, Service Tax 3 STR 311 (Cal.) rejected the appeal of the Revenue. The Hon'ble SC also dismissed the SLP filed by the Department on 7.7.2010. The decision in SCOPE(supra) was followed by a co-ordinate Bench in another decision dated 16.10.2009 in Wellington Estate Condominium in ITA No. 2846/Del/07 for the A.Y. 2003-04 .

5.2 We find that the Hon'ble Jurisdictional High Court in their aforesaid decision in Delhi Gymkhana Club Ltd. (supra) concluded as under:-

“2. After hearing the learned counsel for both the parties at length, we are of the opinion that the aforesaid finding of the Tribunal is correct on facts and in law, which does not call for any interference. The issue, in

fact, stands covered by at least three judgments of this Court, which are as under:

(i) *The Director of Income Tax Vs. All India Oriental Bank of Commerce Welfare Society* [2003] 130 Taxman 575 (Delhi). In this case, the members of the welfare society, who were the employees of the Oriental Bank of Commerce had earned interest income on deposits made out of contribution from the members of the society, i.e., the contributions which were given by the members of the society, were kept in the bank and interest was earned therefrom. The Revenue had contented that as far as this interest income is concerned, the principle of mutuality would not be attracted and that income would be exigible to tax. The Tribunal had negated the aforesaid contention of the Revenue relying upon the judgment of the Supreme Court in the case of *Chelmsford Club Vs. Commissioner of Income Tax* [(2010) 109 Taxman 215. This Court in the aforesaid judgment had dismissed the appeal of the Revenue thereby affirming the decision of the Tribunal. The following para from the said judgment brings out the ratio of the case:

“3. The issue with regard to the concept and principle of mutuality has been elaborately examined by the Apex Court in *Chelmsford Club v. CIT* [2000] 243 ITR 89. Their Lordships have held that where a number of persons combine together contribute to a common fund for the financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus generated cannot in any sense be regarded as profits chargeable to tax. It has been observed that what is required to be seen is whether there is complete identity between the contributors and participators. Once the identity of the contributor to the fund of the recipients of the funds; the treatment of the company, though incorporated as a mere entity for the convenience of the members, in other words as an instrument obtained to their mandate; and the impossibility that the contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves is established, the doctrine of mutuality is established.”

There are three conditions for applicability of the principle of mutuality, which are discerned from the aforesaid are as follows:

a) Where a number of persons combine together contribute to a common fund for the financing of some venture or object;

b) They have no dealings or relation with any outside body; and

c) Surplus generated are not spent for any other purpose accepting for the welfare of the principles. On this basis, the Court clearly held that even if there was an income earned by the society in the form of interest by keeping the funds generated from the members in the bank, such interest will not be treated as income allowable for tax.

(ii) *Commissioner of Income Tax Vs. Talangang Co-operative Group Housing Society Ltd.* [210] 195 Taxman 110 (Delhi). In this case, the assessee was a co-operative housing society and its preliminary activity was to collect money from their members for construction of flats/houses and subsequently allot the same to them. There was no issue that on these contributions from the members, no tax was payable and principles of mutuality would be applicable. However, it was found by the Assessing Officer that certain income was derived from other than construction activities, viz., equalization charges from new members, maintenance fund and entry fee from power of attorney holders, interest on delayed payments and more significantly (which would be relevant for our purposes) interests from bank from FDRs. All these

were not treated as taxable income by the AO. This order of the AO was upheld by the CIT(A), but the Tribunal reversed the aforesaid orders after applying the principle of mutuality and deleted the additions made by the AO. The Department filed an appeal against the order of the Tribunal in the Court, which was dismissed. Insofar as the income generated from bank deposits as well as FDRs is concerned, this Court relied upon the judgment in the case of All India Oriental Bank of Commerce Welfare Society (supra) and held that the principle of mutuality would get attracted. It was also observed that there was nothing on record to show that the amount collected by the assessee had been diverted for any other purpose.

iii) Commissioner of Income Tax, Delhi – XI Vs. Standing Conference of Public Enterprises (SCOPE), [2010] 186 Taxman 142 (Delhi). In this case again, apart from income generated by the SCOPE from its members, it was also found that the assessee had income in the form of deposits with banks and also in the form of rent from house of convention centre and from letting out of the part of the premises of the building occupied by it. Question arose as to whether the tax is payable on the aforesaid income or that would be exempted on the application of principle of mutuality. The Court held that the principle of mutuality would be attracted and no tax was payable even on the income accrued to the assessee in the form of interest from deposit with bank or rent charged from house of convention centre or from letting out on part of the premises. In the process, this Court relied upon the judgment of the Supreme Court in the case of Chemsford Club (supra) and All India Oriental Bank of Commerce Welfare Society (supra). In addition, number of other judgments were referred to and the principle of mutuality was discussed and explained in depth. Following discussion from that judgment is quoted herein: “17. In Chelmsford Club [2000] 243 ITR 89, the Supreme Court clarified that even if such a association is an incorporated company, that would be immaterial if there is identity in character of those who contribute and those who participate in surplus. The can be traced out from the following observations:

“... where there is identity in the character of those who contribute and of those who participate in the surplus, the fact of incorporation may be immaterial and the incorporated company may well be regarded as a mere instrument, a convenient agent for carrying out what the members might more laboriously do for themselves. Their Lordships have laid down the three test before the principle of mutuality can be applied. In a nutshell, these test are:

1. The identity of the contributors to the fund and the recipients from the fund.
2. The organization exists only for mutual benefit.
3. The funds can be expended for mutual benefit or returned to the contributors.”

18. At this stage, we may also take note of the judgment of Gujarat High Court in the case of Sports Club of Gujarat Vs. CIT where the Court held that the principle of mutuality is not destroyed by the presence of transaction, which are non mutual in character. This principle can, in such case, be confined to transactions with members.

The two activities, in appropriate case be supported and the profits derived from non-members, can be brought to tax.

19. In the present case, as already noted above, the respondent is incorporated as a society and the main objective is to improve the purpose of public enterprises. The membership of the society is open to public sector enterprises of Central/State Governments. It is, thus, performed for the

benefit of its members, which are public sector enterprises. It is not indulging in any "commercial activities" in traditional sense, but is catering to the needs of its members. In its building at Lodhi Road, New Delhi, it has convention centre which is normally given to its members for functions. Likewise, other part of the premises are available to the members for their use. Of course, for using convention centre as well as other parts of the building, these members pay some charges which becomes additional source of income. That by itself cannot be treated as commercial activity of the assessee. In *Bankipur Club (supra)*, the Supreme Court held that if the dealings as a whole disclose the profit earning motives and are alike tainted with commerciality, only then principle of mutuality would cease to apply. The principle in this behalf was discerned as under:

"We understand these decisions to lay down the broad proposition - that, if the object of the assessee company claiming to be a "mutual concern" or "club", is to carry on a particular business and money is realised both from the members and from non-members, for the same consideration by giving the same or similar facilities to all alike in respect of the one and the same business carried on by it, the dealings as a whole disclose the same profit earning motive and are alike tainted with commerciality. In other words, the activity carried on by the assessee in such cases, claiming to be a "mutual concern" or Members' club" is a trade or an adventure in the nature of trade and the transactions entered into with the members or non-members alike is a trade/business/transaction and the resultant surplus is certainly profit - income liable to tax."

20. Thus, such company claiming to be mutual concern or club whose object is to carry on particular business or where the income is generated from members and non-members through the business carried on by it, then only it would be treated as tainted with commerciality. Profit earning has to be the prime motive behind such activities, which are business like activities. Obviously in the present case, this cannot be attributed to the assessee. The AO got influenced by the fact that the assessee had let out part of the premises to its members and was receiving rents and also giving the convention centre to non-members. That is not sufficient to clothe the activity of the assessee as commercial activity, which is not the object with which the assessee society is formed. Pre-dominant object is to render appropriate assistance and help to its members for improving their performance and role. Thus, all the three ingredients laid down by the Supreme Court in *Chelmsford Club* would be applicable in the present case.

21. We may also refer to the judgment of the Calcutta High Court in the case of *Dalhousie Institute Vs. Asstt. Commissioner, Service Tax Cell, 2006 (3) STR 311*. Though it was a case where „mandap_ facilities were provided by the club to its members and the question of service tax had arisen, the Calcutta High Court applied the principle of mutuality holding that the aforesaid facilities provided by the club to its members for such functions cannot be termed as commercial activity. Following observations are to be noted in this behalf:

"The principle of mutuality in this case is also squarely applicable, as going by the definitions of mandap, mandap keeper and the taxable service, in this case the facility of use of the premises to the members by its club cannot be termed to be a letting out nor the members of the club using the facility of any portion of the premises for any function can be termed to be a client. The services rendered by any person to his client

presupposes the element of commerciality and obviously this transaction must be involved with the third parties, as opposed to the members of the club.”

Similar question was answered in the case of Saturday Club Ltd. Vs. Asstt. Commissioner, Service Tax Cell, (2006) 3 STR 305 in the following manner:

“So far as the merit is concerned, law is well settled by now that in between the principal and agent when there is no transfer of property available question of imposition of service tax cannot be made available. It is true to say that there is a clear distinction between the „members club and „proprietary club_. No argument has been put forward by the respondents to indicate that the club is a proprietary club. Therefore, if the club space is allowed to be occupied by any member or his family members or by his guest for a function by constructing a mandap, the club cannot be called as mandap keeper, because the club is allowing his own member to do so who is, by virtue of his position, principal of the club. If any outside agency is called upon to do the needful it may raise a bill along with the service tax upon the club and the club as an agent of the members, is supposed to pay the same. The authority cannot impose service tax twice once upon the people carrying out the business of 'mandap keeper' as well as the members' club for the purpose of using the space for constructing or using it as 'mandap'. Therefore, apart from any other question possibility of double taxation cannot be ruled out. If I explain my first query as above it will be crystal clear that if a person being an owner of the house allows another to occupy the house for the purpose of carrying out any function in that house it will not be construed as transfer of property. But if such person calls upon a third party 'mandap keeper' to construct a 'mandap' in such house then in that case such 'mandap keeper' can be able to raise bill upon the user of the premises along with the service tax. Therefore, I cannot hold it good that members' club is covered by the Finance Act, 1994 for imposition of service tax to use its space as 'mandap'. So far as the other point is concerned whether the ratio of the judgments can be acceptable herein or not I like to say 'yes it is applicable'. Income-tax is applicable if there is an income. Sales tax is applicable if there is a sale. Service tax is applicable if there is a service. All three will be applicable in a case of transaction between, two parties. Therefore, principally there should be existence of two sides/entities for having transaction as against consideration. In a members' club there is no question of two sides. 'Members' and 'club' both are same entity. One may be called as principal when the other may be called as agent, therefore, such transaction in between themselves cannot be recorded as income, sale or service as per applicability of the revenue tax of the country. Hence, I do not find it is prudent to say that members' club is liable to pay service tax in allowing its members to use its space as 'mandap'.”

3. Hence, in view of the aforesaid judgment of this High Court which binds us, we are of the opinion that no question of law arises for consideration.

4. This appeal is accordingly dismissed.”

7. We have carefully perused the decision and we are of the view that this issue is covered by the decision of coordinate bench in the case of the assessee. No other decision contrary to the above decision was cited by the ld DR before us. Therefore respectfully following the order of the coordinate bench we dismiss the grounds of the appeal of the revenue.

8. Further on perusal of the order of the 1d CIT(A) it is found that he has allowed all the grounds of the appeal of the assessee wherein Ground No. 1 to 3 were against the order of the Assessing Officer denying the exemption u/s 11, 12 and 13 of the Income Tax Act to the assessee. Vide para no. 3.4 of the order of the CIT(A) he has allowed ground No. 1 to 5 of the appeal, i.e. 1d CIT(A) has also allowed the grounds of appeal of the assessee on the issue of eligibility of exemption to the assessee u/s 11, 12 and 13 of the Act as a charitable trust. We do not find any ground in the appeal of the revenue against this. It is also apparent that the assessee is holding registration u/s 12A of the Act vide order No. 3095 dated 13.01.1989 of the Act. This registration is in force today. In view of this we are also of the view that as the trust is registered u/s 12A and further 1d CIT(A) has allowed the grounds of the appeal of the of the assessee allowing it relief u/s 11, 12 and 13 and consequently it has not been challenged by the revenue in appeal before us, we hold that when the assessee is registered charitable trust its income cannot be computed on the principal of mutuality but is required to be computed u/s 11, 12 and 13 of the Act. Therefore, also this appeal cannot survive.
9. In view of this appeal of the revenue is dismissed.

Order pronounced in the open court on 29/04/2016.

-Sd/-

**(H.S.SIDHU)
JUDICIAL MEMBER**

-Sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Dated: 29/04/2016

A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi