

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

**BEFORE SHRI SHAILENDRA KUMAR YADAV, JM AND
SHRI RAJESH KUMAR, AM**

आयकर अपील सं./I.T.A. No. 3566/Mum/2014
(निर्धारण वर्ष / Assessment Year: 2009-10)

Lands End Co-operative Housing Society Ltd 29-D, Dongersey Cross Road, Malabar Hill, Mumbai 400 006	बनाम/ Vs.	I.T.O. ward-16(1)(3) Room No.220, Matru Mandir,2 nd Floor Tardeo, Grant Road, Mumbai 400 007
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAAAL 0060C		
(अपीलार्थी /Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Satish Mody
प्रत्यर्थी की ओर से/Respondent by	:	Shri Darsi Suman Ratnam

सुनवाई की तारीख / Date of Hearing	:	17/11/2015
घोषणा की तारीख / Date of Pronouncement	:	15/01/2016

आदेश / ORDER

PER RAJESH KUMAR, A. M.:

This appeal by the assessee is directed against the order dated 25.03.2014 of Commissioner of Income Tax (Appeals)-28, Mumbai (hereinafter called as the CIT(A)) for assessment year 2009-10.The assessee has raised following grounds of appeal:

1. *On the facts of the case and in law the learned CIT (Appeals) has erred in confirming the addition made by the assessing officer on account of Transfer Fees amounting to Rs.11,00,000/- received by the Appellant.*
2. *The learned CIT (Appeals) has erred in considering Rs.11,00,000/- received towards contribution from members of the society as income of the society in utter disregards to the principals of mutuality.*
3. *The learned CIT (Appeals) has erred in confirming the addition made by the assessing officer of Rs.6,04,500/- received on account of Non-Occupancy Charges from the members of the society in utter disregards to the principals of mutuality.*
4. *The learned CIT (Appeals) has also erred in not considering the order of the Hon. ITAT in the case of the Appellant where in the transfer fees received are treated as receipts from members of the society under the principals of mutuality.*
5. *The learned CIT (Appeals) has erred in disallowing the claim of the appellant for deduction u/s 80P(2)(d) for the interest earned from co-operative banks. The learned CIT (Appeals) thereby enhanced the assessment and made an addition of Rs.14,88,107/-*
6. *Further the learned CIT (Appeals) has erroneously applied the judgment of Totagar Co-operative Sale Society Limited (322 ITR283) (SC) in respect of interest from Bank.*
7. *The learned CIT (Appeals) has erred in enhancing the assessment by making an addition of Rs.2,06,400/- being amount recovered from members towards car parking charges, Rs.37,290/- for temporary car parking charges on the ground that the said receipts are not covered under the concept of mutuality.*

8. *The appellant prays that the receipts on account of transfer fees amounting to Rs.11,00,000/- , Non-Occupancy Charges amounting to Rs.6,04,800/- Car parking Charges amounting to Rs.2,06,400/- and Temporary Car Parking Charges amounting to Rs.37,290/- shall not be treated as Taxable Income in the hands of the Appellant Society.*
9. *Appellant also prays that it be allowed to take the deduction u/s 80P(2)(d) on interest received from Co-operative banks amounting to Rs.14,88,107/-*

2. Ground No.01 and 02 are against the confirmation of addition on account of transfer fee of Rs.11,00,000/- received by the appellant society. The brief facts are that the assessee was formed to look after the maintenance of the flats owned by its members. The society had its own byelaws providing for various types of charges and fees etc. During the year the assessee received Rs.11 lakhs from Ashok M. Bajaj on 10.04.2008 in respect of Flat No.3-D by way of transfer fee / contribution to amenities fund which was credited to the Common Amenities Fund. During the course of scrutiny proceedings AO added the same to the income of the assessee on the ground that the same was not covered by the principle of mutuality. The first appellate authority also confirmed the addition by holding that the transfer fee received was more than what has been prescribed under Government notification.

2.1. The Id. Authorized Representative brought to our notice that issue raised in the ground no. 1 & 2 qua transfer fee is covered in favour of assessee by its shown

order in ITA No.6866/Mum/2007 Assessment Year 2004-05 vide order dated 27-09-2013 and also by the decision of the Jurisdictional High Court in the case of CIT v/s Darbhanga Mansion CHS Ltd in ITA No.1474 OF 2012 dated 18-12-2014 and therefore the ground no.1 & 2 should be allowed. On the other hand the ld. DR relied on the authorities below.

2.2. We have considered the rival submissions and perused the material on record. We note that identical issue has been decided in favour of assessee in its own case in ITA No.6866/Mum/2007 Assessment year 2004-05 vide order dated 27/09/2013. The relevant paragraphs 3 & 4 of the said order are reproduced as under:-

“We have heard the Ld. AR as well as Ld. DR and considered the relevant material on record. The ld. AR has pointed out that an identical issue has been considered and decided by this Tribunal in assessee’s own case for the assessment year 2003-04 vide order dated 10.01.2011 in ITA No.6066/M/2006. Thus, the ld. AR has submitted that this issue is covered in favour of the assessee. The ld. DR has relied upon the orders of the authorities below. The AO made the addition with respect to the amount received by the assessee towards transfer fee of Rs.500/- from outgoing members, entrance fee for Rs.100/- from incoming members, share premium and contribution to common amenities fund. The CIT(A) deleted the transfer fee of Rs.500/- each on the principles of mutuality but confirm the addition towards the receipt of entrance fee of Rs.100/- each and the receipts of contribution to common amenities fund total amounting to Rs.17,01,200/- . This tribunal in assessee’s own

case for the assessment year 2003-04 has considered and adjudicated the issue of contribution to common amenities in para 4 as under:

“We have carefully considered the rival submissions and perused the record. Case of the assessee is that though the amount was received in the form of contribution to common amenities fund it is essentially utilized for the benefit of common members and thus principles of mutuality are attracted. Facts not being in dispute, in the light of the decision of the ITAT (supra), we accept the plea of the assessee and hold that the impugned amount received in the form of contribution to common amenities fund is exempt from tax since principles of mutuality applied to the instant receipts. Under the circumstances, appeal filed by the assessee is allowed. Pronounced accordingly in the open court on the date of hearing i.e. on 10.1.2011.”

In view of the earlier order of this Tribunal the amount of Rs.16,50,000/- towards common amenities fund is not taxable on the principle of mutuality as decided by this Tribunal is the assessee's own case. As regards the receipt towards share premium and entrance fee from incoming members if the said amount is received for the purpose of utilizing for the common amenities of the society then the same falls under the category of the contribution of common amenities fund and the concept of mutuality will be applicable. Accordingly, the AO to verify the same and then decide as per our observation.”

We also find that Jurisdictional High Court in the case of CIT v/s Darbhanga Mansion CHS Ltd in ITA NO. 1474/Mum/2012 vide order dated 18-12-2014 has decided a similar issue on identical facts in favour of the society. We, therefore,

respectfully following the above decision, delete the addition of Rs. 11,00,000/- by allowing the appeal of the assessee on this point. The AO is directed accordingly.

4. The issue raised in the ground no.3 is regarding the confirmation of addition of Rs.6,04,500/- received during the year on account of Non-Occupancy Charges from the members of the society. The non-occupancy charges are received from those members who do not occupy their flats and let out the same to non-members. As per byelaws of the society, a very nominal fee is received which is described as non-occupancy charges and spent on the building maintenance.

4.1. The Id. Assessing Officer added the same to the income of the assessee on the plea that same was not charged as prescribed and as per Government notification and such charges were collected with profit motive and therefore was not covered by principle of mutuality by not following the decision of Hon'ble Bombay High Court on this issue in the case of Mittal Court Premises Co-operative Society Ltd. v/s Income Tax Officer 320 ITR 414 and also stated that department has not accepted the decision in principle and appeal stands preferred in the Hon'ble Supreme Court. The Ld. AR submitted that the non-occupancy charges received from members were spent for the mutual benefits of the members and the AO added the same to the income of the assessee in utter disregards to the principle of mutuality. The Ld. Counsel placed

reliance on Mittal Court Premises Co-operative Society Ltd. v/s Income Tax Officer (supra) and prayed that the addition of Rs.6,04,500/-made by the Assessing officer be deleted by reversing the order of CIT(A) on this issue. On the other hand the ld. AR relied on the order of the authorities below.

4.2. We have heard the rival submissions and perused the material on record and find that the assessee received non-occupancy charges from those members who let out their flats. The charges are received at the prescribed rates as per the byelaws of the society and are spent for the common purposes of the society for the benefit of the members. In the case of Mittal Court Premises Co-operative Society Ltd. v/s Income Tax Officer 320 ITR 414 the Hon'ble High Court held that the bye-laws themselves provided for non-occupation charges. The contribution, therefore, was by the members for the purpose of mutual benefit. The object of the contribution was the purpose of increasing the society's funds, which could be used for fulfilling the objects of the society. The object of the society was to provide service, amenities and facilities to its members. In these circumstances, the principle of mutuality would apply and therefore non-occupancy charges were not taxable. In our opinion the case of the assessee case is squarely covered by the aforesaid decision. We, therefore, respectfully following the decision of the Jurisdictional High Court delete the addition

of Rs.6,04,500/- on account of non-occupancy charges. The AO is directed accordingly.

8. Ground No. 5 is against the enhancement of assessment by the CIT(A) by rejecting the claim of the assessee u/s 80(P)(2)(d) of the Act of Rs. 14,88,107/- being interest on deposits with other Coop. Societies being Coop. Banks.

8.1 The brief facts of the case are that the assessee had claimed deduction u/s 80P(2)(d) of the Act in respect of interest of Rs. 14,88,107/- on fixed deposits with Coop. Banks. The AO allowed the said deduction as claimed by the assessee however the CIT(A) enhanced the assessment by rejecting the claim of the assessee by following the decision of the coordinate Mumbai bench in the case of Shiv Samrudhi Co-operative Housing Society in ITA No 1073/Mum/2012.

8.2. The Ld AR submitted before us that if the gross total income of Co-operative Society income includes any income by way interest and dividend on deposits eoyh other Coop. Societies including Co-operative Banks , then the said Co-operative Society would be entitled to deduction u/s 80P(2)(d) of the Act of the whole amount received as interest/dividend. The ld. Counsel submitted that the assessee is a Co-operative Society and during the year it earned interest on deposits with Co-operative

Banks and therefore same was rightly claimed as exempt u/s 80(P)(2)(d) of the Act. The Id. Counsel distinguished the facts of its case from that of Shiv Samrudhi Co-operative Housing Society in ITA No 1073/Mum/2012 relied upon by the CIT(A) by submitting that the Tribunal while passing the said order relied on the decision of Hon'ble Supreme Court in the case of Totagar's Co-operative Sale Society Ltd Vs ITO 322 ITR 283 and held that the interest income from the short term deposits and securities not immediately required in the business of the assessee is assessable under the head 'Income from Other Sources' and no deduction U/S 80P(2)(a)(i) of the Act is allowable. Thus the said decision was delivered by the Hon,ble Apex Court on the provisions of section 80(P)(2)(a)(i) of the Act . The Id. AR also argued that the criteria of claiming deduction u/s 80(P)(2)(a)(i) is totally different from that of provisions of section 80(P)(2)(d) of the Act. The Id. Counsel drew distinction between two provisions of the Act by submitting that provisions of section 80(P)(2)(a)(i) are applicable to a assessee carrying on the business of banking or credit facilities to its members. The Id Counsel for the assessee further submitted that the Hon'ble Supreme Court had specifically mentioned that the decision in the present case confined to the facts of the said case. Whereas ,on the other hand, in order to claim deduction u/s 80(P)(2)(d) of the Act the only condition is that the assessee should be co-operative society and it has interest income accrued from the investment with other co-operative society including co-operative bank which is included in or part of the

gross total income. It was argued that the pre-condition for claiming and allowing deduction u/s 80P(2)(a)(i) is that it should be assessable under the head "Income from business" and not as income assessable under the head "Income from Other Sources" whereas the position is different for the purpose of 80(P)(2)(d) of the Act i.e. the assessee should be Coop. Society and it should have income by way of dividend and interest on deposits with other Coop. Societies including banks and the heads of income under which the income is assessable are immaterial for the purpose of claiming the deduction under this section. The Id AR submitted that, therefore, the principle laid down by the Hon'ble Supreme Court in the above decision is not applicable to the assessee's case as the said decision was on different provisions and therefore, the said judgement is distinguishable on facts and not applicable to the assessee. The Id. Counsel strongly relied on the decision of the Hon'ble High Court of Himachal Pradesh in the case of CIT Vs. Kangra Co-operative Bank Ltd. (309 ITR 106) in which and the counsel further submitted that the decision relied upon by the Tribunal is distinguishable on the facts and circumstances and not applicable to the assessee. The counsel finally prayed that in view these arguments the income from other co-operative banks may kindly allowed by reversing the order of CIT(A). The Id. DR on the other hand relied on the order of the authorities below.

8.3 We have heard the rival submissions and perused the material on record. We find that the CIT(A) enhanced the income of the assessee by rejecting the deduction u/s 80P(2)(d) of the Act of Rs.14,88,107/- being interest on investment with other Coop. banks by following the decision in the case of Bandra Samruddihi Co-operative Housing Society Ltd.(Supra) which was passed on the basis of the decision passed by the Hon'ble Supreme Court in the case of Totagar's Co-operative Sale Society Ltd. In the case of Totagar's Co-operative Sale Society Ltd v/s ITAT (supra) the Hon'ble Supreme Court while interpreting the section 80P(2)(a)(i) of the Act held that surplus funds not immediately required in the business and invested in the short term deposit would be assessable under the head "income from other sources" where the Co-operative society is engaged in carrying on business of banking or providing credit facilities to its members and consequently no deduction is allowable u/s 80P(2)(a)(i) of the Act. Whereas in the case before us the issue is whether a co-operative society which has derived income on investment with cooperative banks is entitled to deduction u/s 80P(2)(d). The provisions of Section 80P(2)(d) of the Act provide deduction in respect of income by way of interest or dividend on investments made with other Cooperative society. For the purposes of better proper understanding of these two provisions the relevant extract of the section are reproduced below:

80P: Deduction in respect of income of co-operative Societies.

1. *Where, in the case of an assessee being a co-operative society, the gross total income, includes any income referred to in sub-section (2), there shall be deducted, in accordance with and subject to the provisions of this section, the sums specified in sub-section (2), in computing the total income of the assessee.*
2. *The sums referred to in sub-section (1) shall be the following, namely:-*
 - (a) *In the case of a co-operative society engaged in-*
 - (i) *Carrying on the business of banking or providing credit facilities to its members.*
The whole of the amount of profits and gains of business attributable to any one or more of such attributes.
 - (d) *In respect of any income by way of interest or dividends derived by the co-operative society from its investments with any other co-operative society, the whole of such income.”*

From the close perusal of the provisions of u/s 80P(2)(a)(i) and 80P(2)(d) it is clear that the former deals with deduction in respect of profits and gain of business in case of the co-operative society carrying on business of banking or providing credit facilities to its members if the said income is assessable as income from business whereas latter provides for deduction in respect of income by way interest and dividend derived by assessee from its investments with other cooperative society. Thus it is amply clear that a cooperative society can only avail deduction u/s 80P(2)(d)(i) in respect of its income assessable as business income and not as income from other sources if it carries on business of the banking or providing credit

facilities to its members and has income assessable under the head business whereas for claiming u/s 80P(2)(d) it must have income of interest and dividend on investments with other Co-operative society may or may not be engaged in the banking for providing credit facilities to its members and the head under which the income is assessable is not material for the claim of deduction under this section. Now will evaluate the assessee's case in the light of the decision of the Hon'ble Supreme court. The Honble Supreme Court in the case of Totagar's Co-operative Sale Society Ltd.(Supra) held that a society has surplus funds which are invested in short term deposits where the society is engaged in the business of banking or providing credit facilities to its members in that case the said income from short term deposits shall be treated and assessed as income from other sources and deduction u/s 80(P)(2)(a)(i) would not be available meaning thereby that deduction u/s 80(P)(2)(a)(i) is available only in respect of income which is assessable as business income and not as income from other sources. Whereas in distinction to this , the provisions of section 80(P)(2)(d) of the Act provides for deduction in respect of income of a coop society by way of interest or dividend from its investments with other coop society if such income is included in the gross total income of the such coop society. In view these facts and circumstances we are of the considered view that the assessee is entitled to the deduction of Rs. 14,88,107/- in respect of interest received/derived by it on deposits with coop. banks and

therefore the appeal of the assessee is allowed by reversing the order of the CIT(A). The AO is directed accordingly.

In the result, the assessee's appeal is allowed.

Order pronounced in the open court on 15th January, 2016

Sd/-
(Shailendra Kumar Yadav)
न्यायिक सदस्य / Judicial Member

Sd/-
(Rajesh Kumar)
लेखा सदस्य / Accountant Member

मुंबई Mumbai; दिनांक Dated : 15.01.2016

Ps. Ashwini Gajakosh

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT – concerned
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard File

आदेशानुसार/ BY ORDER,

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