IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW 'B' BENCH, LUCKNOW

BEFORE SH. SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER

ITA No.435/Lkw/2020
A.Y.-2014-15

Asstt. Commissioner of Income Tax, Range-I, Lucknow	vs.	M/s Mohamed Bagh Club, Limited, 202, M.G. Marg, Lucknow-226001
		PAN:AACCM2600B
(Appellant)		(Respondent)

Assessee by:	Sh. Rohit Bhalla, C.A.
Revenue by:	Sh. Sunil Kumar Rajwanshi, Addl. CIT (DR)
Date of hearing:	20.08.2024
Date of pronouncement:	30.09.2024

O R D E R

PER SH. NIKHIL CHOUDHARY, ACCOUNTANT MEMBER:

This is an appeal by the Revenue against the order of the ld. CIT(A)-2, Lucknow under section 250 of the Income Tax Act dated 16.09.2020. The grounds of appeal preferred read as under:-

> *"1. The Ld. CIT (A) has erred in law and on facts in deleting the addition of Rs. 2,79,02,368/- made by the AO on account of difference of turnover as per service tax return and receipt shown.*
>
> *2. The Ld. CIT(A) has erred in law and on facts in deleting the addition without calling remand report from the AO to confront the facts, which were not produced before him for justification of receipt is in capital in nature.*
>
> *3. Appellant craves leave to add as amend any one or more of the ground of appeal as stated above as and when need of doing so arises with the prior permission of the Hon'ble ITAT."*

2. The facts of the case are that the assessee club filed a return declaring total income of Rs.38,91,760/- on 27.09.2014. The case of the assessee was selected for limited scrutiny on account of the fact that higher turnover was reported in the service tax return as compared to the Income tax return. On account of the same, the assessee was asked to explain the difference of Rs.2,79,02,368/- It was submitted that the difference on account of the following:-

> **a. Entrance and restoration fees (Non-refundable)** which was taken directly to the balance-sheet and shown under the heads reserves and surplus instead of profit and loss account as it was a capital receipt for accounting purposes. However, the same was subjected to service tax under the Service Tax Act, 1994. As per CBES circular F. No. B1/6/2005-TRU dated 27.07.2005 any additional fee like life membership fee etc., had to be treated in the same way as subscription.
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> **b. Restaurant Services:**- It was pointed out that as per Rule 2C of Service Tax (Determination of Value) Rules, 2006 made effective from 01.07.2012 vide Notification No.24/2012, abatement of 60% was available on Restaurant Services as component of sale of goods and services were both involved, owing to which the restaurant receipts were shown in service tax return at an abated value, while under the I.T. Act, 1961, no such abatement / relief was available.
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> **c. Reverse Charge / Joint Charge Mechanism:-** It was pointed out that as per Notification No.30/2012-Service Tax dated 20th June, 2012 dealing with reverse charge and joint charge mechanism, service tax has to be paid by the Club as a service receiver is a case of sponsorship services, legal services for Advocates and works contracts services while the same was shown as expenditures in profit & loss account.

3. Thus, it was argued that on account of these three factors, there would always be a variance in the receipts as per Income Tax Act and the Service Tax Act. Upon receipt of this reply, the ld. Assessing Officer asked the ld. Authorized Representative to reconcile the receipts under the two Acts head wise and provide

documentary evidences for the same. However, he notes that no compliance was made by the assessee. The ld. Assessing Officer therefore, held that the assessee had not clarified as to what was the nature of entrance and restoration fees and how it was a capital receipt and furthermore, if it indeed was a capital a receipt, why it was chargeable under the Service Tax Act. He also pointed out that no details or documents regarding restaurant services and other services had been provided. If there was a difference in receipts, and this was not disputed by the assessee then he held that the onus lay on the assessee to explain and reconcile the difference with documentary evidences. However, no such evidences have been filed. Since, the assessee has not filed any documentary evidence and, in the opinion of the ld. Assessing Officer, had failed to reconcile the difference in receipts between the Income Tax Act, 1961 and the Service Tax Act, 1994, the difference amount of Rs.2,79,02,368/- was treated as extra and undisclosed receipts of the assessee that had not been included in the profit & loss account of the year under consideration. He, therefore, added back the amount of Rs.2,79,02,368/-, refused any further deduction on account of any expense against this and initiated penalty proceedings under section 271(1)(c).

4. Aggrieved by the said assessment order, the assessee filed an appeal before the ld. CIT(A). It was submitted that indirect tax law was an altogether unrelated universe of taxation and there could be no nexus of taxation on the basis of comparison between taxability under both the Acts. It was submitted that the income had been reported as per the provisions of the Income Tax Act at Rs.4,30,78,177/- but the value of services as per the service tax returns was Rs. 7,09,80,545/-. It was submitted that with regard to the entrance and restoration fees, since it was a non-refundable and non-annuity character, therefore, such receipts occurs once in a life time for any member of the Club. Hence, such a receipt tantamount to qualifying as per capital in nature and it was not required to be credited to the profit & loss account of the appellant. Hence, such fees were taken

directly to the balance-sheet and shown under the heads reserves and surplus, considering the nature of fees for accounting purpose. However, the same was subjected to Service Tax under the Service Tax Act, 1994, in view of CBES circular F. No. B1/6/2005-TRU dated 27.07.2005 which stated that any additional fee like life membership fee should be treated in the same way as subscription. With regard to the restaurant services, it was reiterated that as per Rule 2C of Service Tax (Determination of Value) Rules, 2006 abatement of 60% was available on restaurant services owing to component of sale of both goods and services but under the Income Tax, no such abatement was allowed. Hence, the income from both the laws could not be at par and such a difference will always persist. It was submitted that this income had duly been reported in the P & L account as it was in the nature of Revenue receipts. With regard to reverse charge / joint charges mechanism, it was pointed out that as per Notification No. 30/2012 Service Tax dated 20.06.2012 dealing with reverse and joint charges mechanism, service tax had been paid by the Club as a service receiver in case of sponsorship services, legal services for Advocates and works contract services but the same was shown as expenses in the profit & loss account and therefore of Revenue in nature. The assessee, therefore, submitted that there was no statutory obligation to reconcile the income as per the Income Tax Act with the receipts as per the service tax returns because there could not be any justification for such reconciliation and any parity between two different kinds of Acts. The ld. CIT(A) held that entrance and restoration fees were one time capital and non-refundable receipt that was not liable to be included in the profit and loss account but the same were subjected to service tax as per the Service Tax Act. In view of the same, she deleted the addition of Rs.2,71,18,600/- made on this account. With respect to the balance amount of Rs. 7,83,768/- observing that they pertain to security deposits received by vendors on which service tax had been paid by the Club, she observed that the security deposit received by the vendors was disclosed in the balance-sheet for the year under consideration and therefore, it was

also reconciled. Such security deposit was subjected to service tax but not a part of P & L account. In view of the above, she directed that the addition made by the ld. Assessing Officer should be deleted.

5. The Revenue is aggrieved at this order passed by the ld. CIT(A) and has accordingly come in appeal before us. Shri. Sunil Kumar Rajwanshi, ld. Sr. DR appeared before us in the case and submitted that the assessee had not been able to point out the reason for the variation in the Income tax return from the service tax return by way of filing any reconciliation statement. It was submitted that once there was a discrepancy then the discrepancy had to be explained by way of filing a re-conciliation statement before the ld. Assessing Officer but in the absence of any rec-conciliation statement being filed, the differences stood unexplained. He also submitted that the ld. CIT(A) had erred in not calling for a remand report from the ld. Assessing Officer to enable the ld. Assessing Officer to controvert the claim of the receipts being capital in nature.

6. On the other hand, Shri Rohit Bhalla, C.A., appearing on behalf of the assessee submitted that there was no basis for making the addition. He pointed out that entrance and restoration fees was a one- time fee which was by its very nature, a capital receipt and therefore, it was not required to be taken to the profit and loss account. However, as per the CBES circular F. No. B1/6/2005-TRU dated 27.07.2005, service tax was required to be paid on the in the same way as subscription. With regard to reverse charge / joint mechanism, it was pointed out that as per Notification No. 30/2012-service tax dated 20.06.2012, service tax had to be paid by the Club as the service receiver in cases of sponsorship services, legal service for Advocates and works contract services while the same was an expenditure taken under the profit & loss account under the Income Tax Act. It was further argued that as per Rule 2C of the Service Tax (Determination of Value) Rules, 2006 w.e.f. 1.07.2012, 60% abatement was available on restaurant services which

was not available under the Income Tax Act. On account of all these factors, there was always bound to be a variation between the receipts as per the Income Tax Act. He submitted that difference on account of the receipts shown in under the Income Tax Act and shown under the Service Tax Act were on account of entrance fees (non-refundable) of Rs.2,71,18,600/- and security deposits of vendors of Rs.7,83,768/- on which service taxes were payable but did not constitute income as per the Income Tax Act. It was submitted that the two Acts belong to completely unrelated universe of taxation and there could be no comparison on the taxability of the assessee under the Income Tax Act on the basis of its taxability under the Service Tax Act. It was further submitted that the entrance fee of Rs.2,71,18,600/- received from vendors had been reflected in the financial statements for the relevant assessment year under appeal in Note No. 1 of the balance sheet as on 31.03.2014 and such receipts were squarely covered under the principles of mutuality under the Income Tax Act. It was further submitted that such principles of mutuality did not apply under the Service Tax Act. It was submitted that the ld. Assessing Officer had failed to appreciate that the Club claims its income to be exempt based on the principle of mutuality as the contributors to the funds and the participators to the funds were common. He relied upon the decision of Hon'ble ITAT, Lucknow Bench 'SMC' in ITA Nos. 42 to 45/Alld/2000 in the case of ***Income Tax Officer vs. Ganges Club Limited, Kanpur*** and the Hon'ble Supreme Court in the case of ***CIT vs. Bankipore Club Limited*** [1997] 226 ITR 97 (SC) wherein it had been held that since members/contributors had contributed for the mutual benefit of all members of the Club, the doctrine of mutuality was evidently applicable on the Club and hence income from members should be treated as exempt. It was further submitted that the Hon'ble Supreme Court in the case of ***Chelmsford Club vs. CIT*** 243 ITR 89 (SC) laid down the three conditions which established the doctrine of mutuality

i. the identity of the contributors to the fund and the recipients from the fund

ii. the treatment of the company, though incorporated as a mere entity for the convenience of the members, in other words as an instrument obedient to their mandate

iii. the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be extended or returned to themselves.

7. It was submitted that in the light of the judgments of ***CIT vs. Bankipore Club Limited*** (supra) and ***Chelmsford Club vs. CIT*** (supra) any excess of receipts over expenditure received by a Club for facilities extended to its members as part of advantage attached to such membership was not taxable as income and neither was the property of the mutual concern assessable to tax. It was, therefore, submitted that since, in the case of the appellant, the contributors and participators are all the same and the activities are taken for the benefit of members of the Club without any profit motive, the income of the Club should be exempt on the principle of mutuality. It was accordingly prayed that the appeal of the Revenue may kindly be dismissed after considering the same.

8. We have duly considered the facts and circumstances of the case. It is observed that ground no. 2 of the Revenue's appeal states that the ld. CIT(A) has erred in law and on facts in deleting the addition without calling for a remand report to confront the facts which were not produced before the ld. Assessing Officer for justification of receipt as capital in nature. During the course of hearing, the ld. AR has submitted that no new facts were presented before the ld. CIT(A), only the nature of the receipt was explained. We observed that the assessee had submitted before the ld. Assessing Officer also that the entrance and restoration fees were a capital receipt but the ld. Assessing Officer instead of raising any query on this issue had asked the assessee to reconcile the differences, produce supporting documentary evidences in this regard and books of accounts for verification of figures of turnover etc,. Since the ld. CIT(A) has merely considered the explanation

of the assessee regarding the nature of the receipt before deciding the fact of whether it was a capital or a revenue receipt, we do not feel that she has erred in any manner in deciding a legal issue without seeking a remand report from the ld. Assessing Officer, as there were no facts to verify that could be subjected to such remand. In the circumstances, ground no. 2 is held to be without merit and is accordingly dismissed.

9. With regard to ground no. 1, we observe that the assessee has quite clearly pointed out that the entrance and restoration fees are one –time receipts that are received from members and because they are once in a lifetime expenses, they are capital receipts which are carried directly to the balance-sheet. Be that as it may, it is observed that such fees are received from the members of the Club for partaking the activities of the Club and therefore, as per various judgments cited by the ld. AR, such receipts are in any case exempt from tax by the principle of mutuality. Furthermore, it is observed that the assessee has explained the difference quite clearly before both the ld. Assessing Officer and the ld. CIT(A) as to why there was a difference of Rs. 2,71,18,600/- in the receipts on this account i.e. that while the same were treated as capital receipts not required to be considered as income of the Club under the Income Tax Act, there was a requirement for it to treat theses receipts as liable to service tax under the Service Tax Act on account of the fact that the principle of mutuality did not apply under the said Act. Therefore, the mere fact that these were subjected to service tax under the Service Tax Act would not render them liable for Income Tax under the Income Tax Act both because they were a capital receipt and also because, being received from members, they were exempt on the principle of mutuality. Furthermore, the balance of Rs.7,83,768/- is seen to have come from certain security deposits by vendor, which cannot be regarded as income under the Income Tax Act. Considering the above, we do not find any infirmity in the decision of the ld. CIT(A)-2, Lucknow in allowing the appeal of the assessee and in deleting the addition made by the ld. Assessing Officer.

10. In the result, the appeal of the Revenue is dismissed.

Order pronounced on 30.09.2024 at Lucknow, U.P.

Sd/-	*Sd/-*
[SUDHANSHU SRIVASTAVA]	**[NIKHIL CHOUDHARY]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

DATED: 30/09/2024
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Copy forwarded to:
1. Appellant –
2. Respondent –
3. CIT DR , ITAT,
4. CIT,
5. The CIT(A)

By order
Sr. P.S.