आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ - अहमदाबाद ।

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD – BENCH 'A'
BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI WASEEM AHMED, ACCOUNTANT MEMBER

आयकर अपील सं./ **ITA No.51/Ahd/2017**
*निर्धारण वर्ष***Asstt. Year: 2013-2014**

DCIT, Cir.2(1)(1) Ahmedabad.	Vs.	M/s.Gulmohar Green Golf & Country Club Ltd. B-204, Shapath-4 Opp: Karnavati Club S.G. Highway Road, Thaltej, Ahmedabad.

अपीलार्थी/ (Appellant)		*प्रत्यर्थी/* (Respondent)

Revenue by	:	Shri S.K. Dev, Sr.DR
Assessee by	:	Shri Jyotish M. Shah, AR

*सुनवाई की तारीख/*Date of Hearing : 08/08/2018
*घोषणा की तारीख /*Date of Pronouncement: 27/08/2018

*आदेश/***O R D E R**

PER RAJPAL YADAV, JUDICIAL MEMBER:

Revenue is in appeal against order of ld.CITA)-2, Ahmedabad dated 16.11.2016 passed for the Asstt.Year 2013-14.

2. In the grounds of appeal, Revenue has raised sole issue i.e. the ld.CIT(A) has erred in deleting disallowance on account of members security deposit amounting to Rs.3,12,30,000/-, which according to the AO is membership fees collected from its members and is to be treated as income for the relevant year.

3. Brief facts in the regard are that assessee-company is engaged in business of club activities. It has filed its return of income on 28.9.2013 declaring total loss at Rs.(-)71,71,259/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) was issued and served upon the assessee. During the assessment proceedings, on verification of record it was noticed by the AO that the assessee has enrolled members on payment of security deposits as entrance fee, which according to the assessee was refundable to the members after 25 years on which no interest would be paid to them. This amount of deposits was not kept as security deposits separately in the accounts rather it was utilized for construction and other amenities to be provided to the club members. To the specific query by the AO, the assessee *interalia* replied that as per the bye-laws of the club, it was refundable amounts received from the members as security deposits after 25 years from the date of enrolment of membership with the club. Such security deposits were shown as long term liability in the balance sheet, and therefore it cannot be treated as income of the club. The ld.AO, however, was not satisfied with the reply of the assessee, denied the claim of the assessee, but restricted the disallowance to the extent of 60% of the security deposits received by the assessee during the year under consideration, and accordingly treated the a sum of Rs.3,12,30,000/- as revenue income. The assessee was not satisfied with the assessment order, and went in appeal before the First Appellate Authority, who after considering the submissions of the assessee and following the decision of ITAT, Ahmedabad Bench in assessee's own case on identical issue for the assessment years 2008-09, 2011-12 and 2012-13, the addition made by the AO was deleted and the appeal of the assessee was allowed. Aggrieved by impugned order of the ld.CIT(A), the Revenue is now before the Tribunal challenging deletion of addition of Rs.3,12,30,000/-

4. Before us, the ld.DR supported order of the AO. He further submitted that security deposit received by the assessee is nothing but membership fees with an intention to minimize income and avoid payment of tax. Though, the assessee has following mercantile system of account, the so-called security deposits has not been shown as liability in the balance sheet, and whatever amounts received from the new members have been utilized for construction work. The ld.AO considered all aspects of the issue and rightly concluded that money received from the new members is to be treated as membership fees and treated accordingly as income of the assessee.

5. The ld.counsel for the assessee, on the other hand, the ld.CIT(A) has discussed the issue in detail and allowed the claim of the assessee. The ld.CIT(A) while allowing the claim of the assessee also relied upon orders of the Tribunal in the assessee's own case for the assessment years 2008-09, 2011-12 and 2012-13 vide which on similar issue the Tribunal has held that deposits collected from its members are refundable and does not bear character of income, and therefore not liable to be taxed. This order of the Tribunal was further challenged by the Revenue before the Hon'ble High Court, and the Hon'ble Court by judgment dated 16.11.2016 upheld the order of the Tribunal and dismissed the appeal of the Revenue. He further submitted that in the assessment year 2010-11 also similar issue travelled to the Tribunal and the Tribunal in ITA No.2046/Ahd/2014 allowed the claim of the assessee. Therefore, this issue has become final and binding, and the same should be followed in the present case also.

6. We have considered rival submissions and gone through the record and also orders of the Tribunal passed in the earlier years also. We find that on this issue we do not require any extra efforts to examine the case of the assessee in order to come to the conclusion that money received from the members are in the nature of loan, which

are to be refunded to the members back after 25 years, and not in the nature of income as observed by the AO. The Tribunal in the assessee's own case, for earlier years on similar issue has allowed claim of the assessee, which was affirmed by the Hon'ble jurisdictional High Court in further appeal. Therefore, this issue is almost settled. However, for the sake of brevity, we reproduce below the discussion and finding of the Tribunal in the case of assessee in ITA No.2046 and 2619/Ahd/2016 dated 2.8.2017:

> *"5. With the assistance of the ld.representatives, we have gone through the record carefully. We find that the issue in dispute is squarely covered by the decision of the Hon'ble High Court. The following observations of the Hon'ble High Court in this regard are worth to note. It reads as under:*
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> > ***"8.3** Considering the Articles of Association and the relevant Rules, Regulations and Bye Laws of the assessee, the security deposit collected by the assessee at the time of enrollment of the club members is refundable after a period of 25 years and/or on happening of the eventuality in Rule/Bye Law No. 2 i.e. if a club member dies or institutional member is dissolved or wind up as the case may be. In other cases the security deposit shall be refunded to the member on expiry of 25 years and the said period may be extended by maximum period of 15 years at the discretion of the club member to avail club facilities for the extended period. It is also true that the said security deposit shall be non-interest bearing refundable security deposit. In light of the above the question posed for consideration of this Court is required to be considered i.e. whether such refundable security deposit shall be considered as revenue/income as sought to be contended on behalf of the revenue or Capital Receipt as contended on behalf of the assessee.*
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> > ***8.4** It is the case on behalf of the Revenue that as security deposit is nonrefundable interest deposit and that the same is utilized/used by the assessee for construction and providing other facilities at the club and that the said security deposit has not been kept apart the same cannot be treated as Capital Receipt, but the same is required to be considered as revenue/income in the hands of the assessee. In support of their above submissions, the Revenue has heavily relied upon the decision of the Hon'ble Supreme Court in the case of Bazpur Co-op. Sugar Factory Ltd. (supra).*

On the other hand it is the case on behalf of the assessee that merely because the security deposit is nonrefundable interest security deposit and merely because the same is not kept apart and merely because the same is used by the assessee for some other purpose, the same does not denude the amount of its character of "deposit" carrying with it the obligation to repay. In support of their above submissions learned Counsel appearing on behalf of the assessee has heavily relied upon the decision of the Hon'ble Supreme Court in the case of S.S. Sakhar Karkhana Ltd. (supra).

8.5 *In the case of S.S. Sakhar Karkhana Ltd. (supra), the Hon'ble Supreme Court had an occasion to consider its earlier decision in the case of Bazpur Co-op Sugar Factory Ltd. (supra). After considering the decision of the Hon'ble Supreme Court in the case of Bazpur Co-op Sugar Factory Ltd. (supra), the Hon'ble Supreme Court has observed in paras 21, 22, 24, 28, 30, 31, 32 as under :--*

> *"21. The Court reiterated the principle that "it is the true nature and quality of the receipt and not the head under which it is entered in the account books as would prove decisive" and that it makes no difference that the disputed amounts have been referred to as deposits and proceeded to consider the crucial issue in that light.*
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> *22. How far the ratio of the decision in Bazpur case could be applied to the case on hand is the first and foremost controversy. In the present case, the purchase and payment of price of sugarcane is undoubtedly part of trading operations of the assessee. It is in the course of such trading operations that the assessee realized the amounts (treated as deposits) with regularity and utilized the money so received in its business. To the extent the full payment is not made to the farmers, the assessee saved the raw material cost as well.*
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> *24. However, it needs to be clarified that the line of inquiry, in order to determine the true nature and character of the receipts, does not stop at ascertaining the mere fact whether the realization was in the course of trading operations. The moment it is found that certain amounts were deducted by the assessee out of the price payable to its members who supplied the raw material, the conclusion does not necessarily follow that all such realizations get impressed with the character of revenue receipts, giving rise to taxable income in the hands of the assessee. It is not any and every*

receipt linked to the trading activity that acquires the quality of revenue receipt. The Tribunal or the Court should go further and delve into the true nature, character and purpose of the realizations. If the amounts are meant to be held as deposits liable to be returned to the depositor at a specified point of time or on the happening of specified contingencies which are by no means uncertain or is otherwise treated as members' money the depository having no unfettered dominion over the said funds, then, it is difficult to characterize them as the income of the assessee. The realization of monies from the grower members in the course of trading operations could as well be construed to be an occasion, mode or convenient point of time at which the 'deposit' could be collected. Perhaps keeping this legal position in view, notwithstanding what has been stated in the earlier portion of the judgment, the learned Judges proceeded to address the next question, i.e. whether the receipts by way of deductions could be regarded as deposits as described in the byelaws. While answering that question in the negative, the Court pointed out that it is the true nature and quality of the receipt that is material but not the head under which it is entered in the account books a principle which is reiterated in a catena of decisions. The Court then went on to conclude that the receipts by way of deductions from the purchase price were not in the nature of deposits. In this context, the reasoning of the Bench may be noticed :--

> *"The essence of a deposit is that there must be a liability to return it to the party by whom or on whose behalf it is made on the fulfillment of certain conditions. Under the amended (sic unamended) bylaw, the amounts deducted from the price and credited to the said fund were first liable to be used in adjusting the losses of the respondent society in the working year; thereafter in the repayment of initial loan from the Industrial Finance Corporation of India and then for redeeming the Government share and only in the event of any balance being left, it was liable to be converted to share capital. The primary purpose for which the deposits were liable to be used were not to issue shares to the members from whose amounts the deductions were made but for the discharging of liabilities of the respondent society. In these circumstances, the receipts constituted by these*

deductions were really trading receipts of the assessee society ....."

30. Although the use of the expression 'deposit' does not conclude the issue, there are intrinsic indications in the byelaws that the expression has been used to mean just what it says. These are: (a) conversion of the deposit into additional shares, (b) transferability/heritability, (c) refundability, and (d) payment of interest on the deposit. The first three features are no doubt dependent upon occurrence of certain contingencies or hedged in by certain limitations. But the deposited amount is not denuded of its character of 'deposit' for that reason alone.

31. First, discussion needs to be focused on the first feature, namely, conversion of deposit into shares. The Tribunal rightly pointed out and it is not disputed before us that such conversion is as good as refund. Such conversion into additional shares is, however, postponed till the events of repayment of loans towards capital expenditure and the repayment of Government share capital happen. In other words, till such time, the member/depositor has no immediate right to demand the payment. Nevertheless, the obligation to repay stood annexed to the deposited amount at the time it was received by the assessee subject of course to the occurrence of the contingency specified in the byelaw itself. It cannot be said, as has been said by the High Court, that "under the byelaws, no event or contingency has been contemplated" under which the members could demand the repayment of the deposit. Nor can it be said that even after the happening of the event specified in the byelaws, the right to demand repayment becomes illusory in view of the discretion reserved to the Board of Directors of the Society. In this context, much of the argument has been built up on the use of the expression 'may' followed by the words "convert such deposits into shares after payment of loans etc." It is contended by the learned counsel appearing for the Revenue that the Board of Directors may very well refuse to convert the deposits into shares in exercise of its discretion on the ostensible ground that the financial position of the Society does not permit such conversion. The very existence of discretion, it is pointed out, negates the existence of liability to convert the deposit into shares. We cannot accede to this contention. Once the loans of the description mentioned in the byelaws which were outstanding on the

date the deposit was made are repaid, in our view, the Board of Directors is bound to convert the deposit amount into shares. The discretion is always coupled with a duty; the discretion cannot be used to circumvent the obligation cast under the law or contract governing the parties. In our view, it would be appropriate to read the expression 'may' as 'shall'. On the occurrence of the specified event, namely, the repayment of the loans referred to in the byelaw and the Government share capital, the member/depositor can clutch at a legally enforceable right to demand repayment, may be, in the form of conversion into additional shares.

32. In our view, the retention of the deposited money with the Society in order to utilize the same for repayment of term loans etc., does not denude the amount of its character of 'deposit' carrying with it the obligation to repay. Nor is it necessary, as the High Court was inclined to think, that the separate identity of the deposited amounts should be kept up. The absence of the right to secure repayment on demand is again not inconsistent with the receipt being a deposit. Liability to return need not be immediate and unconditional, following a demand by the depositor. Even if such liability gets crystallized on the happening of a specified contingency, it is still a liability which can be legally enforced by the depositor. The existence of such liability is an antithesis to the idea of ownership of the money by the Society."

In the aforesaid decision the Hon'ble Supreme Court has further observed that the existence of other features such as transferability of the deposit to another member and the provision for refund of the deposited amount to the member in case of cessation of membership or to his legal heirs in case of death, are important indicators against the treatment of the deposited amount as the money belonging to the Society.

In the case before the Hon'ble Supreme Court it was also found that the deposited amount is not kept aside and even the same is used by the society for repayment of the loan and it was found that time of repayment is indefinite, however it was refundable on the occurrence of the contingencies specified in the byelaws. To the aforesaid the Hon'ble Supreme Court has held that same dose not denude the amount of its "character of deposit" carrying with it the obligation to repay and therefore, the Hon'ble Supreme Court did not accept the case of the Revenue that it may

be treated as revenue income. In the aforesaid decision the Hon'ble Supreme Court distinguished the decision of the Hon'ble Supreme Court in the case of Bazpur Co-op Sugar Factory Ltd. (supra). In para 26, the Hon'ble Supreme Court distinguished the decision of the Hon'ble Supreme Court in the case of Bazpur Co-op Sugar Factory Ltd. (supra) by observing in para 26 as under :--

> *"26. To what extent the principle laid down or the test applied in the Bazpur case can be pressed into service in the present case is the question which needs our close attention. There are two distinguishing features which become apparent on a reading of the byelaws. The first is the absence of provision for payment of interest under the byelaws of Bazpur Co-operative Sugars Ltd. Secondly, in Bazpur case the deducted amounts credited to "loss equalization and capital redemption reserve fund" are liable to be adjusted against the losses of any working year. It is only after adjusting such losses, the deposits are allowed to accumulate and be utilized for repayment of IFCI loan and for redeeming the Government's share contribution. In the process of such adjustment, the entire amount collected from the members and credited to the fund may be dissipated or consumed, whereas in the instant case, the amount collected as deposit remains intact, though it could be utilized from time to time for meeting certain liabilities of capital nature. However, there is one qualification in this behalf. If the society has not incurred any loss and it remains a profit making concern, the situation will be very similar in both the cases. The amounts will then be utilized for repayment of long-term loans due to the financial institutions and the Government's share capital and after such process of repayment is complete, the disputed amounts could be made available to the grower members in the form of increased shares. Yet, in Bazpur case, at the time the sums were received from the grower member and remitted to the loss equalization fund, there was no knowing whether the 'deposit' would remain intact at all. The claim of the member to the deposited amount at that stage was too tenuous and slippery to earn the legal recognition of any proprietary interest over it. It cannot be said that the member had the right to get back the amount when it was recovered and credited to the Fund. The ultimate conclusion reached in Bazpur case can be explained on this basis. There is yet another angle from which the problem can be viewed. As between the member and the society, who is having*

substantial dominion over the 'deposits'? In Bazpur case the answer could only be that it is the assessee-society which had such dominion. The position is different in the present case, as explained hereafter."

***8.6** Applying the above test to the present case and considering the fact that the security deposit is refundable after a period of 25 years or on occurrence of the contingencies mentioned in the byelaws and it cannot be said that the assessee club had absolute dominion over the impugned deposits, the case on behalf of the Revenue that the same be treated as revenue income cannot be accepted. Merely because the security deposit is not kept apart and/or subsequently the amount of security deposit is utilized by the club for other purposes such as construction and providing other amenities at the club, the same shall not loose the "character of deposit", which as observed hereinabove is refundable on occurrence of the contingencies as mentioned in the byelaws. No error has been committed by the learned Tribunal in holding the same as Capital Receipt in view of the decision of the Hon'ble Supreme Court in the case of S.S. Sakhar Karkhana Ltd. (supra).*

***8.7** Now, so far as the decision of this Court in the case of Unique Mercantile Services Pvt. Ltd. (supra) is concerned, it is required to be noted that infact before the Division Bench it was the case of fees and the question was whether the fees collected and recovered is required to be spread over in the span of 15 years and/or the same is required to be considered in the first year. In the case before the High Court as such there was no question as to whether such refundable security deposit shall be treated as an income or not.*

***9.** In view of the above and for the reasons stated above and considering the fact that the security deposit recovered from the members at the time of their enrollment as a club member is refundable on occurrence of the contingencies mentioned in the Rules, Regulations and Bye Laws, same is required to be treated as a deposit and therefore, the same is required to be considered as capital receipts. We confirm the impugned judgment and order passed by the learned Tribunal. The substantial question of law raised in the present appeals is answered in favour of the assessee and against the Revenue. Present Tax Appeals stand disposed of accordingly. No costs."*

6. Respectfully following the judgment of the Hon'ble High Court, the addition restricted by the ld.CIT(A) is not sustainable,

consequently, the appeal of the assessee is allowed and that of Revenue is dismissed."

In view of the above order of the Tribunal, following rule of consistency, we confirm order of the ld.CIT(A) and rejects the grounds of appeal of the Revenue.

7. In the result, appeal of the Revenue is dismissed.

Order pronounced in the Court on 27th August, 2018.

Sd/-	Sd/-
(WASEEM AHMED)	(RAJPAL YADAV)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Ahmedabad; Dated 27/08/2018