

IN THE INCOME TAX APPELLATE TRIBUNAL "G" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकर अपील सं/ I.T.A. No.114/Mum/2023

(निर्धारण वर्ष / Assessment Years: 2019-20)

Gayatri Commercial Premises Co-Op, Society Ltd. Unit No. 102/103, Behind Mittal Ind. Estate Andheri Kurla Andheri (East) Mumbai- 400059	बनाम/ Vs.	CPC/ITO, 22 (1)(4) 3 rd Floor, Piramal Chambers Lalbaugh Mumbai- 400034
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAAG5064D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Shri. N.R. Agarwal
Revenue by:	Shri. Krishna Kumar, (Sr. AR)

सुनवाई की तारीख / Date of Hearing: 15/03/2023

घोषणा की तारीख /Date of Pronouncement: 31/05/2023

आदेश/ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)/NFAC dated 13-12-2022 for AY 2019-20 confirming the addition of Rs. 93,20,286/-.

2. The assessee society has raised the following grounds of appeal reads as under: -

“1. The Ld. CIT(A) erred in confirming the addition of Rs.93,20,286/- as a business income in order passed u/s 143(1) & 154 of the Act by CPC.

2. The Ld. CIT(A) erred in not granting deduction under Mutuality Principal.”

3. The regarding ground no. 1, the Ld. CIT(A) has dismissed the ground of appeal of the assessee by observing as under: -

“The Ld. CIT(A) has rejected the assessee's the ground of appeal by observing at para no. 7 of the impugned order as under:-



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

“The appellant society has wrongly filled up details in 'Exemption schedule' i.e. Schedule EI of Return of Income. In 'Schedule -BP computation of Income from business and profession' of Return of Income vide Column A5 which reads as 'Income credited to profit and loss account which is exempt Rs 93,20,286 is mentioned. Appellant society was supposed to give details of such exempt income credited to profit and loss account in 'Exemption schedule of Return of Income. But in Exemption schedule (item 4(1)) appellant society mentioned maintenance charges from members which are exempt from tax" as Zero. Thus there is discrepancy in information between schedule BP & Schedule EI.”

Hence CPC, Bengaluru issued letter to appellant society vide letter number CPC/1920/G22/1971720995 dated 31-12-2019 calling for explanation for variation found i.e. why exemption claimed in profit and loss account is higher than Total exempt income earned by appellant society during the year as per 'Exemption schedule'. The Appellant society admittedly failed to give clarification to CPC within time allowed.

If any new claims are made by assesses using 'Return data correction' option, the same will not be considered for rectification. In the present case, appellant used 'Return data correction' option to reduce taxable income by correcting data mentioned in 'Exemption schedule". New exemption claim of Rs 93,20,286/- was made in the 'Rectified data correction' form contrary to 'Nil' exempt income claim made in the same schedule in the original return which drastically brought out change in Total income admitted in the original return. As the claim made by the appellant society by way of rectification is beyond the scope of corrections entertained by way of 'Return data correction', CPC, Bengaluru disregarded the data correction



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

made in the schedule, consequently not rectified order passed u/s
143(1).

4. The Ld. AR of the assessee assailing the action of the Ld. CIT(A) brought to our notice that assessee has claimed exemption of Rs. 93,20,286/- being “Maintenance charges received from members” in the original return of income (ROI). However, while the return was processed u/s 143(1) of the Act, the CPC taking note that there was some mistake in filing up of certain columns of the return of income disallowed the claim. The assessee taking note of the action of CPC disallowing the claim filed ‘*rectified data correction,*’ however, the same was not rectified. So, the assessee challenged the action of CPC before the Ld. CIT(A), who dismissed it. Assailing the action of Ld CIT(A), the Ld AR submitted that the impugned action of Ld CIT(A) is erroneous because he passed the order without appreciating that (i) no new claim was made in rectification return. Whereas, in the original return, claim was made though in wrong columns. (2) Specific ground was raised challenging taxing of Rs. 93,20,286/- as business income. (3) Ld CIT(A) is having same powers as that of AO (4). Ld. CIT(A) did not considered circular no. 14 (XL-35) DATED 11-4-1955 "ITO is supposed to grant deduction etc. even though same is not claimed in the return, AO to allow deduction not claimed by assessee.

5. And also Ld. AR submitted that there cannot be estoppel against law; and as per the Article 265 of Constitution of India, “No tax shall be levied or collected except by authority of law” and drew our attention to the following case laws:-

a).Nirmala L. Mehta v/s A. Balsubramaniam CIT 269 ITR 1
(Bom)



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

b).CIT v/s Archana R Dhanwatey 136 ITR 355 (Bom)

c). Wipro Ltd v/s DCIT 382 ITR 179 (Karn)

d).Smt Snehlata Jain v/s CIT 192 CTR 50 (J&K)

e). TATA INDUSTRIES LTD vs. ITO dated 20th July, 2016,181 TTJ 0600 (Mumbai) Hon'ble bench has held in para 30 of the order as under:-

6. According to the Ld. AR, the assessee itself has offered disallowance in the return of income more than the exempt income earned and submitted that even if the assessee under misconception has over assessed itself in the return of income, the Appellate Authorities ought to have given relief to the assessee to the extent the assessee is over assessed and direct the lower authorities to tax the assessee as per the provisions of law. According to Ld. AR that ratio is given in the case of "National Thermal Power Co. Ltd." vs. CIT" 229 ITR 383 wherein the facts before the Hon'ble Supreme Court was that the assessee in that case offered the interest amount for taxation and the assessment was completed on that basis. Before the Ld. CIT (A), the assessee though had taken a number of grounds of appeal; however, the inclusion of the said amount of interest was not challenged. The inclusion of the said amount of interest was not objected to even in the grounds of appeal as originally filed before the Tribunal. However, the assessee by way of subsequent letter raised the additional ground in relation to the said inclusion of interest in the income of the assessee. In the above circumstances, the question before the Hon'ble Supreme Court was "Where on the facts found by the authorities below a question of law arises (though not raised before the authorities) which bears on the tax liability of



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

the assessee, whether the Tribunal has jurisdiction to examine the same?" The Hon'ble Supreme Court while answering the said question observed that under section 254 of the Act, the power of the Tribunal in dealing with the appeals is expressed in the widest possible terms; the power of the Tribunal under section 254 is not restricted only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals); that both the assessee as well as the department have a right to file an appeal/cross objection before the Tribunal and the Tribunal is not prevented from considering questions of law arising in assessment proceedings although not raised earlier. While answering the question in affirmative, the Hon'ble Supreme Court concluded that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. The Ld. AR also cited the full bench decision of the Hon'ble Bombay High Court in the cases of "Ahmedabad Electricity Company Ltd. vs. CIT" and "Godavari Sugar Mills Ltd. vs. CIT" 199 ITR 351 wherein it has been observed that the basic purpose of an appeal procedure in an income tax matter is to ascertain the correct tax liability of the assessee in accordance with law. Therefore, at both the stages, either by the Appellate Assistant Commissioner or before the Appellate Tribunal, the appellate authority can consider the proceedings before it and consider the material on record before it for the purpose of determining the correct tax liability of the assessee. Thus, according to the Ld. AR, the Ld CIT (Appeals) erred in not granting deduction



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

under *Mutuality principal* which ought to have been allowed.

According to him, the assessee had collected from members Rs. 93,20,286 on account of various expenses such as Property tax, Maintenance Charges, Repairs & Sinking funds, Common Electricity charges, Water charges etc and the same was spent for the purpose for which it was collected, which fact is discernable from profit & loss account. Hence according to him, Rs. 93,20,286 (Maintenance Charges) claimed as exempt on the principle of Mutuality was not taxable, as per the law laid by Hon'ble Supreme Court in the case of *ITO vs. VENKATESH PREMISES CO-OPERATIVE SOCIETY LTD.* 402 ITR 670 (SC) wherein at para 10 held '*.....The income of the assessee is contributed by its members. The assessee has been formed specifically with the object of providing a common effluent facility to its members. The income is not generated out of dealings with any third party. The entire contribution originates in its members and is expended only in furtherance of the object of the association for the benefit of the members. On these facts. both the CIT(A) and the Tribunal were justified in coming to the conclusion that the surplus so generated falls within the purview of the doctrine of mutuality and was not exigible to tax*'.

7. The Ld. AR also drew our attention to page no. 23 to 90 of appeal set and especially to page no 44 wherein copy of the *rectification return* filed is found placed therein. From a perusal of the same i.e. page 44 column (5) titled "*Income credited to profit and loss account (included in 1) which is exempt*", Column (C) (2) wherein sub-heading "*Any other exempt income*



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

(specifying nature and amount) the exempt income is shown by assessee as Rs.93,20,686/-. This fact is shown under **Scheduled BP** (*Computation of income from business and profession*) under the sub-heading as noted “*income credited to profit and loss account which is exempt*” the assessee had shown and amount of Rs. 93,20,686 /-. And thereafter he drew our attention to page no. 81 schedule EI i.e. Details of Exempt Income (Income not to be included in Total income or not chargeable to tax) assessee has shown as item 4 “*other exempt income*” as maintenance and other charges collected to the tune of Rs. 93,20,286/- and other exempt income to Rs. 2,400/- thus total amount of Rs. 93,20,686/-. The Ld. AR also drew our attention to profit and loss account (refer page no 194 of appeal set) wherein surplus for the year is shown as Rs. 32,42,544/-; and drew our attention to page no 198 (income and expenditure appropriate account) wherein it is noted that Rs. 16,37,544/- has been transferred to the balance sheet. Thus, assessee brought to our notice that surplus is to the tune of Rs.32,42,544/- which was transferred to balance-sheet. According to the Ld. AR, it can be seen that even in the original return of income the claim was made though under wrong heading/columns.

8. According to the Ld. AR, even if mistake are made while filling up the columns in ROI, then also the AO/CIT(A) have to consider only the correct facts and bring to tax which is leviable as per law; and even if the assessee under mistake or misconception has offered more tax, then the AO/CIT(A) was duty bound to only tax the correct income. Assessee for that proposition referred to the CBDT circular no 14(XL35) dated 11.04.1955. The Ld. AR brought to our notice that assessee in the instant case had collected from members an amount of Rs. 93,20,286/- on account of various



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

expenses such as property tax, maintenance charges, Repairs, sinking funds, water charges, common electricity charges etc. The Ld. AR drew our attention the profit and loss account and other relevant financials placed at page 191 to 198 of the appeal-set and showed us that the amount collected (supra) was spend for the purpose for which it was collected; and therefore pleaded that on the *principle of mutuality* the receipts by the co-operative society from its members are exempt from income tax based on the mutuality concept.

9. Per contra, the Ld. DR supported the impugned action of Ld. CIT(A) and does not want us to interfere with the action of Ld. CIT(A).

10. We have heard both the parties and pursued the record. We note that the assessee is co-operative commercial premises co-operative society Ltd. For the relevant year under consideration i.e. AY 2019-20, the assessee society filed return of income with Nil business income. Return was processed u/s 143(1) (a) of the Act on 31.12.2019 treating amount of Rs. 3,41,90,136/- as business income, raising demand of Rs. 34,83,398/-. Aggrieved, assessee filed rectification before CPC dated 26.08.2020, which confirmed business income at Rs. 2,96,50,864/-. Aggrieved, assessee preferred as appeal before the CIT(A)/NFAC wherein it challenged the non-rectification of order passed u/s 143(1)(a) order and also taxing Rs. 93,20,286/- as a *business income* against Nil business income filed by the assessee co-operative society. And assessee also raised the ground of appeal for non-grant of benefit under the *principle of mutuality* while taxing of Rs. 93,20,286/- as business income. However, the Ld CIT(A) dismissed the



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

grounds of appeal raised against the action of the CPC not rectifying order passed u/s 143(1)(a) of the Act.

11. Coming to the ground of appeal regarding application of principle of the mutuality, the Ld. CIT(A) held that it was question of fact and which requires examination of facts and documents. Therefore, he declined to adjudicate the ground of Mutuality. Aggrieved, by the action of the Ld. CIT(A) of the assessee is before us.

12. We note that the Ld. CIT(A) has correctly noted that assessee society in the return of income at schedule BP (*computation of income from business and profession at columns A5*) shown as income credited to profit and loss account which is *exempt* shown of Rs. 93,20,286/-. However, in the schedule EI it mentioned *maintenance charges received from members which are exempt from tax as zero*. Therefore, the CPC after noticing that assessee failed to give explanation in respect of the variation had treated amount of RS. 93,20,286/- as taxable business income of the assessee, since, it was not shown as exempt in the schedule EI. We note that the assessee is premises society named as Gayatri Commercial Premises Co-Op Society Ltd. And while uploading the return of income it made certain mistakes in the columns to be filed by it *viz, it wrongly filed up details in "Exemption Schedule" i.e. Schedule EI of return of income*. Taking note of this discrepancy (*i.e. exemption claimed in profit and loss account is higher than total exempt income earned by appellant society during the year as per "Exemption schedule"*), the CPC not getting any explanation from assessee on this discrepancy, was pleased to disallow Rs.93,20,286/-. After getting the intimation order of CPC u/s 143(1)(a) of the Act. The assessee tried to correct the same by electronically '*rectified data correction*' which was



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

dismissed, since it (rectified data correction) was only for limited purpose and not for making any new claim. This action of the CPC was challenged before the Ld. CIT(A) who was pleased to dismissed the appeal of the assessee by noting as under: -

“Since it is appeal against 154, scope is limited to adjudicating whether CPC, Bengaluru erred in not rectifying the order passed u/s 143(1) basing on ‘Rectified data correction’ filed by the appellant u/s 154 or not and whether rectification sought by the appellant society falls within the scope of 154 or not but the scope does not extend to examine whether a new claim can be made by the appellant otherwise than by filing revised return and whether or not it can be entertained since the appeal under consideration is not an appeal against 143(1) order.”

13. And the Ld. CIT(A) has dismissed the ground of appeal of the assessee regarding, it is claim of ‘Mutuality’ by holding as under: -

“8. Vide second Ground of appeal it is contended by the appellant that the CPC erred in not giving benefit of ‘Mutuality’ in its order passed u/s 154. The question is whether the appellant claimed applicability of ‘Mutuality concept’ in its rectification application filed before CPC or not before deciding whether CPT erred in not giving that benefit to the appellant. It is beyond doubt that there is no separate rectification application filed by the appellant apart from ‘Rectified data correction’ filed in which details in exemption schedule were modified. Request for ‘Mutuality benefit’ was not possible in rectified data correction’ and has not been made by the appellant. Rectification order passed by CPC, Bengaluru was passed taking only ‘rectified data correction’ into consideration. Therefore, Order passed u/s 154 by CPC, Bengaluru can’t be faulted for not considering a request that was never made by the Appellant. Further



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

applicability of mutuality is a question of fact which requires examination of documents like bye laws of assessee premises society details of members, actual usage of funds etc. Hon'ble Bombay High court in case of CIT Vs Bombay oil seeds & oil exchange Ltd. 202 ITR 198 held as under: -

“The cardinal principle to apply the test of mutuality is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund. In other words, there must be complete identity between the contributors and the participators. The question whether all the members were contributors or not is a question of fact, which has to be decided in each case by the authorities concerned. In the facts of that case, the Tribunal was held justified in holding that the test of mutuality was satisfied with regard to laga receipts and the said receipts did not constitute income of the assessee”

Hence examination of applicability Mutuality concept in case of a society is a question of fact which is beyond scope of 154.

Hence Ground 2 of appellant is also dismissed.”

14. We do not countenance the impugned action of Ld. CIT(A) because the assessee's plea regarding the amount in question being disallowed i.e. Rs.93,20,286/- as not taxable has not been examined on its merits. As per the Article 265 of the Constitution of India '*No tax shall be levied or collected except by Authority of Law*'. It must be borne in mind that *Rules of procedure are not by themselves an end but to achieve the ends of justice. Rules of procedure are tools forged to achieve justice and not hurdles to obstruct the pathways to justice. Technicalities should not come in the way of substantial justice.* Refer



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

Hon'ble Bombay High Court in the case of Nirmala Mehta CIT 269 ITR (Bomb) wherein the Hon'ble High Court held that offer of receipt by assessee to tax under the Act, will not estop the assessee from contesting the receipt as not exigible under the Act. Therefore, taking note that the assessee is a premises Co-operative Society and is claiming exempt amount on the ground of principle of 'Mutuality' in respect of Rs.93,20,286/- which it has collected from its members for various charges has been disallowed without examining whether it is exempt under the 'Principle of Mutuality' which even though Ld. CIT(A) held to be essential question of fact did not bother to examine the same on the ruse that impugned order before him was an order of CPC u/s 154 of the Act. Be that as it may, for the ends of justice and fair play, we restore this issue back to the file of AO to examine on facts whether the claim of assessee is allowable on the Principle of Mutuality in the light of plethora of decisions the subject and as per the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs. Bombay Oil Seeds & Oil Exchange Ltd. 202 ITR 198 and the Hon'ble Supreme Court decision in ITO vs Venkatesh Premises Co-operative Society Ltd- Civil appeal no. 3271 of 2018 order dated 12.03.2018. Since the claim raised by assessee is a mixed question of fact and law, the AO to examine the relevant facts as to determine whether Rs.93,20,286/- is not taxable on the *principle of Mutuality* in the light of judicial precedence cited supra and in accordance to the law. Therefore, we set aside the impugned order of the Ld. CIT(A) and remand the matter back to the file of the AO to decide as to whether Rs.93,20,286/- is exempt on the 'Principle of Mutuality' and needless



ITA No.114/Mum/2023

A.Y. 2019-20

Gayatri Commercial Premises Co-Op Society Ltd.

to say, assessee to be given proper opportunity of hearing before he passes the order.

15. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on this 31/05/2023.

Sd/-

(AMARJIT SINGH)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 31/05/2023.

Shubham P. Lohar

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

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

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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