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

BEFORE SHRI AMIT SHUKLA, JM AND SHRI RAJESH KUMAR, AM

आयकर अपील सं./I.T.A. No 4598/Mum/2014

(**निर्धारण वर्ष /** Assessment Year: 2007-08)

I.T.O -16(2)(4), 2nd Floor, Matru Mandir, Tardeo Road, Mumbai-400 07.	**बनाम**/ Vs.	The Casa Grande Co-op. Housing Society Ltd. 22, K.S Tayebji Marg, Little Gibbs Road, Malabar Hill, Mumbai-400 006.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAATC 4054A		
(अपीलार्थी /**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओर से / **Appellant by**	:	Shri. Rajesh Ojha
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri. K.P. Dewani

सुनवाई की तारीख / **Date of Hearing**	:	12/01/2016
घोषणा की तारीख / **Date of Pronouncement**	:	29/01/2016

आदेश / O R D E R

PER RAJESH KUMAR, A. M:

This appeal by the revenue is directed against the order dated 07.04.2014 of Commissioner of Income Tax (Appeals)-27, Mumbai (hereinafter called as the CIT(A)) for assessment year 2007-08. The revenue has raised the following grounds of appeal:

1. "*Whether on the facts and in the circumstances of the case, and in law the Ld. CIT(A) is justified in law on holding that the voluntary contribution of Rs.70,00,000/- by one of its member in lieu of transferring right to the exclusive use of the valuable assets/facilities by the society during the A.Y.2007-08 is covered within the principals of mutuality.*"

2. The issue raised in ground no.1 whether the CIT(A) is justified in holding that the voluntary contribution of Rs.70,00,000/- by one of its member in lieu of transferring right to the exclusive use of the facilities by the society is covered within the principals of mutuality.

3. The brief facts of the case are that the assessee, a co-operative housing society, received donation of Rs.70,00,000/- from Shri Kirit R. Jasani a member as voluntary donation and the same was shown under the head of "Building Repairs & Renovation" in the balance sheet of the assessee. The assessee filed its return of income on 26.08.2006 at nil income and the same was processed under section 143(1) of the Act. Thereafter a notice u/s 148 of the Act was issued on 30.03.2012 and properly served on the assessee society and the assessment u/s 143(3) r.w.s. 147 of the Act was framed vide order dated 28.03.2013 at Rs. 70,06,000/- by adding Rs. 70,00,000/- received as voluntary donation besides making some other additions. The ld. AO added the same to the income of the assessee on the ground that society could not prove the intention of concept of mutuality and therefore, the

donation received from Shri Kirit R. Jasani a member of the assessee society for repairs is non-mutual income of the society. The ld. CIT(A) after considering the detailed submissions of the assessee deleted the addition of Rs. 70,00,000/- by holding that donation received from Shri Kirit R. Jasani for building repairs/ renovation was out of mutuality by disagreeing with the AO on the point of mutuality .He also observed that the AO came to the conclusion without any material on record on the concept of non mutuality. The ld. CIT(A) also observed that a similar issue has been decided in the case of the assessee in ITA No. 467/Mum/2008 assessment year 2004-05 in its favour and therefore the issue is directly covered in favour of the assesse by its own order and the AO was wrong in holding that the voluntary donation was received out of non-mutuality.

4. The ld. DR on the other hand relied on the order of the AO by arguing vehemently that the donation was not received out of mutuality and therefore constituted income of the assesee society and prayed for setting aside the order of the CIT(A) and upholding the order of the AO. The ld. AR per contra, while arguing the case brought to our notice that the case of the assessee was covered in its favour by a decision of tribunal in its own case in ITA No. 467/Mum/2008: Assessment Year 2004-05 therein a similar voluntary donation received of Rs.1,75,00,000/- from a member to make good the shortfall in the expenditure

incurred by the Society for undertaking the major repairs and renovation of the building and therefore the appeal of the department be dismissed and the order of the CIT(A) which was rightly passed by following the decision in the above ITA deserved to be upheld.

5. We have heard the rival submissions and perused the material on record. We find that the issue involved in the appeal is covered directly by its own case in earlier year in ITA No. 467/Mum/2008 assessment year 2004-05 and relevant paras 9 to 14 are re-produced as under:-

> *"9. We considered the matter in detail. As rightly pointed out by the learned counsel appearing for the Assessee a similar case was considered by the ITAT Mumbai "A" Bench in the case of Shree Parleshwar Co-operative Housing Society Ltd. Vs. ITO[8 SOT668(Mum.)]. In that case, the assessee-society had availed additional FSI. The additional FSI was utilized for constructing accommodations for the members newly admitted in the society, when new members were admitted in the society; substantial amounts were collected from them. Those amounts were utilized not only for construction of accommodation fur the new member but also for renovating and extending facilities to the existing members. Even though there was surplus in hands of the asessee which was utilized for the benefit of the other members by way of renovation and extension of facilities. The Tribunal held that the surplus would not be in the nature of income as the entire activity was covered by the principle of mutuality. The present case is far better than the above case. In the above a case cited by the learned counsel, the assesee-society in fact had surplus funds on the exchange of the FSI to the new members admitted in the society. In the present case,*

there is no such question of any surplus in the hands of the assessee-society.

10. In the present case one of the members volunteered himself to contribute substantial amount to the assessee-society to undertake substantial maintaining and repairing work of the existing building. The repairs and maintenance and uplift of the existing building as a whole are beneficial to all the members of the society. Therefore, in the activities carried out by the assessee-society in spending the contribution received from the member, the principle of mutuality has been strictly observed. The application of funds is the crucial test. Here the fund of Rs.1,75,00,000 was contributed by one of the members. How the funds were expended? The funds were expended in renovating and repairing the existing building facilities of which the benefits are available to all the members. Therefore there is no doubt that the expenditure incurred by the assessee-society is for the benefit of the entire members, and therefore, fully covered by the rule of mutuality.

11. Now regarding the source of funds utilized for the renovation work of the building one has to see that the contribution has come from a member. No outsider is involved. Whether the contribution has come from all the members from some of the members or only of the members, it has basically come from the in house of the society. There is no transaction between the assessee-society and non-member outsider. The receipt of contribution and application of the funds both are confined inside the frame of the society and its members. Therefore on the question of receiving the contribution from one of the members of the society there is no valuation of the rule of mutuality. Therefore, it is very difficult to hold that the contribution made by one of the members of the society for certain particular purposes partakes the character of income in the hands of the assessee society. That findings is quite perverse.

12. There is no element of income at all in the present case. In fact the entire amount contributed by the member was spent by the assessee-society for renovating the building and making additional facilities. As an additional facility the assesee-society has given the right of additional parking space and right to use one of the lifts to

the donor member. But it has to be seen that the entire amount has been spent for the members. There is no surplus in that account. Where there is no surplus in that account there is no question of income. Therefore, one has to see that as a matter of fact, even before applying the principle of mutuality there is no question of income arising at all.

13. If we examine the case from another angle, it is to be seen that it is only a question of expenditure. The member who volunteered himself to contribute Rs.1,75,00,000 to undertake the repair work was in fact reimbursing the society of the expenditure incurred by the society. The society has incurred expenditure in expanding the facilities and in carrying out eh repair works. There was shortage of funds that shortage was made good by the member. So that is only a question of reimbursement or compensating the expenditure. Therefore as far as the assessee society is concerned. It has not earned anything. So there is no question of any income at all. The society by itself does not have its own income. The expenditures are met by the contribution made by the members or member. Even if the member wants to have some extra facilities and the demand is supported by the remaining members the additional facilities can be erected only through the medium of co-operative society. A member of a housing society cannot incur any expenditure directly even though the expenditure was incurred for this personal benefit. The work has to be carried out through the office of the society. The society alone can undertake such work. Therefore, in fact even in a case where a personal benefit is given to amber by doing some work. The same work is done by the society for and on behalf of that member. Therefore, on this ground also there is no question of any income.

14. In the facts and circumstances of the case, we find that the lower authorities have erred in treating the sum of Rs.1,75,00,000 as the income of the assessee-society. It is accordingly deleted."

5.1 Further in the case of the CIT Vs. Darbhanga Mansion Co-op Housing Society Ltd. and Su Prabhat Co-operative Housing Society Ltd. Vs. Income Tax

Officer, the Hon'ble Jurisdictional High Court has decided the same issue in favour of the assessee while deciding the substantial question of law. We, therefore, respectfully following the decision the Jurisdictional High Court and Co-ordinate Bench as referred to above dismiss the appeal of the revenue. The AO is directed accordingly.

In the result, the revenue's appeal is dismissed.

Order pronounced in the open court on 29th January, 2016

Sd/-	Sd/-
(Amit Shukla)	(Rajesh Kumar)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated :29.01.2016
Ps. Ashwini Gajakosh

<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 – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**