

आयकर अपीलिय अधिकरण "ए" न्यायपीठ पुणे में ।  
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, PUNE

श्री डी. करुणाकरा राव, लेखा सदस्य, एवं श्री विकास अवस्थी, न्यायिक सदस्य के समक्ष ।  
BEFORE SHRI D. KARUNAKARA RAO, AM AND SHRI VIKAS AWASTHY, JM

आयकर अपील सं. / ITA Nos.1064 & 1065/PUN/2016  
निर्धारण वर्ष / Assessment Years : 2009-10 & 2011-12

Janata Grahak Madhyavarti  
Sahakari Sangh Maryadit,  
Grahak Bhavan, 2020,  
Sadhasiv Peth, Tilak Road,  
Pune - 411030

PAN : AACFJ1835C

.....अपीलार्थी / Appellant

**बनाम / V/s.**

Dy. Commissioner of Income Tax,  
Circle - 11(1), Pune

.....प्रत्यर्थी / Respondent

Assessee by : Shri Nikhil Pathak  
Revenue by : Shri Ashok Babu

सुनवाई की तारीख / Date of Hearing : 16-08-2018  
घोषणा की तारीख / Date of Pronouncement : 29-10-2018

**आदेश / ORDER**

**PER VIKAS AWASTHY, JM :**

These two appeals have been filed by the assessee. In ITA No. 1064/PUN/2016 the assessee has assailed the order of Commissioner of Income Tax (Appeals)-5, Pune dated 03-02-2016 for the assessment year 2009-10. ITA No. 1065/PUN/2016 is directed against the order of

Commissioner of Income Tax (Appeals)-5, Pune dated 03-02-2016 for the assessment year 2011-12.

Since, the issues involved in both the appeals are identical and are arising from same set of facts, both the appeals are taken up together for adjudication and are being disposed of vide this common order.

2. For the sake of convenience, the facts are extracted from the appeal of assessee for assessment year 2009-10. The brief facts of the case as emanating from records are : The assessee is a Co-operative Society registered under Maharashtra State Co-operative Societies Act, 1960 and is engaged in running a department store. In re-assessment proceedings the Assessing Officer observed that the assessee is debiting provision for rebate expenses every year and the unutilized rebate is subsequently written off by treating it as capital receipt. The Assessing Officer held that the part of rebate written off as cessation of liability u/s. 41(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") and thus made addition of Rs.86,46,377/-.

Aggrieved by the assessment order dated 28-10-2014 passed u/s. 143(3) r.w.s. 147 of the Act, assessee filed appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) vide impugned order upheld the findings of Assessing Officer and dismissed the appeal of assessee. Now, the assessee is in second appeal before the Tribunal and has assailed the order of Commissioner of Income Tax (Appeals) by raising following grounds / additional grounds :

- “1. *In the facts and in the circumstances of the case and in law, the learned C.I.T. [A] erred In confirming the addition of Rs.82,35,000/- made by the Assessing Officer on account of disallowance of*

*unutilized rebate being capitalized ignoring the mandatory provisions set forth in the bye-laws of the society and when she correctly held that such addition made by the AO u/s. 41(1) of the LT. Act, 1961 was not justified.*

2. *On the facts and in the circumstances of the case and in law, the learned C.I.T [A] erred In confirming the addition of Rs.82,35,000/- made by the Assessing Officer on account of disallowance of unutilized rebate being capitalized by the appellant ignoring the very principle of mutuality as per which unutilized rebate transferred to Reserve Fund was not taxable as income.*
3. *Without prejudice to the ground No.2 above, on the facts and in the circumstances of the case and in law, the learned C.I.T. [A] erred in confirming the addition of Rs.82,35,000/- without appreciating the facts that the above amount of unutilized rebate was transferred to the Reserve Fund as per the mandatory provisions of the bye-laws of the society , ratified by the General Body Meeting and the meeting of the Board of Directors and the benefit of such unutilized rebate was mutually received by all the members of the appellant society including the members who had voluntarily surrendered/ donated the same.*
4. *Without prejudice to the ground Nos.2 and 3 above, on the facts and in the circumstances of the case and in law, the learned C.I.T. [A] erred in confirming the addition of Rs.82,35,000/- without appreciating the facts that she is not empowered to confirm the addition altogether on a different pretext considering the same as "provision written back" changing the very nature of addition made by the Assessing Officer u/s. 41 (1) of the LT. Act, 1961.*
5. *The appellant denies his liability to pay any interest u/s 234 B and 234 C of the I.T. Act, 1961 and hence the same may please be deleted.*
6. *The appellant craves leave to add, amend, modify, alter, revise, substitute, delete any or all grounds of appeal, if deemed necessary at the time of hearing of the appeal."*

#### **Additional Ground**

- 1] *The assessee submits that the transactions with its members are not taxable on the principles of mutuality and therefore, the addition made of Rs.82,35,000/- on account of un utilized rebate pertaining to sale to members was not warranted on the facts of the case.*

3. Shri Nikhil Pathak appearing on behalf of the assessee submitted that the assessee co-operative society offers rebate to its members ranging between 1% to 2% on the principles of co-operative movement. The rebate offered to the members is not paid in cash but in kind. The members have the option to utilize/redeem rebate within a period of 2 years. The assessee is following mercantile system of accounting. In the first year of rebate the assessee creates a provision in the books of account for the liability on account of such rebate. The un-utilized part of rebate amount is transferred to reserves. The ld. AR submitted that the rebate is an expenditure resulting in the reduction of sales turnover. The un-utilized part of rebate which is credited to reserve fund is not an income of the assessee. The authorities below have erred in holding un-utilized rebate written off as cessation of liability u/s. 41(1) of the Act. The ld. AR reiterated his submissions made before the authorities below.

3.1 The ld. AR further submitted that the rebate is allowed only to the members of the Co-operative Society on the proportion of the purchases made by them. No rebate is allowed to non-members of the assessee society. The rate of rebate to be allowed to the members alone is approved by the Board of Directors in accordance with the Bye-laws of the Society. Since, the assessee is a Co-operative Society and the benefit of rebate is allowed only to the members of the society, the principles of mutuality also get attracted. The assessee is raising additional ground on mutuality. The ld. AR fairly admitted that the issue of mutuality was neither raised before the Assessing Officer nor before the Commissioner of Income Tax (Appeals).

4. On the other hand Shri Ashok Babu representing the Department vehemently defended the order of Commissioner of Income Tax (Appeals). The ld. DR submitted that the assessee for the first time has raised the issue of mutuality before the Tribunal. The assessee had never raised this ground before the authorities below. No reason has been given by the assessee for not raising this plea before the Assessing Officer or the Commissioner of Income Tax (Appeals), therefore, the additional ground raised by the assessee deserves to be rejected.

5. We have heard the submissions made by representatives of rival sides and have perused the orders of authorities below. The assessee in appeal has assailed the order of Commissioner of Income Tax (Appeals) in confirming the addition of Rs.82, 35,000/- in respect of un-utilized rebate being written off and transferred to reserve account. The addition has been made by Revenue under the provisions of section 41(1) of the Act. The assessee before us has raised additional ground of appeal invoking the principles of mutuality. We find that the fresh plea of mutuality raised in additional ground by the assessee emanates from the facts already on record. No fresh evidence is required to be adduced to adjudicate this ground. The additional ground raised would have bearing on the tax liability of the assessee. Therefore, in the light of decision of Hon'ble Supreme Court of India in the case of NTPC Ltd. Vs. Commissioner of Income Tax reported as 229 ITR 383. We are admitting additional ground raised by the assessee.

6. Both the sides are unanimous in admitting that since the plea of principles of mutuality has been raised for the first time before the

Tribunal, it has to be first examined by the authorities below. We are also of considered view that before applying principles of mutuality it would be appropriate if the issue is first examined by authorities below. Thus, the present appeal by the assessee is remitted to the file of Assessing Officer to examine the applicability of principles of mutuality on the addition made.

7. In the result, the appeal of assessee for assessment year 2009-10 is allowed for statistical purpose.

**ITA No. 1065/PUN/2016 (A.Y. 2011-12)**

8. The ld. AR submitted that addition in assessment year 2011-12 has been made on similar lines as was made by the Assessing Officer in assessment year 2009-10. The grounds / additional ground raised by the assessee are also identical to the grounds / additional ground raised in assessment year 2009-10. Therefore, the submissions made in respect of assessment year 2009-10 would equally apply to assessment year 2011-12.

9. The ld. DR also admitted the fact that the addition and the grounds of appeal in both the assessment years i.e. assessment years 2009-10 and 2011-12 are identical.

10. Both sides heard. Orders of the authorities below perused. It is not in dispute that the grounds/additional ground raised in assessment year 2011-12 is identical to the assessment year 2009-10. We have restored the appeal of assessee to the file of Assessing Officer for de-novo adjudication in the light of fresh plea raised in assessment year 2009-10.

The findings given by us in assessment year 2009-10 would *mutatis mutandis* apply in assessment year 2011-12, as well. Therefore, for the detailed reasons given above, the present appeal of the assessee for assessment year 2011-12 is allowed for statistical purpose.

11. In the result, both the appeals of assessee are allowed for statistical purpose.

Order pronounced on Monday, the 29<sup>th</sup> day of October, 2018.

Sd/-	Sd/-
(डी. करुणाकरा राव/D. Karunakara Rao)	(विकास अवस्थी / Vikas Awasthy)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

पुणे / Pune; दिनांक / Dated : 29<sup>th</sup> October, 2018

RK

**आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-5, Pune
4. The Pr. C.I.T. -4, Pune
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, "ए" बेंच,  
पुणे / DR, ITAT, "A" Bench, Pune.
6. गार्ड फ़ाइल / Guard File.

//सत्यापित प्रति // True Copy//

आदेशानुसार / BY ORDER,

निजी सचिव / Private Secretary,  
आयकर अपीलीय अधिकरण, पुणे / ITAT, Pune