

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "SMC", MUMBAI  
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER AND  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 5250/Mum/2018 (A.Y. 2011-12)

ITA No. 5249/Mum/2018 (A.Y. 2012-13)

ITA No. 5247/Mum/2018 (A.Y. 2014-15)

M/s Happy Home Co-operative Housing Society Ltd.

Happy Home CHS Ltd., Nehru Road,

Opp. Jal Hotel, Vile Parle (East),

Mumbai-400057

**PAN: AAAAH4036N**

..... Appellant

**Vs.**

ITO-25(2)(4),

Room No. 503, C-10,

Pratyaksh Kar Bhavan, BKC,

Bandra (East), Mumbai-400051.

..... Respondent

Appellant by

: Sh. Piyush Chaturvedi

Respondent by

: Sh. Indira Adakil, CIT-DR

Date of hearing

:

13/04/2022

Date of pronouncement :

07/07/2022

**ORDER**

**PER GAGAN GOYAL, A.M:**

1. These three appeal by the assessee are directed against the order of Commissioner of Income Tax (Appeals)-37, Mumbai [hereinafter referred to as 'the CIT (A)'] vide common order dated 29.06.2018 for the Assessment Years (AY) 2011-12, 2012-13 & 2014-15 respectively. In ITA No. 5250/Mum/2018 for AY 2011-12, the assessee has raised the following grounds of appeal. Grounds of appeal for remaining two years are also similar. Hence, disposed of by common order.

1. On the facts and circumstances of the case as well as in law, the learned CIT(A)-37, Mumbai erred in confirming the order dated 29-12-2016 passed by the learned AO u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961, which is not only bad in law but also violates the principles of natural justice.

2. On the facts and circumstances of the case as well as in law the learned CIT(A)-37, Mumbai erred in confirming the addition of development charges and TDR deposits of Rs. 16,50,584/-, violating the principles of mutuality.

3. On the facts and circumstances of the case as well as in law the learned CIT(A)-37, Mumbai erred in confirming the disallowance of revenue expenses of Rs. 11,788- being 20% of the expenses on adhoc basis which is bad in law.

4. Your appellant craves your leave to add, amend, alter and modify any ground grounds before the final disposal of the appeal.

2. Brief facts of the case are that the assessee has filed return of income on 06.06.2011 declaring total income at Rs. 1,05,740/-. The case was re-opened under section 148 of the Income Tax Act, 1961 (for short 'the Act') and notice was issued on 31.03.2016. Reasons were supplied for re-opening and assessee had not filed any objection to re-opening of the case. The case was taken up for scrutiny and accordingly the statutory notices under section 143(2) of the Act were issued and duly served on the assessee. In assessment order, Assessing Officer (AO) stated as under:

"Further, during the above referred year i.e. F.Y. 2010-11 relevant to A.Y. 2011-12 there is increase of Rs. 20,53,332/- from F.Y. 2009-10 to F.Y. 2010-11 in reserve fund and the income was not offered for the taxation."

3. Same is confronted to the assessee in the form of show-cause for the chargeability of the same. During the year, the assessee has shown to have received the following amounts received from members towards increase in Reserve Fund:

Sr.No.	Name of Member	Amount Rs.	Remarks/ Nature
1.	Shri Gulshanji Bahl (Plot	1,30,465	Development

	No.11)		Charge deposit
2.	Shri Vishwas Y Ghaskadbi (Plot No. 2)	11,43,519	Development Charge deposit
3.	Shri Gulshanji Bahl (Plot No 11)	3,76,600	TDR deposits
Total		16,50,584	

4. Amount of Rs. 11,43,519/- pertains to Shri Vishwas Y Ghaskadbi were paid by the developer M/s Shri Sankalp Builders on his behalf. Considering this fact, AO took the view *"In view of the same, it is clear that the receipts of Rs. 16,50,584/- is not paid by the members of the society and principle of mutuality is not applicable on the said receipts. Hence, you are requested to show cause as to why not receipts of Rs. 16,50,584/- be added in your total income"*.

5. In response, vide letter dated 26.12.2016, the assessee has stated as under:

"We are in the receipt of your show cause notice sent on email on 25-12-2016 and asking us to reply latest by 26-12-2016 and no further opportunity will be given further. At the outset we would like to say that this is against principles of natural justice and we are not given enough time to prepare and reply in the matter and reply is being given under protest for short notice.

6. Your Honor has taken a very narrow view instead of bird view in regards to Rs.16,50,584/- received from members of society. At the outset we like to draw your attention towards the fact that society has decided in AGM to collect such amounts from members who undertake development activity on their plots. Hence all amounts are payable by member, society is in no way concerned with developer as he is just a third party and society has no say on him. Society has only control and say on member. All rules bye-laws are applicable to member and not third party (developers). Member for convenience or whatever reasons may

have directed Developer to pay society on their behalf. So it is just a mode of payment where instead of developer paying member and member ultimately paying society, developer has directly paid to society. However these amounts remain to be paid by member only and society is in no way concerned for their arrangements between member and developers. In books of accounts also society has received these payments on behalf of members. Copy of letter dated 10/10/2008 issued by society to one of the member Shri Gulshanji Bahl is enclosed. From the letter it is clear that payment is to be made by member only. However on behalf of member anyone can make payment still it will be construed as amount received from member only. It is important to note, question is whether member was liable to make payment or not to society. Rest everything falls in place. Copy of letter goes beyond doubt that member needs to pay to society.

7. Copy of another letter dated 20-10-2010 from member Shri Vishwas Ghaskadbi is enclosed. In this letter member Shri Vishwas Ghaskadbi clearly states that "I please note that we have entrusted the responsibility of Redevelopment to M/s shree Sankalp Builders and the above mentioned charges are being paid by them." So it is just mode of payment that on his behalf developer is paying. Society is communicating with members only. Copy of letter dated 25/9/2010 address to Shri Vishwas Ghaskadbi is enclosed in which society has asked him to pay charges as decided in AGM. It is important to note that no where there is mention of developers name. Society is least bothered about member and developer, agreement.

8. Kindly note that letters which are enclosed are duly signed and accepted by respective member.

9. Further Shobhana Ghanekar in her statement has never denied the She is not liable to pay to society. She only has confirmed that these amounts are not paid from her bank accounts and that developer has paid. She has also confirmed that society has asked for payment of sum Rs.9801020 (379722+601298) from her towards charges before giving NOC. Which reiterates our point that member is liable to pay. Also Member Vishwas Ghaskadbi in his statement has never denied that amounts were not paid on his behalf by developer. He has only confirmed that he has not paid from his bank account. Question no 7 ask whether he has paid any sum to which he has denied... which is correct. But he is not denying that developer has paid on his behalf. Further society has issued letter for payment of charges copy of which is enclosed and no separate bills as such are issued. But this doesn't change nature of transaction amount remains due from member only. Same is repeated in Question no 10. Question no 9 relates to arrangement between Mr Ghanekar and Developer Shree Sankalp Builders, Society is no way concerned with it so it is irrelevant to our case.

10. From above it is crystal clear that these amounts Rs.16,50,584 were due from members and nature of payment remains same irrespective of who pays it. Principle of mutuality applies as Amounts are due from member and ultimately will be utilized for benefit of members”.

11. AO has not convinced with the reply of the assessee, hence, without giving the benefit of mutuality and treating development charges and TDR deposits as taxable made the additions of Rs. 16,50,584/-.

12. In addition to above, AO made addition on *ad hoc* basis @ 20% of the expense of Rs. 58,938/-.It is seen that disallowance @ 20% in respect of major expenses has been made in assessment order u/s. 143(3) of the assessee’s own case for A.Y. 2013-14 being non-genuine in absence of supporting evidences.

Therefore, vide order sheet noting dated 12.08.2016, the assessee was asked to justify its claim of non-disallowance of expenses.

13. In response to the above, the assessee has made its submissions as under:

“Society is operating on Principles of Mutuality and hence surplus/deficit collected from its members is not taxable. Assessee has not claimed any expenses against its income and hence there is no question of disallowing expenses on estimation basis. Assessee has offered interest income only under head Income from other sources and has not claimed any expense against such income. It goes without saying that addition can't be made.”

14. On ground no.1, we have gone through the order of AO and thereafter the appeal order passed by the Ld. CIT(A). It is apparent vide para-2 of the AO's order that assessee nowhere challenged the re-opening of the case under section 148 of the Act and rather filed return in response to notice under section 148 and unconditionally participated in re-assessment proceedings. Allegation of violation of the principle of natural justice against the office of Ld. CIT(A) is also not established. It is apparent from the order of Ld. CIT(A) that assessee availed appropriate opportunities for submissions and arguments. The view of the assessee *vis-a-vis* Ld. CIT(A) may differ in the instant case but allegation of violation of principle of Natural Justice is not sustainable. **Hence, ground no.1 raised by the assessee is dismissed as infructuous. Moreover, it has become a usual practice to take this ground of not providing opportunity in violation of principle of Natural Justice, which in turn appellant usually not able to substantiate during the course of hearing. Such type of practice at the end of appellant should be avoided until unless they have some cogent material/reason to substantiate the same.**

15. Keeping aside all the facts and figures as discussed by AO and Ld. CIT(A) in their respective orders (amount received under the head Development Charges, TDR deposits and disallowance of Revenue Expenses), prime issue to resolve this controversy is whether the appellant society is entitled for the benefit under the concept of mutuality.

16. We have carefully gone through the assessment order, order of Ld. CIT(A) and submissions of assessee before both the authorities. The basic allegation against the assessee was, assessee society received Development charges and TDR deposits through developers as mentioned in assessment order. There is no allegation on assessee society about the identity of the contributor and beneficiaries, any dealing with any third party and angle of commerciality is involved.

17. The doctrine of mutuality, based on common law principle, is premised on the theory that a person cannot make a profit from himself and amount received from oneself, cannot be regarded as income and taxable under section-4. The essence of the principle of mutuality lies in the commonality of the contributors and the participants who are also the beneficiaries. The contributors to the common fund must be entitled to participate in the surplus and participator in the surplus are contributors to the common fund. The law envisages a complete identity between the contributors and the participants in this sense. Any surplus in the common fund shall therefore not constitute income but will only be an increase in the common fund meant to meet sudden eventualities and liabilities.

18. In CIT, Bihar Vs. M/s Bankipur Club Ltd. (1997) 226 ITR 97 (SC), considering the surplus of receipts over expenditure generated from the facilities extended by a club to its members and its exemption from tax on principles of mutuality, it was observed :

*"20.....In all these cases, the appellate tribunal as also the High Court have found that the amounts received by the clubs were for supply of drinks, refreshments or other goods as also the letting out of building for rent or the amounts received by way of admission fees, periodical subscription etc. from the members of the clubs were only for/towards charges for the privileges, conveniences and amenities provided to the members, which they were entitled to as per the rules and regulations of the respective clubs. It has also been found that different clubs realised various sums on the above counts only to afford to their members the usual privileges, advantages, conveniences and accommodation. In other words, the services offered on the above counts were not done with any profit motive and were not tainted with commerciality. The facilities were offered only as a matter of convenience for the use of the members (and their friends, if any, availing of the facilities occasionally).*

*21. In the light of the above findings, it necessarily follows that the receipts for the various facilities extended by the clubs to their members, as stated hereinabove as part of the usual privileges, advantages and conveniences, attached to the membership of the club, cannot be said to be "a trading activity". The surplus excess of receipts over the expenditure as a result of mutual arrangement, cannot be said to be "income" for the purpose of the Act."*

19. Transfer charges are payable by the outgoing member. If for convenience, part of it is paid by the transferee, it would not partake the nature of profit or commerciality as the amount is appropriated only after the transferee is inducted as a member. In the event of admission, the amount is returned. The moment the transferee is inducted as a member the principles of mutuality apply. Likewise, non-occupancy charges are levied by the society and is payable by a member who does not himself occupy the premises but lets it out to a third person charges are again utilised only for the common benefit of The facilities and amenities to the members. Contribution to the common amenity fund taken from a member disposing property is similarly utilised for meeting sudden and regular heavy repairs to ensure continuous and proper hazard free maintenance of the properties of the society which ultimately ensures to the enjoyment, benefit and safety of the members. These charges are levied on the basis of resolutions passed by the society and in consonance with its bye-laws. The receipts in the present cases have indisputably been used for mutual benefit towards

maintenance of the premises, repairs, infrastructure and provision of common amenities.

20. Any difference in the contributions payable by old members and fresh inductees cannot fall foul of the law as sufficient classification exists. Membership forming a class, the identity of the individual member not being relevant. Induction into membership automatically attracts the doctrine of mutuality. If a Society has surplus FSI available, it is entitled to utilise the same by making fresh construction in accordance with law. Naturally such additional construction would entail extra charges towards maintenance, infrastructure, common facilities and amenities. If the society first inducts new members who are required to contribute to the common fund for availing common facilities, and then grants only occupancy rights to them by draw of lots, the ownership remaining with the society, the receipts cannot be bifurcated into two segments of receipt and costs, so as to hold the former to be outside the purview of mutuality classifying it as income of the society with commerciality.

21. In the present case, the facts are not in dispute the assessee is a Co-operative Housing Society formed of plot owners who had obtained a lease of land from the Maharashtra Housing Board. The society looks after the maintenance and infrastructure. If any members desire to avail of the benefit of transferable development rights for carrying out construction or additional construction on his plot, the member has to pay certain premium to the society. The AO is of the view that TDS premium is charged by the society from its member but paid by the developer on members behalf to permit them to commercially exploit the potential for the development of the plot; whereas in reality it was a profit sharing arrangement of the commercial nature.

22. The admitted facts would indicate that the TDR premium is liable to be paid by a member of the Society who desires to utilize additional FSI in the form of Transferable Development Rights. The principle of mutuality would clearly apply to a situation as to the present. In the context of the payment of non occupancy charges by a member of a Co-operative Housing Society to the Society, a Division Bench of this Court held in *Mittal Court Premises Co-operative Society Ltd. vs. Income Tax Officer,* that the principle of mutuality would apply. The Division Bench noted that the object of the Society is to provide service, amenities and facilities to its members. Non-occupancy charges are payable by a member on account of the fact that the member is not in occupation of the premises. In our view, the same principle would apply to the present case. The TDR premium is a payment made by a member to the Society of which he is a member, as a consideration for being permitted to make an additional utilization of FSI on the plot allotted by the Co-operative Housing Society. The Society which looks after the infrastructure, requires the payment of the premium in order to defray the additional burden that may be cast as a result of the utilization of the FSI. The point however, it shat there is a complete mutuality between the Co-operative Housing Society and its members.

23. From the discussion above, it is essentially clear that the receipts of the assessee are not chargeable to tax applying the doctrine of mutuality. **As alleged by the AO that the payments have been made by the developer on assessee's behalf is not material in the given circumstances. Just because payments had been made by the developer, doctrine of mutuality cannot be taken away from the assessee society.**

24. In view of the above, in our considered view amount of TDR deposit and development charges received amounting to Rs. 16,50,584/- for A.Y. 2011-12, Rs.

15,05,638 for A.Y. 2012-13 & and amount of TDR Utilization Charges/TDR Premium Rs. 7,37,450/- and amount of development charges Rs. 3,41,515/- are not chargeable to tax on the concept of mutuality

25. Based on above discussions and factual finding, if an assessee is entitled for the benefit under the doctrine of mutuality, no expense disallowed on *ad-hoc* basis can be added back to the income of the assessee.

26. In view of the above, ad-hoc expenses amounting to Rs. 11,788/- for A.Y. 2011-12, Rs. 41,087/- for A.Y. 2012-13 & and Rs. 2,00,77/- for A.Y. 2014-15 cannot be added back to the income of the assessee.

27. In the result, appeals of the assessee are allowed.

Order pronounced in the open court on 7<sup>th</sup> of July, 2022.

Sd/-

Sd/-

(PAVAN KUMAR GADALE)

(GAGAN GOYAL)

JUDICIAL MEMBER

ACCOUNTANT MEMBER

Mumbai, दिनांक /Dated: 07/07/2022

SK, Sr.PS

Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

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BY ORDER,

(Dy./Asstt. Registrar)  
ITAT, Mumbai