आयकर अपीलीय अधिकरण, **'सी'** न्यायपीठ**,** चेन्नई। **IN THE INCOME TAX APPELLATE TRIBUNAL** **'C' BENCH: CHENNAI** **श्री एबी टी. वर्की, न्यायिक सदस्य एवं** श्री **अमिताभ शुक्ला,** लेखा सदस्य **के समक्ष** **BEFORE SHRI ABY T. VARKEY, JUDICIAL MEMBER AND** **SHRI AMITABH SHUKLA, ACCOUNTANT MEMBER**		
आयकर अपील सं./**ITA Nos.74 & 75/Chny/2023** निर्धारण वर्ष**/Assessment Years: 2017-18 & 2016-17**		
Madras Gymkhana Club, The Island No.1, Anna Salai, Chennai – 600 002.	**v.**	The ITO, NCW-9(2), Chennai.
[**PAN: AAATM 7562 R**]		
(अपीलार्थी**/Appellant)**		**(**प्रत्यर्थी**/Respondent)**
अपीलार्थी की ओर से/ Appellant by	:	Shri S. Sridhar, Advocate
प्रत्यर्थी की ओर से /Respondent by	:	Shri P. Sajit Kumar, JCIT
सुनवाईकीतारीख/Date of Hearing	:	01.07.2024
घोषणाकीतारीख /Date of Pronouncement	:	21.08.2024

आदेश **/ O R D E R**

PER ABY T. VARKEY, JM:

These are appeals preferred by the assessee-Club against the order of the Learned Commissioner of Income Tax (Appeals)-18, (hereinafter in short 'the Ld.CIT(A)'), Chennai, both dated 16.12.2022 for the Assessment Years (hereinafter in short 'AY') 2017-18 & 2016-17 respectively.

2. Grounds of appeal raised by the assessee in ITA No.74/Chny/2023 for AY 2016-17 are as under:

> 1. The CIT Appeals has erred in law and in fact in passing the order u/s. 154 after passing the order earlier directing the AO to verify the application of Income as per the Madras High Court's decision in the Assessee's own case.
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> 2. The CIT Appeals is wrong in not dismissing the petition of the AO u/s. 154 as there is no mistake apparent from the record and AO can authorize and verify as per the direction and pass suitable order.
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> 3. The CIT appeals has erred in not following the order of the Madras High Court in the Assessee's own case.
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> 4. The CIT Appeals is not correct in overlooking the fact that the issue has not become final and the matter is before the larger bench of the Supreme Court on appeal by the Department and various clubs all over India. This information and details are available with the department.
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> 5. On these and other grounds that may be adduced at or before the time of hearing, it is submitted that the order of the CIT Appeals u/s. 154 be set aside and the appeal of the Assessee be allowed as per the decision of the Madras High Court in the Assessee's own case.

3. Both sides agree that the issues involved in both the appeals are similar/identical, therefore, decision in one of the appeals would decide the fate of the other. Therefore, we take up the appeal for AY 2016-17 as lead case, the decision of which will be followed for the other appeal for AY 2017-18.

4. The main grievance of the assessee is against the action of the Ld.CIT(A) passing the impugned order u/s.154 of the Income Tax Act, 1961 (hereinafter in short 'the Act') on 16.12.2022, whereby, he exercised *suo-moto* his power of rectification of his own earlier order

passed on 20.05.2019 for AY 2016-17; & dated 23.03.2022 for AY 2017-18.

5. The brief facts of the case are that the assessee is a society registered under the Societies Registration Act and established for the promotion of sports and services to its members. The AO noted that the assessee had filed return of income on 17.10.2016 declaring total income of Rs.NIL on the basis of principles of mutuality; and the return was processed u/s.143(1) of the Act, which was later selected for scrutiny through CASS; and the AO noted that the assessee is a Club providing various recreational facilities and sports facilities to its Members. The AO called for certain details; and he observed that assessee has shown gross income of Rs.9,94,79,235/-, which includes interest income of Rs.39,33,880/-, which income (viz interest income), the AO noted that assessee had claimed exemption under the concept of mutuality. However, the AO didn't agree, therefore, he show-caused the assessee and asked the assessee to explain how the interest income would be exempted under principles of mutuality; and pursuant to it, the assessee explained the concept of mutuality and asserted that interest income would also not be taxable under mutuality. However, the AO taking note of the Hon'ble Madras High Court decision in assessee's own case for AYs 1996-97 to 1999-2000 noted that the *interest income* from the investments it made, cannot be exempted from taxation on the principle

of mutuality; and the same was added after allowing 10% of it as income spent for administrative & other expenses, and the balance amount Rs.35,40,842/- was added as taxable income. Aggrieved, the assessee preferred an appeal before the Ld.CIT(A) who by passing the First Appellate order dated 20.05.2019 held as under:

> 5.3.1 I have carefully gone through the AO's observations and the appellant's contentions as mentioned above under para No.5.1 and 5.2 respectively.
>
> 5.3.2 The issue under consideration pertains to whether the concept of mutuality is applicable to the interest income earned by the appellant club on fixed deposits with banks. In appellant's own case, it has been held by the Hon'ble ITAT (ITA No.747/Mds/2009 for the AY 2005-06) and Hon'ble High Court of Madras (TCA Nos 397 to 404 of 2008) by relying on the decision of the Hon'ble Supreme Court in the case of Bangalore Club (350 ITR 509) that the concept of mutuality is not applicable to the interest income earned. Respectfully following the binding judicial precedents as above, the addition of interest income made by the AO is upheld in principle.
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> 5.3.3 However, at this juncture, the AR of the appellant submitted that the Hon'ble High Court in the case cited supra had observed in Para 30 of the order that when the interest income and deposits are utilized towards infrastructural development, it will be within the ambit of the concept of mutuality and hence will not be liable to tax. The relevant extracts of the observations of Hon'ble Madras High Court are reproduced as under for ready reference.
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> **Extract from the decision of the Hon'ble Madras High Court in Tax case (Appeal) Nos.397 to 404 of 2008 in appellant's own case;**
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> > "30. It is not the case of the assessee clubs that the funds which were invested in the form of fixed deposits or securities were kept in such deposit with a definite idea of using the same in any specific projects for the further development of the infrastructural facilities of the club in the form of buildings or other facilities. On the other hand while the assessee clubs were able to generate substantial amount by way of contribution, donation etc., it had no corresponding plans or schemes to improve its infrastructure facilities or that such surplus funds were earmarked for any particular developmental activity in the interest of all the members of the assessee clubs and that since incurring of the expenses for such activities can be made in a phased manner, the amounts were being kept in

> such a way that it could be drawn for spending as and when the requirement for such spending is necessitated."

5.3.4 Further the Hon'ble High Court has also held in para 36 of the same order as under:

> "36. Therefore, what is relevant is to see as to how the funds generated by way of contribution, donation etc., from the members as well as the outsiders are expended and that utilization of such funds were with a view of fulfill the object of providing various recreational and other facilities to the members and then alone it can be held that the principle of identity between the contributor and the participator is fulfilled which is the basic requirement in the concept of mutuality of the enterprise."

5.3.5 In view of the above, it is necessary that the AO must give a finding as to whether the interest income and deposits are being utilized for the development of infrastructural and other facilities of the club and if so, the principle of mutuality will apply and accordingly the interest income will not be taxable. Otherwise, the principle of mutuality will not apply and the interest income will be taxable. It is to further state that similar directions were also issued by the CIT(A) in assessee's own case for the assessment years 2010-11 & 2011-12 in ITA Nos. 34 & 96 of 2013-14 and 2014-15 dated 30.11.2015. Accordingly, AO will take appropriate decision in line with the directions as above.

6. Thereafter, the AO moved a Miscellaneous Application u/s.154 of the Act dated 25.02.2019 seeking rectification of the First Appellate order (supra) and submitted that the directions contained in the aforesaid order dated 20.05.2019 to the AO (and dated 23.03.2022 for AY 2017-18) was mistake apparent on the face of the record; and also pointed out that the Ld.CIT(A) while passing the original First Appellate order for both the Assessment Orders have not considered the order of the Hon’ble Madras High Court in the assessee’s own case, wherein, the Hon’ble High Court has concurred with the decision of the Hon’ble Karnataka High Court in the case of Bangalore Club reported in 234 ITR 308, which decision of the Hon’ble Karnataka High Court has been upheld by the Hon’ble Supreme

Court in the case of Bangalore Club reported in [2013] 5 SCC 509. The Ld.CIT(A) while considering the Miscellaneous Application (MA) moved by the AO (supra) gave notice to the assessee and after rebutting the objection raised by the assessee regarding the maintainability of MA held that non-consideration of a ratio decidendi/decision of the Hon'ble Supreme Court/jurisdictional High Court would amount to mistake apparent on the face of the record by relying upon the decision of the Hon'ble Supreme Court in the case of ACIT v. Saurashtra Kutch Stock Exchange Ltd., reported in 305 ITR 227 (SC), [*though, in the context of the power of rectification of the Tribunal order u/s.254(2) of the Act*], which we note is *pari materia* with that of sec.154 of the Act, which provision of law, we are concerned in the present appeals. The Ld.CIT(A) after hearing the assessee rectified his impugned order dated 20.05.2019 for AY 2016-17 by holding as under:

> 8. A similar miscellaneous petition was preferred by the AO on the CIT(A)'s order dated 20.05.2019 for the AY 2016-17 also on the similar lines. An opportunity of being heard was provided to the assessee; the reply given by the assessee is identical to that of the submission made by the assessee for the AY 2017-18 except that of the following additional point submitted for the AY 2016-17:
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> > "Currently, the case of mutuality on interest income is pending before the larger Bench of Hon'ble Supreme Court by both the Department and the Assessee and other clubs, it is clear that it is a question of law and cannot be rectified as a mistake."
>
> First of all, the assessee has not given the details of the cases claimed to have been pending before Larger Bench of Hon'ble Supreme Court on this issue, if any. Hon'ble Supreme Court of India in the case of Bangalore club vs. CIT (2013) 5 SCC 509 has already decided the issue of taxability of interest earned as stated above. As narrated above, Hon'ble Madras High Court in the assessee's own case in TCA

No.397 of 2008 dated 30/7/2009 also held that the principle of mutuality is not applicable to the interest earned by the club and it is taxable. As held by the Hon'ble Supreme Court in the case of ACIT vs Saurashtra Kutch Stock Exchange Ltd. (BC) 305 ITR 227, non-consideration of an existing decision of Supreme Court/ Jurisdictional High Court properly is a mistake apparent from record and rectification can be done. Hence, assessee's claim does not hold water. Therefore, respectfully following the binding judicial precedents as above, the appeal order dated 20.05.2019 for the AY 2016-17 is also rectified as follows:

> i. The paragraph 5.3.5 asking the AO to determine the principle of mutuality in respect of interest income which is contrary to the decisions of Hon'ble High Court and the Hon'ble Supreme Court stand deleted.
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> ii. The interest income is shown under the head, Income from other sources in this case. Hence, the provisions of Section 57(iii) of the Income-tax Act, 1961 would apply in this case.

The Assessing Officer is directed to give effect to this order accordingly, after obtaining the details from the assessee with respect to Section 57(iii) of the Act.

9. Thus, the miscellaneous petitions filed by the AO for the AYs 2017-18 and 2016-17 are disposed of accordingly.

7. Aggrieved by the aforesaid order of the Ld.CIT(A), the assessee has raised the grounds noted supra.

8. We have heard both the parties and perused the material available on record. We note that the assessee club has shown gross income of Rs.9,94,79,235/-, (which included interest income of Rs.39,33,880/-), which was claimed as not taxable on principles of mutuality. The AO didn’t accept the claim of the assessee that the interest income from investment/bank wouldn’t be taxable and after giving deduction of 10% (*income spent for administrative & other expenses*) computed Rs.35,40,842/- as taxable income. On appeal, the Ld.CIT(A) disposed off

the appeal by passing the first appellate order dated 20.05.2019, wherein, he has taken note of certain observations made by the Hon'ble High Court of Madras in the assessee's own case for AY 1997-98 i.e. especially Para No.36, wherein, their Lordships observed as under:

> 5.3.4 Further the Hon'ble High Court has also held in para 36 of the same order as under:
>
> > "36. Therefore, what is relevant is to see as to how the funds generated by way of contribution, donation etc., from the members as well as the outsiders are expended and that utilization of such funds were with a view of fulfill the object of providing various recreational and other facilities to the members and then alone it can be held that the principle of identity between the contributor and the participator is fulfilled which is the basic requirement in the concept of mutuality of the enterprise."

And directed the AO to find out '*as to whether*' the interest income and deposits were utilized/being utilized for the development of infrastructural and other facilities of the Club and then to consider as to whether, the '*principles of mutuality*' will apply or not on the interest income. Upon receipt of this Order of the First Appellate Authority, the AO moved Miscellaneous Application (MA) u/s.154 of the Act, requesting rectification of the mistake apparent on the face of the record by pointing out that the Hon'ble High Court at Para No.37 in no uncertain term has held that *"investment of surplus fund with some of the Member banks and other institutions in the form of fixed deposits and securities which in turn result in earning of huge surplus amounts by way of interest cannot be held satisfy the mutuality concept"* and AO also brought to his notice that for

coming to such a conclusion, the Hon'ble Madras High Court has taken note of the decision of the Hon'ble Karnataka High Court in the case of Bangalore Club reported in 287 ITR 263 (Karnataka). The AO also pointed out that the decision of the Hon'ble Karnataka High Court in Bangalore Club (supra) has been upheld by the Hon'ble Supreme Court in the case of Bangalore Club which is reported in 350 ITR 509 (SC). Thus, according to the AO, the first appellate order dated 20.05.2019 suffered from mistake apparent on the face of the record. The Ld.CIT(A) while considering the MA, heard the assessee and repelled the assessee's objection regarding exercise of powers u/s.154 of the Act, by taking note of the Hon'ble Supreme Court's decision in the case of Saurashtra Kutch Stock Exchange Ltd., (supra), wherein, their Lordships have held as under:

> 40 The core issue, therefore, is whether non-consideration of a decision of jurisdictional court (in this case a decision of the High Court of Gujarat) or of the Supreme Court can be said to be a "mistake apparent from the record"? In our opinion, both the Tribunal and the High Court-were right in holding that such a mistake can be said to be a "mistake apparent from the record" which could be rectified under section 254(2). [Emphasis given by us]

9. From the aforesaid decision of the Hon'ble Supreme Court, it is crystal clear that non-consideration of the decision of the Hon'ble jurisdictional High Court in the assessee's own case by the Ld.CIT(A) would definitely amount to mistake apparent on the face of the record

since the in the assessee's own case for AY 1996-97 the question of law framed by the Hon'ble High Court was as under:

> 2. The common question of law involved in these appeals are as to 'whether the Tribunal was right in holding that the interest income of the assessee clubs received from its corporate members, on the investment of surplus funds as Fixed Deposits with them, is not exempted from tax on the concept of Mutuality. In some appeals, a further question of law as to 'whether the Tribunal is right in holding that the re-opening of the assessment under section 147 of the Income-tax Act was valid in respect of the assessee clubs.

10. And the Hon'ble Madras High Court held at Para Nos.34-35 as under:

> 34. As far as the Division Bench judgment of the Karnataka High Court in the case of Bangalore Club (supra) is concerned, the facts are identical and the assessee in that case is also a club having identical nature of membership and activities. The various reasoning adduced in the said judgment squarely applies to the facts of this case and, therefore, we adopt the said reasoning also to support our conclusions.
>
> 35. …….
>
> 36. Therefore, what is relevant is to see as to how the funds generated by way of contribution, donation etc. from the members as well as the outsiders are expended and that utilization of such funds were with a view to fulfill the object of providing various recreational and other facilities to the members and then alone it can be held that the principle of identity between the contributor and the participator is fulfilled which is the basic requirement in the concept of mutuality of the enterprise.
>
> 37. At the risk of repetition, it will have to be held that investment of surplus fund with some of the member banks and other institutions in the form of Fixed Deposits and securities which in turn result in earning of huge surplus amounts by way of interest cannot be held to satisfy the mutuality concept. As held in the decision of the Karnataka High Court in LT1. Employees Death and Superannuation Relief Fund's case (supra) the principle of Mutuality could be confined in respect of the income earned by the club out of the contributions received by the club from its members but it will have no application in respect of the interest earned from the deposits of surplus funds in the banks by way of income.

