IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, MUMBAI

BEFORE SHRI SANDEEP GOSAIN, JM &
MS PADMAVATHY S, AM

I.T.A. No.4979/Mum/2024
(Assessment Year: 2014-15)

I.T.A. No.4980/Mum/2024
(Assessment Year: 2015-16)

I.T.A. No.4982/Mum/2024
(Assessment Year: 2016-17)

I.T.A. No.4983/Mum/2024
(Assessment Year: 2017-18)

The Imperial Condominium Level 2, FM Office The Imperial Tower, B B Nakashe Marg, Tardeo, Mumbai-400034. **PAN : AADAT4393D**	Vs.	**ACIT, Circle-19(3),** Room No. 206, 2nd Floor, Matru Mandir, Grand Road, Mumbai (Maharashtra-400007.
Appellant)	:	**Respondent)**

Appellant /Assessee by	:	Shri. Vijay Mehta, AR
Revenue / Respondent by	:	Shri Krishna Kumar, Sr.DR
Date of Hearing	:	06.11.2024
Date of Pronouncement	:	12.11.2024

O R D E R

Per Padmavathy S, AM:

These appeals by the assessee are against the separate orders of Commissioner of Income Tax (Appeals) / National Faceless Appeal Centre, Delhi

[in short 'the CIT(A)'] all dated 30.07.2024 for Assessment Years (AY) 2014-15 to AY 2017-18. The common issue contended by the assessee for AY 2014-15 to 2017-18 pertain to the addition made by the Assessing Officer (AO) by denying the benefit of principle of mutuality to the assessee towards the fees received on account of transfer of apartments during the year. For AY 2014-15 the AO also made an addition towards surplus in the Income & Expenditure A/c stating that the principle of mutuality is not applicable to condominium. For AY 2014-15, the AO also denied the deduction claimed by the assessee under section 57 of the Income Tax Act, 1961 (the Act) against the income offered to tax under the head "Income from Other Sources".

2. The assessee is a condominium registered under the Maharashtra Apartment Ownership Act on 16.10.2012 and is assessed to tax as Association of Persons (AOP). The facts pertaining to AY 2014-15 are that the assessee filed the return of income on 31.10.2014 declaring a total income at Rs. 3,69,43,660/-. The AO after perusal of the financial statements of the assessee noticed that the assessee has for the year ended 31.03.2014 has accounted a sum of Rs. 1,34,71,471/- as transfer fees received from members and that the assessee has not offered the said amount to tax on the ground that it is exempt under the principle of mutuality. The AO was of the view that the principle of mutuality does not arise in the case of condominium and accordingly did not accept the claim of the assessee that the receipt towards transfer fees is not taxable. The AO therefore made an addition of Rs. 1,34,71,471/- on account of transfer fees. Further the AO added the entire surplus as per the Income & Expenditure A/c to the tune of Rs. 1,33,59,548/- on the same ground that the assessee being a condominium is not entitled to claim exemption of the income on the principle of mutuality. The AO also disallowed the audit fee of Rs. 40,000/- and accounting expenses of Rs. 7,20,000/- claimed by the

assessee in the return of income under section 57 against the income offered to tax under the head "Income from Other Sources". The CIT(A) upheld the additions/disallowances made by the AO by holding that

> *“8.1 Perusal of the assessment order shows that the Ld. AO has taken a great effort to differentiate between a co-operative society and a condominium. In my opinion, the differentiation between the two is not the crux of the issue at hand. Main issue for consideration in the case, in my opinion, is whether the principle of mutuality is being followed by the appellant assessee or not. If the same is followed, irrespective of the assessee being a co-operative society or a condominium or anything else, its income gets exempt from taxation.*
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> *8.2 The basic test to check whether the 'principle of mutuality' has been followed or not is enumerated in the judgments relied upon by the appellant as well as by the Ld. AO. The cardinal requirement in the case of mutuality, as held by the Hon'ble Apex Court in the case of CIT v. Kumbakonam Mutual Benefit Fund (1964) 53 ITR 243 (SC), 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. If all the participators to the common fund are also contributors and their identities are established, then the test of mutuality is satisfied. Similar view was held by the Hon'ble Bombay High Court in the case of CIT v. Bombay Oilseeds & Oil Exchange Ltd. (1993) 202 ITR 198 (Bom). It was further held by the Hon'ble Bombay High Court that 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. This view has been the basic principle in deciding on the taxability of the receipts in all the judgments relied upon by the appellant.*
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> *8.3 Now applying the above test to the case of appellant, from the records, it is seen that the contribution is being made both by the incoming members as well as by the outgoing members. Appellant in its submission has stated that the members may come in or go out. and it is irrelevant that only some members, from those who contributed, participated in the surplus. In my opinion, on the contrary, this is the most important and deciding factor to the 'principle of mutuality. It is seen that the members who are contributing towards transfer fees are not getting benefits out of the amounts which they have contributed to the condominium. If there are members who are making the contributions but do not get any benefit out of the amounts which they*

have contributed to the condominium, this is sufficient to arrive at the conclusion that there is no complete identity between the contributors and the participators. Contention of the appellant that the activity of the condominium is non-commercial in nature does not help its case. Once it is held that the ratio laid down by the Hon'ble Apex Court in the case of CIT v. Kumbakonam Mutual Benefit Fund (supra), 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, has not been followed, it may be held that the 'principle of mutuality' is not applicable to the case of the appellant.

8.4 The decision of the Hon'ble Apex Court in the case of ITO vs Venkatesh Premises Cooperative Society Ltd, as relied upon by the appellant, also does not help its case, as the facts in that case are distinguishable. In the said case, the question before the Hon'ble Court was whether certain receipts by cooperative societies, from its members, generating profits and surplus, having an element of commerciality, are exempt or not, based on the doctrine of mutuality. Thus, in the case of Venkatesh Premises Cooperative Society Ltd, there was no dispute on the contribution of funds by the members, and the issue for consideration was on account of element of commerciality, while in the instant case, the moot question is of the identity between the contributors and the participators to decide upon the applicability of 'principle of mutuality.

8.5 In view of the above, the additions made by the Ld. AO is confirmed.

8.6 As regards the additions made by the Ld. AO on account of audit fees and accounting fees, the appellant has contended that the said amounts are mandatory in nature, incurred to keep financial records in order to timely comply with the requirements of various laws. In this regard, provisions of clause (iii) of section 57 of the Act allows for deduction of only those expenses which are laid out wholly and exclusively for the purpose of making or earning such income. As the expenses incurred on account of 'audit fees' and 'accounting fees' cannot be said to be incurred 'wholly and exclusively for the purpose of making or earning such income, these expenses are not allowable as deduction."

3. The ld. Authorized Representative (AR) at the outset drew the attention of the Bench to the Income & Expenditure A/c for the year ended 31.03.2014 to submit that the assessee has received income only from members towards

maintenance and expended the same towards the maintenance. The ld. AR further submitted that the assessee while filing the return of income has offered to tax those incomes arising from interest, rent, sale of scrap etc. to tax since those incomes cannot be treated as exempt on the principle of mutuality. The ld. AR therefore submitted that the AO is not correct in simply taking the entire surplus and bringing the same to tax stating that the principle of mutuality is not applicable. The ld. AR further submitted that the AO by doing so has taxed the income already offered to tax by the assessee twice. The ld. AR also brought to our attention that in the subsequent AYs i.e. AY 2015-16 to 2017-18 the AO did not make any additions towards surplus from the Income & Expenditure A/c thereby accepting the income arising from collection from members as exempt on the principle of mutuality.

4. With regard to addition made by the AO towards transfer fees, the ld. AR submitted that the issue is settled now by the decision of Hon'ble Bombay High Court in the case of Sind Co-operative Housing Society Vs. ITO (2009) 317 ITR 47 (Bom.). The ld. AR further submitted that the above decision is also considered by the Hon'ble Supreme Court while deciding the issue of taxability of transfer fees in the case of ITO Vs. Venkatesh Premises Co-operative Society (2018) 301 CTR 514 (SC) where it is held that same is not taxable. Accordingly, the ld. AR submitted that the issue of taxability of transfer fee receipt is well-settled and the issue in assessee's case is covered by the decision of the Hon'ble Supreme Court and the decision of the Jurisdictional High Court.

