IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "H", MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI MANOJ KUMAR AGGARWAL, ACCOUNTANT MEMBER

ITA No. 5248/MUM/2018
Assessment Year: 2013-14

M/s Happy Home Co-operative Housing Society Limited, Happy Homes CHS Ltd., Nehru Road, Opp. Jal Hotel, Vile Parle (East), Mumbai - 400057 PAN: AAAAH4036N	**Vs.**	I.T.O. – 25 (2)(4), Room No. 503, C-10, Pratyaksh Kar Bhawan, Bandra Kurla Complex, Bandra (East), Mumbai - 400051
(Appellant)		**(Respondent)**

Assessee by : Shri Piyush Chaturvedi (AR)
Revenue by : S/Shri Gurbinder Singh and Satya Pinisetty (DRs)

Date of Hearing: 26/03/2021
Date of Pronouncement: 21/06/2021

O R D E R

PER SAKTIJIT DEY, JM

This is an appeal by the assessee against the order dated 29.06.2018 of learned Commissioner of Income Tax (Appeals) – 37, Mumbai for the assessment year 2013-14.

2. Ground no. 1 and 2 are the effective grounds. In ground no. 1, the assessee has challenged the addition of Rs. 1,10,00,000/- received towards lease premium.

3. Briefly the facts are, the assessee is stated to be a tenant ownership (Plot ownership) housing society under clause 10(5)(a) of the Maharashtra Cooperative Housing Society Rule, 1961. For the assessment year under dispute, the assessee filed its return of income on 06.09.2013 declaring total income of Rs. 80,270/-. In course of assessment proceedings, the Assessing

Officer (AO) while examining the balance sheet of the assessee noticed that the assessee has received share premium of Rs.1,10,00,000/- during the year under consideration. Therefore, he called upon the assessee to furnish the details of the person from whom, the aforesaid amount was received and also to explain why it was not offered as income. In response to the query raised by the AO, the assessee submitted that the amount in question was received from one of its members, M/s Shreyans Finvest Pvt. Ltd. towards lease premium as per the agreement executed on 30.01.2013. Further, it was submitted, since the amount in question was received from a member, it will be governed under the principle of mutuality, hence, is not taxable. In support of such contention the assessee relied upon various judicial precedents.

4. On verifying the details available on record, the AO found that the assessee was owner of a parcel of land bearing certificate No. 79-A, Hissa No. 10, Survey NO. 80, Survey No. 79, Hissa No. 8 admeasuring 12460 sq.mtrs situated at Nehru Road, Ville Parle (East), Mumbai. He found that the said parcel of land was divided into 27 plots for allotment to 27 members. Plot No. 1 out of the said plot was initially allotted/leased to Shri Madhukar Hanumant Deshpande and his wife Smt. Nalini M. Deshpande on 07.01.1963. Subsequently, on 30.01.2013, the assessee entered into a lease agreement with M/s Shreyans Finvest Ltd. in respect of the very same plot No. 1 and received a share premium of Rs. 1,10,00,000/-. The AO observed, the member to whom plot no. 1 was initially allotted relinquished his rights over the said plot and the lease granted to him was cancelled. Subsequently, it was leased out to Shreyans Finvest Pvt. Ltd. The AO observed, the amount received as lease premium is neither donation nor rent/maintenance as regularly received from members. He observed, it is a benefit derived by the society on transfer of ownership from one member to another. Thus, relying upon certain judicial precedents, including, the decision of ITAT, Mumbai Bench in case of Hatkesh Cooperative Society Ltd. vs. ACIT, ITA No. 494/Mum/2011 and others dated 04.09.2013, he ultimately concluded that the lease premium received of Rs.

1,10,00,000/- is taxable at the hands of the assessee. Accordingly, he added back to said amount to the income of the assessee.

5. The assessee contested the aforesaid addition before the learned Commissioner (Appeals). However, learned Commissioner (Appeals) sustained the addition. Being aggrieved, the assessee is before us.

6. The learned counsel for the assessee submitted, as per the by-laws of the society the primary object of the society is to provide the members with open plots for housing, dwelling houses or flats or if open plots, dwelling house or flats are already acquired, to provide members common amenities and services. He submitted, for achieving the objects the society can raise funds by any mode permitted under the by-laws including by way of premium on transfer of occupancy right. He submitted, as per clause 14 of the by-laws, reserves/funds are to be utilized for repairs, maintenance and renewal of society property. Thus, he submitted, plots are allotted to members on perpetual lease of 999 years and the society provides all common amenities like internal road, drainage and street light etc. to members. He submitted, M/s Shreyans Finvest Pvt. Ltd. was admitted as a member of the society on payment of lease premium as per the Special General Meeting (SGM) held on 22.09.2012. He submitted, on 30.01.2013 lease deed was entered with the said party for leasing out the plot for 949 years. Thus, the transaction was between the society and a member, hence, the amount received towards lease premium would be governed under the concept of mutuality. He submitted, while relying upon the Tribunal's decision in case of Hatkesh Cooperative Housing Society (supra), the AO has completely overlooked the fact that the said decision has subsequently been set aside by the Hon'ble jurisdictional High Court.

7. Opposing various observations of learned Commissioner (Appeals), learned counsel submitted that the allegation of learned Commissioner (Appeals) that collection of lease premium is not authorized under the by-laws is incorrect. Drawing our attention to clause 5(c) of the by-laws he submitted, one of object of the society is to raise funds for achieving the objects of society. Further, referring to clause 7(i) of the by-laws, he submitted, the society can

raise funds by any other mode permitted under the by-laws. Thus, he submitted, by-laws authorize the society to collect lease premium by passing resolution in general body meeting. However, such fund collected has to be used compulsorily for the object of the society. Further, refuting the allegations of learned Commissioner (Appeals) regarding lack of complete identity between the contributor and participator, the learned counsel submitted, M/s Shreyans Finvest Pvt. Ltd. first became the member of the society and only thereafter the lease premium was collected from it. Thus, at the time of contribution of lease premium it was a participator. Further, referring to the decision of the Hon'ble Supreme Court in case of ITO vs. Venkatesh Premises Co-operative Housing Society Ltd., (402 ITR 670), he submitted, once a person is admitted to membership, the members form a class and identity of the individual member being irrelevant, the principle of mutuality gets automatically attracted. He submitted, appropriation of money by the society if takes place after admission to membership, it will be governed under the principle of mutuality. Further, he submitted, the allegation of learned Commissioner (Appeals) that the assessee is exploiting the current market situation is wholly incorrect, as the transfer fee has nothing to do with the market value. Drawing our attention to the lease deed, he submitted, the actual sale transaction between the earlier member and M/s Shreyans Finvest Pvt. Ltd. was for a much higher amount. Whereas, the assessee collected lease premium of Rs. 1.10 crores only. Regarding the allegation of learned Commissioner (Appeals) that by purchasing the flat constructed by a member the non member is enjoying the benefit of contribution made by the member, the learned counsel submitted, the concerned member had not sold to anybody but has used the building its own purpose. Regarding allegation of learned Commissioner (Appeals) that assessee had kept the funds collected from member in fixed deposit and earned interest income, learned counsel submitted, the assessee has not claimed any benefit of mutuality on interest income earned by it and has offered them to tax. He submitted fund/income earned by the assessee is utilized only for the benefit of the members. As regards the observations of learned Commissioner (Appeals)

that as per Govt. rules and regulations transfer fee to be received from a transferee cannot be more than Rs. 25,000/-, learned counsel submitted, lease premium cannot be equated with transfer fee. Without prejudice, he submitted, even if the amount exceeds Rs. 25,000/- it will still be governed under the principle of mutuality as the amount was utilized for the common benefit of the members, who have contributed to the fund. As regards the allegation of the Commissioner (Appeals) that lease premium was shown in the balance sheet instead of the income and expenditure account, learned counsel submitted, since, lease premium is not a regular receipt, it was shown in reserve fund instead of showing in the income and the expenditure account. However, the fund is available in the common kitty for all the members and has to be compulsorily used for major expenses like repair etc. Thus, he submitted, the lease premium is not taxable. In support of such contention, he relied upon the following decisions:–

