IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH 'C', MUMBAI

BEFORE SHRI D. KARUNAKARA RAO, ACCOUNTAT MEMBER AND
SHRI VIVEK VARMA, JUDICIAL MEMBER

I.T.A.NO. 6295/M/2011 (AY: 2003-2004)
I.T.A.NO. 6296/M/2011 (AY: 2002-2003)
I.T.A.NO. 6297/M/2011 (AY: 2004-2005)

M/s. Oval Shiv Shanti Bhuvan Coop. Hsg. Soc. Ltd., 146, Maharshi Karve Road, Churchgate reclamation , Mumbai – 400 026. **PAN:AAAAO0030B**	Vs.	ITO-12(3)(3), Aayakar Bhavan, M.K. Marg, Mumbai – 400 020.
(Appellant)		(Respondent)

Appellant by	:	Shri Dr. K. Shivaram & Rahul K Hakani
Respondent by	:	Shri Om Prakash Meena, DR

Date of Hearing: 6.11.2012 **Date of order: 9.11.2012**

O R D E R

Per D. KARUNAKARA RAO, AM:

There are three appeals under considered. All the three appeals are filed by the assessee for the assessment years 2002-2003, 2003-2004 and 2004-2005 against the different orders of the CIT (A)-23, Mumbai.

2. The grounds raised are identical in all the appeals for the said three assessment years and they revolve around the applicability of **'principle of mutuality'** in respect of voluntary contributions received from the incoming /outgoing members of the Cooperative Housing Society, the assessee.

3. Before us, at the outset, Ld Counsel for the assessee brought to our notice a preliminary issue relating to delay in filing appeal. In this regard, assessee referred to the prayer for condonation of delay of the appeal and the delay is 401 days. In this regard, Ld Counsel mentioned that the assessee erroneously filed the present appeal before CIT(A) instead of before the ITAT. In this regard, Ld AR for the

assessee referred to the letter dt 4.8.2010 addressed to the Asst Registrar, ITAT, Mumbai but filed erroneously before the CIT(A), Mumbai. In this regard, he brought our attention to the proof of filing of appeals erroneously before the CIT (A) on 4.8.2010 (page 9 of the paper book). Further, Ld Counsel also brought to our notice a letter of the CIT (A) addressed to the assessee dated 23.8.2011 **returning** the said appeal papers to the assessee informing the mistake that crept in filing of the appeal before the CIT (A) instead of before the Tribunal. Ld Counsel mentioned that if the date of filing of appeal erroneously before the CIT (A) i.e. 4.8.2010 is considered, the same is in time and the mistake of filing the appeals before the CIT (A) is inadvertent, therefore, assessee has a **reasonable cause** which is apparent from the correspondence cited above. Otherwise, the order of CIT (A) dated 17.5.2010 was received by the assessee on 7.6.2010 and in that case due date for filing of appeal is much later after 4.8.2010.

4. We have considered the facts mentioned above and perused the evidences filed by the assessee before us. It is noticed that the CIT (A) erroneously accepted the appeal papers and having accepted the said papers, the same were returned to the assessee after expiry of **one year** as evident from the covering letter dated 23.8.2011. In our opinion, assessee has a reasonable cause for delay in filing the appeal belatedly. Accordingly, the request for condonation of delay of 401 days is **allowed**.

5. Further, on the merits, Ld Counsel for the assessee narrated the facts that lead to the denial of the benefits of the 'principle of mutuality'. In this regard, Ld counsel mentioned that the assessee is Residential Cooperating Housing Society and the members of the society makes voluntary contributions at the time of sale or purchase of flats of the society. By this way, the assessee received different sums in all these three assessment years (AY 2002-2003, 2003-2004 and 2004-2005) from the members of the society, who are either the incoming or outgoing members or both of the assessee's society and those amounts are voluntary contributions. AO taxed the said amount as taxable income by not granting the benefits of the '*principle of the mutuality'* and the CIT (A) confirmed the said decision of the AO in

his *ex-parte* order. The matter travelled to the Honble Tribunal and the appeal was set aside to the files of the CIT (A) for deciding the issue afresh. In the remand proceedings, CIT (A) confirmed the additions made by the AO except allowing the assessee to the tune of Rs. 25,000/- as per the Government Notification dated 9.8.2001.

6. With the above background of the issue, before us, Ld Counsel for the assessee submitted that the said voluntary contributions received from the incoming / outgoing members are for the welfare of Housing Society; hence, these amounts are covered by the 'principle of mutuality'. Further, Ld Counsel relied on various decisions to take strength in support of his claim that these amounts are not taxable. To start with the Ld Counsel referred paras 9 to 12 in the order of the Tribunal in ITA No.521/Mum/2010, dated 27.8.2010 for the proposition that the voluntary contributions by way of transfer fee is covered by the 'principle of mutuality' and the relevant paras from the order of the Tribunal are reproduced here under:

> "*9. With regard to the* ***transfer fee and voluntary contribution****, we find merit in the plea of the Ld Counsel for the assessee that the issue stands covered in favour of the assessee by the decision of the Hon'ble Jurisdictional HighCourt in Sind Cooperative Housing society vs. ITO (2009) 317 ITR 47 (Bom.) wherein it has been held (at placitum 44 to 46 at page 62,63 of the ITR) as under:*
>
> *"Let us new apply the various tests which are to be considered for applying the principle of mutuality to a case of cooperative housing society based on our earlier discussion.*
> *(1) Is there any commerciality involved? This has to be found from the bye-laws of the cooperative housing society. In the case of the cooperative housing society, admittedly,* ***there is no commerciality involved.*** *Once there is no commerciality involved the first test of profitability does not exist. The first requirement of mutuality is, therefore, met.*
> *(2) From the moneys received are the services offered in the nature of profit sharing of privileges, advantages and conveniences.*
> *In the case of a cooperative housing society, the only activities which it can carry out in terms of its bye-laws are basically maintenance of its property which includes building or buildings. The subscription and/or contributions received by the members can only be expended for the purposes of maintenance and providing other privileges,*

advantages and conveniences to its members in terms of its bye-laws. Another test of mutuality is thus satisfied.

(3) Are the participants and contributors identifiable and belong to the same class in the case of cooperative housing society.

The class of members is clearly identifiable. Members are ordinary members or associate members. The participants and contributors are the members. The members may come in or go out. The fact that only some members from those who contributed may participate in the surplus, as held by the Supreme Court, is irrelevant as long as the class is identifiable. This test is also satisfied in the case of a housing cooperative society.

(4) Do the members have the right to share in the surplus and do they have a right to deal with its surpluses.

In terms of the byelaws it is only the members who have a right to share in the surplus. Under the Maharashtra Cooperative Societies Act, no part of the funds, as provided in section 64 can be paid by way of bonus or dividend or otherwise distributed among its members except as provided therein. Under section 67, there is a limit on the dividend to be paid on liquidation. ***Under section 110 of the Maharashtra Cooperative societies Act*** *the surplus can only be dealt with in the manner provided therein which includes any member or devoted to objects provided by the bye-laws or be transferred to another society with similar object. Rule 90 of the rules provide how the surplus is to be divided. The surplus thus can be distributed in terms of the bye-laws to members and/or by operation of law to another society having the same objective. In other words, yet* ***another test of mutuality is satisfied****.*

Once these tests are satisfied, in our opinion, there can be no doubt that the principle of mutuality will apply to a cooperative housing society which has as its predominant activity, the maintenance of the property of the society which includes its building or buildings and as long as there is no taint of commerciality, trade or business.

For all the aforesaid reasons, the questions as framed will have to be answered in favour of the assessee and against the Revenue."

*10. The above decision has been followed by Their Lordships in Shyam Cooperative Housing Society Ltd. vs. CIT in Income Tax Appeal Nos. 92, 93 and 206 of 2008 dated 17.7.2009 wherein on the question "****whether fee received by the assessee societies – whether on the facts and in the circumstances of the case any part transfer outgoing or incoming members – is not liable to tax on the ground of mutuality?"*** *It has been held as under:-*

"In the Income Tax Appeal No.92, 93 and 206 of 2008 in addition it is submitted that the demands are in respect of the assessment years 1999-2000, 2000-2001, 2001-2002. The transfer

premium was charged based on the Government circular dated 27.11.1989 and 20.12.1989. It is submitted that clause 40(d)(7) of the Model bye laws drafted on 2.7.2001 and the circular dated 9.8.2001 were therefore, not applicable to the case of the appellant.

By our judgment dated 17th July, 2009 in Income Tax Appeal No.931 of 2004 in the case of Sind Cooperative Hsg. Society vs. ITO, we have held that both contributions by the outgoing and incoming members are subject to principle of mutuality. ***We have also discussed the effect of the Government Circular dated 27.11.1989 and 20.12.1989.*** *In the light of that, the question has to be answered in the affirmative in favour of the assessee and against the Revenue."*

11. Similar view was taken by Their Lordships in Su Prabhat Cooperative Housing Society Ltd. vs. ITO in Income Tax Appeal No. 1972 of 2009 wherein on the questions of law.

1) Whether on the facts and circumstances of the case the appellate Tribunal was right in coming to the conclusion that the principle of mutuality does not apply to various amounts received by the appellant?
2) Whether on the facts and circumstances of the case, the sum of Rs. 7,44,000/- received from its members is liable to be taxed as income of the appellant?
3) Whether on the facts and circumstances of the case, the sum of Rs. 20,695/- received as interest is liable to be taxed as income of the appellant?"

It has been held:

5. Both parties agree that the aforesaid three questions are covered by the judgment of the Division Bench of this Court dated 17th July, 2009 in Income Tax appeal No.931/2004 (Sind Cooperative Hsg. Society vs. ITO) reported in (2009) 26 DTR (Bom) 149. Accordingly, all the three questions are answered in favour of the assessee and against the Revenue. Appeal is disposed of in terms of this order with no order as to costs."

12. ***In the absence of any other contrary decision*** *placed on record by the revenue and keeping in view that the decision relied on by the Assessing Officer in CIT vs. Presidency Co-operative Housing Society Ltd. (1995) 216 ITR 321 (Bom) has already been considered and distinguished by Their Lordships in the case of Sind Cooperative Housing Society (supra), by observing that the issue of mutuality was neither argued nor considered, we respectfully following the decision of the Hon'ble jurisdictional High Court hold that the amount received by the assessee are subject to principle of mutuality and accordingly*

> *we are inclined to uphold that the finding of the Ld CIT (A) in deleting the addition made by the Assessing Officer."*

7. There are other decisions as well to demonstrate above approach of the law. From the above it is evident that the Coordinate Bench taken a decision in the case of M/s. Grand Paradi CHS Ltd. vide ITA No.521/M/2010, dated 27.8.2010, which was not available with the CIT (A) at the relevant point of time. While deciding the case in favour of the assessee, the Tribunal has followed the judgment of the **Hon'ble jurisdictional High Court** in the case of *Sind Co-operative Housing Society vs. ITO (2009) 317 ITR 47 (Bom.) and Shyam Cooperative Housing Society Ltd.* vs. CIT in Income Tax Appeal Nos. 92, 93 and 206 of 2008 dated 17.7.2009 which decided the question *"whether fee received by the assessee societies –whether on the facts and in the circumstances of the case any part transfer **outgoing or incoming members** – is not liable to tax on the ground of **mutuality**?"* and the said issue was decided in favour of the assessee in the above cases. The judgment of Hon'ble Bombay High Court in the case of CIT vs. Presidency Cooperative Housing Society Ltd. (1995) 216 ITR 321 (Bom.) which was relied upon by the Revenue was **distinguished** as evident from para 12 of the above extracted portion.

8. Thus, the issue is now settled that the transfer fee contributed voluntarily by the income/outgoing member of the society at the event of transfer of the flats, to the society is covered by the principle of mutuality. Considering the above settled nature of the issue at the level of Hon'ble jurisdictional High Court, we are of the opinion that the grounds raised by the assessee in all the three appeals stand covered in favour of the assessee. Accordingly, relevant grounds of the assessee's appeal are **allowed** for all three years.

9. The alternative grounds raised without prejudice become academic issues and therefore, are not required to be adjudicated considering the relief granted to the assessee on the main argument itself. Accordingly, grounds raised without prejudice are dismissed as academic.

10. In the result, the appeals filed by the assessee are **partly allowed**.

Order pronounced in the open court on this 9th day of November, 2012.

Sd/-	Sd/-
(VIVEK VARMA)	(D. KARUNAKARA RAO)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Date : 9 .11.2012
At :Mumbai
Okk

Copy to :

1. *The Appellant.*
2. *The Respondent.*
3. *The CIT (A), Concerned.*
4. *The CIT concerned.*
5. *The DR "C", Bench, ITAT, Mumbai.*
6. *Guard File.*

// True Copy//

By Order

Assistant Registrar
ITAT, Mumbai Benches, Mumbai