आयकर अपीलीय अधिकरण "एच" न्यायपीठ मुंबई में।

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

श्री बी. आर. मित्तल, न्यायिक सदस्य **एवं** श्री संजय अरोड़ा, लेखा सदस्य के समक्ष ।

BEFORE SHRI B. R. MITTAL, JM AND SHRI SANJAY ARORA, AM

आयकर अपील सं./ I.T.A. Nos.	**निर्धारण वर्ष /** Assessment Years
494/Mum/2011	1996-1997
495/Mum/2011	2000-2001
496/Mum/2011	2001-2002
498/Mum/2011	2002-2003
499/Mum/2011	2006-2007
500/Mum/2011	2007-2008

Hatkesh Co.op. Hsg. Soc. Ltd. Plot No.51, Jai Hind Society, 2nd Floor, Jai Hind Club, N. S. Road No.11, J.V.P.D. Scheme, Vile Parle (West), Mumbai-400 056	**बनाम/** Vs.	Asst. CIT, Circle 21(1), 6th Floor, Pratyakshakar Bhavan, Bldg., No. C-10, Bandra (East), Mumbai-400 051
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. AAALH 0017 Q		
(अपीलार्थी **/Appellant**)	:	(प्रत्यर्थी **/ Respondent**)

अपीलार्थी ओर से / **Appellant by**	:	Shri Rahul K. Hakani & Ms. Neelam C. Jadhav
प्रत्यर्थी की ओर से/**Respondent by**	:	Shri Rajarshi Dwivedy

सुनवाई की तारीख / **Date of Hearing**	:	05.07.2013
घोषणा की तारीख / **Date of Pronouncement**	:	04.09.2013

आदेश / O R D E R

Per Sanjay Arora, A. M.:

These are the Appeals by the Assessee for six years, being assessment years (A.Ys.) 1996-97, 2000-01, 2001-02, 2002-03, 2006-07 and 2007-08, consequent to the disposal of its appeals contesting its assessments u/s.143(3) (r.w.s. 147, save the last two

years) of the Income Tax Act, 1961 ('the Act' hereinafter) by the Commissioner of Income Tax (Appeals)-32, Mumbai ('CIT(A)' for short). The issues arising in these appeals being common, the same were taken up together for hearing together, and are being disposed of by a common, consolidated order.

2.1 The principal issue involved is taxability or otherwise of sums received by the assessee, a residential housing co-operative society, by way of transfer fee and TDR premium. While the assessee claims the same as tax-exempt on the ground of mutuality, relying on the decision by the Tribunal in its own case for other years, as well as by the hon'ble jurisdictional High Court, the Revenue bases its case on the factual findings issued by its authorities, as well as, again, on the same decisions by the hon'ble jurisdictional high court. The assessment order for A.Y. 2002-03 (in ITA No.498/Mum/2011) being the lead order, we shall adopt the same for the purpose of discussing the facts/case, even as was done at the time of hearing. The specific grounds raised for this year are as under:

> "1. The Learned CIT(A) 32 has erred in confirming the findings that Transfer Charges Rs.18,53,760/- received by the assessee which is Plot owner Society as Taxable without appreciating full facts and considering various judgements passed by Hon. Bombay High Court and Hon. Tribunal.
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> 2. The learned Assessing Officer has erred in treating the T.D.R. premium received of Rs.24,06,798/- as income and has further erred in not considering the direction given by Hon. Tribunal in order dated 4th March 2008.
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> 3. The Learned CIT(A) 32 has erred in rejecting the Appellants alternative plea that in case transfer fees are treated as income the expenses incurred by the society of Rs.34,69,365/- should be considered for allowing as expenses."

Ground No. 3 is in effect an alternate ground, while ground no.2 does not arise out of the impugned order. In fact, it does not arise out of the order by the tribunal; this being the second round before it, so that the principal and the sole issue in this appeal is as raised

per ground no.1, i.e., the taxability or otherwise of the transfer fees or transfer premium, as variously described, in law in the facts and circumstances of the case. The tribunal in the first round, vide its order dated 04.03.2008 (in ITA No.7677/Mum/2003/copy on record), set aside the matter back to the file of the A.O. to be decided as per law in accordance with the decision by the Special Bench in *Walkeshwar Triveni Co-op. Housing Society Ltd. vs. ITO* [2004] 88 ITD 159 (Mum) (SB), stating as under:

> "3. The grounds of appeal Nos.1 & 2 of the assessee for Assessment years 2001-02 & 02-03, Ground of appeal Nos. 2 & 3 for A.Y. 1996-97 and the ground of appeal No.1 & 2 of the assessee for A.Y. 2000-01 are common in nature and relates to the issue of taxability of transfer fees received by the society and the disallowance of expenditure thereto. The Ld. Counsel for the assessee submitted that the issue is covered with the decision of Mumbai Tribunal in the case of Vithalnagar Co-operative Housing Society Ltd., vs. DCIT and others in ITA Nos.4241/M/00, 2728/M/99 and 5023/M/99 for Assessment year 1995-96 order dt.17.11.05 wherein the issue was set aside to the file of the Assessing Officer with direction to follow the decision of Mumbai Special Bench in the case of Walkeshwar Triveni Co-Op. Housing Society Ltd. vs. ITO in 88 ITD 159 (Mum.) (SB). The Ld. DR has not opposed the submissions of the Learned Counsel for the assessee. We have considered the rival submissions. We find that the issue in these grounds of appeal of the assessee regarding the taxability of transfer fees received by the appellant society on the principle of mutuality and the issue of disallowance of expenses relating thereto claimed by the assessee is covered with the decision of Mumbai Tribunal in the case of Vithalnagar Co-operative Housing Society Ltd. (supra) and we being in agreement with the said decision of the Mumbai Tribunal in the case of Vithalnagar Co-operative Housing Society Ltd., set aside the issue in these grounds of appeal of the assessee in all the four appeals to the file of the Assessing Officer, who is directed to decide the issue in accordance with the decision of Special Bench of the Mumbai Tribunal in the case of Walkeshwar Triveni Co-Op. Housing Society Ltd. vs. ITO reported in 88 ITD 159 (Mum.) (SB) and any other decision which may be available to him, we decide accordingly."

2.2 This is a subsisting issue in the assessee's case, across all the years, with it being, similarly, the second round before us for A.Ys. 1996-97, 2000-01 and 2001-02, having been decided by the tribunal earlier vide its order dated 04.03.2008 (supra). The Revenue in the set aside proceedings has proceeded to decide the matter in view of the factual

findings, and by following the decision in the case of *Sind Co-operative Housing Society vs. ITO* [2009] 317 ITR 47 (Bom).

3.1 Before us, the assessee's principal case was that the matter is covered by the decision of the tribunal in its own case, i.e., for A.Ys. 2003-04 to 2005-06, vide order (in ITA Nos.6346 to 6348/Mum/2009) dated 24.06.2011 (copy on record). It has been since clarified by the hon'ble jurisdictional high court in *Sind CHS* (supra) that it is immaterial as to whether the transfer fee is paid by the transferor (outgoing) member or by the transferee (incoming) member. As such, the principle of mutuality would govern the transaction of receipt of transfer fee either way. Further, in *Mittal Court Premises Co-operative Society Ltd. vs. ITO* [2010] 320 ITR 414 (Bom), it has been further explained that the government Notification dated 09.08.2001 and 27.11.1989 would not be applicable to a commercial society but only to a residential housing society. The assessee-society is a plot owner's society and not that of residential flat owners and, accordingly, the said Notification/s issued by the Sate Government under the Maharashtra Co-operative Societies Act, 1960 (MHSA) is not applicable to it. Accordingly, there is no question of the society having charged anything beyond or in excess of the amount prescribed under the law. There is nothing in the bye-laws of the society which restricts the amount that could be charged by way of transfer fees, which is in any case to be applied only toward the specified objects of the society, for the common good and benefit of its members. It is also, as explained, immaterial as to who contributes as long as there is identity between the contributors as a class and the participants, so that at each point of time the contributors as a body are comprised of the same set of persons who are entitled to participate (in the profits/surplus or the fund). This is precisely the basis on which the first appellate authority allowed it relief for the anterior years, i.e., A.Ys. 2003-04 to 2005-06, since confirmed by the tribunal vide its order dated 24.06.2011 (supra).

3.2 The ld. DR was equally vehement in support of the impugned order. The ld. CIT(A), as a reading of his order would show, examined the issue threadbare vide paras

3.3 to 3.8 of his order, also reproducing the Notification dated 09.08.2001 issued u/s.79A of the MHSA. The assessee-society has charged transfer fee much in excess of the maximum limit of Rs.25,000/- stipulated thereby for being charged per transfer by a co-operative housing society. In fact, the entire transfer fee of Rs.18.54 lacs under reference comes from a single person, Shri Vinod Parekh *qua* two plots (refer pg.2 of the assessment order dated 28.02.2003). *How could one, under the circumstances, say that there is no profit element or consideration involved*? The hon'ble court in *Sind CHS* (supra) has held that any amount charged by a housing society in excess of the prescribed limit and retained by it would be exigible to tax. It is facile to say that the said Notification is not applicable to the assessee-society as it is a plot owner's society and not a flat owner's society. *In fact, the Society in* Sind CHS *(supra) was also a plot owners' society*. The very fact that the Government did not consider it necessary to or in fact issue a separate Notification specifically for such societies would not mean that it is not applicable thereto; on the contrary, would only imply that it is applicable to such societies inasmuch as the plot owners' societies are also housing societies meant to satisfy, and as much, the need for housing and, further, governed by the MHSA as well as the model bye-laws issued there-under. That is, to say that while there is a legal bar on a residential flat society, so that it could legally charge only as much, but no corresponding bar on a residential housing society where formed by the plot owners, is misconceived, and the only implication, if at all, of non-issue of a separate Notification for such societies is that the Notification covers the same as well. That apart, the assessee-society has, upon charging of transfer fee and TDR premium, allowed not only the transfer of membership, but also thereby allowed its members to purchase TDRs from the open market and load it to their existing structures. As found by the Revenue upon inspection, the members had demolished their existing structures and constructed new buildings; in fact, multi-storied buildings, on their allotted plots, either letting the flats constructed or selling the same to non-members. As such, apart from members, a substantial part of the housing on the society's land is 'owned' and/or occupied by non-members, considerably diluting the

identity between the contributors and the participants that the society is supposed to represent, at least in substance. Further, all the common utilities of the society viz. parks, roads, electric/water supply, drainage, street lights, etc., are being equally enjoyed by the members as well as non-members residing thereat. *This is a clear case of commerciality having imbued the operations of the society*. None of these primary facts have been denied, much less rebutted by the assessee before either of the authorities below. *How could, under such circumstances, the assessee be considered as a tax-exempt entity, or at least in relation to the transfer fees and TDR premium received by it on the ground of mutuality*? The collection of these sums, which arise from year to year, have to be seen in light of these developments, and not as isolated incidents or in an isolated manner.

3.3 The ld. AR, in rejoinder, would, with reference to the various provisions of MHSA, viz. sections 2(16), 2(27), and 4, clarify that the assessee-society is a housing society, further, falling, under the classification 'Tenant Ownership Housing Society' (under rule 10(5)), operating on cooperative principles. The land was allotted to the members by collecting there-from the same amount as was required to be deposited on account of lease with the Housing Board; the relevant figures being borne out by its balance-sheet for the relevant year (AY 1996-97). There is, thus, no question of any profit. Again, with reference to sections 64, 67, 70, 110 of MHSA, it was sought to be emphasized that the surplus inures only to the members and, further, is subject to adequate control *qua* its investment and application. The question of taxability of transfer fee collected in excess of the Notification/s issued by the State Government came for consideration before the tribunal in its' own case for A.Ys. 2003-04 to 2005-06, whereat the tribunal confirmed the principle of mutuality on such transfer fees as well, i.e., collected in excess of the limit imposed by the Government per the said Notification/s. In fact, in *Mittal Court PCS Ltd.* (supra), the hon'ble court has held that such excess, if collected, would have to be refunded and, in any case, a member is not prohibited from gifting any amount to the society for its' objects. The issue of TDR premium, again, stands considered by the hon'ble court in the case of *CIT vs. Jai Hind CHS Ltd.* [2012]

349 ITR 541 (Bom), wherein, following its approval of the principle of mutuality in respect of non-occupancy charges paid by a member to the society in *Mittal Court PCS Ltd.* (supra), it stands clarified that the same principle would apply to the case of TDR premium as well, as the said premium is required to defray the additional burden that would be cast on utilization of additional FSI. In fact, this aspect has also been considered and upheld by the tribunal in its' own case for A.Y. 2002-03, where, following the decision of the special bench in *Walkeshwar Triveni CHS Ltd.* (supra), it allowed the assessee's claim on TDR premium; the special bench having allowed the same on transfer fees.

With regard to the common facilities and amenities being provided by the society, the Revenue's charge was pleaded as not correct. All the expenses borne by the society, as its accounts would reveal, are toward provision of various services to the members, viz. pest/rodent control, trash collection, plot beautification and maintenance, cleaning, etc. The same are incurred by paying charges for the purpose, on the production of the vouchers, to the members only. Where, however, the vouchers are not forthcoming, so that the claim is not substantiated, the amount is written back in accounts, again swelling the society's funds. *The services/amenities stated by the Revenue, viz. common access roads, gardens, drainage, water supply, electricity supply, etc. are in fact not provided by the society*.

4. We have heard the parties, and pursed the material on record.

4.1 We shall, before we proceed to discuss the issue arising for our consideration, consider it relevant to briefly visit and state the law in the matter, which is fairly well settled and, if we may say so, trite, having been subject to elucidation by the apex court time and again, as recently in the case of *Bangalore Club vs. CIT* [2013] 350 ITR 509 (SC), rendered on a review of the precedents, including the *locus classicus* on the subject. The hon'ble court summed up the rationale and philosophy of the concept of the mutuality very succinctly in the following words:

> *"The principle of mutuality relates to the notion that a person cannot make a profit from himself. The concept of mutuality has been extended to defined groups of people who contribute to a common fund, controlled by a group, for a common benefit. Any amount surplus to that needed to pursue to the common purpose is said to be simply an increase of the common fund and as such neither considered income nor taxable."*
>
> (emphasis, by underlining, ours)

The apex court, further, culled out, once again, the basic principles and parameters attending mutuality, so that a decision in each case would have to be taken on the touchstone of the satisfaction or otherwise thereof in the facts and circumstances of the case. *It is in fact here that the difference arises.* That is, the issue is not in the principle of mutuality *per se*, but in its application, as also observed by the apex court in the case of the *CIT vs. Kumbakonam Mutual Benefit Fund Ltd.* [1964] 53 ITR 241 (SC), which in fact it follows in *Bangalore Club* (supra). As famously put by it in *CIT vs. Royal Western India Turf Club Ltd.* [1953] 24 ITR 551 (SC), the principle that no one can make profit out of himself is true enough but may in its application easily lead to confusion (pg. 560). Again, as clarified in *CIT vs. Bankipur Club Ltd.* [1997] 226 ITR 97 (SC), which it again noted with approval, that whether or not the persons dealing with each other are a 'mutual club' or carrying on a trading activity or adventure in the nature of trade, is largely a question of fact; *further emphasizing that at what point does the relationship of mutuality end and that of trading begins is a difficult and vexed question*. A host of factors may have to be considered to arrive at the conclusion (page 110). It is these factors, in light of the findings of fact, that we believe we are required to consider in the instant case.

The three perquisites which form the essential conditions for mutuality, as listed by the hon'ble apex court, in the said case are as under:

a) complete identity between contributors and participants (of course, reckoned as a class);

b) the actions of the participants must be in furtherance of the mandate of the society - which is a matter of fact, to be determined from the memorandum and articles of association, rules of the membership, rules of organization, etc.; and

c) there must be no scope of profiteering by the contributors from the fund made by them, which could only be expended on or returned to them.

Entity based claims

4.2 We shall first examine the assessee's claim for being a mutual concern in light of the foregoing. This is as, as explained by the apex court in *Bangalore Club* (supra), as also earlier, as in the case of *Bankipur Club Ltd*. (supra), it is the arrangement claimed as a mutual concern or association, that has to be seen as satisfying, or not so, the conditions of mutuality. Clearly, the arrangement in its entirety and the whole gamut of its operations would have to be seen, as explained by the apex court in *Bangalore Club* (supra). Our first observation in the matter is that we are unable to see as to how the principle or the notion of mutuality could be extended to a cooperative housing society, be it a flat owner's society or a plot owner's society, being meant to provide housing facility, i.e., in its design, concept and form, as prevalent in the instant case. The reason is simple. A group of people come together and join hands for a defined, non-profit purpose - something they could or are required to do even individually, to enable it being so done more advantageously in terms of time, effort, management, economy, etc., i.e., better organization in short. Take a common day example, drawing from the area of housing itself. The flat owners in a building desire to provide security for themselves – a basic need, which each of them would even otherwise want for himself. They appoint security staff, paying their salary, uniform, etc., by pooling money through monthly subscriptions, so as to meet the operational cost. This could be extended to cleaning or any other maintenance services of the building (for common areas) as well. *A mutual arrangement cannot, by definition, lead to any scope for income in the hands of the contributors or the participants*, toward which we have cited some everyday examples. The surplus only represents the excess of such contributions toward a common purpose over the actual expenditure. This is precisely why, where and to the extent the same leads to some income, as where the surplus is parked as a deposit in a bank yielding interest income, the same has been, once again, clarified by the apex court in the case of *Bangalore Club*

(supra) to be outside mutuality. *This is even if the banks are also members and, two, that the interest income is to be applied for common purposes.* That is, the difference or the dichotomy between the 'surplus' with a mutual concern/association, on one hand, and the 'income' arising to it (which could only be from a source outside itself), on the other, is plain and manifest in the terms of the arrangement itself.

However, a break in the mutuality, as in the case of interest income, may not necessarily lead to disbanding or relegating the arrangement or the association as not a mutual concern. The same would only be where the same goes to the very root, as an essential ingredient of the so called mutual arrangement, as was found by the apex court in the case of *Kumbakonam Mutual Benefit Fund Ltd.* (supra), where the entity was found to be set up for trading purposes, even as the banking activity, as pursued by the company as its object, was limited only to its members. *The apex court nevertheless found it to be not a mutual concern*. Other than in such cases where the violation is pervasive, permeating the arrangement or its operations in its different or essential aspects, so that the entity does not retain the essential attributes of mutuality, all that would result is in excluding such 'income' from the ambit of mutuality.

So, however, the arrangement cannot in any case lead to, apart from a right to it being spent for common purposes, or to receive the proportionate share on winding-up, a capital asset or scope for generation of income in the hands of the individual members or contributors. It may be that the association has accumulated sizeable funds or assets over a period of time, or that on account of the amenities or privileges it provides to its members, its membership is a 'prized' commodity. The society may for that reason restrict its membership or charge a good amount towards securing its' membership, apart from other qualifications. That, however, would not again result in any income in the hands of its members *per se*. On the contrary, where it is found to be a money spinning unit, the club charging a hefty premium, which has no correspondence with its activities or expenses on the amenities or privileges it provides, it could well be charged for profiteering. That though would be a matter of fact, to be decided on the conspectus of

the case. However, the charge, as cautioned by the apex court in *Bangalore Club* (supra), cannot be levied lightly, and the mandate (of the Club) must not be construed myopically, and space must be made for situations leading to benefit to the membership both in the short term as well as that may accrue to the organization indirectly in the long run. *In no case, however, could the members of the association or club trade on their membership rights, as the members in the instant case are in a position to*. This is precisely why membership of most social or other definite cause clubs is restricted, and not transferable, or is so to a very defined class of persons, as next of kin, which thus operates as a suitable qualification as well as restriction. A member incapable of or not desirous of contributing or participating further, may quit the Association.

4.3 In the case of a housing society as the present one, however, the contributors, by virtue of their membership, obtain a valuable capital asset in their own hands, i.e., the leasehold right in the plots allotted to them, as well as the interest in the super structure. No doubt, the said structure has only been funded by them, but then it is only on the land leased to them by the society, so that independent of the rights in land, leased to them on a 998 year lease, the same is of no value. *It is this that they may encash or capitalize on or even trade on, as say by letting the property. Such valuable rights that inure to the members, i.e., separate and distinct from the rights that vest in them as a part of the class of contributors, militates against the very notion of mutuality, which in its concept and operation cannot yield any income to them in their individual capacity.* In fact, they have practically all the rights, and at a cost, and which they may leverage to generate income for themselves. To exemplify, consider this: a member, to whom a plot is allotted, lets out the house built thereon, earning a monthly rent. Of course, the rent he receives is his income, and has nothing to do with the society or its income. So however, it is only by virtue and on account of he being a member of the housing society that he could generate the rental income. *This, thus, is our basic objection, inasmuch as a mutual concern, by its very nature and concept, cannot lead to any profit, on the basis of contribution to and participation therein, to the contributor/participant*. We have deliberately taken an

everyday example of letting, and independent of the transfer and TDR premium issues which dog such cases, and is the bone of contention between the parties, only to clarify our objection, which goes to the root of the matter, though is at heart, very simple. There is no creation of any Fund at this stage, i.e., when the society is formed and the members are enrolled; the society charging the members for granting lease what stands charged to it (on getting 999 years lease from the Government). The arrangement, thus, in its design and concept, is not a mutual arrangement, even as independent and apart from the said rights, the plot owners or members may organize themselves for any mutual activity, even if it arises or is consequential to their holding the said rights, as the maintenance activity referred to earlier. As such, any income, be it in the form of transfer fees or TDR premium, that arises to the society/association on account of the said arrangement would, by definition, be ineligible for mutuality.

This aspect of the matter, i.e., the nature of the rights arising on the grant of lease by the housing society, stands in fact examined and discussed by the hon'ble jurisdictional high court in the assessee's own case in *CIT vs. Presidency Co-operative Housing Society Ltd.* [1995] 216 ITR 321 (Bom) in the context of the issue of taxability of the receipt of transfer fee. With reference to its decision in the case of *Shree Nirmal Commercial Ltd. v. CIT* [1992] 193 ITR 694 (Bom), it notes with approval that the arrangement is akin to a sale or transfer of substantial rights to the members. In the cited case, the company devised a scheme, where-under non-refundable deposits were accepted from the shareholders against right to occupancy in the floor space on land obtained by it on lease from the Government for construction of commercial premises. The court having regard to the manner in which the said deposits were taken from the shareholders and having regard to the fact that the shareholders were entitled to assign the floor space to others on the payment of compensation and to transfer their occupancy rights by selling shares, held that the whole transaction was in reality a sale of floor space by the assessee-company to its shareholders. After parting with the right of occupancy of the floor area to every member, what remained with the assessee was merely ownership in the technical

sense of the word. The receipt by way of non-refundable deposits was accordingly treated as a trading receipt (at page 328). The striking similarity with the instant case may be noted, and this is precisely this point that we were trying to bring forth when we said that the arrangement leads to substantial rights in the hands of the members, which they may subsequently use or deploy for their profit. The hon'ble court in *Presidency CHS Ltd.* (supra), in endorsing the lease agreement as commercial, examined the matter from several angles, countering all the arguments advanced, including with regard to the transferability being not open, and that the society retains the right to reject a proposed transfer.

Continuing further, it would also be noted that the arrangement is violative of third condition (c) by the hon'ble apex court in *Bangalore Club* (supra), whereat it makes clear that all the members would, by virtue of their being contributors and participants, are entitled to a rights to the surplus being expended or returned to them, which of course would include the right to decide on its distribution, as long as it is in furtherance of the mandate of the Association, and no further. The rights in their respective flats/houses, a valuable right by all means, arises to the members of a housing society by virtue of their membership of the society. The Association, thus, becomes an instrument or vehicle for holding wealth and, consequently, for generation of income by leveraging thereon, i.e., by the member-contributors in their individual capacity. This, the substantial rights or the capital asset, is precisely what they in fact trade on by paying transfer fee and/or TDR premium to the society. This is impermissible under the concept of mutuality where the assets, if any, could be held only by the Fund or the Association, i.e., by the members collectively, and in furtherance of and toward the object/s for which they had grouped or organized themselves in the first place, and which could include any lawful activity, save one that is commercial in nature or for profit, i.e., which has profit as its motive. In fact, per section 2(24)(v) r/w s. 28(iii), the Act specifically seeks to bring income of such trade or like Association to tax as business income. We have already explained, on the basis of settled law, that a mutual concern, in its concept and operation, is incapable of generating

income, for itself, much less for it's members. And, where so, which could, if at all, be only incidental, and would again be taxable. *This therefore constitutes our first and primary objection to the assessee's case for being allowed exemption or its various income or categories of income on the principle of mutuality; a housing society, as the one before us, by its very design and concept being not a mutual concern, confer as it does on its individual members valuable, transferable rights, i.e., in their own right, property by definition, which they can hold independent of each other, i.e., independent and apart from their rights to the common fund or property that they as members may hold or enjoy as a body or a group*. It may be argued that such a housing society may by its' bye laws prohibit transfer, in which case the objection would not hold. The argument is misplaced. The very fact that the arrangement leads to creation of wealth in the hands of the individual member-contributors is sufficient for the purpose of holding it as not a mutual concern or association. Further on, as the matter impinges on the civil rights, the provisions of common law as well as that relating to holding and enjoyment of property, and immovable property in particular, would need to examined, besides the provisions of the relevant co-operative societies act, before one could authoritatively comment on the legality of the stated embargo on transfer. In fact, such restriction - which is hypothetical, and assumed only for the purpose of discussion, if stipulated, would defeat the very concept and operation of the co-operative movement *qua* the housing sector, which is in fact a leading and successful example of the application of the co-operative movement, representing a primary need of the people, as indeed it, i.e., the co-operative movement, has addressed vital concerns and presented itself as an effective instrument in organizing human effort and resources to generate wealth and income for its members and, thus, serve as a vehicle or agent for social and economic upliftment. Examples of co-operative movement in the areas of milk and dairy farming, banking, etc., abound. The scope and nature of our examination is only *qua* taxation, i.e., with regard to the application of the doctrine of mutuality on, firstly, co-operative housing societies *per se* and, secondly, on its specific incomes, under the given parameters - nothing more, and nothing less.

We may further also clarify that our objection aforesaid to the co-operative housing society, as the present one, as being governed by mutuality or being a mutual concern, is an in principle objection, stated upon taking an overall view and perspective of the design and operation of such societies; their purpose; and the nature of the rights that it leads to in the hands of the individual members (as distinct and opposed to from that as a group). In this, we find ourselves fully supported by the decision in the case of *Presidency CHS Ltd.* (supra), wherein the hon'ble court examined the nature of receipt under reference, viz. 'transfer fees', to hold it to be only 'income', a term of the widest import. We have already stated that by very definition, a mutual concern cannot by its operations, i.e., which constitute its primary object/s, generate income, which could only be incidental to its main objects, as by way of an application of its funds or wealth, viz. interest on banking deposit, rent on property, etc. *That is, the concept of mutuality and income generation from its principal activities are contrary to each other, as explained by the apex court, once again, in* Bangalore Club *(supra).* This however does not and would not in any manner imply that no part of the receipt of such society can be exempt on the ground of mutuality. *This is as mutuality is essentially an activity based phenomenon*. A housing society may choose to fund the maintenance expenditure not through income arising from, say, interest of bank deposits - as in the instant case, but by monthly subscription from its members. The surplus in such a maintenance fund, i.e., excess of collection over a period over the maintenance expenditure incurred thereat, would not be the society's income, which by definition has to arise from outside oneself, the group representing the society. This would be so even if the society transfers this excess to its' general fund, to be applied for other common benefit applications, i.e., apart from maintenance. And, for the same reason - such activities being again mutual, with the receipt only representing their funding. Further, again, it not intended to suggest or imply in any manner that the expenditure incurred on its various activities by a housing society, to be considered as mutual, could or is to be only in the nature of revenue expenditure, as maintenance expenditure referred to by us. The common benefit expenditure could

include that yielding enduring benefit, as toward infrastructure facilities, as by way of internal roads, parks, street lights, drainage, water and electric supply, etc. *All we have stated and clarified is that the concept of 'income' and 'mutuality' are antithesis to each other*. This we consider to be also the ratio of the decision by the hon'ble jurisdictional high court in the case of *Presidency CHS Ltd.* (supra).

4.4 Be that as it may, we proceed to examine the specific facts of the case. The main objects of the society and regulations with regard to the lease granted by the society, is while clauses 2 and 6, which read as under (reproduced at para 3 of the Assessment Order):

> "2. The objects of the Society shall be to carry on the trade of building, and of buying, selling, hiring letting and developing land in accordance with co-operative principles and to establish and carry on social, recreative and educational work in connection with its tenants and the Society shall be full power to do all things it deems necessary all expedient for the accomplishment of all objects specified in its bye-laws, including the powers to purchase, hold, sell, exchange, mortgage, rent lease, sub-lease, surrender, accept, surrenders of, and deal with lands of any tenure and to sell by installments and subject to any terms or conditions and to make and guarantee advances to members for building or purchasing property and to erect, pull down, repair, alter or otherwise deal with any building thereon."
>
> (emphasis, ours)

Clause 6 reads as:

> "6. Member shall not arrange, under let or part with the possession of the property or any part thereof without the previous consent in writing of the society."

It is further incorporated as:

> "on every permitted disposition, or devolution of or dealing with the said plot or building the member (a) shall pay to the society half the premium received by him from the purchaser member in respect of the vacant plot sold and (b) shall pay to the society, in case of the plot together with building thereon, half the amount received by him over and above the capital cost."

Now, without doubt, a trading or commercial purpose could not define a mutual concern, while the assessee-society's object itself states that assessee could buy, develop and sell land. The same would only be at market rates, so that the profit motive is built into the transaction/s. On this being put to the ld. AR during hearing, it was clarified by him that no such activities, though permissible under its charter, have been perused by the assessee, and where so, income arising there-from would be taxable. As such, admittedly if any of the assessee's activities are imbued with commerciality, the same would lead to income chargeable to tax under section 4 of the Act. In this regard, in our view, the provision for charge of premium by the assessee-society and, further, worked at one half the amount of the premium received by the transferor-member from the transferee-member cannot but be considered as a commercial transaction. As such, not only does the arrangement lead to creation and holding of wealth/property by the individual-members, it allows them to encash or otherwise exploit it, paying the society its share. That is, the society also partakes of the profit arising on the subsequent transfer by a member, to the extent of 50% thereof. If that is not commercial, what is, while the law has laid down (as by the apex court, among others, in *CIT vs. Bankipur Club Ltd.* (supra), would disqualify a concern as a mutual entity on a very taint of commerciality. This is precisely what weighed with the hon'ble court in *Presidency CHS Ltd.* (supra) in holding the arrangement, for which it also examined the terms of the lease, providing for a like clause, in holding the arrangement as commercial in nature. Surely, this is not to meet the regular operational expenses, transfer being an uncertain and variable phenomenon, which argument was again considered by the hon'ble court. The society is thus a 50% stake holder in the individual property, i.e., as build-up in the hands of the members. The transfers may be few, and uncertain in timing, but what is important and relevant is that the society is firstly claiming a stake, reckoned at 50%, and two, realizing it. Though it may not appear not to have sold anything, it has thus realized the accretion in value of the property, in which it considers to have a defined share, to that extent. The transfer fees, again by way of the defined share (50%) premium at the time of next transfer would

stand to be worked out with reference to the present transferees' cost. The society, by receiving 'transfer fees', is, thus, only seeking to monetize 'its' wealth i.e., to the extent it considers it to have a stake therein. It may be argued, ostensibly not without merit, that in that case, transfer fees is not income. This is as that it's receipt yet leaves the capital structure of the society undisturbed, the argument that prevailed with the hon'ble court in *Presidency CHS Ltd.* (supra) in declaring it as income in character. True, but what needs to be borne in mind is that the position still remains much the same. What the assessee is partaking of is what would otherwise, i.e., but for the charge of 'transfer fee', or its charge at a nominal sum, unlinked to the premium or the consideration for transfer, legally accrue or arise to the transferor-member. In fact, it still does; it is only that the assessee considers itself to have a right therein which, therefore, the transferor is called upon to discharge, making it as a condition for NOC. The assessee's rights or capital structure as per its charter, or books, remains untouched. In fact, even if the lease deed executed with the members were to contain such a clause, in implementation of which the transfer fee clause is mandated in the society's bye laws, as in fact pointed out by the hon'ble court, our point is still made and in fact more validly. That is, that the lease granted is a commercial transaction, and thus commercial considerations imbue its operations, as indeed was found by the hon'ble court. Now it cannot be that while the lease deed is a commercial transaction, as found by the hon'ble court, the bye law, containing like clause; in fact, facilitating the relevant clause in the lease deed, is not. Couple this with the fact, which is again uncontroverted, that no monthly or periodic subscriptions are charged, so that there are no contributions, and the maintenance activities of the society funded wholly or mainly out of interest on bank deposits, and it is clear that the manner and operation of the assessee-society is clearly not governed by mutuality. *In sum, the assessee's objects allowing it to conduct business and, further, its articles (bye laws) reserving a right in the lease hold rights granted to its members, which in fact enable it to charge a part (50%) of the premium arising to them on transfer as transfer fee, as also TDR premium toward further construction, taints its objects with*

commerciality, excluding mutuality. No specific services, except some routine paper work, a part of the normal administrative functions, it may be appreciated, is rendered for the purpose, while premiums linked to market rates are charged on the basis of the area and/or on the basis of the transaction value. *This constitutes our second objection to the assessee being not eligible for being considered as a mutual concern*. It would be also noted that this arises directly out of and is incident to the creation and holding of wealth by the individual members that the arrangement allows, and which formed our first objection to the same being conferred mutuality status. *The two objections, thus, dovetail each other.*

4.5 Our third and final objection toward the same is the break-down in the identity between the contributors and participants. The same, though not apparent from the record, has been found obtaining on the ground on a physical inspection by the Revenue. The same, it would be appreciated, arises or springs directly from it pursuing the policy of allowing the individual members to purchase TDRs from outside and load them on to their existing structures. No restrictions have been stated to be placed by the Society in this regard, which in any case would not alter the character of the transaction, though provide us of a view of its regulation in the matter, i.e., the sale or the letting of the new structure proposed to be set up by a member. In short, the members can exploit, even assuming as subject to some reasonable restrictions, their capital assets as permissible under law. This has resulted in a commonality of interest in the residential buildings on the society's land; the members having either sold or otherwise let the flats to non members.

The assessee's claim of not receiving any amount from, or not providing any services to, the non-members, only needs to be stated to be rejected. *In fact, the very fact that the assessee claims of such services being extended only to members proves that non members, and in sufficient numbers, are also residing thereat*. The non members residing in the flats built by the members on their plots have access to and enjoy the same facilities, viz. the internal roads, parks, drainage, water and electric supply, etc., as the

members residing in their houses or in the flats in the buildings constructed by them. Can it possibly be said that though residing at the residential units on the society's land, they do not use the roads or water or electricity or parks, et. al. How would they possibly reside in that case. *Again, is it that separate and parallel facilities, being essential, have been set up or provided*? There is nothing on record to indicate that. They are not, and in fact cannot possibly be denied the same common facilities set up for the residents, and neither is there any material on record to support or reason to justify the said denial. *In fact, the assessee itself justifies charging of the TDR premium on that basis, i.e., the additional support services required to support the additional FSI*. The assessee-society conveniently states of no such facilities/amenities being provided by it. *Then who, we wonder, is providing these basic, essential services, so vital for residence*? Further, in that case, there would be no scope for recovering any sum even from the members. As regards its claim of incurring expenditure on pest/rodent control, cleaning services, trash collection, etc. and the like, the same may well be true. But the question is: Are the basic services required for residing at the society's land, viz. internal roads, parks, lighting, electricity, water, drainage, security, etc., the infrastructural facilities set up by the housing society, available only to the members, or to non-members as well? The assessee has been completely unable to address this basic question raised by the Revenue, inspite of being specifically questioned on this aspect during hearing. In fact, it has not disputed the primary facts as listed in its respect as listed by the ld. CIT(A) at para 3.7 (pages 11 through 14) of his order for AY 2002-03. If these are, on which we have no doubt, commonality of interest, as charged by the Revenue and, resultantly, a break down of the identity between contributors and participants, cannot be denied; rather, is patent and the natural conclusion.

This in fact also violates another basic condition of mutuality. That is, there must be no dealings with the non-members, and at best marginal. The number of non-member families residing at the society's land, either in absolute numbers or as a ratio of the total resident families, which would again vary from year to year, is anybody's guess. The non

members, or increase in their numbers over time, considering that one house gets converted into a multi storied building, comprising several flats (residential units), which is what in fact makes the conversion lucrative, so that there has been a deluge over time, cannot be said to be unsubstantial, if not actually far in excess of the members, particularly considering that the total plots were only 81 in number. We have already stated why they are, as residents, as much a part of and beneficiaries of the assessee's land and infrastructure facilities set-up, as the 'contributors'. They are thus 'participants', though not in the society's Fund, but as partakers of the output/services/amenities rolled out or substantially rolled out by the society. There is a clear mismatch between the 'contributors' and the 'participants', when considered not from the limited stand point of those having a right in the surplus fund, but those having a stake in and actually availing of the services and amenities for which the society is set up. While the right in the surplus would arise for consideration or for giving effect to only on the closure or winding up, the right to avail of and benefit from the assessee's services is a far more relevant, real right, i.e., of practical, everyday import. It is for this that we consider such resident non-members as 'participants' inasmuch as thereby they actually participate in its activities/ amenities. They in fact in that sense are more privileged than the members themselves, availing of the fruits of the activities without contributing or having contributed therefor! No doubt, the primary purpose initially was to promote housing for its members, but once the flats constructed on the plots allotted to the members are transferred to non-members or otherwise let to them, i.e., by converting their houses into multi-storied buildings, the membership becomes a lucrative investment or a source of income for the members. Mutuality ceases and commerciality steps right in; rather, dominates, taking centre stage as it were. In fact, the whole exercise of TDR premium is only to exploit their advantageous position, a capital asset, with the assessee raking in the moolah.

In view of the foregoing discussion and analysis, in our view the assessee is not a mutual concern and its various receipts cannot be considered as tax exempt on that ground. If, however, it is for any year able to establish mutuality qua a particular receipt,

the same being activity based, in consonance with its bye laws, the same though can be considered.

Receipt-wise claims

5. Though we have considered the assessee's case for being tax-exempt as a mutual concern, we may also deal individually with its claim for exemption *qua* transfer fees and TDR premium as being governed by mutuality, particularly with reference to the case as made out. This is also necessary as the Revenue has, though making out a case of the assessee being not entitled to its claim of being a mutual concern, denied it exemption on these specific receipts, which we believe to be the only receipts in the main, other than bank interest, which is agreeably taxable.

Transfer Fee

5.1 The claim for exemption on this receipt arises for all the assessment years under reference. The assessee relies for the purpose on the decision by the hon'ble jurisdictional high court in *Sind CHS v. ITO* [2009] 317 ITR 41 (Bom) and *Mittal Court Premises Co-operative Society Ltd. vs. ITO* [2010] 320 ITR 414 (Bom), besides by the tribunal in its own case for AYs. 2003-04 to 2005-06 (supra).

Our first objection to the transfer fees being considered as tax-exempt in the present case is that the said income arises in exercise of the rights conferred by the arrangement, which is by definition not a mutual arrangement, but a clear case of commercial rights, which in substance is akin to a sale, as explained by the hon'ble court in its case in *Presidency CHS Ltd.* (supra), i.e., in the assessee's own case.

Without prejudice, in our clear view, the issue is covered against the assessee and in favour of the Revenue by the decisions in the case of *Presidency CHS Ltd.* (supra) *and Sind CHS* (supra). It is well settled that it is the quality of the receipt that determines its nature. The nature of this receipt has in fact been examined, in light of the underlying arrangement in pursuance to which it arises, in its own case in *Presidency CHS Ltd.* (supra), to find it as only 'income'. With reference to the decision by the apex court in

National Cement Mines Industries Ltd. v. CIT [1961] 42 ITR 69 (SC), the hon'ble court draws on *the proposition that it is not the nature of the receipt under general law but in commerce that is material*. Examining the bye laws and the lease agreement, which provided for retaining a right to a share in the excess that the members may receive while transferring their rights, the hon'ble court was of the view that the receipt by way of transfer fees is only in the nature of 'income'; in fact, one that had been contractually provided for. Its capital structure remained undisturbed, so that there was no question of it being a capital receipt or on capital account. The purpose of inserting the clause for the society to receive payment every time the lease changed hands was in its view only to ensure income, so that it had thereby provided for a source of income. Reference in this context is drawn to the detailed discussion, also entailing facts, as appearing at pages 327 to 331 of the reports. *Accordingly, it was held that transfer fee was not a capital receipt, but income chargeable to tax*. The hon'ble court did not go in to the further question as to whether it was assessable as business income or as income from other sources; the same being largely irrelevant. True, the question of mutuality, as observed by it later in *Sind CHS* (supra), was not before the hon'ble court, as also sought to be argued by the assessee before the first appellate authority. However, as afore-stated, the concept of 'income' and 'mutuality' are antithesis to each other, so that one excludes the other. After explaining the concept of mutuality in light of the precedents, and examining the facts of the case, the apex court in *Bankipur Club Ltd.* (supra) held that the surplus arising is not 'income' for the purposes of the Act, being a result of a mutual arrangement. This stands reiterated by it in *Bangalore Club Ltd*. (supra). That is, it is not possible to say that a receipt constitutes 'income', though is subject to 'mutuality'; income, by definition, flowing from outside oneself, while the basis of mutuality is that one cannot profit out of oneself. In fact, as a careful reading of the decision in *Presidency CHS Ltd.* (supra) would show, the hon'ble court considered it, in the facts and circumstances of the case, as receipt borne out of a commercial transaction, barring mutuality. *That is, not only was it found by the hon'ble court as of 'income' in nature, i.e., as opposed to capital, so that*

implicit therein is the finding of it being revenue in nature and, further, as arising from an outside source, but also as of commercial or trading in nature. Though it stopped short of categorizing it as a business receipt, a finding *qua* which was not relevant, the receipt being in any case taxable, it would be noted that the hon'ble adverts to the bye laws (at pg. 330 H of the reports), observing that the same provided for carrying on business of building, and of buying and selling, etc., leaving this aspect to be decided by the tribunal. *How could, therefore, one may even think of transfer fees as not being the assessee's income*?

Coming, next, to the decision in the case of *Sind CHS* (supra). In our view, the same does not assist the assessee's case. Firstly, for the reason that the decision in the case of *Presidency CHS Ltd.* (supra) would prevail, being rendered in the facts of the assessee's case, and after considering the law in the matter, which has not undergone any change (refer: *Bangalore Club Ltd*. (supra)). Two, the hon'ble court in *Sind CHS* (supra) does not give a blank or clean chit to transfer fees as tax-exempt, and it's decision of it being subject to mutuality is a qualified one. As explained, a receipt cannot be both 'income' and 'mutual' at the same time. As such, it cannot be that a receipt, bearing a single character, as a 'transfer fee' in the instant case, is partly 'income' and partly 'mutual'. The only manner, therefore, that the decision in the case of *Sind CHS* (supra) is to be interpreted and understood in harmony and reconciled with a series of decisions by the apex court *qua* mutuality, as well as in the case of *Presidency CHS Ltd.* (supra), as it indeed has to be, is that though the hon'ble court was of the view that transfer fee is *per se* income, was of the further and clear view that inasmuch as the same is charged by the society in terms of its bye laws in furtherance of its objects, a reasonable amount, not exceeding that as provided in the relevant Notification issued by the State Government under the relevant statute (as MCS Act, 1960), has to be respected and accorded mutuality status. That is, it provides for a small window of exemption. Again, not providing for any such reasonable limit, it may be appreciated, would, apart from being open to the charge of it being 'income', also attract the charge of commerciality, the very

reason why, though being collected under its bye laws, it was considered as income in *Presidency CHS Ltd.* (supra). The hon'ble court in *Sind CHS* (supra) in fact refers more than once in the decision to the objects or operations of the society being not tainted with commerciality, so that the same constitutes a fundamental consideration that cannot be, or seen to be, violated, while in our case the hon'ble court has already found the transaction of transfer fees to be arising out of or as a result of a commercial transaction, with in fact it being linked to the transfer consideration, i.e., market rate, in principle. The hon'ble court in *Sind CHS* (supra), further makes it abundantly clear that any excess over the amount stipulated under the Notification would be subject to section 72 of the Indian Contract Act, i.e., liable to be refunded and, further, if retained by the society, will not be subject to mutuality; it stating as: (pg. 62)

> 'If, therefore, any amount has been received beyond the amount notified by the Government and that amount has not been refunded to the members, to that excess amount, as already held, the principle of mutuality will not apply.'

This, we may add, is also the reading of the said decision by the tribunal in the case of *KKEMCAs Ltd. v. Asst. CIT* [2013] 143 ITD 594 (Del). The hon'ble jurisdictional high court in *Bharatiya Bhavan Co-operative vs. Smt. Krishna H. Bajaj & Ors.* (in W.P. No.1094 of 2004 dated 17.02.2010/copy placed on record) confirmed the protection of ss. 65 and/or 72 of the Contract Act, i.e., in principle, as applicable to all sums paid in excess of that prescribed by or under law, being illegal. This would also explain our observation earlier that the hon'ble court has regarded the receipt as income *per se*. The said decision has thus to be necessarily regarded as providing a leeway – in a limited manner – for according exemption under the exigencies of the situation obtaining. This is as a receipt could not, in principle, be partly mutual and partly not so, unless of course the two parts can be said to bear different characters, as was found in *CIT vs. W.I.A.A. Club Ltd.* [1982] 136 ITR 569 (Bom). The apex court in *Chowringhee Sales Bureau P. Ltd. vs. CIT* [1973] 87 ITR 542 (SC) and *Sinclair Murray & Co. P. Ltd. vs. CIT* [1974] 97 ITR 615

(SC), among others, has clarified that where sums are wrongly retained, the same would be exigible to tax, and which would also be so on the ground of unjust enrichment.

The decision in the case of *Mittal Court PCS Ltd.* (supra), also relied upon by the assessee, would not apply as the same is in respect of non-occupancy charges, and is in fact in line with the decision in the case of *Sind CHS* (supra), discussed hereinabove. As regards the assessee's reliance on the order by the tribunal in its case (for AYs 2003-04 to 2005-06/ supra/ PB pgs. 1-8), we find the same as of no consequence in view of the decision in the case of *Presidency CHS Ltd.*(supra) and *Sind CHS* (supra). Again, the decision by the tribunal in the case of *ITO v. Damodar Bhuvan CHS* (in ITA No. 1610/Mum/2010 dated 16.9.2011/PB pgs. 42 – 46), holding that the quantum of receipt with reference to the restriction thereon by any law as of no consequence is contrary to the decision by the hon'ble court in *Sind CHS* (supra). In fact, earlier on the special bench of the tribunal in *Walkeshwar Triveni Co-operative Housing Society Ltd.* (supra) held as under, emphasizing *quid pro quo* in such payments, and which, it would be seen, is in conformity and agreement with the decisions by the hon'ble court in *Sind CHS* (supra) and *Bharatiya Bhavan Co-operative vs. Smt. Krishna H. Bajaj & Ors.* (supra):

> "85. Cooperative Housing Societies in our country playing a very special and prominent role in catering to the housing needs of our people. If the Society is a voluntary association, created for mutual help without profit motive, no tax is being charged on the income of such Society. This profile of taxation at times tempts the human ingenuity to defile the law. Consequently, the spirit of mutuality is abused with impurity. To hood-wink the law premium is worded under different names, viz. DONATION, WELFARE FUND, COMMON AMENITIES FUND, etc. etc. Such contributions are compulsive to effect the transfer. Society can put interdict on the transfer *de hors* such contributions. As such there is *quid pro qua* in accepting such contributions. Such charges are neither legal nor voluntary. Profit is the prime object for making such charges to effect the transfer. This amounts to mal-practice. Such unlawful or illegal means should not be encouraged."

The hon'ble court in *Sind CHS* (supra) has clarified the receipt to be contractual. A contract in violation of law is void *ab initio*; the legal consequences of taxation though

would follow. The regulation by law of commercial societies, as under reference in *Mittal Court PCS Ltd.* (supra), is different, so that they stand on a different footing.

Under the circumstances, therefore, the impugned transfer fees shall be tax exempt as mutual to the extent of the extant rate as applicable to the class of Municipality under which the assessee-society falls, per the relevant/current Notification issued by the Government. Our said decision though would have ordinarily been subject to our finding the assessee-society as not or no longer a mutual concern, so that no part of the transfer fees would be exempt. However, the first appellate authority has allowed it part relief on the same lines as afore-stated, with the Revenue being not in appeal. His order is therefore confirmed. We decide accordingly.

TDR Premium

5.2 This issue arises for AYs. 2006-07 & 2007-08, even as the assessee has, by mistake, also raised it for A.Y. 2002-03; the same being not before the tribunal while deciding the appeal in the first instance nor, consequently, before the Revenue in the second round (refer para 2.1 of the order). Our first observation is that the assessee and its activities, for the detailed reasons listed hereinbefore, is not governed by the principle of mutuality, so that no part of its income would be exempt on the basis of mutuality.

Further, in our considered view, the matter arising for consideration being a mixed question of fact and law cannot be said to be covered by the decision in the case of *Jai Hind CHS Ltd.* (supra). This is for the clear and simple reason that whether commerciality is involved, or the transaction is guided by profit motive, is largely a matter of fact, to be determined on the conspectus of the facts and circumstances of the each case. The assessee's charter as well as its' operations have been found to be imbued with commerciality. Besides, as found by the Revenue in the instant case, common facilities are being enjoyed by both the members and the non-members, so that there is a break down of the identity, so essential and vital to preserve mutuality. Reference in this context is made to the detailed findings at para 3.7 (at pages 11 through 14) of the impugned order (for AY 2002-03). The findings, as afore-stated (refer paras 4.4, 4.5 of

this order) remain uncontroverted. All this, then, explains the non-application of the decision in the case of *Jai Hind CHS Ltd.* (supra) in the instant case. The ld. AR before us has sought to justify the claim, stating that services such as pest/rodent control, trash bag/collection, plot beautification, cleaning, etc., are provided only to members. That may well be true, even as we have already expressed our disagreement with the claim, and have no reason to hold that the basic services such as internal roads, parks, water and electric supply, drainage, street light, etc. are not enjoyed by the non-members residing at the society's land as well. *So, however, the question is, how is the argument relevant*? If the assessee has instituted and, accordingly, raised a maintenance fund for these services, surely the same shall be guided by mutuality. It is nobody's claim that the TDR premium is collected or even charged for that purpose. In fact, even if did, the same would be of no moment, as again there would be no identity between the contributors and participants; the TDR premium being a specific receipt for, if at all, a specific purpose, i.e., to provide infrastructure support for the additional FSI, which again contradicts the claim of the said facilities being not provided to all, while the infrastructure is for all residents, i.e., including non-members. We are considering the taxability of TDR premium, assuming for the moment that the assessee is a mutual concern. The claim of certain maintenance services as pest control, cleaning, trash collection, etc., as being limited to members, is thus of no relevance in this regard.

We find that the arrangement has led to not only a complete break down of identity, i.e., between contributors and participants, as explained at para 4.5 above, but also to huge sums to the society and opportunity for profit for its members, in violation of condition # 3 prescribed by the hon'ble apex court in *Bangalore Club* (supra); the figures, which have assumed volume and regularity over time, as readily available, being as:

Asst. Year	Transfer Fees	TDR Premium
A.Y. 1996-97	Rs.13,56,000/-	
A.Y. 2000-01	Rs.1,02,07,653/-	
A.Y. 2001-02	Rs.10,95,620/-	

A.Y. 2002-03	Rs.18,53,760/-	Rs.24,06,798/-
A.Y. 2006-07	Rs.15,45,000/-	Rs.56,44,670/-
A.Y. 2007-08	Rs.41,32,560/-	Rs.51,27,200/-

The condition as to profit, if one were to convey it more clearly and vividly, as stated in, what is known as the *Styles's* case, as clarified by the apex court in *Royal Western India Turf Club Ltd.* (supra), is the impossibility that contributors should derive profits from contributions made by them to the fund which could only be expended or returned to themselves.

Further on, in our view, the break down of mutuality when a contributor-member takes a loan from the club on interest, as explained by the apex court in *Bangalore Club* (supra), would apply in equal measure when, similarly, he, on payment of premium to the society, acquires permission to purchase TDRs. This is for two reasons. Firstly, as explained at length in this order, in our view, the whole concept of mutuality suffers and gets vitiated because the arrangement leads to acquisition of individual rights with the members on the grant of lease to them by the society. *It would be seen that it is this which is later sought to be capitalized through transfer, letting, etc., and it is only such receipts arising to the society in the exercise of such rights by the members and, correspondingly, profit to them, that are under challenge for mutuality. The acquisition of TDRs is only in continuation and a part of the said process*. Two, as explained by the apex court in *Bangalore Club* (supra), the common fund should exist and be applied between the group/club and its members. When the deposit by the club with the member-bank is given on loan to its client, the club's money goes out of this closed system, and the mutuality breaks. Similarly, the TDR premium paid to the society is recouped by the member through sale and/or otherwise worked on to generate income from its investment, as by letting the flat. That is, he trades on it, much in the same manner as the bank does on the money borrowed from, or deposited with it by, the club.

Finally, in our view, the decision in the assessee's case in *Presidency CHS Ltd.* (supra), as well as by the hon'ble court in *Sind CHS* (supra), providing only a limited window of exemption *qua* transfer fees, for the detailed reasons afore-stated, would also apply to the receipt by way of TDR premium as well.

For the foregoing reasons and binding precedents, we are unable to follow the decision in the case of *Jai Hind CHS Ltd.* (supra) and by the tribunal in the assessee's case for other years. The assessee has placed a resolution dated 05/8/1996 by the assessee-society (forming part of the Annual Report for 1995-96 dated 25/8/1996). The same is *qua* TDR premium. It; rather the report itself, was not referred to during hearing by either party. There is no reference thereto in the assessee's written submissions nor even in the orders by the authorities below. We are thus constrained not to take it as a part of the record in terms of rule 18 of the Appellate Tribunal Rules, 1963. We, accordingly, confirm the Revenue's stand in treating the receipt by way of TDR premium by the assessee-society as a part of its income liable to tax under the Act.

Expenses

5.3 The assessee's alternate plea for all the years is for being allowed expenditure in case 'transfer fees' and/or 'TDR premium' is considered as income subject to tax. The same has been denied by the Revenue in the absence of any relation between the expenses with the impugned receipts. Before us no improvement in its case could be made by the assessee. Without doubt, only the net income (on any activity or source or account) is to be taxed, so that the expenditure incurred in its respect would in principle warrant deduction. However, it is incumbent on the assessee to show as to how the expenditure being claimed against the stated receipts is related thereto or is in its respect, and which it has completely failed to. The expenditure has apparently no correlation therewith, viz. for AY 1996-97, being in the main on Navratra expenses, get together expenses and magazine expenses. Even if such expenditure, which may also include for other years general and administration expenses, or for maintenance expenses, is shown to be funded from the said receipts, the same would only be application of income, and

not expenditure thereagainst. The ld. AR before us was at loss to explain as to how the said expenditure could be claimed as a deduction. The assessee's claim is wholly without basis and, thus, stands rightly rejected by the Revenue. We decide accordingly.

6. In the result, the assessee's appeals for all the years are dismissed.
परिणामतः निर्धारिती की अपीलें खारिज की जाती है ।

Order pronounced in the open court on September 04, 2013

Sd/- Sd/-

(B. R. MITTAL) (SANJAY ARORA)
न्यायिक सदस्य / JUDICIAL MEMBER लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांकDated : 04.09.2013

Roshani , Sr. PS, A.K. Patel, PS & Shashi, PS

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**