5. The ld. AR on the issue of denial of deduction under section 57 of the Act towards audit fees and accounting fees submitted that the assessee is earning substantial income from interest on bank deposits/bonds and is also earning income

from rental income from ATM. The ld. AR further submitted that the assessee has offered the income to tax and has claimed only those expenses which are incurred exclusively for earning such income as deduction under section 57 of the Act. The ld. AR drew our attention to the Schedule of General Admin and Office Expenses (page 13 of PB) to submit that only relevant expenditure which are incurred towards earning Income from Other Sources have been claimed by the assessee as deduction. Accordingly, the ld. AR argued that the AO is not correct in disallowing the expenditure claimed by the assessee under section 57 of the Act.

6. The ld. DR on the other hand relied on the order of the lower authorities.

7. We heard the parties and perused the material on record. The assessee is a condominium and is formed as an association wherein the association and the members deal with each other exclusively without involvement of any outsider. This fact is substantiated from the perusal of the Income & Expenditure wherein the income of the assessee is derived from the maintenance collection from the members other than certain interest income. Further from the perusal of the Income & Expenditure we notice that the income collected from members is spent towards maintenance of the common area, utility cost, purchases of spares etc. which is spent again towards maintenance. We also notice from the perusal of the computation of income of the assessee that the assessee has offered to tax the interest income to which the concept of mutuality is not applicable after claiming deduction towards certain expenditures. It is also relevant to note that the AO in subsequent years in assessee's case did not deny the benefit of principle of mutuality to the income earned by the assessee out of collection made from members. We also notice that in the disallowance made by the AO considering the entire surplus of the Income & Expenditure, the interest income which is already

offered to tax is also included and therefore, there is merit in the submission of the ld. AR that there is double taxation to this extent. Considering the facts and circumstances, in our considered view the principle of mutuality cannot be denied to the assessee merely for the reason that the assessee is not a Co-operative Society and the financial statements of the assessee supports the claim that the assessee has not dealt with the any outsider other than the members. Therefore, we hold that the AO is not correct in making the addition of the entire surplus of Rs. 1,33,59,548/- in the hands of the assessee and the AO is accordingly directed to delete the said addition.

8. The next issue is with regard to the transfer fee collected from the members by the assessee. The assessee has transferred the amount collected to the Repairs & Replacement Fund. The AO held that the receipt towards transfer fee collected should be brought to tax since the concept of mutuality is not applicable to the said receipt. In this regard, we notice that the Hon'ble Bombay Court in the case of Sind Co-operative Housing Society (supra) has considered the issue of taxability of receipt of transfer fee and held that

> *“35 Considering these principles, the question is whether on the facts before us, the principle of mutuality would be attracted in respect of the transfer fee received by the housing co-operative societies governed by the provisions of the Maharashtra Co-operative Societies Act and the Rules. In Walkeshwar Triveni Co-op. Housing Society Ltd. [2004] 267 ITR (AT) 86; [2004] 88 ITD 158 (Mum) [SB], the Tribunal itself has held that the amount received from the transferor member would not be exigible to tax. It is only the amount received from the transferee, that is exigible to tax. We have noted that in so far as Sind CHS and National CHS Ltd. their bye-laws provide that the amount has to be paid by the transferor member. The issue, therefore, of the transferor or the transferee for those assessees really does not arise.*
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> *36. However, we will have to answer the issue considering what was considered in the case of Walkeshwar [2004] 267 ITR (AT) 86 (Bom) and*

considering the model bye-laws which are now adopted by most housing societies. We have noted the bye-laws as also the provisions under the Act and the Rules. The transfer fee can be appropriated only if the transferee is admitted to membership. The fact that a proposed transferee may make payment in advance by itself is not relevant. The amount can only be appropriated on the transferee being admitted as a member. As it is a transfer fee, if the transferee is not admitted as a member, the amount received will have to be refunded, as the amount is payable only on a transfer of rights of the transferor in the transferee. If it is held that payment of transfer fees is by a stranger, it will certainly be in the nature of gift and not income. If an amount is received more than what is chargeable under the bye-laws or Government directions, the society is bound to repay the same and if it retains the amount it will be in the nature of profit making and that specific amount will be exigible to tax. Considering the bye-laws, as the main activity of a co-operative housing society is to maintain the property owned by it and to render services to its members by way of usual privileges, advantages and conveniences, there is no profit motive involved in these activities. The amount legally chargeable and received goes into the fund of the society which is utilized for the repairs of the property and common benefits to its members.

