IN THE INCOME TAX APPELLATE TRIBUNAL
BENCH 'C' NEW DELHI
ITA No.3383/Del/2009
Assessment Year: 2005-06
ASSISTANT DIRECTOR OF INCOME TAX (E)
TRUST CIRCLE II, NEW DELHI
Vs
HOLOGRAM MANUFACTURERS ASSOCIATION
50, ADHCHINI, SRI AUROBINDO MARG, NEW DELHI-17
PAN NO.AABCH7353K

I P Bansal, JM and Shamim Yahya, AM

Dated: September 9, 2011

Appellants Rep by: Shri P C Yadav, Adv. & Shri Rajesh Jain, FCA
Respondent Rep by: Shri Salil Mishra, Sr.DR

Income Tax - Section 2(24)(iia), 4, 28(iii) and - Whether once principle of mutuality is governed, voluntary contribution cannot be added as income of mutual association, under section2 (24)(iia) which is meant for association possessing 12A, whether provision of section 28(iii) are not applicable to the cases where an association could not provide any specific services to its members, whether provision of section 44A are applicable where there is deficit of income to meet the expenses of the mutual association Held- Appeal of the revenue is dismissed-

The assessee is a society registered with Registrar of Societies, Government of NCT, Delhi, and engaged in welfare of Hologram Industry through out the world against the piracy, for the impugned year it has received certain membership fee from its members which it has spent on organizing seminar aboard after meeting all the expenses there left certain surplus, beside this assessee had received certain amount towards corpus- AO taxed the surplus as income of the association under section 28(iii) and also taxed the corpus as income under section 2(24)(iia)- Before CIT(A) assessee explained that assessee is a mutual association and there was complete identity between contributors and participants- CIT(A) after verifying all the aspects allowed the appeal of the assessee- Before ITAT revenue contended that provisions of section 2(24)(iia) and 28(iii) are applicable to the facts of the case-On the other hands counsel for the assessee argued that none of these provisions would apply if principle of mutuality is not refuted by the AO-

After hearing the parties at length ITAT held as under:-

++As per the provisions of Section 28(iii), what is taxable as 'Profit and gains of the profession' is an income derived by a trade, professional or similar association from **specific services performed for its members**. It has been the case of the assessee that the amount received by it does not arise from specific services rendered to its members.

++The annual subscription received by it is in accordance with the clauses of Memorandum of Association and Rules and Regulations and the amount received by it in respect of international conference was in respect of interested members and it is not with respect to any specific services provided to the members on the basis of some cost. No material whatsoever has been brought on record by the revenue to show that any of the amount collected by it from its member was in respect of specific services performed by the assessee for its members. The words 'performing specific services' was also found place in Section 10(6) of 1922 Act (corresponding provisions was considered by Hon'ble Supreme Court in the case of *CIT vs. Calcutta Stock Exchange Association Ltd. (36 ITR 222)* and the relevant observations of their lordships from the said decision are as under….

++ If the aforementioned observations of their lordships are kept in mind, then, it will be clear that Section 28(iii) could not be invoked for the purpose of taxing the annual subscription received by the assessee from its members which is as per its Memorandum of Association and Rules and Regulations and receipts relating to subscription on account of international conference also could not be taxed under the provisions of Section 28(iii) of the Act.

++ Now, we come to the provisions of Section 2 (24) (iia) of the Act, which read as under:-

++ Now, the question will remain that whether surplus arrived at by the assessee of Rs.3,29,919/- is taxable or not. This has been held to be exempted by learned CIT (A) on the applicability of principle of mutuality. As pointed out earlier, it has not been the case of the assessee that its income is exempt as per the principle of mutuality as in the return of income it did not claim so. The computation of income filed by the assessee was on the basis of claim of charitable institution. The said claim of charitable institution has been rejected by the department, therefore, the income of the assessee has to be computed as per the other provisions of the Act which include Section 44A and if the department wants to assess the resultant income, then, it has to be computed under the normal provisions of the Act. Out of surplus of Rs.3,29,999/-, the amount earned by the assessee on FDRs of Rs.1,18,633/- is to be removed as the same, as per the provisions of Income-tax Act, is assessable under the head 'Income from other sources' and this has so been done by the assessee in the computation purported to be filed before the Assessing Officer, the copy of which has been placed at page 6 of the paper book wherein taxable income has been shown at Rs.1,18,630/-. The rest of the amount has been claimed by the assessee u/s 44A of the Act. In our opinion, Section 44A does not grant the exemption to the assessee with regard to the surplus shown by it being receipt excess of expenditure. It only describe that if such receipts fall short of expenditure, then, deduction regarding expenditure has to be allowed. But, in the present case, there is a surplus in the account of the assessee which exceed the expenditure. Therefore, if there is a surplus which cannot be claimed under the provisions of Section 44A of the Act. However, the resultant surplus is allowable on the basis of principle of mutuality as no material has been brought on record by the Assessing Officer to show that any of the receipt of the assessee pertains to non-members. Learned CIT (A) has deleted the addition on account of applicability of principle of mutuality and in the absence of any material having been brought on record by the revenue to show that any of the receipts of the assessee had arisen from non-members, we see no justification in interfering in the finding recorded by learned CIT (A). According to the decision of Hon'ble Delhi High Court in the case of *CIT vs. Delhi Gymkhana Club Ltd. (2011) 53 DTR 330* **= *(2011-TIOL-41-HC-DEL-***

IT) interest on FDRs has also been held to be covered by the doctrine of mutuality. Therefore, looking from any angle, we find no infirmity in the order of the CIT (A) vide which it has been held that no part of the income of the assessee is exigible to tax on the principle of mutuality. Finding no force in the departmental appeal, the same is dismissed.

Appeal of the revenue is dismissed.

ORDER

Per: I P Bansal:
This is an appeal filed by the assessee. It is directed against the order passed by the CIT (A) dated 1st May, 2009 for Assessment Year 2005-06. The grounds of appeal read as under:-
"1. On the facts and in the circumstances of the case, the learned CIT (A) has erred in considering and consequently holding that the status of the society is that of a mutual association, when, in the first place the assessee had claimed itself to be a charitable organization with it's objectives being for charitable purposes and in the event of claim having been found to be untrue the alternative plea taken for considering the society as a mutual association should not have been considered at all.
2. On the facts and circumstances of the case, the Ld. CIT (A) has erred in deleting the additions in respect of corpus donation at Rs.6,18,750/- and excess of income over expenditure at Rs.3,29,919/- because the same were duly taxable in view of the fact that registration u/s 12A was not available to the assessee.
3. The appellant craves leave for reserving the right to amend, modify, alter, add or forego any ground (s) of appeal at any time before or during the hearing of this appeal."
2. The assessee is a society registered at Sl. No. S-33947 of 1998 by the Certificate of Registration granted by Registrar of Societies, Government of NCT, Delhi, dated 1st December, 1998. Copy of certificate is filed at page 11 of the paper book. Copy of Memorandum of Association and Rules and Regulations are filed at pages 12-24 of the paper book. The activities of the society are stated in the assessment order by the Assessing Officer as under:-
"The Society is an association of Hologram Industries and working for anti piracy in security holograms, organizing seminar for facilitation of hologram industries and other related activities."
3. During the year under consideration, the assessee has shown surplus of income and expenditure at Rs.3,29,919/-. The receipts and expenses of the assessee are as under:-

Expenditure	Amount	Income	Amount
Exhibitions & Seminars	3,703	Annual Membership Fee Received	582,500
Meetings & Conference Expenses	58,922	Receipts for HP HP Prague 2004	842,552

Expenses on HP HP Prague 2004	815,998	Interest Received on Bank FDRs	118,633
Advertisement	26,700	HoMai Award Fee Recd.	29,138
Affiliation Fee	5,000		
Computer Expenses	4,836		
Office Expenses	84,998		
Telephone, Postage & Couriers	27,033		
Printing & Stationery	2,682		
Secretarial & Admin. Charges	180,000		
Auditors Honorarium	10,000		
Bank Charges	3,528		
Travelling & Conveyance	17,906		
Web site expenses	1,598		
Surplus	329,919		

4. Copy of computation of income has been filed at page 54 of the paper book which has shown net taxable income at Rs.94,000/-. The computation of income in the said computation is as under:-

COMPUTATION OF INCOME

Profits and Gains of Business or Profession				
Excess of Income over expenditure		0.00		
Income from Other sources				
Interest				
Bank Interest FDR Interest	118633.00	118633.00		
Voluntary Contributions/Donations				
Donation towards corpus fund	618570.00			
HoMai Entry Fee Recd.	29138.00			
Receipts for conference at Prague	842552.00			
Annual Membership fee recd.	582500.00	2072940.00	2191573.00	

Less : Deductions				
Others				
Corpus Fund eligible u/s 11 (1)(d)	618750.00	618750.00	618750.00	1572823.00
	Gross Total Income			1572823.00
	Total Income			1572823.00
	Rounded off as per Section 288A			1572823.00
				1572823.00
Less: Exemptions u/s 11 Set apart for the future			235923.45	
Amount applied for charitable or religious purposes Net Taxable Income			1242904.00	1478827.45
				94000.00

5. It may be mentioned here that another copy of computation of income is also filed by the assessee at page 6 of the paper book showing income therein at Rs.1,18,633/- which is interest received on FDR and in that computation the assessee had claimed the benefit of Section 44A but the said computation has not been described by the Assessing Officer in the assessment order and it may have been filed during the course of assessment proceedings.

6. The Assessing Officer initiated assessment proceedings against the aforementioned return filed by the assessee and has mentioned the fact that claim of the assessee regarding registration u/s 12AA was rejected by the Director of Income-tax (Exemptions) vide the order dated 8th May, 2007. He asked the assessee to explain as to why the corpus donation of Rs.6,18,650/- should not be treated as income being voluntary contributions u/s 2 (24) (iia) of the Act. In response, it was submitted that the said amount relates to membership granted to the members in terms of clause 12 of the Rules and Regulations and this represent various categories of members and this represent corpus fund as per terms of clause 14.2 of the Association. It was claimed that the association is governed by Section 44A of the Act, therefore, its income is not taxable. The Assessing Officer did not accept such claim of the assessee as, according to the Assessing Officer, the amount received by the assessee represent receipts u/s 28(iii) of the Income-tax Act, hence, are taxable. He, therefore, treated the amount of Rs.6,18,750/- being the amount received by the assessee from its members in respect of membership fee and also the surplus amount of Rs.3,29,919/- as income of the assessee and, in this manner, he has assessed the income of the assessee at Rs.9,48,669/- being aggregate sum of aforementioned two amounts.

7. Before CIT (A), it was claimed that the assessment made by the Assessing Officer was not called for as the amount of Membership fee received by the assessee could not be taxed as per principle of mutuality and so was the case with the interest earned on FDRs which is amounting to Rs.1,18,633/-. It was explained that the

amount of Rs.8,42,552/- was received by the assessee for a conference (HotoPack HoloPrint 2004) at Prague, Czechoslovakia during 16th to 18th November, 2004 and the said conference was organized at international level for the promotion of hologram industry. Since the assessee was working for the development of hologram industry in India it invited all members by e-mail and telephonically to participate in the conference at Prague and it is because of that in respect of the members visited the conference the amount was received which was an aggregate sum of Rs.8,42,542/- against which the expenditure was made at Rs.8,15,998/- giving a surplus of Rs.26,554/-. So far as it relates to applicability of Section 28(iii), it was submitted that none of the amounts was earned by the assessee by way of specific services extended to its members, therefore, Section 28(iii) had no application. The assessee claimed that the amounts received by the assessee were neither taxable u/s 28(iii) of the Act nor u/s 2(24)(iia) of the Act. It was submitted that the case of the assessee is governed by the principle of mutuality, as such, no part of the income of the assessee could be assessed. After considering all these submissions, learned CIT (A) had deleted both the additions, namely, of income excess over expenditure of Rs.3,29,919/- and the corpus donation in the shape of membership of Rs.6,18,750/-. The revenue is aggrieved, hence, in appeal and has raised the aforementioned grounds of appeal.

8. After narrating the facts, it was vehemently pleaded by the learned DR that the learned CIT (A) was wrong in considering the alternative claim of the assessee regarding principal of mutuality and on that basis he was totally wrong in granting the relief to the assessee, as, on that basis even the income returned by the assessee has not been looked into. He submitted that the case of the Assessing Officer rest upon the provisions of Section 28(iii). He submitted that the amount received by the assessee from its member was with regard to specific services rendered, hence, the same will fall within the ambit of Section 28(iii). He submitted that the assessee also could not claim the benefit of Section 44A. The assessee also was held not entitled for the benefit of registration u/s 12AA of the Act. Therefore, he pleaded that the assessee was to be assessed under the normal provisions of the Act and, therefore, the Assessing Officer was right in making the assessment and learned CIT (A) has wrongly deleted the addition.

9. On the other hand, relying upon the submissions made before the Assessing Officer and CIT (A) and also the findings recorded by the learned CIT (A), it is the case of the assessee that the relief has rightly been given to the assessee, therefore, the order of the CIT (A) should be upheld.

10. It may also be mentioned here that at the foremost the learned AR of the assessee has submitted that tax effect of the present appeal is less than Rs.3 lac, therefore, the departmental appeal should not be admitted in view of the recent Circular issued by the CBDT which is dated *9th February*, *2011 reported in 332 ITR 1 (St.).*

11. We have carefully considered the rival submissions in the light of the material placed before us. It is undisputed that the assessee has not been registered u/s 12A of the Act and, therefore, it cannot be considered eligible for the benefit granted by Section 11 of the Act. The assessee in its return of income had claimed that benefit only. Therefore, the claim of the assessee has to be considered de hors the claim made by it u/s 11 of the Act.

12. Before the Assessing Officer, it was the claim of the assessee that its income should not be considered to be taxable in view of Section 44A of the Act. To properly appreciate such contention of the assessee, it will be necessary to reproduce Section 44A of the Act:-

"Special provision for deduction in the case of trade, professional or similar association.

44A. (1) Notwithstanding anything to the contrary contained in this Act, where the amount received during a previous year by any trade, professional or similar association (other than an association or institution referred to in clause (23A) of section 10)] from its members, whether by way of subscription or otherwise (not being remuneration received for rendering any specific services to such members) falls short of the expenditure incurred by such association during that previous year (not being expenditure deductible in computing the income under any other provision of this Act and not being in the nature of capital expenditure) solely for the purposes of protection or advancement of the common interests of its members, the amount so fallen short (hereinafter referred to as deficiency) shall, subject to the provisions of this section, be allowed as a deduction in computing the income of the association assessable for the relevant assessment year under the head "Profits and gains of business or profession" and if there is no income assessable under that head or the deficiency allowable exceeds such income, the whole or the balance of the deficiency, as the case may be, shall be allowed as a deduction in computing the income of the association assessable for the relevant assessment year under any other head.

(2) In computing the income of the association for the relevant assessment year under sub-section (1), effect shall first be given to any other provision of this Act under which any allowance or loss in respect of any earlier assessment year is carried forward and set off against the income for the relevant assessment year.

(3) The amount of deficiency to be allowed as a deduction under this section shall in no case exceed one-half of the total income of the association as computed before making any allowance under this section.

(4) This section applies only to that trade, professional or similar association the income of which or any part thereof is not distributed to its members except as grants to any association or institution affiliated to it.]"

13. Section 44A is the special provision for grant of deduction in the case of trade, professional or similar association. It starts with non-obstante clause. Therefore, it is a non-obstante provision and has to be considered independent from the other provisions of the Act. It applies to the trade, professional or similar associations which are other than the association or institutions referred to in clause (23A) of Section 10. If such eligible association receive amount from its members, whether by way of subscription or otherwise (not being remuneration received for rendering any specific service to such members) and that amount falls short of expenditure incurred by such association during that previous year (not being the expenditure deductible in computing the income under any other provisions of this Act and not being in the nature of capital expenditure) solely for the purpose of protection or advancement of the common interest to its members, the amounts so fallen short (deficiency) shall, subject to the provisions of this Section, be allowed as deduction in computing the income of the association assessable for the relevant assessment year under the head 'Profit and gains of the business or profession.' Therefore, to compute the income of the assessee under the head 'Profit and gains of business or profession', the amount received by the assessee from its members whether the same is by way of subscription or otherwise, has to first meet the expenditure incurred by the association during the relevant previous year irrespective of the fact that the said expenditure is deductible in computing the income under any other provisions of this Act and it should not be in the nature of capital expenditure. In other words, if the association does not fall within the clause 23A of Section 10 and it is an association related to trade, professional or similar association, then, the amount received by it from its members by way of subscription or otherwise are not directly taxable, but, they have to be deduced by the amount expended by the assessee solely for the purpose of protection or advancement of the common interest

of its members provided the same is not allowable under any other provisions of the Act and it is not in the nature of capital expenditure.

14. Therefore, it has to be examined that whether provisions of Section 44A are applicable to the case of the assessee. Firstly, it is an association related to trade and, therefore, it is not outside the scope of Section 44A of the Act. Secondly, it is an admitted fact that the assessee is not an association or institution referred to in clause 23A of Section 10 as the said clause of Section 10 governs the institution specified by the Central Government by notification in the official gazette and it is not even the case of the department that the assessee falls within the ambit of Section 10 (23A). The careful perusal of receipt and expenditure of the assessee will reveal that the expenses incurred by the assessee are not in the nature of capital expenditure. The details of expenditure will reveal that they have been incurred solely for the purpose of protection or advancement of common interest of its members as it is not the case of the Assessing Officer that the expenses shown by the assessee have been incurred for any purpose other than in the advancement of its object. If it is so, then, the amount expended by the assessee for the purpose of protection or advancement of the common interest of its member will be allowable as deduction. Therefore, the claim of the department can only be restricted to the amount of Rs.3,29,919/- which also comprise an amount of Rs.1,18,633/- representing interest earned by the assessee on FDRs.

15. In this view of the situation, we see no justification in the addition made by the Assessing Officer vide which an amount of Rs.6,18,750/- received by the assessee from its members has been considered taxable. Therefore, we hold that the said amount has wrongly been taxed by the Assessing Officer and learned CIT (A) was right in holding that the amount received by the assessee as annual membership fee could not be taxed though for different reason that it cannot be taxed u/s 44A of the Act.

16. However, it can be the case of the department that amount received by the assessee from its members, if it is not expended for the purpose of protection and advancement of the common interest of its members has not been granted exemption u/s 44A of the Act. That situation will be taken care of by the addition of Rs.3,29,919/- which represent surplus of income over expenditure. For that, we will examine the case whether the said addition has also rightly been deleted or not.

17. Now, coming to the other addition of Rs.3,29,919/-, learned CIT (A) has held that the said amount cannot be taxed u/s 28(iii) of the Act and it also cannot be taxed u/s 2 (24) (iia) of the Act. Section 28 (iii) read as under:-

"Profits and gains of business or profession.

28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",-

(i) .....

(ii).....

(iii) income derived by a trade, professional or similar association from specific services performed for its members ;"

18. As per the provisions of Section 28(iii), what is taxable as 'Profit and gains of the profession' is an income derived by a trade, professional or similar association from specific services performed for its members. It has been the case of the assessee that the amount received by it does not arise from specific services rendered to its members. The annual subscription received by it is in accordance with the clauses of Memorandum of Association and Rules and Regulations and the amount received by it in respect of international conference was in respect of interested members and it is not with respect to any specific services provided to the members on the basis of some cost. No material whatsoever has been brought on record by the revenue to show that any of the amount collected by it from its member was in respect of

specific services performed by the assessee for its members. The words 'performing specific services' was also found place in Section 10(6) of 1922 Act (corresponding provisions was considered by Hon'ble Supreme Court in the case of *CIT vs. Calcutta Stock Exchange Association Ltd. (36 ITR 222)* and the relevant observations of their lordships from the said decision are as under:-

"The words 'performing specific services' [in section 10(6)] in our opinion, mean, in the context,' conferring particular benefits' on the members. The word 'services' is a term of a very wide import, but in the context of Section 10 of the Act, its use excludes its theological or artistic usage. With reference to a trade, professional or similar association, the performing of specific services must mean conferring on its members some tangible benefit which otherwise would not be available to them as such, except for payment received by the association in respect of those services."

19. If the aforementioned observations of their lordships are kept in mind, then, it will be clear that Section 28(iii) could not be invoked for the purpose of taxing the annual subscription received by the assessee from its members which is as per its Memorandum of Association and Rules and Regulations and receipts relating to subscription on account of international conference also could not be taxed under the provisions of Section 28(iii) of the Act.

20. Now, we come to the provisions of Section 2 (24) (iia) of the Act, which read as under:-

"2 (24) "income" includes-

(i) profits and gains;

(ii) dividend ;

(iia) voluntary contributions received by a trust created wholly or partly for charitable or religious purposes or by an institution established wholly or partly for such purposes [or by an association or institution referred to in clause (21) or clause (23), or by a fund or trust or institution referred to in sub-clause (iv) or sub-clause (v) [or by any university or other educational institution referred to in sub-clause (iiiad) or subclause (vi) or by any hospital or other institution referred to in sub-clause (iiiae) or sub-clause (via)] of clause (23C) of section 10 [or by an electoral trust.

Explanation.-For the purposes of this sub-clause, "trust" includes any other legal obligation;"

21. In view of the fact that the assessee has not been granted the benefit of Section 11, and it is also not an institution referred to in clause (21) or clause (23) or clause (23C) of Section 10. Therefore, there is no question of application of Section 2 (24) (iia).

22. The aforementioned findings will lead to the situation that Section 28(iii) and Section 2 (24) (iia) are not applicable.

23. Now, the question will remain that whether surplus arrived at by the assessee of Rs.3,29,919/- is taxable or not. This has been held to be exempted by learned CIT (A) on the applicability of principle of mutuality. As pointed out earlier, it has not been the case of the assessee that its income is exempt as per the principle of mutuality as in the return of income it did not claim so. The computation of income filed by the assessee was on the basis of claim of charitable institution. The said claim of charitable institution has been rejected by the department, therefore, the income of the assessee has to be computed as per the other provisions of the Act which include Section 44A and if the department wants to assess the resultant income, then, it has to be computed under the normal provisions of the Act. Out of surplus of Rs.3,29,999/-, the amount earned by the assessee on FDRs of Rs.1,18,633/- is to be removed as the same, as per the provisions of Income-tax Act, is assessable under the head 'Income from other sources' and this has so been done by the assessee in the computation purported to be filed before the Assessing

Officer, the copy of which has been placed at page 6 of the paper book wherein taxable income has been shown at Rs.1,18,630/-. The rest of the amount has been claimed by the assessee u/s 44A of the Act. In our opinion, Section 44A does not grant the exemption to the assessee with regard to the surplus shown by it being receipt excess of expenditure. It only describe that if such receipts fall short of expenditure, then, deduction regarding expenditure has to be allowed. But, in the present case, there is a surplus in the account of the assessee which exceed the expenditure. Therefore, if there is a surplus which cannot be claimed under the provisions of Section 44A of the Act. However, the resultant surplus is allowable on the basis of principle of mutuality as no material has been brought on record by the Assessing Officer to show that any of the receipt of the assessee pertains to non-members. Learned CIT (A) has deleted the addition on account of applicability of principle of mutuality and in the absence of any material having been brought on record by the revenue to show that any of the receipts of the assessee had arisen from non-members, we see no justification in interfering in the finding recorded by learned CIT (A). According to the decision of Hon'ble Delhi High Court in the case of *CIT vs. Delhi Gymkhana Club Ltd. (2011) 53 DTR 330* **= *(2011-TIOL-41-HC-DEL-IT)*** interest on FDRs has also been held to be covered by the doctrine of mutuality. Therefore, looking from any angle, we find no infirmity in the order of the CIT (A) vide which it has been held that no part of the income of the assessee is exigible to tax on the principle of mutuality. Finding no force in the departmental appeal, the same is dismissed.

24. In the result, the departmental appeal is dismissed.

(The order pronounced in the open court on 09.09.2011.)