* **THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 1st July, 2010

\+ ITA No.744/2010

Commissioner of Income Tax, Delhi - VII ..... Appellant
Through: Ms.Sonia Mathur, Advocate

versus

M/s Talangang Coop. Group Housing
Society Ltd. ..... Respondent
Through: None

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE MANMOHAN

1. Whether reporters of the local papers be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

DIPAK MISRA, CJ

This is an appeal under Section 260A of the Income Tax Act, 1961 (for brevity 'the Act') assailing the order dated 15th May, 2009 in ITA No.779/Del/2006 passed by the Income Tax Appellate Tribunal, New Delhi (for short 'the tribunal') whereby the tribunal allowed the appeal preferred by the assessee in part.

2. The factual matrix as is discernible is that the assessee filed the return of income for assessment year 2001-2002 on 7th February, 2003 declaring a loss of Rs.5,48,075/-. The case was selected for scrutiny and accordingly notices were issued under Sections 143(2) and 142(1). The assessee, a cooperative society, produced the books of accounts, the bank passbooks, the bills and vouchers and such other documents as required by the assessing officer. The assessing officer

on the basis of a report submitted by the DDIT Unit-I, Delhi and the information gathered by the auditors of the assessee society proceeded to finalise the assessment.

3. Before the assessing officer the assessee claimed exemption on the principles of mutuality. The assessing officer referred to the principles laid down in ***CIT v. Royal Western India Turf Club*** (1953) 24 ITR 551 (SC), ***Chelmsford Club v. CIT*** (2000) 243 ITR 89, ***Haryana State Co-operative Labour and Construction Federation Ltd. v. CIT*** (2001) 252 ITR 265 (P&H) and culled out the principle that a cooperative group society is not exempt from filing its return nor from income derived from other than constructional activities. After culling out the principle, the assessing officer referred to the letter dated 19th September, 2001 filed by the Administrator appointed by the Government of Delhi, scanned the objects of the society and opined that the primary activity of the assessee society is to collect money from members for construction of flats/houses and subsequently allot the same to them. It further observed the money can be collected under various heads and the money collected on all heads cannot be exempted except constructional activities. In this backdrop, she expressed the view that the equalization charges from new members, maintenance fund and entry fee from power of attorney holders, interest on delayed payments and interest from banks on FDRs were taxable. Quite apart from the above, the assessing officer took note of the fact that the assessee had sold six shops during the assessment year 2000-2001 and certain amount had been spent on construction of the shops. The assessing officer held that this did tantamount to commercial activity which is not objects of the society. Thus, it is held by the assessing officer that the difference between the sale price and the construction price is to be treated

as income as short term capital gains of the assessee for the assessment year 2001-2002. The amount spent on purchase of dustbins for the garden maintenance was treated as capital nature and assessed as the same. As far as the receipt of interest is concerned, the assessing officer came to hold that for the relevant assessment year the assessee had shown interest receivable from the members and not being incorporated in account and as the assessee was following the mercantile system, it was treated as income. Being of this view, the assessing officer added Rs.27,13,797/- towards income and deducted Rs.50,000/- under Section 80P. In addition to the same, interest under Section 234 B was charged and a proceeding under Section 271(1)(c) for imposition of penalty was initiated.

4. Being grieved and dissatisfied, the assessee preferred an appeal before CIT(A) and contended that the conclusion arrived at by the assessing officer was totally unjustified, violative of principles of natural justice and against the concept of mutuality as is understood in law. It was also contended that the order passed by the assessing officer was perverse inasmuch as she has not appreciated the facts in proper perspective. The appellate authority held that no exemption from taxation of the income of the society was available as there was no obligation on the part of the society to return the funds to the contributors; that the society had constructed the shops as a business venture and had admitted to derive profit out of the venture; that the society instead of maintaining the entire premises belonging to the society for the common benefit of its members had indulged in accepting new members on power of attorney basis and as a consideration for the same had collected equalization charges and maintenance fund as entry fee in the name of external development charges and hence, the concept of equalization was not to be applicable. The assessee put forth the claim that the shops had been

constructed by the society for the benefits of its members / residents within the complex of the society to meet the daily needs of the members of the society. No sanction letter from the Municipal Corporation of Delhi was furnished to validate such construction of shops within the complex of the society and there was a profit motive for which considerations had been duly received and, therefore, with the transfer of capital assets within the meaning of Section 2(47)(v) of the Act, short term capital gain was consequent within the meaning of Section 45 of the Act and, therefore, the addition by the assessing officer cannot be faulted; that the purchase of the dustbins and the purchase of benches having been identified as capital expenses by the auditors the finding of the assessing officer treating the said expenses as capital in nature cannot be faulted; that the amount receivable from the members having been quantified by the auditors as interest receivable from the members which had not been accounted for by the assessee and the maintenance of accounts was under mercantile system, the same should have been provided in the accounts for the year under consideration and thus the addition was justified; and that the charge of interest under Section 234 B being consequential, no interference was called for. Being of this view, the appellate authority dismissed the appeal.

5. Aggrieved by the aforesaid order of the appellate authority, the assessee approached the tribunal in second appeal. The tribunal noted the submission of the assessee and that of the revenue and placing reliance on ***Shree Parleshwar Co-op. Housing Society Ltd. v. ITO, Ward 21(2)(4), (Mum)*** [2006) 8 SOT 668 (Mumbai) came to hold that once it is accepted that principle of mutuality is applicable inasmuch as the object of the society as enumerated under clause 8 goes a long way to show that the assessee society could do all such things which are

incidental or conducive to attain or any or all of the other objects and the clauses of the bye laws pertaining to development and construction of residential houses / flats for the members to provide common amenities and facilities as may be found practicable by the Delhi Development Authority and Municipal Corporation of Delhi and such other authorities and, therefore, the doctrine of equalization gets attracted; the maintenance fund and entry fee from the power of attorney holders are in direct relation with the members of the society and the funds are also collected from the members of the society and the shops having been constructed within the premises of the society having been approved by the concerned government authority it could be irresistibly concluded that the shops were constructed to cater to the needs of the members of the society only and no outside customer is allowed in the complex of the society and there has been necessary sanction for construction of such buildings, therefore, principles of mutuality would also get attracted to the same; that as regards the issue of interest the principles of mutuality would also apply as it is receivable from the members of the society. As regards the capitalization of cost of purchase of the dustbins and benches, the assessing officer was directed to grant depreciation on the capitalized amount as it is a capital expenditure. After so holding, the tribunal directed to delete the additions made out on account of equalization charges, maintenance funds as entry fee from the power of attorney holders, the interest receivable from the members of the society as also the income determined on account of the shops allotted and eventually allowed the appeal in part.

6. Ms. Sonia Mathur, learned counsel for the revenue submitted that the tribunal has grossly erred in applying the principle of mutuality though factual matrix did not so deserve. It is contended by her that the tribunal totally failed to

appreciate that interest income derived by the assessee cooperative society from the deposits made by it out of the contributions made by the members of the society could not come within the ambit and sweep of the principle of mutuality. It is her further submission that the tribunal has read the bye laws of the society in the larger expanse though it should have been read strictly that the principle of mutuality would only apply to the cost incurred for development in the matter relating to construction. It is proponed by Ms. Mathur that the society could not have constructed shops without proper sanction and that apart, this being a business activity, the doctrine of mutuality could not have been taken aid of by the society.

7. To appreciate the submissions raised by learned counsel for the revenue, we have carefully perused the order passed by the forums below. In this connection, we may refer with profit to the decision in ***Director of Income Tax (Exemptions) v. All India Oriental Bank of Commerce Welfare Society***, **(2003) 184 CTR (Delhi) 274**, wherein a Division Bench of this Court posed the question whether the judgment rendered by the apex Court in ***Chelmsford Club v. Commissioner of Income Tax***, **(2000) 243 ITR 89** would apply where the income earned on deposits made out of members and non-members contributions, donation and subscriptions are seggregable or not and dealing with the said question, answered the issue as follows:

> "3. The issue with regard to the concept and principle of mutuality has been elaborately examined by the apex Court in Chelmsford Club v. CIT (2000) 243 ITR 89. Their lordships have held that where a number of persons combine together contribute to a common fund for the financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus generated cannot in any sense be regarded as profits chargeable to tax. It has been observed that what is required to be seen is

> whether there is a complete identity between the contributors and participators. Once the identity of the contributor to the fund of the recipients of the funds; the treatment of the company, though incorporated as a mere entity for the convenience of the members, in other words as an instrument obtained to their mandate; and the impossibility that the contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves is established, the doctrine of mutuality is established."

8. In the case at hand, the tribunal has appreciated that a member who was registered earlier and the member who gets registered later on cannot stand on the same footing. The earlier member had paid less amount as compared to a member who joined subsequently but the same does not really affect the nature of the society or the transactions with such members and the principle of mutuality is still attracted. The character of the society, needless to say, cannot be said to have changed. As regards the activities of the society, the tribunal has held that the bye laws clearly and categorically stipulate that the assessee-society is entitled to do all such things which are incidental or conducive to attain any or all of the other objects. The clauses in the bye laws clearly exposit that it is for the development and construction of residential houses, flats for the members to provide the members necessary common amenities and facilities as may be found practicable by the DDA and the Municipal Corporation of Delhi and such other authorities and, therefore, the society, to cater to the needs of the members, have constructed the shops and no outside consumers are allowed to the complex of the society. The shops were built after obtaining proper certificate from the concerned engineer. In this factual matrix, the tribunal has held that the principle of mutuality would apply to the above income.

9. As regards the interest derived from the deposits made by the society out of the contributions made by the members of the society, the tribunal placing reliance on the decision in ***All India Oriental Bank of Commerce Welfare Society*** (supra) has expressed the view that once the identity of the contributor to the fund of recipients is accepted, the principle of mutuality would get attracted. It is also noticeable that there is nothing on record to show that the amount collected from the respondent has been diverted for any other purpose.

10. In view of the aforesaid analysis, we concur with the conclusion of the tribunal and accordingly the appeal stands dismissed *in limine*.

CHIEF JUSTICE

MANMOHAN, J.

JULY 01, 2010
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