IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCHES, 'A', CHANDIGARH

BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER&
Dr.B.R.R. KUMAR, ACCOUNTANT MEMBER

ITA No. 1084/Chd/2009
Assessment Year: 2006-07

The ITO, Ward-2, Panchkula	Vs.	Gymkhana Club, Sector 6, Panchkula PAN No. AAATG0115B

ITA No. 364/Chd/2003
Assessment Year: 2001-02

The ITO, Ward-4, Panchkula	Vs.	Gymkhana Club, Sector 6, Panchkula PAN No. AAATG0115B

ITA No. 777/Chd/2007
Assessment Year: 2004-05

The ITO, Ward-2, Panchkula	Vs.	Gymkhana Club, Sector 3, Panchkula PAN No. AAATG5668E

ITA No. 778/Chd/2007
Assessment Year: 2004-05

The ITO, Ward-2, Panchkula	Vs.	Gymkhana Club, Sector 6, Panchkula PAN No. AAATG0115B

ITA No. 252/Chd/2007
Assessment Year: 2003-04

The ITO, Ward-2, Panchkula	Vs.	Gymkhana Club, Sector 3, Panchkula PAN No. AAATG5668E

&

ITA No. 535/Chd/2014
Assessment Year: 2010-11

The ITO, Ward-3, Panchkula	Vs.	Gymkhana Club, Sector 6, Panchkula PAN No. AAATG0115B
(Appellant)		(Respondent)

Appellant By : Smt. Chanderkanta
Respondent By : Sh. S.K. Mukhi

Date of hearing : 03.08.2017
Date of Pronouncement : 26.09.2017

ORDER

Per Sanjay Garg, Judicial Member:

The above captioned appeals have been restored back by the Hon'ble High Court of Punjab & Haryana for decisions afresh vide separateorders dated 30.11.2015 passed in ITA Nos. 690 of 2005 (O&M), 70 of 2006 (O&M), ITA No. 243 to 246 of 2006, 420 of 2006, 553 of 2008 (O&M), 883 of 2008(O&M) and dated 5.1.22015in ITA Nos. 277 &278 of 2011(O&M). The Hon'ble High Court has directed

to adjudicate the issue as per directions given in the decision of the Hon'ble High Court passed in ITA No. 690 of 2005 (O&M) dated 30.11.2015.

2. The common issue in all the appeals involved is as to whether the 'principle of mutuality' would be applicable in the case of assessee or not.

3. This is the second round of appeal before us. The brief facts relevant to the issue have been taken from ITA No. 1084/Chd/2009 for assessment year 2006-07. The assessee, Gymkhana Club, Sector 6, Panchkula has been incorporated as a society registered under the Societies Registration Act, 1860 on 17.1.1994 by the Registrar of Societies, Haryana. The assessee club filed its return of income for assessment year 2006-07 on 31.10.2006 returning nil income on the ground that it was a mutual concern. The cases was picked up for scrutiny by the Assessing Officer. The Assessing Officer perused the tax audit report for assessment year 2006-07 filed by the assessee and noticed that there was surplus of income over expenditure at Rs.35,72,081/- including interest income amounting to Rs.21,95,943/-. He also examined the claim of the assessee that it was a mutual concern and, therefore, exempt from tax. He scrutinized the Memorandum of Association and the by-laws of the society and noticed that the management and control of the assessee was wholly and exclusively vested in HUDA (Haryana Urban Development Authority) and, therefore, it was de-facto an extended arm of HUDA.

He noticed that the assessee had made substantial investments in the form of FDRs in bank over which the members had no control and that it was HUDA which actually had control over the funds including FDRs. He also noticed that the contributors to the funds were neither entitled to participate in the surplus nor otherwise had any say in the management including finances/funds of the club. He also noticed that the Club facilities were being extend to certain non-members against payments made by them and thus Club is also involved in profit making activities from third parties. Taking into account the totality of facts and circumstances of the case as narrated in detail in the assessment order, the Assessing Officer held that there was no identity between the contributors and the participants and, therefore, he rejected the claim of the assessee that it was a mutual concern. In support of his decision, the Assessing Officer relied upon several decisions including those of the Hon'ble Jurisdictional High Court. In this view of the matter the entire surplus shown by the assessee in its account including interest income was brought to tax by the Assessing Officer.

4. Aggrieved by the order of the Assessing Officer the assessee filed appeal before the Commissioner of Income-tax (A) who, following the order of this Tribunal in assessee's own case for assessment year 2004-05, allowed the claim of the assessee.

5. Aggrieved by the order passed by the Commissioner of Income Tax (A), the Department preferred appeal before this Tribunal.The

Tribunal vide order dated 28.2.2011 dismissed the appeal of the Revenue observing that the facts for the year under consideration i.e. assessment year 2006-07 were identical to that of assessee's case for assessment year 2004-05. That even in the earlier years, the issue had consistently been decided by the Tribunal in favour of the assessee. The matter had been further carried over to the Hon'ble High Court which was pending for adjudication. It was, therefore, held that there was no reasons to deviate from the ratio laid down in earlier decisions of the Tribunal. The Tribunal accordingly dismissed the appeal of the Revenue and held that the principle of mutuality was applicable to the assessee club and, hence, the income of the assessee club was nottaxable. It is pertinent to mention here that earlier the issue whether the principle of mutuality applies to the assessee concern hasarisen in assessment year 1997-98. The matter travelled to the Hon'ble High Court. The Hon'ble jurisdictional High Court whileadjudicating the issue as to whether the principle of mutuality would be applicable in the case or not, while relying uponthe decisions of the Hon'ble Supreme Court in the case of 'Banglore Club Vs. CIT' (2013) 350 ITR 509 (SC) summed up the conditions laid down for the applicability of doctrine. The relevant partof the order dated 30.10.2015 passed in ITA No. 690 of 2005 for assessment year 1997-98 is reproduced as under:-

> *"13. The conditions for invoking the principle of mutuality have been recently enumerated by the Apex Court in Bangalore Club's case (supra) wherein after considering various other pronouncements of the*

Supreme Court and the High Court on the subject, it has been laid down that 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 the group, for a common benefit. Any surplus amount to that needed to pursue the common purpose is said to be simply an increase of the common fund and as such neither considered income nor taxable. Broadly, the following conditions have been laid down for the applicability of doctrine of mutuality:-

(i) The first condition to invoke the principle of mutuality requires that there must be a complete identity between the contributors and the participators;

(ii) the second feature demands that the action of the participants and the contributors must be in furtherance of the mandate of the association. However, in the case of a club, the steps have to be taken in furtherance of activities that benefit the club and in turn its members. The condition postulates a direct step with direct benefits to the functioning of the club. The mandate of the club requires to be examined in the factual matrix keeping in view the memorandum or articles of association, rules of membership, rules of the organization etc. However, it cannot be construed myopically. In some situations, the benefit may be evident directly in the short run, in others, they may be accruable to an organization indirectly, in the long run and the space must be made for both such forms of interactions between the organization and its member;

(iii) Further, there must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves and it is a difficult question of fact that at what point mutuality ends and commerciality begins."

6. The Hon'ble High Court further observed that the Tribunal while adjudicating the appeal had not recorded any definite findingof facton the basis of the legal enunciations on this issue. The Hon'ble High Court therefore, remanded the matter back to the Tribunal to adjudicate the same and pass a speaking order after hearing both the parties. Following the said order dated 30.11.2015 for assessment year 1997-98 passed in ITA No. 690 of 2005 (O&N), the Hon'ble High Court subsequently restored the matter to the file of the Tribunal for all subsequent years accordingly.

7. The appeals of the Department in some of the years have already been dismissed being tax effect involved therein less than Rs. 10 lakhs and thus the same being not maintainable as per Circular No. 21/2015 of CBDT dated 10.12.2015, which has been made applicable retrospectively to the pending appeals also. Since the tax effect involving in the captioned appeals is more than the monetary limit prescribed, hence, the captioned appeals wereheard on merits as directed by the Hon'ble High Court.

8. The main contention of the Revenue is that the assessee club has been formed under the control of Haryana Urban Development Authority (HUDA) which is authority established by Haryana Government. HUDA is totally a Government entity. The Chief Administrator of HUDA is an ex-officio president of the assessee club. The Memorandum of Association further provides for constitution of a Board of Patrons consisting of Vice Chairman, HUDA & Chief

Secretary to the Govt. of Haryana, P.S.C.M., Commissioner & Secretary to Govt. of Haryana in the Department of Town & Country Planning, Chief Administrator, HUDA and a Representative of Defense Services (Western Command) not below the rank of Lt. Gen. (To be nominated). The Board of Patrons has veto power on the decisions taken by any committee/body of the society. The Memorandum of Association also provides for the constitution of an Executive Committee to look after the day-to-day management of the club. The Executive Committee consists of the President who has necessarily to be the Chief Administrator, HUDA, Vice President of the Society who has to be the Administrator of HUDA and similar other officers of the Govt. The above-mentioned officials of HUDA exercise control over the assessee club.That assessee club is not independent entity but working under the control of HUDA. All the financial decisions are being taken by HUDA authority. Besides this, President, Vice President and other members are also not elected from the members of the club. All the expenditure is incurred through HUDA. This issue of control is being highlight to show that there is no complete equality between the contributors of the club. Further, the assessee club is receivinginterest income from fixed deposits held with various banks. These amounts deposited in fixed deposits have mostly been received from members of the club as membership fee, renewal fee or in the form of other charges like subscriptions and guest charges. This whole amount is deposited with various banks. The withdrawals of this amount and the use to which it can be put, is

totally in the hands of the management of the club, which comprises, the official of Haryana Governmenti.e. Chief Administrator. It has also been contended that as per clause 5(d) of the Memorandum of Association, upon the winding up or dissolution of the society, if, there remains after satisfaction of all its debts and liabilities any property,the same shall not be paid to or distributed among the members of the society, but shall be given or transferred to some other Institution having objects similar to the objects of the society to be determined by members of the society at or before the time of dissolution. The Ld. DR therefore has contended that the surplus is not shared by members of the club, hence principle of mutuality does not apply to the case of assessee society.

9. On the other hand, the contention of the Ld. AR has been that though, asper the Memorandum ofAssociation, foradministrativepurposes, the management of the club has been given to the High officials of the HUDA, however, the funds of the Club are used for the common purposes and benefits of members.Contributions to the funds as well as participators were completely identifiable. That as per the objects of the Society funds of the Club can be applied towards the promotion of the objects of the Club and no portion thereof can be paid or transferred directly or indirectly to the members of the Club / Society. He has also relied upon the winding up clause in the memorandum of the society and has submitted that after satisfying its liabilities, the remaining assets / properties is not to be

paid or distributed among the members of the society but shall be given or transferred to some other institution having objects similar to that of the Society. He, therefore, has stated that no profit element is involved in the activities of the society and that the 'principle of mutuality' is applicable to the assessee society.

10. We have considered the rival contentions and have also gone through the records. Before going deep in the controversy, it is imperative to firstly discuss the aims / objectives and other relevant conditions and clauses regarding its constitution and membership. The aims and objects of the society have been enumerated in para 4 of the memorandum of Association, which reads as under:-

"Aims/ Objectives & functions of the Society

The objectives for which the Society is formed are -

i) To afford its members all the usual privileges, advantages and conveniences of a Club Society.

ii) To promote understanding and amity amongst the members of the Club / Society

iii) To provide facilities for development of physical, cultural and taking of healthy exercises,by providing all type of amenities for impartinginstructions, in the games such as swimming, tennis,badminton, table tennis,billiards, squash and other indoor as well as outdoor games etc.

iv) To invite as and when feasible, renowned artists, masters, sportsmen, culturalleaders, scholars, scientists and creative artists, who may or may not be members of the Society to take advantage of the facilities offered by the Society.

v) To promote or hold either alone or jointly with any association or persons, meetings, tournaments, competitions and matches relating to games to other health–exercise and to offer, give or contribute prizes, medal and awards and to promote, give or support dance, concerts and other social supporting or cultural, entertainments events.

vi) To establish, promote or assist in establishing or promoting and to subscribe to or become a member of any other Association whose objects are similar or in part of similar to the objects of the Club or the establishment or promotion of which may be beneficial to the Club. The HUDA Gymkhana Club may affiliate with any other club."

11. Article 5 deals with the 'condition' which provides that income and property of the Society shall be applied towards thepromotion of the objects of the society and no part thereof shall be transferreddirectly or indirectly to the members of the Society. Further, no member of the Governing Body of the Society shall be paid any salary. Further, clause (d) of Article 5, as discussed above, provides that on itsdissolution of the club, the property will not vest in the members of the society rather the same shall be transferred to some other institution having objects similar to the objects of the Society. Article 6 deals with management and affairs of thesociety which says that the same will rest in a GoverningBody of which the following will be the first members:

S.No.	Name	Address	Occupation	Design.
1	Sh. Bhaskar Chatterjee	Chief Administrator	Service	President
2	Sh. K.K.Khandelwal	Administrator, HUDA, Panchkula		Vice President
3	Sh. Parveen Kumar	Estate Officer, HUDA, Panchkula	Service`	General Secretary
4	Sh. S.C. Kansal	C.C.G.HUDA	Service	Treasurer
5	Sh. S.K. Sardana	Legal Remembrance, HUDA	Service	Joint Secretary
6	Sh. T.R. Sharma	D.C. Panchkula	Service	Member
7	Sh. K.P.Singh	S.P. Panchkula	Service	Member
8	Sh. S.K.Monga	Administrator (HQ)	Service	Member
9	Sh. B.P. Sinha	C.T.P. HUDA	Service	Member
10	Sh. R.C. Taneja	S.E. HUDA	Service	Member

Thereafter, we find mention of the names of 11 persons who have decidedto form the Society in the name of Gymkhana Club, Sector 6, and Panchkula, as under:-

1	*Sh. G.S. Ojha, IAS*	*Chief Secretary to Government Haryana*
2	*Sh. Dharmendra Kumar, IAS*	*P.S.C.M.*

3	*Sh. Pradeep Kumar, IAS*	*Commissioner & Secretary to Government Town & Country & Urban Estates*
4	*Sh. BhaskerChaterjee, IAS*	*Chief Administrator, HUDA, Panchkula*
5	*Sh. K.K. Khandelwal*	*Administrator, HUDA, Panchkula*
6	*Sh. S.R. Monga, IAS*	*Administrator (HQ), HUDA, Mani-majra*
7	*Sh. O.P. Sardana*	*Legal Remembrance, HUDA*
8	*Sh. B.P. Sinha*	*Chief Town Planner, HUDA*
9	*Sh. S.K. Kapoor*	*Chief Town Planner, Haryana*
10	*Sh. S.L.Gulati*	*Chief Engineer, HUDA*
11	*Sh. Parveen Kumar, HCS*	*Estate officer, HUDA Panchkula*

Further, it has been provided as under:-

"Constitution:

There will be a Board of Patrons consisting of the following:-

1	*Vice Chairman, HUDA and Chief Secretary to Government. Haryana*	*Chairman, Board of Patrons*
2	*P.S.C.M.*	*Member*
3	*Commissioner & Secretary to Government. Haryana, Town & Country Planning Department*	*Member*
4	*Chief Administrator, HUDA*	*Member*

5	*Representative of Defence Services (Western Command) Not below the rank of Lt. Gen. (to be nominated)*	*Member*

The Board of Patron shall have the absolute powers in terms of taking decision pertaining to any matter relating to Club and to do all such other lawful things as are incidental or conducive to the attainment of the above objects. It will have veto power on the decision taken to any committee / body relating to the club.

5. Management of the Club-

The management of the Club shall be looked after by an Executive Committee with the following Members:-

1	*President*	*One*
2	*Vice-president*	*One*
3	*General Secretary*	*One*
4	*Joint Secretary*	*One*
5	*Treasurer*	*One*
6	*Executive Member*	*Five*
7	*Non Official members*	*Four*
	Total	*14*

Note:-

1. *The Chief Administrator, HUDA will be ex-officio President of the Gymkhana Club, Panchkula.*
2. *The Administrator, HUDA, Panchkula will be ex-officio Vice President of the Club.*
3. *The Estate officer HUDA or any other officer to be nominated by the President of the Club with the prior*

approval of the Board of Patrons will be the ex-officio General Secretary of the club.

4. *C.C.F. HUDA or any other officer nominated by the President of the Club with the prior approval of the Board of Patrons will be the ex-officio Treasurer of Gymkhana Club.*

5. *The Joint Secretary of the Club shall be nominated by the President with the prior approval of the Board of Patrons.*

6. *Office Executive Members:*

7. *There will be five official Executive Members to be nominated by the President with the prior approval of the Board of Patrons*

8. *There will be four non official member to be nominated by the President Gymkhanas Club, with the prior approval of the Board of Patrons."*

12. There are separate categories of the members of the club:-

a) Permanent members

b) Dependent members

c) Corporate members

d) HUDA members

e) Service members

13. It has been further provided that Permanentmember has to pay an entrance fee, annual subscription, monthly subscription and such other fees as may be fixed from time to time by the Executive Committee.The Dependent Members are the spouse and dependent children of the members. Guest of the Permanent Members can also use the facility on payment of certain amount. The Corporate Member

means a limited Company or an organization who will have the right to nominate not more than three persons who will be entitled to enjoy Clubfacilities on payment of subscription fee. Another clause of members is HUDA Members, who are members of the Authority and Gazetted officers of HUDA posted at Panchkula/Chandigarh and they are eligible to becomepermanentmembers on payment of fee of Rs. 250/- and monthly subscription of Rs. 50/- or such fee and subscription as may be determined by the Executive Committee. In the category of Service Members, all the class-I & II officers of the State Government / Central Government, Boards / Corporations etc. have been made eligible to become permanentmembers of the Club on payment of fee of Rs. 500/- and monthly subscription of Rs. 50/- or such fee and subscription as may be determined by the Executive Committee. The admission of any person into any category of the members of the club is subject to the decision of the executive committee.

14. The main thrust of the Ld. DR is that the contribution and management of the Clubsolely rests with the government officials of the HUDA only. The non-officials or the members from the public have no say in the management and functioning of the Club. The high rank officials of the HUDA have been made ex.officio President, Vice President, Secretary, Joint Secretary, Treasurer etc. of the Club which means that any person who will be posted on the said posts like that of Chief Administrator or Administrator of HUDA etc., will

automatically hold the position of President orVice President as per the rank of his post in HUDA in the Executive Committee of the Club. The Members from the public can be admitted only to enjoy the facilities of the Club on payment of subscription fee and other charges but they are not entitled to hold any position in the management of the club except the four non-official members to be nominated by the President.

15. In the above background, now we have to discuss as to whether the 'Principe of Mutuality' applies to the Club or not. It is revealed that originally the higher rank officials of the HUDA have created an Association in the name of assessee Society i.e. Gymkhana Club, Panchkula. It was resolved by them that certain high rank officials of the HUDA will be only will look after the management of the Society. The membership was also open to the persons from public subject to the approval by the Executive Committee. It is also an admitted fact that only the members of the Club are entitled to enjoy the facilities of the Club. It is also an admitted fact that surplus is to be expended for the common benefit of the Club members or for carrying out the objectives of the Club. All the members of the Club enjoy the equal right so far as the utilization of the facilities of the Club or the common benefits of the members are concerned.

As held by the Hon'ble Supreme Court in the case of 'Banglore Club' (supra), the 'principal of mutuality, relates to the notion that a person cannot make a profit from himself. An amount received from oneself

is not regarded as income and is therefore, not subject to tax. The concept of Mutuality has been has been explained to define group of people who contribute to a common fund, controlled by the group, for a common benefit. Any amount surplus to that needed to pursue the common purposes is said to be simply an increase of common fund and as such neither considered income nor taxable. In the light of the above principles, we have to decide as to whether the surplus accrued / collected during the year is taxable income of the assessee or the same is just the collection of the common fund to which Principle of mutuality applies.

16. The Hon'ble Supreme Court in the case of Bangalore Club (supra) has also discussed the nature and functioning of the mutual organizations. It has been observed that a common feature of mutual organization in general and of licensed Club in particular is that participators usually do not have property right to their shares in the common fund, nor they can sell their share. And when they cease to be members, they lose their right to participate without receiving a financial benefit from the surrender of their membership. A further feature of the licensed Club is that there are both membership fee and the price charged for club services are greater than their cost and further additional contributions. It is this kind of price and / or additional contributions which constitutes mutual fund.

The nature, formation and functioning of the assessee Club before us also resembles to the characteristic and parameters of a

mutual organization as discussed above. The only distinguishing feature in respect of the assessee Club is that the management and control of the Club vests in certain pre-authorized/pre determined persons according to their rank and status in the government organization HUDA (Haryana Urban Development Authority), which means that members of the Club do not enjoy equal rights so far as the management and decision making in Society is concerned. They also do not have voting rights to elect their representatives for running the management and affairs of the Club on their behalf, rather, the members in the Management Committee come by default because of their official position in HUDA. This being the position, now we examine as to whether the assessee club conforms to the parameters required of a mutual organization.

17. One of the point of views can be that the decision to appoint ex-officio members was taken by the first members of the club at the time of its creation which also finds mention in the Memorandum of Association. The other members entering into the club have agreed to the aforesaid aims and objects, hence, it can be said to be a mutual decision of the members of the club to adopt such a procedure of appointing ex-officio members in the management committee. That the members may mutually agree to appoint any person or persons or to give responsibility to any of its members to run the day to day affairs of the club. Hence management of the club has nothing to do with the

mutual status of the club. However this view has a rebuttal that if the members have a right to mutually take a decision to appoint any person/persons in the management, then the must got right to mutually take a decision to remove or discharge that person/persons from the management of the club. Right to appoint includes right to remove or discharge also. Now if we admit the plea that it is the mutual decision of the club members to give the responsibility of the management of the club to the high rank officers of HUDA, whether any right of reverse action that is to divest the officials of HUDA from the management of the club lies with the members of the club? The answer is no. We have gone through the memorandum of the association but have not found any clause giving any such right in particular or any other right in general to the members of the club in general. All the rights vests in the executive committee. The Board of Patron have the absolute powers in terms of taking decision pertaining to any matter relating to Club.They have veto power on the decision taken to any committee / body relating to the club. Under these circumstances, it can not be said that the appoint of management or vesting of all rights relating to the running of affairs of the club including taking financial decisions relating to the manner and items on which the surplus is to be applied. In general parlance, as we understand, the participation in the surplus includes not only the right to get common benefit out of surplus but also the right to participate in the decision making as to in what manner or on what item or services the surplus is to be applied. Having said so, we do not mean that the consent of each or every

member is required to be taken, but it must come from the members as a class or by or through their representatives either elected or selected mutually by the members. In the case of the assessee club, the representatives who takes the decisions relating to the club are neither elected nor selected by the members of the club but they come by default as per the clause of the Memorandum of association. Even there is nothing provided in the Memorandum of association that members/ general body of the members have got any right to bring any change in any clause of the MOA. As discussed above, The Hon'ble Supreme Court in para 7 of the order in the case of 'Banglore Club' (supra) has observed that the concept of Mutuality has been explained to define group of people who contribute to a common fund, controlled by the group**,** for a common benefit. In the case of assessee club, though the contribution to common fund for a common benefit is present, however, we have our doubts, in view of the discussion made above, that it can in the real sense be said that the club is controlled by the group.

Having said so, the next question comes as to whether the assessee Societyfalls short of a mutual organization, so far as the taxability of the income is concerned ? As discussed above, all the contributors are the members of the Club. The surplus has to be expended for the mutual benefit and in carrying out the objects of the Club. The Revenue has not pointed out any profit motive so far as the

collections, activities and contribution of the funds, activities run by the assessee Club and the participation in the funds is concerned.

18. No doubt, clause (iv) of the Memorandum of Association provides to invite non-members who are eminent persons of the society such as renowned artists, masters, sportsmen, cultural leaders, scholars, scientists and creative artists, to take advantage of the facilities offered by the Society.In our view that itself does not give any impression that inviting such members to enjoy the facilities of the Club has any profit motive. The facilities of the Club are not offered to non-members as a matter of practice but it is restricted only to the eminent persons of the society who are invited by the Club to avail the facilities of the Club. It is not the case of the Revenue that funds of the Club have been raised or collected with a profit element to the HUDA or to the official management who are ex-officio members of the Club. No doubt the participation in the surplus of the non-official members is restricted to the enjoyment and use of facilities of the Club and they are not entitled to participate in the decision making as to on which activity and in what manner funds are to be expended for the common benefit of the members or for carrying out the objects of the Club. Such a restriction though may be of some importance with the question as to the mutually equal rights in the management of Club if any such dispute arises inter se between the members. However, so far as the taxability of the surplus is

concerned, the surplus funds cannot be said to be income of the Society as there is lack of business profit motive involved and the funds so collected have to be necessary expended for the common benefit of the contributors only. It has also been held time and again that when we speak of the contributions to the common fund and the participation in the surplus, that does not mean that each member should contribute to the fund or that each member should participate in the surplus but they have to be seen as a class of the persons who were contributing and are entitled to participate in the surplus. It is not the matter that the class may be diminished by persons coming out of the scheme or increased by others coming in. The taxation under the Income Tax Act is to be done on the receipts or the income of the society. As discussed above, though the assessee club may fall short of the definition of mutual organization in common parlance or understanding of the term, however, so far as the taxation of the surplus out of the contributions is concerned, the same cannot be said to be the income of the club, being a common fund collected for common benefit of the contributors only.

So far as the winding up clause is concerned, the Ld. DR has stressed that on winding up, members are not entitled to share any surplus on the winding up. As discussed in earlier paras of this order, it has become a common feature of mutual organizations in general and licensed clubs in particular that on winding up the members are not entitled to the share in the surplus rather the whole of the surplus

funds is decided to be spent on charity or given to some other organization having same or similar objectives. Hon'ble Supreme Court in Banglore Club's case (supra) in para 15 of the judgement has observed as under:

> *"**15.** In short, there has to be a complete identity between the class of participators and class of contributors; the particular label or form by which the mutual association is known is of no consequence. Kanga & Palkhivala explain this concept in "The Law and Practice of Income Tax" (8th Edn. Vol. I, 1990) at p. 113 as follows:*
>
> > *"...The contributors to the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid." The Madras, Andhra Pradesh and Kerala High Court have held that the test of mutuality does not require that the contributors to the common fund should willy-nilly distribute the surplus amongst themselves : it is enough if they have a right of disposal over the surplus, and in exercise of that right they may agree that on winding up the surplus will be transferred to a similar association or used for some charitable objects...."*

19. We further, taking clue from the observations of the Hon'ble Supreme Court in Banglore Club's case (supra), may add here that sometimes the right to share in the surplus may lead to a conclusion of involvement of the motive of commerciality in the operation or working of such an organization resulting into denial of the benefit of

mutuality. In this respect, the Hon'ble Supreme Court in 'Banglore Club' (supra) has referred to the British Common Law decisions in the case of 'Styles (Surveyor of Taxes) Vs. New York Life Insurance Co' (1889) 2 TC 460 and in the case of 'Thomas Vs. Richard Evans & Co Ltd (1927) 11 TC 790 wherein it has been held that if profits are distributed to shareholders, the principle of mutuality is not satisfied. Further, in the case of 'Commissioner of Income Tax, Madras Vs. Kumbakonam Mutual Benefit Fund Ltd'., AIR 1965 SC 96, the Hon'ble Supreme Court denied the exemption on different facts of the case before it from those of Styles case (supra) and denied the exemption because of the taint of commerciality, observing as under:-

> *"It seems to us that it is difficult to hold that Stylee's case applies to the facts of the case. A shareholder in the assessee company is entitled to participate in the profits without contributing to the funds of the company by taking loans. He is entitled tor received his dividend as long as he holds a share. He has not to fulfil any other condition. His position is in no way different from a shareholder in a banking company, limited by shares. Indeed, the positon of the assessee is no different from an ordinary bank except that it lends money to and receives deposits from the shareholders. This does not by itself make its income any the less income from business within S.10 of the Indian Income Tax Act."*

20. The Hon'ble Supreme Court in 'Bangalore Club' (supra) has further observed in para 23 of the order that it is a difficult question of fact as at what point mutuality ends and commerciality begins. The

Hon'ble Supreme Court has referred to the decision of the 'CIT, Bihar Vs. Bankipur Club Ltd'., (1997) 5SCC 394., wherein it has been observed as under:-

> "*at what point, does the relationship of mutually end and that of trading begin" is a difficult and vexed question. A host of factors may have to be considered to arrive at a conclusion. "Whether or not the persons dealing with each other, is a 'mutual club' or carrying on a trading activity or an adventure in the nature of trade" is largely a question of fact [Wilcock's case - 9 Tax Cases 111, (p.132); C.A. (1925)(1) KB 30 at p.44 and 45]."*

In view of the above, there can not be said to be straight jacket formula to say that in every a mutual concern the members must be entitled to a share in the surplus. In the aforesaid case laws as discussed by the Hon'ble Supreme Court in Banglore Cliub's case (supra), if the scheme or the mechanism of functioning of a mutual organization is so devised that a taint of commerciality is involved, the income of the organization can be subjected to tax. As observed by the hon'ble supreme court, it is difficult and vexed question as to at what point of time the relationship of mutually ends and that of trading begins. Since the affairs of the assessee trust are controlled by the serving officers of HUDA, hence it has to pass through greater scrutiny as the chances of it crossing the thin line between the mutuality and commerciality are very high. However, at this stage, so far the Assessment Years under consideration are concerned, the revenue could not point out the taint of commerciality in the

contribution, management and application of the surplus collected through contributions and subscriptions from the members and for price of the facilities availed by its members, hence, the same cannot be said to be taxable income of the society.

21. So far as the receipt from interest on FDR's is concerned, the ld. Counsel for the assessee society has fairly agreed that the issue has been settled by the Hon'ble supreme court in the case of Banglore Club (supra) against the assessee by observing as under:

> *"25. This brings us to the facts of the present case. As aforesaid, the assessee is an AOP. The concerned banks are all corporate members of the club. The interest earned from fixed deposits kept with non- member banks was offered for taxation and the tax due was paid. Therefore, we are required to examine the case of the assessee, in relation to the interest earned on fixed deposits with the member banks, on the touchstone of the three cumulative conditions, enumerated above.*
>
> ***26.*** *Firstly, the arrangement lacks a complete identity between the contributors and participators. Till the stage of generation of surplus funds, the setup resembled that of a mutuality; the flow of money, to and fro, was maintained within the closed circuit formed by the banks and the club, and to that extent, nobody who was not privy to this mutuality, benefited from the arrangement. However, as soon as these funds were placed in fixed deposits with banks, the closed flow of funds between the banks and the club suffered from deflections due to exposure to commercial banking operations. During the course of their banking business, the member banks used such deposits to advance loans to their clients. Hence, in the present case, with the funds of the mutuality, member banks engaged in commercial operations with third parties outside of the mutuality, rupturing the 'privity of mutuality', and consequently, violating the one to one identity between the contributors and participators as mandated by the first condition. Thus, in the case before us the first condition for a claim of mutuality is not satisfied.*

27. *As aforesaid, the second condition demands that to claim an exemption from tax on the principle of mutuality, treatment of the excess funds must be in furtherance of the object of the club, which is not the case here. In the instant case, the surplus funds were not used for any specific service, infrastructure, maintenance or for any other direct benefit for the member of the club. These were taken out of mutuality when the member banks placed the same at the disposal of third parties, thus, initiating an independent contract between the bank and the clients of the bank, a third party, not privy to the mutuality. This contract lacked the degree of proximity between the club and its member, which may in a distant and indirect way benefit the club, nonetheless, it cannot be categorized as an activity of the club in pursuit of its objectives. It needs little emphasis that the second condition postulates a direct step with direct benefits to the functioning of the club. For the sake of argument, one may draw remote connections with the most brazen commercial activities to a club's functioning. However, such is not the design of the second condition. Therefore, it stands violated.*

28. *The facts at hand also fail to satisfy the third condition of the mutuality principle i.e. the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves. This principle requires that the funds must be returned to the contributors as well as expended solely on the contributors. True, that in the present case, the funds do return to the club. However, before that, they are expended on non- members i.e. the clients of the bank. Banks generate revenue by paying a lower rate of interest to club-assessee, that makes deposits with them, and then loan out the deposited amounts at a higher rate of interest to third parties. This loaning out of funds of the club by banks to outsiders for commercial reasons, in our opinion, snaps the link of mutuality and thus, breaches the third condition.*

29. *There is nothing on record which shows that the banks made separate and special provisions for the funds that came from the club, or that they did not loan them out. Therefore, clearly, the club did not give, or get, the treatment a club gets from its members; the interaction between them clearly reflected one between a bank and*

its client. This directly contravenes the third condition as elucidated in Styles (Surveyor of Taxes) and Kumbakonam Mutual Benefit Fund Ltd. cases (supra). Rowlatt J., in our opinion, correctly points out that if profits are distributed to shareholders as shareholders, the principle of mutuality is not satisfied. In Thomas (supra), at pp. 822-823, he observed thus :

> *"But a company can make a profit out of its members as customers, although its range of customers is limited to its shareholders. If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with the shareholders - even if it limited to trading with them - makes a profit, that profit belongs to the shareholders, in a sense, but it belongs to them qua shareholders. It does not come back to them as purchasers or customers. It comes back to them as shareholders, upon their shares. Where all that a company does is to collect money from a certain number of people - it does not matter whether they are called members of the company, or participating policy holders - and apply it for the benefit of those same people, not as shareholders in the company, but as the people who subscribed it, then, as I understand the New York case, there is no profit. If the people were to do the thing for themselves, there would be no profit, and the fact that they incorporate a legal entity to do it for them makes no difference, there is still no profit. This is not because the entity of the company is to be disregarded, it is because there is no profit, the money being simply collected from those people and handed back to them, not in the character of shareholders, but in the character of those who have paid it. That, as I understand it, is the effect of the decision in the New York case."*
>
> *(Emphasis applied)*

In the present case, the interest accrues on the surplus deposited by the club like in the case of any other deposit made by an account holder with the bank.

***30.** An almost similar issue arose in Kumbakonam Mutual Benefit Fund Ltd. case (supra). The facts in that case were that the assessee, namely, Kumbakonam Mutual Benefit Fund Ltd., was an incorporated company limited by shares. Since 1938, the nominal capital of the*

assessee was Rs.33,00,000/- divided into shares of Rs.1/- each. It carried on banking business restricted to its shareholders, i.e., the shareholders were entitled to participate in its various recurring deposit schemes or obtain loans on security. Recurring deposits were obtained from members for fixed amounts to be contributed monthly by them for a fixed number of months as stipulated at the end of which a fixed amount was returned to them according to published tables. The amount so returned, covered the compound interest of the period. These recurring deposits constituted the main source of funds of the assessee for advancing loans. Such loans were restricted only to members who had, however, to offer substantial security therefor, by way of either the paid up value of their recurring deposits, if any, or immovable properties within a particular district. Out of the interest realised by the assessee on the loans which constituted its main income, interest on the recurring deposits aforesaid was paid as also all the other outgoings and expenses of management and the balance amount was divided among the members pro rata according to their share-holdings after making provision for reserves, etc., as required by the Memorandum or Articles aforesaid. It was not necessary for the shareholders, who were entitled to participate in the profits to either take loans or make recurring deposits.

31. *On these facts, as already noted, the Court distinguished Styles (Surveyor of Taxes) case (supra) and opined that the position of the assessee was no different from an ordinary bank except that it lent money and received deposits from its shareholders. This did not by itself make its income any less income from business. In our opinion, the ratio of the said decision is on all fours to the facts at hand. The interest earned by the assessee even from the member banks on the surplus funds deposited with them had the taint of commerciality, fatal to the principle of mutuality.*

32. *We may add that the assessee is already availing the benefit of the doctrine of mutuality in respect of the surplus amount received as contributions or price for some of the facilities availed by its members, before it is deposited with the bank. This surplus amount was not treated as income; since it was the residue of the collections left behind with the club. A façade of*

a club cannot be constructed over commercial transactions to avoid liability to tax. Such setups cannot be permitted to claim double benefit of mutuality. We feel that the present case is a clear instance of what this Court had cautioned against in Bankipur Club (supra), when it said:

> *"... if the object of the assessee company claiming to be a "mutual concern" or "club", is to carry on a particular business and money is realised both from the members and from non-members, for the same consideration by giving the same or similar facilities to all alike in respect of the one and the same business carried on by it, the dealings as a whole disclose the same profit earning motive and are alike tainted with commerciality. In other words, the activity carried on by the assessee in such cases, claiming to be a "mutual concern" or Members club" is a trade or an adventure in the nature of trade and the transactions entered into with the members or non-members alike is a trade/business/transaction and the resultant surplus is certainly profit - income liable to tax. We should also state, that "at what point, does the relationship of mutuality end and that of trading begin" is a difficult and vexed question. A host of factors may have to be considered to arrive at a conclusion. "Whether or not the persons dealing with each other, is a "mutual club" or carrying on a trading activity or an adventure in the nature of trade" is largely a question of fact [Wilcock's case - 9 Tax Cases 111, (132) C.A. (1925) (1) KB 30 at 44 and 45]." (Emphasis supplied)*

33. *In our opinion, unlike the aforesaid surplus amount itself, which is exempt from tax under the doctrine of mutuality, the amount of interest earned by the assessee from the afore-noted four banks will not fall within the ambit of the mutuality principle and will therefore, be exigible to Income-Tax in the hands of the assessee-club."*

22. In view of the above discussion of the matter, it is held that for the assessment years under consideration, the assessee is entitled to the benefit of the doctrine of mutuality in respect of the surplus amount

received as contributions or price for some of the facilities availed by its members. However the amount of interest earned by the assessee from the fixed deposits in the banks will not fall within the ambit of the mutuality principle and will therefore, be exigible to Income-Tax in the hands of the assessee-club.

23. Our above decision will apply mutatis- mutandis to all the captioned appeals. In view of the above all the captioned appeals are treated as partly allowed.

Order pronounced in the Open Court on 26.09.2017

Sd/-	**Sd/-**
(Dr. B.R.R. KUMAR)	**(SANJAY GARG)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 26th Sept, 2017
Rkk

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT*
4. *The CIT(A)*
5. *The DR*