

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'SMC', NEW DELHI**

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
(THROUGH VIDEO CONFERENCING)**

ITA No.7162/Del/2019 & 471/CHANDI/2018
Assessment Year: 2014-15

The Legend Condominium Association, Tower D-3, Sushant Lok-III, Sector-57, Gurgaon-122001 PAN No.AABTT8507G	Vs	ITO Ward- 4 (4) Gurgaon
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Ashwani Garg, Advocate
Respondent by	Sh. Vipul Kashyap, SR. DR

Date of hearing:	27/09/2021
Date of Pronouncement:	30/09/2021

ORDER

PER N. K. BILLAIYA, AM:

ITA No.471/CHANDI/2018 and 7162/Del/2019 are two separate appeals by the assessee preferred against the order of the CIT(A)-1, Gurgaon dated 08.01.2018 pertaining to A.Y.2014-15.

2. At the very outset counsel for the assessee stated that the appeal in ITA No.7162/Del/2019 has been filed inadvertently and the assessee may be allowed to withdraw the said appeal.

3. On this concession ITA No.7162/Del/2019 is dismissed as withdrawn.

4. The sum and substance of the grievance of the assessee in ITA No.471/CHANDI/2018 is that the CIT(A) erred in confirming the addition of Rs.41,71,334/- made on account of interest on FDR, interest on SB account and interest from Clarion Properties.

5. Briefly stated the facts of the case are that during the course of the scrutiny assessment proceedings the AO noticed that the assessee has received following amounts from non members :-

1. Interest on FDR	8,47,188/-
2. Interest on SB account	60,615/-
3. Interest from Clarion Properties	<u>32,63,531/-</u>
Total	<u>41,71,334/-</u>

6. Assessee was required to explain as to why the income from commercial activities and non members be not brought to tax in view of judgment of the Hon'ble Supreme Court in the case of CIT Vs. Bangalore Club 350 ITR 509. No plausible reply was given by the assessee the only reply given by the assessee is that "on the basis of income earned and expenses incurred, the AOP has filed the ITR and due taxes has been paid showing income under the head profit and gains from business and profession as well as income from other sources.

7. After considering the facts and the submissions the AO concluded as under :-

The reply of the assessee has been considered but found not acceptable. The society is a resident welfare society and no business activity carried out by it, being an AOP with the main objective to provide maintenance services, security services, power backup services to its clients viz. the flat owners, villa owners, tenants resident in flats and villas, shopkeepers, other commercial property holders and tenants of commercial properties in the residential complex of the society. The assessee has debited certain expenses against the receipt of interest on FDR, interest on saving bank account and interest income received from clarion properties, which is not an allowable as these receipts are from non-members and the same are liable to tax in view of verdict of Hon'ble Apex Court in the case of Bangalore Club Vs Commissioner of Income Tax.

3.2 Keeping in view the written reply of the assessee and discussion and also in view the decision of Hon'ble Supreme Court in the case of Bangalore club Vs CIT, mentioned supra, the income so earned from the non-members amounting to Rs. 41,71,334/- is brought to tax. However, the assessee has shown an income of Rs. 11,480/- against which assessment is framed at Rs. 41,71,334/- resulting thereby an addition of Rs. 41,59,854/-.*

8. Assessee carried the matter before the CIT(A) and reiterated what has been stated before the AO during the course of the assessment proceedings. After considering the facts and the submission the CIT(A) held as under :-

I have carefully considered the appellant's submissions. I have also perused the copy of the agreement dated 16.07.2017 filed

by the appellant. This agreement is between the following four persons

- i) M/s Clarion Property Limited.*
- ii) The owners/ Users*
- iii) The Legend Condominium Association*
- iv) M/s Ajanta Builder Pvt. Ltd.*

3.7 Para C & D of this agreement reads as under:-

C. After the completion of the complex, an Association of the owners of various units in the complex was formed under the Haryana Apartment Ownership Act and the Developer handed over the maintenance of common areas comprised in the area falling under the share of the developer other than the restricted common areas to the Association.

D. The said Association vide the present agreement is desirous of appointing the fourth party as the maintenance agency for undertaking maintenance services of the common areas.

3.8 Further para F of the agreement reads as under:-

f. The user has approached Association/MCO with a request to provide maintenance services and on the assurances that the user shall abide by the terms and shall promptly pay the bills raised by the MCO or its nominated agency the parties have now decided to execute this Agreement on the terms and conditions recorded hereunder.

3.9 It may also be relevant to refer to the provisions of para 5.2 of Article-5 of the agreement which reads as under:-

That the second party shall bear and pay the cost of maintenance and operation of common facilities and services

and shall further also pay a onetime interest free maintenance deposit (IFMD) @ Rs. 538/- per sq. Mtr payable at such rate for total super area of the said unit, which deposit shall be payable before or at the time of execution of this agreement to the association. IFMD collected by the Association/third party from different users/owners including the 2nd party herein by the society shall be handed over by the third party/Association to the First party/Developer @ 6% simple interest per annum for 15 years and the interest earned shall be utilized towards the maintenance expenses. At the end of the 15 years the first party/developer shall hand over the entire amount of IFMD to the third party/association within 2 months of being called upon to do so by the third party association.

3.10 It is apparent from the reading of the aforesaid provisions of the agreement that the interest free maintenance deposit was given by the owners to the association and not to the builder. It was the association which has thereafter deposited the money with the builder on which the association was to receive interest @ 6%. Further, there was no obligation on the part of the builder to provide the maintenance services as submitted by the appellant. The deposit made by the association with the builder @ 6% interest per annum is similar to a deposit with the bank. Such receipts of interest from the builder by the Association even if used for the purpose of maintenance of the condominium are not covered by the provision of mutuality. The issue is squarely covered by the decision of the Hon'ble Supreme Court in the case of Bangalore

Club (Supra). The addition by the Assessing Officer is accordingly confirmed. These grounds of appeal dismissed.

9. Before me the counsel for the assessee vehemently stated at the time of handing over of possession the builder executed with each owner a maintenance agreement as per which the owners were requested to pay one time Interest Free Maintenance Deposit (IFMD) towards maintenance of the society for which the builder was entitled to use income from the said deposit at the rate of 6% per annum towards the provision of maintenance service. It is the say of the counsel that as per the agreement the builder was required to provide for services for 15 years and after the expiry 15 years the IFMD was to be transferred to the association. The counsel contended that the reimbursement received by the association was not taxable in the hands of the association as IFMD was not a voluntary deposit made by the apartment owners with the object of earning an income but was a compulsory condition for receiving possession of the apartment.

10. Per contra the DR supported the findings of the AO and read the relevant findings of the CIT(A).

11. I have given a thoughtful consideration to the orders of the authorities below. At the very outset I would like to refer to the

judgment of the Hon'ble Supreme Court in the case of Bangalore Club (supra). The relevant part of the judgment read as under :-

For a receipt to be exempt on the principles of Mutuality, three conditions have to be satisfied. The first is that there must be a complete identity between the contributors and participators. The second is that the actions of the participators and contributors must be in furtherance of the mandate of the association. The third is that there must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves. On facts, though the interest was entered from banks which were corporate members of the club, it was not exempt on the ground of mutuality because (i) the arrangement lacks a complete identity between the contributors and participators. With the funds of the club, 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, (ii) the surplus funds were not used in furtherance of the object of the club but were taken out 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 & (iii) The banks generated revenue by paying a lower rate of interest to the assessee-club and loaning the funds to third parties, the interest accrued on the surplus deposited by the club like in the case of any other deposit made by an account holder with the bank. 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.

12. In the light of this judgment of the Hon'ble Supreme Court I find that the first appellate authority has examined the relevant part of the agreement between Clarison property, the owners/users, the legend Condominium Association, M/s. Ajanta Builder Pvt. Ltd. The relevant findings of the agreement has been extracted elsewhere in the findings of the CIT(A).

13. Considering the relevant part of the agreement in the light of the decision of the Hon'ble Supreme Court (supra). I do not find any error or infirmity in the findings of the CIT(A).

14. In the result, the appeal filed by the assessee is accordingly dismissed.

Order pronounced in the open court on 30.09.2021.

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

NEHA

Date:- 30.09.2021

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	27.09.2021
Date on which the typed draft is placed before the dictating Member	30.09.2021
Date on which the typed draft is placed before the Other member	30.09.2021
Date on which the approved draft comes to the Sr.PS/PS	30.09.2021
Date on which the fair order is placed before the Dictating Member for Pronouncement	30.09.2021
Date on which the fair order comes back to the Sr. PS/ PS	30.09.2021
Date on which the final order is uploaded on the website of ITAT	30.09.2021
Date on which the file goes to the Bench Clerk	30.09.2021
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	