1. *Sea Face Park Co–operative Hsg. So. Ltd. vs. The Income Tax Officer, Ward 16 (2) (1) of Income Tax Appeal no. 762 of 2008 (Bom) dated 2nd August, 2018.*
2. *Income Tax Officer vs. Venkatesh Premises Co–operative Society Ltd., Civil Appeal no. 2706 of 2018 dated 12th March, 2018.*
3. *Hatkesh Co–operative Housing Society Ltd. vs. Assistant Commissioner of Income Tax, Circle 21 (1), (2016) 75 taxmann.com 39 (Bom).*
4. *Hatkesh Co–operative Housing Society Ltd. vs. Assistant Commissioner of Income Tax, Circle 21 (1), Mumbai ITA no. 66/Mum/2014 & ITA no. 67/Mum/2014.*
5. *The Commissioner of Income Tax – 16 vs. Darbhanga Mansion CHS Ltd., Income Tax Appeal no. 1474 of 2012 (Bom) dated 18th December, 2014.*
6. *M/s Bangalore Club vs. Commissioner of Income Tax (SC), Civil Appeal no. 124 of 2007 and others dated 14th January, 2013.*

7. *The Commissioner of Income Tax – 21 vs. Jai Hind CHS Ltd. Income Tax Appeal no. 6057 of 2010 (Bom) dated 21st March, 2012.*
8. *ITO 16(1)(1) vs. Sterling CHS Ltd. ITA no. 1443/Mum/2010 dated 11.02.2011.*
9. *Mittal Court Premises Co–operative Society Ltd. vs. The Income Tax Officer Ward 12 (3) (1) (Bom) Income Tax Appeal no. 999 of 2004 and others dated 17th July, 2009.*
10. *Sind Co–operative Housing Society Vs. Income Tax Officer, Ward 1 (7) Pune (Bom) (2009) 182 taxman 346 (Bombay)*
11. *Bombay High Court judgment in the case of Pareleshwar CHS (2016) 71 taxmann.com 179 (Bombay)*
12. *Gujarat High Court in the case of Prabhukunj CHS (2015) 59 taxmann.com 104 (Gujarat)*
13. *CIT vs. Talangang Co–operative Group Housing Society Ltd. (2010) 195 Taxman 110 (Delhi)"*

8. The learned Departmental Representative, strongly relying upon the observations and AO and the learned Commissioner (Appeals) submitted, the assessee being owner of plots admits persons as its members on payment of admission fee and thereafter plots are leased to such members for a consideration as per the terms of the lease agreement. Though, he submitted, the relationship between the assessee and the members is basically that of a lessor and lessee only. The members enjoy only occupancy right over the flats constructed on plots of land leased out to them. As far as lease premium is concerned, there is no mutuality, since, it belongs to the society and the members have no right to participate therein. He submitted, the lease premium is not routed through the income and expenditure account, hence, is not cover under bye-law no.149 which provides for appropriation of profits. He submitted, lease premium is not distributed but is only accumulated by the assessee. Whereas, normal expenses are met from the membership fee and other receipts and only net profit from such receipt is considered for appropriation. He submitted, the object of the assessee is only to lease out

plots to the members. It is the members, who make construction on the plot allotted, even, by purchasing TDR. He submitted, the members are free to transfer their right in the property if they have fulfilled the conditions and there is no need for any no objection certificate from the assessee. He submitted, the society only charges transfer fee from the transferor for the transfer of shares along with occupancy right. Referring to the definition of premium in the by-laws, he submitted, premium is payable by the member transferring his shares and interest in the property of the society in addition to transfer fee. He submitted, the by-laws do not permit the society to charge premium from its members. Referring to the by-laws, he submitted, the assessee can create reserve funds by crediting to it sums out of the net profit of the year, all entrance fees, transfer fees, premium received from the transferor member and donations if any. Other funds like repairs and maintenance funds and sinking funds can be created only as per the rate fixed uniformly for all members on certain basis. Thus, he submitted, as per the by-laws, the assessee is not authorized to raise any fund by charging premium on his own from any of its members, new or old. Narrating the peculiar facts relating to the ownership and transfer of the subject property, the learned Departmental Representative submitted, initially the plot in question was allotted to Shri Madhukar Deshpande and others, who constructed a building over the plot. He submitted, subsequently the original lessee agreed to sale the plot along with building to Shri Suni Purushottamdas Bagari for a total consideration of Rs. 2,60,00,000/- and registered sale deed was executed on 08.03.2004 along with a irrevocable power of attorney executed on 10.03.2004. He submitted, thereafter Shri Suni Purushottamdas Bagari constructed a new building by getting a plan approved from the competent authority. He submitted, subsequently Shri Suni Purushottamdas Bagari transferred the property to M/s Shreyans Finvest Pvt. Ltd. for a consideration of Rs. 6,00,00,000/- through a registered deed of assignment executed on 10.09.2009 followed up with irrevocable power of attorney executed on 30.10.2010.

9. He submitted, if the property was transferred by the original lessees in 2004, how they could be admitted as members on 29.09.2008 and shares are transferred in their name. More so, when the lease granted on 29.09.2008 to the original lessees was terminated on 05.01.2012 due to breach of lease condition. Therefore, he submitted, due to cancellation of lease, plot no. 1 reverted back to the assessee and the assessee became owner of the plot with absolute right. He submitted, while the assessee has charged lease premium from M/s Shreyans Finvest Pvt. Ltd. no such premium was charged from the previous lessees or any other lessees. He submitted, the entire transaction, if examined properly, would reveal that the assessee wanted to extrac its share of appreciation of lease value of the plot as on date and having allowed successive lessees to construct thereon even before they were admitted as member is only to corner them to pay a substantial sum by way of lease premium before approving the transfer between the old lessee and the new buyer. Therefore, it is purely a commercial exploitation of the property. He submitted, since the by-laws do not permit collection of funds by way of lease premium, it cannot be governed under mutuality. He submitted, once the property is sold to a non-member, there is break-down of mutuality. He submitted, facts on record indicate that M/s Shreyans Finvest Pvt. Ltd. was allowed to purchases TDR from open market and load it on to construct additional structure. This is clearly in the nature of commercial exploitation of the property. Further, he submitted, as per the Govt. of Maharashtra Rules and Regulations, the maximum amount chargeable by a society cannot exceed an amount of Rs. 25,000/-. Therefore, since the lease premium received by the assessee exceeds the amount fixed under rules and regulations, it will not come under the principle of mutuality. Further, he submitted, the lease rentals, lease premium etc. are not distributed to the members but are vested with the assessee in its own right. The assessee has invested these funds in bank and income is earned by way of interest thereon which are not covered under mutuality. He submitted, no common services or amenities are provided from such receipts and neither are they distributed to the members. He submitted, the assessee

has not shown the lease premium in the income and expenditure account nor it has treated it as contribution from the new member but has accounted for it as a separate income of the society in its own capacity. Referring to the balance-sheet of the assessee as on 31.03.2013, he submitted, lease premium is not included in the reserve funds but was shown separately as society premium. Whereas, in the preceding year nil balance has been shown under such head. Thus, he submitted, the accounting entries clearly show that the assessee did not consider the lease premium to be in the nature of contribution or gift or donation or any other form of common fund. Rather, it considers the same as its own income. In support of his contention, learned Departmental Representative relied upon the decision of the Hon'ble jurisdictional High Court in case of Sind Co-operative Housing Society (supra).

10. We have considered rival submissions, both oral and in writing, in the light of the decisions relied upon. We have also carefully perused the respective orders of the departmental authorities and other materials on record. The core issue arising for consideration is, whether the lease premium received by the assessee from M/s Shreyans Finvest Pvt. Ltd. would be covered under the principle of mutuality. Before, we proceed to adress the issue, it is necessary to bear in mind certain facts which would have a crucial bearing. On a perusal of the lease deed dated 30.01.2013 between the assessee and Shreyans Finvest Pvt. Ltd., a copy of which is at page 28 of the paper book, would reveal that on 07.01.1963 the assessee through a lease deed had leased out plot no. 1 to Shri Maduhkar Deshpande and his wife the said lessees constructed a building over the said plot of land. It is also noticed, the plot was leased out for a period of 999 years. Subsequently, by registered sale/assignment deed executed on 23.02.2004, the original lessees transferred the ownership of the property to Shri Suni Purushottamdas Bagari for a consideration of Rs. 2,60,00,000/-. It further appears from the aforesaid lease agreement, since, Shri Suni Purushottamdas Bagari submitted incomplete application for membership and also did not offer any admission fee, he was not admitted as a member of the society. Whereas, Shri Suni Purushottamdas Bagari based on a plan approved

by the Bombay Municipal Corporation constructed a new building over the said plot of land and also obtained a part occupancy certificate on 14.03.2007. Subsequently, on 10.09.2009 Shri Suni Purushottamdas Bagari executed a registered deed of assignment with Shreyans Finvest Pvt. Ltd. assigning his right, title, interest and possession over plot no. 1 along with the building constructed by him for a consideration of Rs. 6,00,00,000/-. It is further relevant to observe, as mentioned in the aforesaid lease deed, the original lessees viz Anil Madhukar Deshpande and the legal heirs of his deceased wife applied for membership in the society and their application was approved by the society on 29.09.2008 and shares certificates were issued to them. Subsequently, due to alleged breach of lease conditions the society issued a notice to the original lessees for cancellation of lease and forfeiture of shares. As per paragraph 14 of the lease deed, the original lessee also accepted the forfeiture of such shares.

11. Thus, from the above-narrated facts it becomes clear that when membership was granted to the original lessees and shares were issued in 2008 they had already transferred/assigned their right and interest in the property to Shri Suni Purushottamdas Bagari. That being the case, it is not understood how they can be admitted as the member of the society after having transferred their right, title and interest over the leased property. It also emerges that Shri Suni Purushottamdas Bagari to whom the original lessees have transferred the leased property was never admitted as a member of the society. Whereas, Shreyans Finvest Pvt Ltd., admittedly, had purchased the property from Shri Suni Purushottamdas Bagari in the year 2009. Thus, the chain of events indicate that Shreyans Finvest Pvt. Ltd. has acquired the right, title and interest over plot no. 1 along with the building from a person, who was never a member of the society. In the aforesaid factual scenario, the onus is entirely on the assessee to explain as to how the principle of mutuality would apply to the lease premium received from Shreyans Finvest Pvt. Ltd.

12. Further, on perusal of the by-laws, it is seen that the term 'transfer fee' is defined in rule 3(xxvii) to mean the sum payable by a transferor to the

society for the transfer of his share along with occupancy right as provided under the bye-law No. 38(e)(vii). Whereas, rule 3(xxvii) defines 'premium' to mean the amount payable to the society by the member transferring his shares and interest in the capital/property of the society, in addition to the transfer fee as provided under bye-law no. 38(e)(ix). Thus, it is very much clear, except rule 3(xxvii) the term 'premium/share premium' has not been defined anywhere. Thus, a reading of the definition of 'premium', as aforesaid, makes it clear that premium can only be paid by a member while transferring his shares and interest in the capital/property of the society. It is further noticed, Chapter VII speaks of members, their rights, responsibilities and liabilities. Rule 17(c), which begins with a non obstante clause, provides that no person can be accepted as a member without approval of the competent authority, such as, Collector of the District, if the society has been given land by Government/CIDCO/MAHADA.

13. However, facts on record do not bring much clarity regarding the source from which the assessee had acquired the land. In case, land was acquired from or given by the authorities prescribe in rule 17(c), the approval of Collector is mandatory. These facts have not been examined by the departmental authorities. Further, the departmental authorities have also not examined whether the conditions as provided under rule 18 and 19(C) have been fulfilled while admitting Shreyans Finvest Pvt Ltd as a member. On a query from the Bench as to when Shreyans Finvest Pvt. Ltd. was admitted as a member of the society, whether prior to or after the receipt of share premium, learned Counsel for the assessee drew our attention to letter dated 03.03.2020 filed before the Bench enclosing the minutes of Managing Committee meeting dated 24.09.2012, wherein, admission of Shreyans Finvest Pvt. Ltd. as a member of the society was approved. However, learned Counsel for the assessee fairly submitted that the said document was not furnished before the departmental authorities as they never asked for it.

14. Be that as it may, the aforesaid documentary evidence filed by the assessee, definitely, is in the nature of an additional evidence which requires to

be factually verified by the departmental authorities through enquiry. Thus, from the aforesaid facts, it is very much clear that neither the Assessing Officer nor learned Commissioner (Appeals) have property examined/enquired into various aspects discussed above before completing the proceedings at their level. In our view, both departmental authorities have left various loose ends untied.

15. At this juncture, it is necessary to examine the decision of the Hon' ble jurisdictional High Court in case of Sind Co-operative Housing Society vs ITO (supra). While dealing with the applicability of principle of mutuality to payment of transfer fee/premium, the Hon' ble High Court referred to model bye-laws of the flat owners/plot purchased type housing societies. In this context, the Hon'ble High Court specifically referred to bye–law No. 38(e)(ix) reading as under:-

> *"(ix) payment of amount of premium at the rate to be fixed by the general body meeting but within the limits as prescribed under the circular issued by the Department of Co-operation/Government of Maharashtra from time to time.*
>
> *No additional amount towards donation or contribution to any other funds or under any other pretext shall be recovered from transferor or transferee."*

16. Further, the Hon' ble High Court also referred to bye-law No. 40 reading as under:-

> *"The transferee shall be eligible to exercise the rights of membership on receipt of the letter in the prescribed form from the society, subject to the provisions of the MCS Act, 1960 and Rules made thereunder."*

17. The Hon'ble High Court also referred to notification dated 09.08.2001 issued by the Government of Maharashtra, Ministry of Co-operation and Textiles, in supersession of earlier notification, restricting the charging of premium for a maximum amount of Rs. 25,000/-. Thus, the aforesaid provisions of the model bye-laws (also adopted by the assessee) as well as

notification dated 09.08.2001 read in conjunction would reveal that the housing society can collect transfer fee/premium both from the transferor as well as transferee. However, it should not exceed an amount of Rs. 25,000/- After analyzing the provisions of model bye-law as well as the extant rules and notification relating to Co-operative Societies in Maharashtra, the Hon'ble High Court observed as under:-

> *"20 Considering these principles, the question is whether on the facts before us, the principle of mutuality would be attracted in respect of the transfer fee received by the Housing Co-operative Societies governed by the provisions of the MCS Act and Rules. In Walkeshwar Triveni Co-op. Housing Society Ltd.'s (supra), the Tribunal itself has held that the amount received from the transferor member would not be exgible to tax. It is only the amount received from the transferee, that is exgibile to tax. We have noted that insofar as Sind CHS and National CHS Ltd. their bye-laws provide that the amount has to be paid by the transferor member. The issue, therefore, of transferor or transferee for those assesses really does not arise.*
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> *However, we will have to answer the issue considering what was considered in the case of Walkeshwar Triveni Co-op. Housing Society (supra) and considering the model bye-laws which are now adopted by most housing societies. We have noted the bye-laws as also provisions under the Act and Rules. The transfer fee can be appropriated only if the transferee is admitted to membership. The fact that a proposed transferee may can be appropriated only if the transferee is admitted to membership. The fact that a proposed transferee may make payment in advance by itself is not relevant. The amount can only be appropriated on the transferee being admitted as a member. As it is a transfer fee, if the transferee is not admitted as a member the amount received will have to be refunded, as the amount is payable only on a transfer of rights of the transferor in the transferee. If it is held that payment of transfer fees is by a stranger, it will certainly be in the*

nature of gift and not income. If an amount is received more than what is chargeable under the bye-laws or Government direction, the society is bound to repay the same and if it retains the amount it will be in the nature of profit making and that specific amount will be exigible to tax. Considering the bye-laws, as the main activity of a housing co-operative Housing Society is to maintain the property owned by it and to render services to its members by way of usual privileges, advantages and conveniences, there is no profit motive involved in these activities. The amount legally chargeable and received goes into the fund of the society which is utilized for the repairs of the property and common benefits to its members.

21. We may now deal with some other submissions advanced on behalf of the revenue. It was contended that the class of members means, members such as permanent temporary, honorary etc. This is based on the assumption that there can be different classes of members. In a Co-operative Housing Society there can be members and associate members. We have already quoted from the judgements where reference is to members as a class and that class may be diminished by members going out or increased by the members coming in. But the class remains the same. As already noted by the Supreme Court in Bankipur Club Ltd's case (supra), the identity must be as a class of contributors and participants and it does not matter that the class may be diminished or increased by members going out or coming in. Similarly it is not necessary that each member should contribute or each member should participate in the surplus and get back from the surplus... what he has said, as long as they have control over the surplus.

22. It was also sought to be contended that the payment is not voluntary and at any rate the excess amount charged than what is permitted in the bye-laws will be exigible to tax. Firstly whether it is voluntary or not would make no difference to the principle of mutuality.

Secondly payments are made under the bye-laws which constitutes a contract between the society and its members which is voluntarily entered into and voluntarily conducted as a matter of convenience and discipline for running of the society. It is the case that the amounts more than permissible under the notification had been received under pressure or coercion or contrary to Government directions, then considering section 72 of the Contract Act, that amount will have to be refunded. At any rate if the society retains the amount in excess of binding Government notification or the bye-laws that amount will be exigible to tax as it has an element of profiteering.

23. It was then sought to be contended that the premium charged is a profit. As we have already noted and considering the bye-laws, the society is registered with the object principally of looking after the property including building thereon. There is no trading or business transactions. The members by adopting the bye-laws agree amongst themselves that a fee for transfer of flat/tenement when it is sold would be paid to the society. It may be that both incoming or outgoing member have to contribute to the common fund of the society. It may be that both incoming or outgoing member have to contribute to the common fund of the society. The amount paid however, is to be exclusively used for the benefits of the members as a class.

24. It was next contended that there is no legal bar for the assessee to earn profits. There can be no dispute on that proposition but the profit must come from a commercial activity in the nature of trade, business or the like in which event the assessee then will have to pay tax on such profits. Charging of transfer fees as per bye-laws has no element of trading or commerciality. There therefore being no taint of commerciality, the question of earning profits would not arise when the housing society from the funds received applies the moneys received towards maintenance of the society and providing the members with usual privileges, advantages and conveniences."

18. While concluding, the Hon'ble jurisdictional High Court laid down the following tests to ascertain whether the principle of mutuality would apply to a co-operative housing society:

> *(1) "Is there any commerciality involved- This has to be found from the bye-laws of the co-operative housing society. In case of the co-operative housing society, admittedly there is no commerciality involved. Once there is not commerciality involved the first test of profitability does not exist. The first requirement of mutuality is therefore, met.*
>
> *(2) From the moneys received are the services offered in the nature of profit sharing or privileges, advantages and conveniences.*
>
> *In case of co-operative housing society, the only activities which it can carry out in terms of its bye-laws are basically maintenance of its property which includes of buildings. The subscription and or contributions received by the members can only be expended for purposes of maintenance and providing other privileges, advantages and conveniences to its members in terms of its bye-laws. Another test of mutuality is thus satisfied.*
>
> *(3) Are the participants and contributors identifiable and belong to the same class in the case of co-operative housing society.*
>
> *The class of members are clearly identifiable. Members are ordinary members or associate members. The participants and contributers are the members. The members may come in or go out. The fact that only some members from those who contributed may participate in the surplus, as held by the Supreme Court is irrelevant as long as the class is identifiable. This test is also satisfied in the case of a Housing Co-operative Society.*
>
> *(4) Do the members have the right to share in the surplus and do they have a right to deal with its surpluses."*

19. In our view, the aforesaid observations of the Hon'ble jurisdictional High Court and the tests laid down to ascertain whether principle of mutuality would apply or not, are germane to the issue at hand. The first thing, which needs to be ascertained is, whether at the time of receipt of share premium M/s Shreyans Finvest Pvt. Ltd. was a member of the society. The next issue is, while admitting Shreyans Finvest Pvt. Ltd. as a member of the society all

conditions of membership, as noted earlier in the order, were fulfilled. It is also necessary to verify the applicability of notification dated 09.08.2001 issued by the Ministry of Co-operation and Textiles, Government of Maharashtra. Of course, ultimately, whether the share premium received by the assessee is covered under the principle of mutuality has to be tested in the touchstone of various tests laid down by the Hon'ble jurisdictional High Court in case of Sind Co-operative Housing Society (supra). Since, the aforesaid aspects have not been examined by the departmental authorities in the light of the ratio laid down in case of Sind Cooperative Housing Society (supra), we are inclined to restore the issue to the Assessing Officer for de-novo adjudication after verifying all facts and material on record, as well as, keeping in view the submissions of the assessee and the ratio laid down in the various decisions referred to earlier in this order. Since, we are restoring the issue, we refrain from deliberating any further on the other decisions relied upon by the learned counsel for the assessee as they have been rendered in their own factual context. Needless to mention, the Assessing Officer must afford reasonable opportunity of being heard to the assessee before deciding the issue. Ground is allowed for statistical purposes.

20. In ground no. 2, the assessee has challenged part disallowance of expenses.

21. Briefly the facts are, in course of assessment proceedings the Assessing Officer noticed that the assessee had claimed expenses of Rs.2,55,105/- under different heads. Alleging that complete supporting evidences are not available, the Assessing Officer disallowed 20% out of the expenses incurred on purely ad-hoc basis. Learned Commissioner (Appeals) also sustained the disallowance.

22. We have considered rival submissions and perused the material on record. As could be seen, the Assessing Officer has made part disallowance out of the expenditure claimed by the assessee relying upon certain remark of the auditor. In case, the assessee is able to furnish supporting evidence to prove the expenditure incurred, no disallowance on ad-hoc basis can be made.

Further, before us learned Counsel for the assessee has submitted that since income of the assessee is not taxable under the concept of mutuality and the only taxable income earned by the assessee towards interest from bank, against which the assessee has not claimed any expenditure, no further disallowance should have been made. Further, he has submitted, even otherwise also the expenditure claimed including the disallowed amount relates to activities concerning the members. Therefore, disallowance of such expenses cannot increase the taxable income but will only increase the surplus, which will come under the concept of mutuality.

23. Considering the fact that we are restoring the issue relating to applicability of principle of mutuality in respect of share premium, it deemed appropriate to restore this issue also to the Assessing Officer for deciding afresh after due opportunity of being heard to the assessee. This ground is allowed for statistical purposes.

24. In the result, appeal is allowed for statistical purposes.

Order pronounced in the open court on 21st June, 2021.

Sd/-	***Sd/-***
(MANOJ KUMAR AGGARWAL)	(SAKTIJIT DEY)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 21/06/2021

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

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