37. We may now deal with some other submissions advanced on behalf of the Revenue. It was contended that the class of members means, members such as permanent, temporary, honorary, etc. This is based on the assumption that there can be different classes of members. In a co-operative housing society there can be members and associate members. We have already quoted from the judgments where reference is to members as a class and that class may be diminished by members going out or increased by the members coming in. But the class remains the same. As already noted by the Supreme Court in Bankipur Club [1997] 226 ITR 97, the identity must be as a class of contributors and participants and it does not matter that the class may be diminished or increased by members going out or coming in. Similarly, it is not necessary that each member should contribute or each member should participate in the surplus and get back from the surplus what he has paid, as long as they have control over the surplus.

38. It was also sought to be contended that the payment is not voluntary and at any rate the excess amount charged than what is permitted in the bye-laws will be exigible to tax. Firstly, whether it is voluntary or not would make no difference to the principle of mutuality. Secondly, payments are made under the bye-laws which constitute a contract between the society and its members which is voluntarily entered into and voluntarily con- ducted as a matter of

convenience and discipline for running of the society. If it is the case that the amounts more than permissible under the notification had been received under pressure or coercion or contrary to Government directions, then considering section 72 of the Contract Act, that amount will have to be refunded. At any rate if the society retains the amount in excess of the binding Government notification or the bye-laws that amount will be exigible to tax as it has an element of profiteering.

39. It was then sought to be contended that the premium charged is a profit. As we have already noted and considering the bye-laws, the society is registered with the object principally of looking after the property including building thereon. There is no trading or business transactions. The members by adopting the bye-laws agree amongst themselves that a fee for transfer of flat/tenement when it is sold, would be paid to the society. It may be that both incoming or outgoing member have to contribute to the common fund of the society. The amount paid, however, is to be exclusively used for the benefits of the members as a class."

9. We further notice that the Hon'ble Supreme Court in the case of Venkatesh Premises Co-operative Society (supra) has considered the above decision of the Hon'ble Bombay High Court and held that the transfer fees is not taxable on the principles of mutuality. Respectfully following the above decisions, we hold that the transfer fee received by the assessee is not taxable and accordingly direct the AO to delete the addition made in this regard.

10. On the issue of expenses claimed by the assessee towards audit fees and accounting expenses, we notice that the assessee has claimed the said expenses against the interest income offered to tax under the head "Income from Other Sources". On perusal of the financial statements, we notice that the assessee has substantial income from other sources and therefore there is merit in the contention of the ld. AR that certain expenditure have been incurred towards earning such income. We further notice that the assessee has incurred other general admin and office expenses and that the claim towards deduction under section 57 is made only

for the audit and accounting expenses. Considering the facts peculiar to the issue in our view the expenses claimed by the assessee is reasonable and therefore, we direct the AO to delete the disallowance made in this regard.

11. For the AY 2015-16 to 2017-18 the AO has made addition towards the receipts of transfer fees by the assessee and the CIT(A) confirmed the said addition. We have while adjudicating the same issue for AY 2014-15 has already held that the same is not taxable by placing reliance on the decision of the Hon'ble Supreme Court and the Jurisdictional High Court. Since the facts are identical for AYs 2015-16 to 2017-18 in our considered view our decision in AY 2014-15 is mutatis mutandis applicable to AY 2015-16 to 2017-18 also. Accordingly, we direct the AO to delete the addition made towards transfer fee for AYs 2015-16 to 2017-18 also. It is ordered accordingly.

12. In the result, the appeal of the assessee for AYs 2014-15 to 2017-18 are allowed.

Order pronounced in the open court on 12-11-2024.

Sd/-	***Sd/-***
(SANDEEP GOSAIN)	**(PADMAVATHY S)**
Judicial Member	**Accountant Member**

**SK, Sr. PS*

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai