INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C": NEW DELHI

BEFORE
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER

ITA No. 5990/Del/2016
Asstt. Year: 2013-14

Garden Estate Residents Welfare Association (Regd.) Garden Estate, M.G. Road, DLF City, Phase-III, Gurgaon	Vs.	Income Tax Officer Ward-1(4) Gurgaon
(Appellant)		**(Respondent)**

Assessee by:	Shri CS Aggarwal, Sr. Adv
Department by :	Shri S.N. Meena, Sr. DR

O R D E R

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the assessee against order dated 3.10.2016 passed by the Ld. Commissioner of Income Tax (Appeals) –I, Gurgaon {CIT (A)} and pertains to assessment year 2013-14.

2.0 Brief facts of the case are that the assessee is a Resident Welfare Association and had come into existence on 6.09.1991. This association was registered with Registrar of Firm and Societies, Haryana on 22.7.1992. This association has been

formed by the residents of the residential complex called Garden Estate, Gurgaon. As per the Memorandum of Association of the assessee society, only those persons who are the owners of the dwelling units in Garden Estate or nominated persons of the corporate firms, institutions or organisations which own the dwelling units can be the members of the society.

2.1 In the instant assessment year, the assessee had furnished its return of income showing a total income of Rs. 90,53,170/- which was in terms of profit and loss account. Subsequently, a revised return was filed wherein the return was filed declaring a loss of Rs. 54,193/-. The assessee's case was selected for scrutiny through CASS and subsequently the assessment was completed at an income of Rs. 2,66,14,833/- after making the following additions:

1. Bank interest	Rs. 18,09,368/-
2. Receipts from advertisement	Rs. 4,69,030/-
3. Receipts from contractual payments	Rs. 28,42,085/-
4. Rental receipts	Rs. 2,00,500/-
5. Compensation receipts	Rs.1,67,15,029/-
6. 50% of interest on enhanced compensation	Rs. 45,78,771/-

2.2 Aggrieved, the assessee approached the Ld. First Appellate Authority contending that the additions made by the AO

were unsustainable both on facts and in law and since the association had been formed by the flat owners and was for their benefits only, the excess of receipts over expenditure could not be regarded as income. The Ld. CIT (A), however, only allowed a minor relief to the assessee in respect of addition made on account of receipts from advertisement and upheld the disallowance/addition of all other items by holding that all the additions were in the nature of income which was taxable and was not saved by the principle of mutuality.

2.3 Aggrieved, the assessee is now before the ITAT and has challenged the upholding of the additions by the Ld. CIT (A) by raising following grounds of appeal :-

1. *That the learned CIT (A) has erred both on facts and in law in confirming the assessment framed by the learned AO disregarding that the assessee is a mutual benefit society and that the receipts which has been brought to tax could not have been treated as part of the total income of the assessee society.*
2. *That the learned CIT (A) has erred both on facts and in law in confirming the addition made of Rs. 1,67,15,029/- under the head 'capital gain' by disregarding the factual substratum of the case and that the aforesaid amount did not represent even its receipt much less an income.*
3. *That the learned CIT (A) has further erred in confirming an addition of a sum of Rs. 18,09,368/- being the bank interest, as an income liable to be included in the total income. He has failed to comprehend the factual substratum of the case and sustained the addition on the*

application of the principles laid down by the Apex Court in the case of Banglore Club vs. CIT reported in 350 ITR 509, which was wholly distinguishable on the facts.

3.1 That in sustaining the aforesaid addition the learned CIT (A) has failed to appreciate the factual substratum of the case as stated by the assessee in its reply dated 10.2.2016.

4. That the learned CIT (A) has failed to appreciate that the assessee had furnished the return of total income declaring a loss of Rs. 54,193/- and while computing the total income, it had included the amounts received from non-members for the services rendered to the members as its income and as such said sum ought not to have been brought to be separately taxed, while computing the total income. Thus the addition made while computing the total income of Rs. 35,11,665/- by way of interest and of a further sum of Rs. 45,78,771/- representing the interest received on computation in respect of the land not being belonging to the assessee was not sustainable.

5. That the learned CIT (A) has thus erred in upholding the findings of the learned AO (see para 7 of AO's order) that the excess over the expenditure amounting to Rs. 1,05,49,082/- had rightly been set off against the corpus funds accumulated year to year and not from the receipts of :

(i) Rs. 18,09,368/- (if held as taxable), representing interest received from banks
(ii) Rs. 35,11,665/- representing contractual receipts
(iii) Rs. 45,78,771/- representing interest and additional interest received on compensation

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6. That the learned CIT (A) has further erred in upholding an addition made under the head capital gain of Rs. 1,67,15,029/- disregarding that no such capital gain had accrued to the assessee either on facts and in law and

thus the addition made is completely misconceived in law and on facts.

7. *That the learned CIT (A) has failed to appreciate that such a sum of Rs. 1,67,15,029/- did not represent an amount assessable in the hands of the assessee by way of capital gain, disregarding that the assesee was not the owner of the land in respect of which the assessee had received the compensation and was inchoate receipt in law. In sustain the aforesaid addition the learned CIT (A) has overlooked the statutory provisions of section 45 of the Income Tax Act.*
8. *That the findings of the learned CIT (A) that, the learned AO had correctly computed the total income, when he had set off the expenditure incurred, not out of the receipts of the society of the instant year and held taxable of the instant year but form the corpus is misconceived both in law and on facts, as he had overlooked that even on the basis of first principle, the income is to be computed on year to year basis and thus while computing the total income all the receipts had to be necessarily set off from the outgoings i.e. the expenditure incurred before computing the total income.*
9. *It is therefore prayed that the additions made and sustained by the learned CIT (A) be held as not taxable while computing the total income of the assessee and income returned by the assessee, a mutual benefit society ought to have been accepted without making any addition to its returned income*.

3.0 The Ld. AR submitted that a sum of Rs. 1,67,15,029/- represents an amount of compensation granted by the Land Acquisition Commissioner (LAC) under an award dated 11.9.2007 and additional compensation granted by an order of the Ld. Addl. District Judge dated 31.08.2012 in respect of two awards, one being No. 96/2008 and another being 790/2008.

Both the awards pertain to the land situated in the area developed by M/s. Gulmohar Estates India Pvt. Ltd. on which flats were developed and had been acquired by the various flat owners numbering 373. It was submitted that the said sum of Rs. 1,67,15,029/- had been received during the Financial Year (FY) 2012-13 relevant to Assessment Year (AY) 2013-14. It was submitted that the aforesaid sum of compensation represents 80% of the aggregate amount of the award including the additional compensation and the remaining 20% of the amount of the award had accrued to one Shri Dinesh Kumar.

3.1 It was submitted by the Ld. AR that so far as the assessee Association is concerned, it is not the owner of the land acquired and the amount received by it was conditional and inchoate and that the land belonged to the flat owners and not to the assessee. It was submitted that it became entitled to receive the aforesaid amount not as an owner but when it had undertaken to use the compensation amount, only for the benefit and betterment of the Garden Estate Colony, which included the amount to be paid to the State of Haryana towards external development charges, as was to be paid by M/s. Gulmohar Estates India Pvt. Ltd., if held as payable. The Ld. AR argued

that, thus, the amount of compensation received by it is inchoate not only because of the quantification but also because it is not entitled in law to receive such compensation. It had received the said sum only as a representative of the flat owners and that too, the aforesaid sum was to be only utilized to make the payment to State of Haryana towards external development charges and also for the betterment of the society since such flat owners were the owners of the land. It was submitted that under the Haryana Apartment Ownership Act, 1983 it is very well defined that the land beneath the structure and adjacent land would belong to the flat owners in the proportion to the area owned and held by them.

3.2 It was further submitted by the Ld. AR that the findings of the learned CIT (A) are wholly erroneous and unsustainable in law as the assessee society is not the owner of the land. On the contrary, the land is claimed to be owned by M/s. Gulmohar Esattes Ltd. and, in fact, in the order of enhancement dated 31.08.2012, it has been stated that *"the land continues to be residential and is jointly shared by 373 apartment owner"*. It was submitted that in such a situation there can be no justification to bring to tax the amount of compensation received

by it in the hands of the assessee. It was reiterated that the impugned sum was received to be paid to the State of Haryana since they were claiming external development charges from the owner of the land i.e. M/s. Gulmohar Estates Ltd. The Ld. AR sought to rely on the judgment of the High Court of Delhi in the case of CIT vs. Suman Dhamija reported in 382 ITR 343.

3.3 It was further submitted that the assessee society is incorporated for the welfare and well-being of 'Garden Estate' (GE) to ensure that the GE complex is properly managed, administered and maintained in a manner conducive to comfortable, hassle-free living compatible with the standards and expectations of the its members. The Ld. AR submitted that the objects of the assessee do not authorize it to own any land on behalf of its members and nor is the assessee owning any land. It was submitted that under the builder-buyer agreement, it is the individual flat owners who have right in the common undivided area and, therefore, as such, the finding of the learned CIT (A) that the assessee was the rightful owner of the land is wholly erroneous and unsustainable in law. It was submitted that even the decision of the Ld. Addl. District Judge, Gurgaon, dated 31.08.2012 in the case of Garden Estate Resident Welfare

Association vs. State of Haryana and others does not hold that the assessee is the owner of the land. It was submitted that in the aforesaid decision it has been held that M/s. Gulmohar Estates Ltd. has purchased the land which was leased out to one Shri Dinesh Kumar and the plot-holders of the assessee association but since the lease granted to M/s. Gulmohar Estates Ltd. has been cancelled, as such the assessee association was entitled for the compensation. It was submitted by the Ld. AR that in the aforesaid decision, it has not been held that the assessee is the owner of the land. The Ld. CIT (A) observed that since the 373 apartment owners had undivided and un-partitioned interest in the land as such, the assessee association was the rightful owner of the land. It was submitted that the learned CIT (A) has completely failed to consider that the assessee association was formed only for the welfare of its members and that it has no right over the properties of its members. The Ld. AR argued that its duty is limited to manage, administer and maintain the Garden Estate in a manner conducive to comfortable, hassle-free living compatible with the standards and expectations of the its members. He argued that in

such circumstances the finding that the assessee was the rightful owner of the land is wholly erroneous and misconceived in law.

3.4 It was submitted that in the context of HUF, wherein HUF is also the body of the individual family member, it is settled law that income arising from the sale of the properties of the members cannot be taxed in the hands of the HUF. Reliance was placed on the order of the Tribunal in the case of Rajnish Chaudhary (HUF) vs. ACIT reported in (2015) 68 SOT 166 (Delhi-Trib.) in this regard.

3.5 It was further argued that the scheme for charging capital gains to tax can be culled out from a conjoint reading of the provisions of sections 45, 48, 49 and 55 of the Income Tax Act, 1961 (hereinafter called 'the Act'). It was submitted that Section 45 prescribes that on transfer of a capital asset effected in a previous year, the difference arising by way of any profits or gains shall be charged to income-tax under the head "Capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. It was submitted that the terms "capital asset" and "transfer" are defined respectively in sections 2(14) and 2(47) of the Act and that for the purpose of computing the income chargeable as specified under

section 45, the mode of computation has been prescribed in section 48 of the Act. The Ld. AR submitted that it is laid down that for the purpose of ascertaining the income which is chargeable to capital gains tax, the expenditure which is incurred wholly and exclusively in connection with the transfer and the cost of acquisition of the asset along with the cost of improvement, if any, will have to be deducted from the full value of consideration received or accruing on such transfer taking place. It was further submitted that Section 55 specifies the meaning of the terms "cost of improvement" and "cost of acquisition" and that Section 49 lays down the modality of ascertaining the cost of acquisition with reference to certain modes of acquisition specified under sub-section (1) of the said section. The Ld. AR submitted that in the present case, undisputedly, the land belonged to the members of the assessee association, however, since all the 373 members of the assessee society have a right in the land and the assessee has no right in the land, and further, the cost of the land is not determinable even in the hands of its members, as such, cost of acquisition of land in the hands of its members is also indeterminate and hence the whole computation mechanism will fail, and hence, in the

absence of ascertained cost of acquisition, the charge under the head "Capital gains" cannot be fastened to the full value of consideration. It was submitted that, further, the learned CIT (A) has upheld the action of the Assessing Officer (AO) in adopting the cost at NIL which is legally unsustainable in law. Reliance was placed on the judgment of the Hon'ble Gujarat High Court in the case of CIT vs. Manoharsjinhji P. Jadeja reported in 281 ITR 19.

3.6 It was further argued by the Ld. AR that the sum received by the assessee is not a sum received in the course of its activities and hence the same is a capital receipt. It was again emphasised that the assessee is a mutual benefit society, and as such, all the receipts of the assessee are applied towards the benefit of its individual members and, therefore, even on the principle of mutuality, such receipt is not taxable in the hands of the assessee.

3.7 The Ld. AR reiterated that the AO has failed to comprehend the distinction between application of income and diversion of such an income by an overriding title at source. The income by way of long term capital gain, if at all arisen, had arisen in the hands of flat owners wherein the assessee (society)

had no right, title or interest. The mere fact that the amount had been received by the society would only amount to an application of income by the flat owners and there being no diversion of such income by an overriding title in favour of the society, no such income could be said to have accrued to it and assessed in its hands. It was submitted that it is important to be noted that the learned Addl. District Judge had granted the compensation, as specifically stated by him, to the land owners.

3.8 It was further submitted by the Ld. AR that the entire sum of Rs. 91,57,542/- received is interest paid under section 28 of the Land Acquisition Act and has the same character as that of compensation. It was submitted that it has been held by the Hon'ble Apex Court in CIT Vs. Ghanshyam HUF reported in 315 ITR 1 (SC) that the interest under section 28 is part of compensation whereas interest under section 34 is only for the delay in making the payment after the compensation amount is determined. Interest under section 28 is a part of enhanced value of the land which is not so in the case of payment of interest under section 34. The Ld. AR drew our attention to the following chart depicting the details of interest received amounting to Rs. 91,57,542/- u/s 28 and submitted

that the interest of Rs. 91,57,542/- could not have been included in the total income:

Asstt. Year	Compensation		Additional Compensation		Total
	Interest u/s 28 @ 9%	Interest u/s 28 @ 15%	Interest u/s 28 @ 9%	Interest u/s 28 @ 15%	
2008-09	3,55,320.00		1,47,571.00		5,02,891.00
2009-10	3,55,320.00	5,92,200.00	1,47,572.00	4,22,148.00	15,17,240.00
2010-11		11,84,400.00		8,44,297.00	20,28,697.00
2011-12		11,84,400.00		8,44,297.00	20,28,697.00
2012-13		11,84,400.00		8,44,297.00	20,28,697.00
2013-14		2,77,380.00		7,73,940.00	10,51,320.00
Total	7,10,640.00	44,22,143.00	2,95,143.00	37,28,970.00	91,57,542.00

3.9 It was further submitted that the AO, while framing the assessment and bringing to tax the amount of compensation received, has held that the cost of acquisition be adopted as Nil but since the assessee has not acquired any land and as such unless and until it had acquired a land it could not have transferred the same. The Ld. AR argued that in the instant case, it is an admitted fact that when the order of acquisition was made on 11.09.2007, the superstructure had already been constructed and, thus, the owners of the flats were statutorily the owners of the land also. Thus, in the absence of the assessee having acquired the land which is admitted by the AO, *per se* the provisions of section 45 of the Income Tax Act have no application. It was submitted that the AO is not assessing 373 owners of the apartments who alone are the owners of the land.

It was argued that it is well settled rule of law that correct income is to be assessed in the right hands and, thus, the amount of compensation could not have been held to be taxable in the hands of the assessee and nor even the interest on such compensation received by the assessee-society. The Ld. AR sought to rely on the judgment of the Hon'ble Apex Court in the case of CIT vs. Ch. Atchaiah reported in 218 1TR 239 (SC).

3.10 It was further submitted that is also well settled that no income can be brought to tax under any other head of income, when such an income failed to be assessed under the specific head. It was submitted that the Hon'ble Apex Court in the case of CIT vs. Harprasad & Co. Pvt. Ltd. reported in 99 ITR 118 (SC) at page 125 has held that before an income can be assessed, the said income must be chargeable to tax under a specific head of income. It was submitted that the aforesaid receipt could not have been held to be assessable in the hands of the assessee by any stretch of imagination. It was argued that it is an undisputed fact that no conveyance deed in respect of any land was executed in favour of the assessee society and, therefore, there could have been no justification whatsoever even

to consider the said sum taxable in the hands of the assessee as well as interest in respect thereof. It was submitted by the Ld. AR that the mere application of receipt does not attain the character of a receipt as income. Thus, what could have been taxed by the authorities, if at all, were to tax 373 flat owners and not the assessee.

3.11 Without prejudice to the aforesaid arguments, it was further submitted by the Ld. AR that in the instant case, it is an admitted fact both by the AO and the Ld. CIT (A) that the cost of acquisition is Nil in the hands of the assessee and as such the computation provision fails and once the computation provision fails for computing the capital gains under the Income-tax Act, there cannot be any levy of capital gains tax in the hands of the assessee as has been held by the Hon'ble Apex Court in the case of CIT v. B.C. Srinivasa Setty 128 ITR 294 (SC).

4.0 With respect to ground nos. 4 and 5 (iii) pertaining to addition of Rs. 45,78,771/- (Interest on enhanced compensation) , the Ld. AR submitted that the addition was made of Rs. 45,78,771/- being 50% of the interest on

compensation and enhanced compensation totaling to Rs. 91,57,542/-. It was submitted that the assessee, in view of the order of the Ld. Additional District Judge, Gurgaon, dated 31.08.2012, had received compensation and enhanced compensation along with interest thereon. It was again submitted that the land in respect of which compensation was received was not owned by the assessee and hence the compensation and enhanced compensation in respect of acquisition of land is not taxable in the hands of the assessee. It was submitted that the assessee, along with compensation and enhanced compensation, had also received interest thereon to the tune of Rs. 91,57,542/- which was shown under the head 'other income' in the Profit and loss account as is evident from Schedule 9 of the profit and loss account. It was submitted that since the interest has been received on the compensation and enhanced compensation in respect of the acquisition of the land as such, the interest received by the assessee would be part of the compensation in view of the judgment of the Hon'ble Apex Court in CIT v. Ghanshyam (HUF) reported in [2009] 315 ITR 1 (SC), and since the compensation received by the assessee is a capital receipt, as such, interest received thereon is also a capital

receipt and hence not taxable.

5.0 With respect to ground no 5 (i) pertaining to addition of Rs. 18,09,368/- relating to bank interest, it was submitted by the Ld. AR that in Para 3 of the order of assessment, the assessing officer has considered the receipt of interest of Rs. 18,09,368/- in respect of the deposits made by the assessee and has held that since the interest has been received from banks which are not the members of the assessee society, hence in accordance with the decision of the Hon'ble Apex Court in the case of Bangalore Club vs. CIT reported in 350 ITR 509, such an amount received by the assessee from banks on the surplus deposited by the assessee is taxable in the hands of the assessee society as income from other sources. It was submitted that the assessee is receiving interest on the bank deposits since the AY 2002-03, and in AY 2002-03, the AO had made addition in respect thereof. However, such addition was deleted by the Tribunal by holding that its income is not chargeable to tax on the basis of principle of mutuality. It was further submitted that similarly for the AY 2003-04, an addition had been made by the AO which also was deleted by the Tribunal. Our attention was

drawn to the relevant orders of the Tribunal and it was further submitted that, thereafter, from AY 2004-05 till AY 2012-13, such interest income has been accepted to be not taxable on account of principle of mutuality. However, it is only for this year that the revenue has proceeded to treat the receipt of interest as not covered by the principle of mutuality. A chart showing the receipt from interest since AY 2002-03 and treatment by the revenue in respect thereof was also submitted by the Ld. AR and it was submitted that the aforesaid action of the AO is contrary to the principle of consistency. The Ld. AR placed reliance upon the judgment of the Hon'ble Apex Court in the case of Commissioner of Income-tax v. Excel Industries Ltd [2013] 358 ITR 295 (SC) wherein it has been held that revenue cannot be allowed to flip-flop on the issue and having accepted the order of the Tribunal in preceding years, revenue cannot be allowed to take a contrary view in subsequent assessment years. Further, reliance was also placed on the judgment of the Constitution Bench of the Hon'ble Apex Court in the case of CIT vs. J.K. Charitable Trust reported in 308 ITR 161(SC), wherein it has been held that if the facts for the year under assessment are identical to the facts of the immediately preceding year, then in

such a situation, the revenue would not be permitted to deviate from the position that it had accepted in the preceding assessment year. The Ld. AR argued that it has been consistently decided time and again by the Hon'ble Apex Court and the Hon'ble High Courts that claims once allowed in any assessment year must be allowed in succeeding assessment years by following the rule of consistency unless and until there is a change in the position of law or change in facts of the case. The Ld. AR argued that there is neither change in facts of the case nor any change in the position of law and that though the doctrine of *res judicata* does not apply to income-tax proceedings, but where the revenue has taken a particular stand on an issue on similar/identical facts in the case of the assessee, for the sake of consistency, the same view should continue to prevail in the case of the assessee unless there is material difference in the facts.

5.1 It was further submitted that both the AO and the Ld. CIT (A) have failed to consider the factual substratum of the case. It was submitted that the residential complex Garden Estate was developed by the Gulmohar Estates Ltd on the land

purchased by such company and condominiums and flats constructed by the company were sold to the buyers. In the aforesaid residential colony, the said company has also constructed club house, roads and other facilities but after selling the flats and condominiums, the said company had started defaulting in making the payments to HUDA on account of External Development Charges which led to the cancellation of the license of the company in the year 1995. It was submitted that after the cancellation of the license, the residential colony was vested in the Director, Town & Country Planning, Chandigarh, Haryana and the buyers of the residential colony had started facing problems, and in such circumstances the assessee society was formed for the welfare of the residents of the Garden Estate. It was submitted that huge amount of Rs. 5.24 crores was due to the HUDA on account of the External Development Charges and the assessee society has taken contributions from the members to the tune of Rs. 3,58,98,972/- which was kept in form of bank deposits with the bank to be paid to HUDA. It was submitted that the aforesaid amount was kept as reserve to discharge the outstanding liability and to safeguard the interest of the Garden Estate residents.

5.2 It was further submitted that the amount kept in bank deposits was not surplus but reserve maintained by the assessee society to discharge the liability towards HUDA on account of External Development Charges. It was submitted that the interest received by the assessee on the bank deposits is not taxable and is covered by the principle of mutuality as the interest has to be utilized for the benefit of the members of the society only.

5.3 The Ld. AR submitted that the said receipt cannot be held to be taxable, despite the fact it has not been received by it from the members, since it was the funds of the members of the society alone, which had been contributed by them deposited for their benefit. In support of the contention that such interest is not taxable, the Ld. AR sought to rely upon the order of the Tribunal in the case reported in 101 ITD 391 in the case of Shivalika Co-operation Group Housing Societies Ltd. v. ITO wherein, following the judgment of the Hon'ble Delhi High Court in the case of DIT vs. All India Oriental Bank of Commerce Welfare Society 184 CTR 274, it was held that interest income earned by an assessee even on the surplus fund of a mutual

society deposited in the bank is covered by the principle of mutuality. It was further submitted that a similar view has been expressed by the Hon'ble Delhi High Court in the case reported in 287 ITR 22 in the case of Saraswati Kunj House Building Society Ltd. It was submitted by the Ld. AR that since in the instant case it cannot be held that there is any receipt which is tainted with commerciality, the assessee is not liable to be assessed on the amount received by it from its members.

5.4 With respect to the Revenue's reliance on the judgment of the Hon'ble Apex Court in the case of Bangalore Club vs. CIT reported in 350 ITR 509, it was submitted with respect that the same is inapplicable as in the aforesaid case, the amount on which interest was received was not kept by the club to discharge any statutory obligation on the behalf of its members, whereas in the case of the assessee, the amount which was kept with the banks are in the nature of reserve maintained by the assessee to discharge the statutory liability on behalf of its members to be paid to HUDA as and when demanded. Hence the ratio of the aforesaid judgment is inapplicable.

6.0 The Ld. AR submitted that in ground no 4, the assessee has challenged the sustenance of the addition of Rs. 35,11,665/- representing contractual receipts. The aforesaid addition consisted of the following sums:

S. No.	Particulars	Additions (in Rs)
i.	Addition in respect of rental income received from NGK Retail Pvt. Ltd. after allowing deduction u/s 24(a)	2,00,550/-
ii.	Income received as contractual receipts	28,42,085/-
iii.	Income received from advertisements	4,69,030/-
	Total	35,11,665/-

6.1 With respect to the Rental Income received from NGK Retail Ltd, it was submitted by the Ld. AR that the assessee society, in order to facilitate its members, has given a portion of the club house to M/s NGK Retail Pvt. Ltd for providing vegetables and fruits. The total sum received on account of rent was of Rs. 2,86,500/- and after allowing the deduction u/s 24(a), an addition of Rs. 2,00,550/- was made. It was submitted that the AO held that principle of mutuality is not applicable in respect of such receipts as such receipts are

commercial in nature and have been earned from non-members. The Ld. AR submitted that before the learned CIT (A), the assessee had submitted that this issue is covered by the order of the Tribunal in assessee's own case for the AY 2002-03 in ITA No. 1030/Chd/2007, however he upheld the addition by overlooking the aforesaid order of the Tribunal. It was submitted that in the aforesaid order, the Tribunal had considered the various receipts of the assessee and had held that such receipts are not taxable on the principle of mutuality. It was further submitted by the Ld. AR that the assessee was showing rental receipts till AY 2012-13 and that such rental income has been accepted to be not taxable on account of mutuality. However, it is only for this year that the revenue has proceeded to treat the rental receipt as not covered by the principle of mutuality. A chart showing the receipt from rent since AY 2002-03 and treatment by the revenue in respect thereof was also submitted by the Ld. AR and it was submitted that the aforesaid action of the AO was contrary to the principle of consistency.

6.2 With respect to the income received from advertisements, it was submitted that the assessee has been

showing receipts from advertisement since AY 2004-05 and such receipts have been accepted to be not taxable on account of the principle of mutuality till AY 2012-13. A chart showing the receipts from advertisement since AY 2004-05 and treatment by the revenue in respect thereof was submitted by the Ld. AR and it was submitted that the aforesaid action of the AO was contrary to the principle of consistency. It was also submitted that the aforesaid receipts on account of advertisement have been received from the members who wanted to advertise in the society about their commercial activities and that such sum was received by the assessee from the advertisement/s by means of display boards, banners etc and the funds so collected by the assessee society have been utilized by the assessee for the welfare of its members. It was also submitted that since the said sum has already been included in the receipts of the society, as such a separate addition made in respect thereof is wholly unwarranted in law.

6.3 With respect to income received as contractual receipts, the Ld. AR submitted that the AO has also made an addition of Rs. 28,42,085/- being contractual receipt on the

ground that such receipt is not covered on the principle of mutuality. It was further submitted that out of the aforesaid sum of Rs. 28,42,085/- a sum of Rs. 24,86,675/- was received by the assessee from its members as maintenance charges and was already shown as receipt and the remaining sum of Rs. 3,55,410/- was part of advertisement receipt of Rs. 4,60,030/-. It was submitted that the aforesaid sum of Rs. 28,42,085/- was taken by the AO from Form 26AS wherein such sum was shown as contractual receipt whereas the fact of the matter is that out of the aforesaid sum, a sum of Rs. 24,86,675/- was received by the assessee as maintenance charges from its members who were corporate bodies and had deducted tax thereon. It was submitted that the total maintenance charges collected by the assessee from its members during the year was Rs. 1,88,05,756/- and out of the aforesaid sum, on Rs. 24,86,675/- TDS was deducted. It was submitted that since the sum of Rs. 24,86,675/- was the annual maintenance charges received from its members and same was already included in its Income and Expenditure Account, as such, the same is not taxable.

6.4 The Ld. AR submitted that the remaining sum of Rs. 3,55,410/- is part of advertisement receipt on which also TDS was deducted and in Form 26AS it was shown as contractual receipt. It was submitted that since the advertisement receipt is not taxable on the principle of mutuality, as such, addition made by the AO is wholly unsustainable in law.

7.0 The Ld. AR also argued that the AO/ Ld. CIT (A) have grossly erred in holding that the excess of the expenditure over the income has to set off from the corpus funds accumulated year to year by the assessee. It was submitted that since the aforesaid receipts of the assessee were not taxable, as such, the assessing officer was not correct in law to re-compute the income of the assessee at (-) Rs. 1,05,49,082/- as neither the interest, nor the alleged contractual receipt nor the interest on the compensation is taxable.

8.0 Responding to the arguments raised by the Ld. AR, the Ld. Sr. DR submitted that as far as the interest earned from deposits in the bank is concerned, the same is not covered by the mutuality principle as has been held by the Hon'ble Apex

Court in the case of Bangalore Club vs. CIT reported in (2013) 350 ITR 509. It was submitted that in the instant case the assessee association had not offered the income earned from interest on deposits with non-member banks and had utilised the said interest for the day to day working without offering the same to tax. It was submitted that the interest earned can be used for the day to day activities but only after paying the tax due on the said income.

8.1 With reference to the enhanced compensation received during the year and shown under capital reserve by the assessee, the Ld. Sr. DR submitted that the land in question was a capital asset. It was submitted that even from the copy of order of the Ld. Addl. Distt. Judge, Gurgaon it is evident that the land was residential and jointly shared by the 373 apartments owners. It was submitted that, therefore, the compensation received was on account of acquisition of a capital asset which was a piece of land situated in the heart of commercial and residential hub of Gurgaon city near to MG Road and, therefore, the compensation received was liable to be taxed. It was also submitted that in the case of capital gain earned, the concept of mutuality is not attracted as the capital gain is not part of the

normal course of activities done by the association and is also not earned from its members.

8.2 Likewise, for the issue relating to interest on enhanced compensation, the Ld Sr. DR submitted that as per the provisions of section 145A (b) of the Act, any interest received by the assessee on compensation or enhanced compensation is deemed to be the income of the year in which it was received. It was further submitted that, further, as per the provisions of section 56(2)(viii), income by way of interest received on compensation is to be taxable under the head of income from other sources and the principle of mutuality is again not attracted.

8.3 With respect to other additions pertaining to addition on account of advertisement, rent and contractual receipts, the Ld. Sr. DR submitted that on perusal of the profit and loss account it was seen that the assessee association has derived income from advertisement amounting to Rs. 4,69,030/- and on further perusal of Form 26AS, it was noticed that the assessee had derived income from rent and contractual receipts amounting to Rs. 31,28,585/- from various companies which were not the members of the association. The Ld. Sr. DR

submitted that these receipts were purely of commercial nature and were derived by the assessee from profit earning activities and earned from non-members and, therefore, the same were not exempt under the principle of mutuality. The Ld. Sr. DR also placed reliance on the findings of the Ld. CIT (A) on these issues and submitted that the findings of the Ld. CIT (A) had been arrived at after due consideration of the arguments of the assessee before him. The Ld. Sr. DR prayed that the order of the Ld. CIT (A) be upheld.

9.0 We have heard the rival submissions and have also perused the material on record. Ground No. 1 is general in nature and requires no specific adjudication.

9.1 As far as ground No. 2 is concerned, it challenges the action of the Ld. CIT (A) in confirming the addition of Rs. 1,67,15,029/- under the head "capital gains". As per the records, this amount represents amount of compensation granted by the Land Acquisition Collector (LAC) under the award dated 11.9.2007 and additional compensation granted by an order of Ld. Additional Distt. Judge dated 31.8.2008. Both these awards pertain to the land situated in the area developed by M/s. Gulmohar Estate India Pvt. Ltd. on

which flats were developed and had been acquired by the various flat owners which were 373 in number. This amount of Rs. 1,67,15,029/- was received during the year under consideration. It is the assessee's contention that as far as the assessee society is concerned, it is not the owner of the land but only an association whereas the allottees were the real owners. It has been submitted that the assessee society has received the amount only as a representative of the flat owners and that this amount was to be utilised only for the purpose of making payments to the State of Haryana towards external development charges and also for the betterment of the society since the flat owners were the owners of the land. The Ld. AR has also placed reliance on the provisions of Haryana Apartment Ownership Act, 1983 and has submitted that in this Act it has been defined that the land beneath the structure and adjacent land would belong to the flat owners in the proportion to the area owned and held by them. It is undisputed that the assessee is a registered association comprising of the residents of the residential colony called Garden Estate situated in Gurgaon. As per the records, the land is claimed to be owned by M/s. Gulmohar Estates Ltd. A perusal of the order of the enhancement dated 31.8.2008

passed by the Ld. Addl. Distt. Judge also records that the land continues to be residential and is jointly shared by the 373 apartment owners. It is claimed by the assessee that the amount received in compensation is the amount which has been received is to be paid to the State of Haryana since they were claiming external development charges from the owner of the land i.e. M/s. Gulmohar Estates Ltd and that, thus, for all practical purposes, the assessee association has received the amount on behalf of the residents of the Garden Estates and it cannot be inferred that this is in the nature of capital gains taxable in the hands of the assessee society. However, this aspect has not been examined in the proper perspective by the lower authorities. There is no finding of fact recorded in this regard. It is also the claim of the assessee that the compensation came to be received by the assessee only in place of M/s. Gulmohar Estates Ltd., (which had purchased the land and had leased the same out to one Shri Dinesh Kumar and the plot holders of the assessee association). However, since the lease was cancelled, the Ld. Addl. District Judge held that the assessee association was entitled to the said compensation. This aspect of the assessee's claim needs to be verified. Therefore, given the lack of clear

finding by the lower authorities on the aspect of the assessee's right over the compensation, the veracity of assessee's claim regarding payment to be made to HUDA and the actual ownership of the land in question, we deem it fit to restore this issue to the file of the AO for the purpose of deciding this issue afresh in accordance with law after duly examining and recording a finding with respect to the actual ownership of the land, the assessee's claim of over-riding title and the actual right over the said compensation. The AO will give reasonable opportunity to the assessee to present its case before proceeding with the adjudication.

9.2 Ground Nos. 4 and 5 (iii) challenge the action of the Ld. CIT (A) in bringing to tax an amount of Rs. 45,78,771/- being interest on enhanced compensation as income of the assessee. For reasons as mentioned in Para 9.1 above, we restore this issue also to the file of the AO for fresh adjudication in accordance with law after giving proper opportunity to the assessee.

9.3.0 In Ground No. 5(i), the assessee has challenged the confirmation of addition of Rs. 18,09,368/- being interest from bank. This addition has been made on the ground that

interest has been received from banks which are not members of the assessee society and, therefore, in accordance with the judgment of the Hon'ble Apex Court in Bangalore Club vs. CIT (supra) this amount was taxable in the hands of the assessee association as income from other sources. It is seen that the assessee has been receiving interest on the bank deposits since assessment year 2002-03 and the AO had made a similar addition in that year which was however deleted by the ITAT by holding that this amount was not chargeable to tax on the basis of principle of mutuality. Similarly, in assessment year 2003-04, a similar addition was deleted by the ITAT. Thereafter, from assessment years 2004-05 till 2012-13, this interest income was accepted as not taxable on account of principle of mutuality. However, the Hon'ble Apex Court in the case of Bangalore Club vs. CIT reported in (2013) 5 SCC 209, vide judgment dated 15/01/2013 has held that interest on amounts deposited with banks is not covered by the principle of mutuality. The relevant observations of the Hon'ble Apex Court are contained in Para 25 to 33 and the same are being reproduced here in under for a ready reference:

"25. This brings us to the facts of the present case. As aforesaid, the assessee is an AOP. The concerned banks are all corporate members of the club. The interest earned from fixed deposits kept with non- member banks was offered for taxation and the tax due was paid. Therefore, we are required to examine the case of the assessee, in relation to the interest earned on fixed deposits with the member banks, on the touchstone of the three cumulative conditions, enumerated above.

26. Firstly, the arrangement lacks a complete identity between the contributors and participators. Till the stage of generation of surplus funds, the setup resembled that of a mutuality; the flow of money, to and fro, was maintained within the closed circuit formed by the banks and the club, and to that extent, nobody who was not privy to this mutuality, benefited from the arrangement. However, as soon as these funds were placed in fixed deposits with banks, the closed flow of funds between the banks and the club suffered from deflections due to exposure to commercial banking operations. During the course of their banking business, the member banks used such deposits to advance loans to their clients. Hence, in the present case, with the funds of the mutuality, member banks engaged in commercial operations with third parties outside of the mutuality, rupturing the 'privity of mutuality', and consequently, violating the one to one identity between the contributors and participators as mandated by the first condition. Thus, in the case before us the first condition for a claim of mutuality is not satisfied.

27. As aforesaid, the second condition demands that to claim an exemption from tax on the principle of mutuality, treatment of the excess funds must be in furtherance of the object of the club, which is not the case here. In the instant case, the surplus funds were not used for any specific service, infrastructure, maintenance or for any other direct benefit for the member of the club. These were taken out of mutuality when the member banks placed the same at the disposal of third parties, thus, initiating an independent contract between the bank and the clients of the bank, a third party, not privy to the mutuality. This contract lacked the degree of proximity between the club and its member, which may in a distant and indirect way benefit the club, nonetheless, it cannot be categorized as an activity of the club in pursuit of its objectives. It

needs little emphasis that the second condition postulates a direct step with direct benefits to the functioning of the club. For the sake of argument, one may draw remote connections with the most brazen commercial activities to a club's functioning. However, such is not the design of the second condition. Therefore, it stands violated.

28. The facts at hand also fail to satisfy the third condition of the mutuality principle i.e. the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves. This principle requires that the funds must be returned to the contributors as well as expended solely on the contributors. True, that in the present case, the funds do return to the club. However, before that, they are expended on non- members i.e. the clients of the bank. Banks generate revenue by paying a lower rate of interest to club-assessee, that makes deposits with them, and then loan out the deposited amounts at a higher rate of interest to third parties. This loaning out of funds of the club by banks to outsiders for commercial reasons, in our opinion, snaps the link of mutuality and thus, breaches the third condition.

29. There is nothing on record which shows that the banks made separate and special provisions for the funds that came from the club, or that they did not loan them out. Therefore, clearly, the club did not give, or get, the treatment a club gets from its members; the interaction between them clearly reflected one between a bank and its client. This directly contravenes the third condition as elucidated in Styles and Kumbakonam Mutual Benefit Fund Ltd. cases (supra). Rowlatt J., in our opinion, correctly points out that if profits are distributed to shareholders as shareholders, the principle of mutuality is not satisfied. In Thomas Vs. Richard Evans & Co. (supra), at pp. 822-823, he observed thus:

> *"But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with the shareholders - even if it limited to trading with them - makes a profit, that profit belongs to the shareholders, in a sense, but it belongs to them qua shareholders. It does not*

come back to them as purchasers or customers. It comes back to them as shareholders, upon their shares. Where all that a company does is to collect money from a certain number of people - it does not matter whether they are called members of the company, or participating policy holders - and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then, as I understand the New York case, there is no profit. If the people were to do the thing for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference, there is still no profit. This is not because the entity of the company is to be disregarded, it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand it, is the effect of the decision in the New York case."

(Emphasis supplied) In the present case, the interest accrues on the surplus deposited by the club like in the case of any other deposit made by an account holder with the bank.

30. An almost similar issue arose in Kumbakonam Mutual Benefit Fund Ltd. case (supra). The facts in that case were that the assessee, namely, Kumbakonam Mutual Benefit Fund Ltd., was an incorporated company limited by shares. Since 1938, the nominal capital of the assessee was Rs.33,00,000/- divided into shares of Rs.1/- each. It carried on banking business restricted to its shareholders, i.e., the shareholders were entitled to participate in its various recurring deposit schemes or obtain loans on security. Recurring deposits were obtained from members for fixed amounts to be contributed monthly by them for a fixed number of months as stipulated at the end of which a fixed amount was returned to them according to published tables. The amount so returned, covered the compound interest of the period. These recurring deposits constituted the main source of funds of the assessee for advancing loans. Such loans were restricted only to members who had, however, to offer substantial security therefor, by way of either the paid up value of their recurring deposits, if any, or immovable properties within a particular district. Out of the interest realised by the assessee on the loans which constituted its main income, interest on the recurring deposits aforesaid was paid

as also all the other outgoings and expenses of management and the balance amount was divided among the members pro rata according to their share-holdings after making provision for reserves, etc., as required by the Memorandum or Articles aforesaid. It was not necessary for the shareholders, who were entitled to participate in the profits to either take loans or make recurring deposits.

31. On these facts, as already noted, the Court distinguished Styles case (supra) and opined that the position of the assessee was no different from an ordinary bank except that it lent money and received deposits from its shareholders. This did not by itself make its income any less income from business. In our opinion, the ratio of the said decision is on all fours to the facts at hand. The interest earned by the assessee even from the member banks on the surplus funds deposited with them had the taint of commerciality, fatal to the principle of mutuality.

32. We may add that the assessee is already availing the benefit of the doctrine of mutuality in respect of the surplus amount received as contributions or price for some of the facilities availed by its members, before it is deposited with the bank. This surplus amount was not treated as income; since it was the residue of the collections left behind with the club. A façade of a club cannot be constructed over commercial transactions to avoid liability to tax. Such setups cannot be permitted to claim double benefit of mutuality. We feel that the present case is a clear instance of what this Court had cautioned against in Bankipur Club (supra), when it said:

> *"… 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. We should also state, that "at what point, does the relationship of mutuality end and that of trading begin" is a difficult and vexed question. A host of factors may have to be considered to arrive at a conclusion. "Whether or not the persons dealing with each other, is a "mutual club" or carrying on a trading activity or an adventure in the nature of trade" is largely a question of fact [Wilcock's case - 9 Tax Cases 111, (132) C.A. (1925) (1) KB 30 at 44 and 45]." (Emphasis supplied)

33. In our opinion, unlike the aforesaid surplus amount itself, which is exempt from tax under the doctrine of mutuality, the amount of interest earned by the assessee from the afore-noted four banks will not fall within the ambit of the mutuality principle and will therefore, be exigible to Income-Tax in the hands of the assessee-club."

9.3.1 Therefore, in view of the definitive law having been laid down by the Hon'ble Apex Court as aforesaid on principle of mutuality vis a vis interest on bank deposits, we hold that the impugned interest is chargeable to tax and is not covered by the principle of mutuality. Accordingly, we find no reason to interfere with the findings of the Ld. CIT (A) on the issue and dismiss ground no. 5(i).

9.4.0 In ground No. 4, the assessee has challenged the sustaining of addition of Rs. 35,11,665/- representing contractual receipts which comprised of addition in respect of rental income amounting to Rs. 2,00,500/-, income from

advertisement amounting to Rs. 4,69,030/- and contractual receipts amounting to Rs. 28,42,085/-.

9.4.1 It is seen that the issue of rental income is covered by the order of the Tribunal in assessee's own case for assessment year 2002-03 wherein the ITAT has considered the various receipts of the assessee and has held that such receipts were not taxable on the principle of mutuality. It is also seen that in earlier years rental receipts have been accepted to be not taxable by the department on the basis of principle of mutuality and it is only in this year that the revenue has treated the same as an income. The assessee has filed a chart depicting the rent earned by the assessee from assessment year 2002-03 to assessment year 2015-16 and it shows that the same has been accepted as exempt by the department.

9.4.2 Similarly, receipts from advertisement have been accepted from assessment year 2004-05 onwards as not taxable till assessment year 2012-13 on the principle of mutuality. A chart filed by the assessee in this regard corroborates the claim of the assessee. Therefore, we are of the considered opinion that once the revenue has accepted the position for a particular item, the revenue cannot be permitted to flip-flop on the issue and

having accepted the order of the Tribunal in a preceding assessment year, it cannot be permitted to take a contrary view in the subsequent year. For this we place reliance on the judgment of the Hon'ble Apex Court in the case of Commissioner of Income-tax v. Excel Industries Ltd [2013] 358 ITR 295 (SC) wherein it has been laid down by the Hon'ble Apex Court claims once allowed in any assessment year must be allowed in succeeding years also by following the rule of consistency unless and until there is a change in the position of law or change in the facts of the case. In the present case there is neither a change in the facts nor any change in position of law and, therefore, we are unable to agree with the adjudication of the Ld. CIT (A) on the issue and, accordingly, we set aside the order of the Ld. CIT (A) on the issues of rental receipts and advertisement receipts and direct the AO to delete the addition.

9.4.3 As far as the income from contractual receipts is concerned, it is seen that out of the impugned sum of Rs. 28,42,085/- a sum of Rs. 24,86,675/- was received by the assessee from its members as maintenance charges. This amount was picked up from Form No. 26AS by the AO on which tax had been deducted at source by the corporates who had given

maintenance charges. The total maintenance charges collected by the assessee during the year was Rs. 1,88,05,756/- and this includes the amount of Rs.24,86,675/-. It is seen that this amount is already included in the gross amount which is shown in the income and expenditure account and it is not to be considered separately. The remaining balance of Rs. 3,55,410/- received on account of advertisement receipts is again picked up from Form 26AS on which tax has been deducted and this receipt is also a part of gross receipts and is not includible separately. Since maintenance charges received are not taxable on the principle of mutuality and since there can be no double taxation of the same amount, the same is directed to be deleted. For similar reasoning, the remaining amount of Rs. 3,55,410/-, being part of advertisement receipt, is also directed to be deleted.

9.5 Ground Nos. 6 and 7 are related to ground No. 2 on which we have already given our adjudication in the preceding paragraphs.

9.6 Ground No. 8 is consequential.

9.7 Ground No. 9 is general in nature and does not call for any separate adjudication.

10. Accordingly, in the final result, the assessee's appeal stands partly allowed.

Order pronounced on 22/06/ 2020.

Sd/-	Sd/-
(O.P. KANT)	**(SUDHANSHU SRIVASTAVA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated: 22/06/2020

Veena

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi