**IN THE INCOME TAX APPELLATE TRIBUNAL**
**MUMBAI BENCHES " B ", MUMBAI**

**BEFORE SHIRI G.E. VEERABHADRAPPA, HON'BLE PRESIDENT**
**AND SHRI AMIT SHUKLA, JUDICIAL MEMBER**

**ITA No. : 3516/Mum/2011**
Assessment Year : 2006-07

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| The ITO-16(1)(2),<br>Matru Mandir,<br>Mumbai-400 007 | Vs. | M/s. New Gulistan CHS Ltd.<br>13, Carmichael Rd,<br>Mumbai-400 026<br><br>**PAN NO: AAAAN 1756 F** |
| (Appellant) | | (Respondent) |

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| Appellant by | : | Shri S. K. Mohanty |
| Respondent by | : | Shri M. D. Pandya |
| | | |
| Date of hearing | : | 29.02.2012 |
| Date of Pronouncement | : | 07.03.2012 |

**<u>O R D E R</u>**

**<u>PER AMIT SHUKLA (J.M.) :</u>**

The present appeal has been filed by the Department against order dated 23.01.2009 passed by the learned CIT(Appeals)-28, Mumbai for the quantum of assessment for the Assessment Year 2006-07, mainly on two grounds of appeal which are reproduced below :-

> *"1. The Ld. CIT(A) erred in deleting the addition on account of transfer charges of ₹.25,45,000/- following the decision of Hon'ble High Court of Bombay in the case of M/s. Suprabhat CHS and SIND CHS wherein it has been held that all amounts received by the CHS on the grounds of transfer charges are exempt under the principle of mutuality. The decision has not been accepted by the Department and the issue is sub-judice.*
>
> *2. The Ld. CIT(A) has erred in deleting the addition on account of non-occupancy charges of ₹.48,000/- following the*

*decision of Hon'ble ITAT Special Bench decision in the case of Walkeshwar Triveni and Grand Paradi CHS wherein it has been held that non-occupancy charges taken from members who have let out their flats is exempt under principle of mutuality. The decision has not been accepted by the Department and the issue is sub-judice."*

2. The facts in brief are that the appellant is a Co-operative Housing Society having income from activities of society and also from other sources. During the course of assessment proceedings, the Assessing Officer noted that the assessee has collected a sum of ₹.25,45,000/- by way of transfer premium and contribution towards the common amenity fund from eight (8) members by the society during the year. This receipt was directly taken to balance sheet without crediting to the income and expenditure account. He added the entire sum of ₹.25,45,000/- collected from four outgoing as well as four incoming members as transfer fees for allowing them transfer the four flats which they had purchased and sold in their names, on the ground that this amount was taxable as the principle of mutuality do not apply. He after relying upon the judgment of Special Bench of Mumbai ITAT in the case of **Walkeshwar Triveni Co-op. Housing Soc. Ltd. VS. ITO** reported in **(2004) 267 ITR (AT) 86 (Bom) (SB)** held that this amount of transfer fees taken in excess of ₹.25,000/- was taxable income.

3. The learned CIT(Appeals) after relying upon the judgment of Hon'ble Jurisdictional High Court in the case of **Sind Co-operative Housing Society vs. ITO** reported in **(2009) 317 ITR 47 (Bom),** wherein it was held that the contribution of incoming and outgoing members of the society received as a transfer fee are exempt under the principle of mutuality and, therefore, deleted the addition of ₹.25,45,000/-.

4. Both the parties fairly agreed that the issue is squarely covered by the judgment of the Hon'ble Jurisdictional High Court in the aforesaid case.

5. After carefully considering the judgment of Hon'ble Jurisdictional High Court in the case of **Sind Co-operative Housing Society vs. ITO** (supra), we find that the issue is squarely covered by the said judgment, wherein on the following facts the Hon'ble High Court observed and held as under :-

> *"The assessee, a co-operative housing society, was registered with the object principally of looking after the property including building(s) thereon. The bye-laws of the assessee permitted it to charge a transfer fee in terms of the notification issued by the Government of Maharashtra. Bye-law 38(3)(ix) provided that the assessee can charge transfer fee and the members by adopting the bye-laws agreed, amongst themselves, that a fee for transfer of flat/-tenement when it was sold would be paid to the assessee. Both the incoming or the outgoing member had to contribute to the common fund of the assessee. The amount paid was to be exclusively used for the benefit of the members as a class. The amount could only be appropriated on the transferee being admitted as a member. If the transferee was not admitted as a member, the amount received would have to be refunded, as the amount was payable only on a transfer of rights of the transferor in the transferee. The amount legally chargeable and received went into the fund of the assessee which was utilized for the repairs of the property and common benefits to its members. On appeal contending that the Tribunal overlooked the principle while holding that contribution by the transferee would not attract the principle of mutuality :*
>
> *Held, allowing the appeal, (i) that whether the fee was voluntary or not would make no difference to the principle of mutuality. Payments were made under the bye-laws of the assessee which constituted a contract between the assessee and its members which was voluntarily entered into and voluntarily conducted as a matter of convenience and discipline for running of the assessee-society. If any amount was received more than was chargeable under the bye-laws*

> *or the Government notification, the assessee was bound to repay the amount and if it retained the amount it would be in the nature of profit making that specific amount exigible to tax. Under the bye-laws, charging of transfer fees had no element of trading or commerciality. Since there was no taint of commerciality the question of earning profits would not arise when the assessee from the funds received applied the moneys received towards maintenance of the society and providing the members with usual privileges, advantages and conveniences. Thus, the principle of mutuality was applicable to the assessee which had as its predominant activity, the maintenance of the property of the society which included its building(s) and as long as there was no taint of commerciality, trade or business, the receipt of transfer fees was not liable to tax."*

5.1 The aforesaid judgment has been further followed by the Hon'ble Bombay High Court in the case of **Mittal Court Premises Co-operative Society Ltd. vs. ITO** reported in **[2010] 320 ITR 414 (Bom)**.

5.2 Thus respectfully following the aforesaid judgments the addition of ₹.25,45,000/- as deleted by the learned CIT(Appeals) is affirmed and the ground raised by the department stands dismissed.

6. The second issue relates to the addition of ₹.48,600/- made on account of non-occupancy charges. The Assessing Officer held that this amount is taxable as the same and do not come within the purview of principle of mutuality for the reasons given in the assessment order.

7. The learned CIT(Appeals) following the judgment of Hon'ble' Special Bench of ITAT Mumbai in the case of **Walkeshwar Triveni Co-op. Housing Soc. Ltd. VS. ITO** (supra) and also in the case of **ITO vs. Grand Co-operative Housing Society Ltd.** deleted the addition.

8. Both the parties fairly agreed that the issue stands covered by the Special Bench of ITAT Mumbai Bench in the aforesaid case. After going

through the judgment and considering the reasoning given by the Assessing Officer, we find that this issue is squarely covered by the judgment of Hon'ble' Special Bench of ITAT Mumbai in the case of **Walkeshwar Triveni Co-op. Housing Soc. Ltd. VS. ITO** (supra). Further this issue has been further affirmed by the Hon'ble Bombay High Court in the case of **Mittal Court Premises Co-operative Society Ltd. vs. ITO** reported in **(2010) 320 ITR 414**, wherein it was observed and held as under :-

> *"(ii) That the bye-laws themselves provided for non-occupation charges. The contribution, therefore, was by the member. The object of the contribution was the purpose of increasing the society's funds, which could be used for the object of the society. The object of the society was to provide service, amenities and facilities to its member. In these circumstances, the principle of mutuality would apply. The non-occupancy charges were not taxable."*

9. Thus respectfully following the above judgments, the addition on account of non-occupancy charges of ₹.48,600/- as deleted by the learned CIT(Appeals) stands affirmed and the ground raised by the department is dismissed.

10. In the result, the appeal filed by the Department is dismissed.

Order pronounced on this 7th day of March, 2012.

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| Sd/- | Sd/- |
| **( G. E. VEERABHADRAPPA )**<br>**PRESIDENT** | **( AMIT SHUKLA )**<br>**JUDICIAL MEMBER** |

MUMBAI, Dt: 07.03.2012

Copy forwarded to :

1. The Appellant,
2. The Respondent,
3. The C.I.T.
4. CIT (A)
5. The DR, B - Bench, ITAT, Mumbai

//True Copy//

BY ORDER

ASSISTANT REGISTRAR
ITAT, Mumbai Benches, Mumbai

Roshani