> 38. Having regard to our above conclusion, the first question of law as answered by the Tribunal will have to be upheld equally the second question of law is also answered against the assessee. In the result, the appeals fail and the same are dismissed. No costs. [Emphasis given by us]

11. A perusal of the aforesaid order of the Hon'ble High Court would reveal that the investment of surplus fund by assessee in bank, which generated interest, cannot satisfy the mutuality concept and therefore, was exigible to tax. The observations made by the Hon'ble High Court at Para Nos. 30 & 36 was in the knowledge of the assessee while the assessment proceedings was going on before the AO in the year 2018, since the Hon'ble Madras High Court order discussed supra was dated 30.07.2009; and it was not the case of the assessee before the AO that the funds which were invested in the form of Fixed Deposits or securities [kept in such deposit] were with a definite idea of using the same in any specific projects for the further development of the infrastructural facilities of the Club in the form of building or other facilities. Therefore, in the absence of such a claim being made before the AO even after 10 years after the order of the Hon'ble Madras High Court in their own case, setting up such a case before Ld CIT(A) during the first round was an afterthought because no material was kept before Ld CIT(A) to make such a claim. We came to such a conclusion after perusal of records, which doesn't reveal that assessee filed any additional evidence before the Ld.CIT(A) [in the first round] to prove its assertion that its case would fall

in the case-scenario as stated at Para Nos.30 & 36 of the Hon'ble High Court (supra). And even if for argument sake it is assumed that such a claim was set up before the Ld.CIT(A), who enjoyed co-terminus power as that of AO, then he could have very well examined the relevant facts and ascertained as to whether the assessee has made out a prima facie case that *the funds were invested in the form of Fixed Deposits or securities which were kept in such a deposit with a definite idea of using the same in a specific project for further development of the infrastructural facilities of the Club in the form of building or other facilities*. Even before us, the assessee has neither filed any material to show that such a claim was raised before the AO at the first instance nor before the Ld.CIT(A) or before us to show the bonafide of such a claim. In the aforesaid background, the action of the AO can't be faulted for moving Miscellaneous Application before the Ld.CIT(A) for correcting the mistake apparent on the face of the record, when there was a binding order of the Hon'ble Madras High Court in assessee's own case for AY 1996-97; and moreover, it is noted that the Hon'ble Madras High Court concurred with the ratio of decision of the Hon'ble Karnataka High Court in the case of Bangalore Club (supra) which has been upheld by the Hon'ble Supreme Court in the case of Bangalore Club v. CIT & Anr. reported in [2013] 350 ITR 509 (SC). Therefore, we find that the Ld.CIT(A) rightly exercised his power u/s.154 of the Act which is

sustainable in law and therefore, upheld. Consequently, both the appeals preferred by assessee are devoid of merits and stands dismissed.

12. In the result, both appeals filed by the assessee are dismissed.

Order pronounced on the 21st day of August, 2024, in Chennai.

Sd/-	**Sd/-**
(अमिताभ शुक्ला)	**(एबी टी. वर्की)**
(AMITABH SHUKLA)	**(ABY T. VARKEY)**
लेखा सदस्य**/ACCOUNTANT MEMBER**	न्यायिक सदस्य**/JUDICIAL MEMBER**

चेन्नई/Chennai,
दिनांक/Dated: 21st August, 2024.
TLN, Sr.PS

आदेश की प्रतिलिपि अग्रेषित**/Copy to:**

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT, Chennai / Madurai / Salem / Coimbatore.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF