

आयकर अपीलीय अधिकरण “C” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH, MUMBAI

**BEFORE SHRI SANJAY GARG, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.2470/Mum/2013

(निर्धारण वर्ष / Assessment Year : 2009-10)

Poonam Chambers ‘B’ Wing Commercial Premises Co-Op. Society Ltd., Plot No. G, Shiv Sagar Estate, Dr. A.B. Road, Worli, Mumbai – 400018.	<u>बनाम/</u> v.	Income Tax Officer – 18(1)(2), Mumbai.
स्थायी लेखा सं./PAN : AAAAP1685M		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Deepak Tikekar & Shri Nitesh Shah
Revenue by :	Dr. S. Pandian

सुनवाई की तारीख / **Date of Hearing** : 29-03-2016

घोषणा की तारीख / **Date of Pronouncement** : 22-06-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee-society, being ITA No. 2470/Mum/2013, is directed against the appellate order dated 18-01-2013 passed by learned Commissioner of Income Tax (Appeals)- 29, Mumbai (hereinafter called “the CIT(A)”), for the assessment year 2009-10, the appellate proceedings before the learned CIT(A) arising from the assessment order dated 23-12-2011 passed by the learned Assessing Officer (hereinafter called “the AO”) u/s 143(3) of the Income Tax Act, 1961 (Hereinafter called “the Act”).

2. The grounds of appeal raised by the assessee-society in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“1. ON FACTS IN CIRCUMSTANCES OF THE CASE AND IN LAW THE LEARNED CIT-A ERRED IN CONFIRMING ADDITION MADE BY ITO ON ACCOUNT OF VOLUNTARY CONTRIBUTION OF RS. 3,57,82,500/- TO NEW BUILDING FUND.

2. ON FACTS IN CIRCUMSTANCES OF THE CASE AND IN LAW THE LEARNED CIT-A ERRED IN REFUSING TO ADMIT ADDITIONAL EVIDENCE OF RESOLUTION REGARDING TRANSFER CHARGES, PASSED IN THE GENERAL MEETING OF THE ASSESSEE SOCIETY ON 10TH JUNE 2003.

3. ON FACTS IN CIRCUMSTANCES OF THE CASE AND IN LAW THE LEARNED CIT-A ERRED IN NOT DIRECTING ITO TO DELETE THE LEVY OF SURCHARGE.”

3. The brief facts of the case are that the assessee is a cooperative society and derived its income from its members and interest on fixed deposits during the previous year relevant to the instant assessment year under appeal. The assessee-society declared total income at Rs. 5,49,530/- after claiming deduction under chapter VIA of the Act. The A.O. observed that an amount of Rs. 3,57,82,500/- had been received as voluntary contribution to building fund from the members , the details of which are as under:-

i)	Bonanza Trading Company Pvt. Ltd.	Rs. 43,07,500/-
ii)	Samarjit Realities & Farms Pvt. Ltd.	<u>Rs.3,14,75,000/-</u>
	Total	Rs.3,57,82,500/-

The assessee-society was show caused as to why the transfer fee/contribution received in ‘New Building Fund’ should not be taxed as income from other

sources as these are not covered by the principle of mutuality. The assessee-society in reply submitted that it has received transfer fees from following two parties, the details are as under:-

Date	Particulars	Amount
2 nd August, 2008	Samarjit Realities & Farms Pvt. Ltd.	Rs. 25000=500
12 th February, 2009	Bonanza Trading Company Pvt. Ltd.	Rs. 25000=500
Total		Rs. 51,000/-

The assessee-society submitted that contribution for reconstruction was collected after the collapse of the building and it was collected from all members in equal proportion under the advice of court appointed architect. The building fund is very old fund created prior to collapse of the building in 1997 and no contribution was received in building fund account during the year. It was submitted that contribution for reconstruction was collected from all the members equally under the directions of court appointed architect for reconstructing collapsed building and the 'New Building Fund' is created after the reconstruction of building for repairs and maintenance of new building and the members voluntarily contributed to this new fund. There is no resolution passed to this effect. Two transfers took place during the assessment year 2009-10 and copies of both the agreements were also attached by the assessee-society along with details of contribution received in 'New Building Fund'. The copy of letter from members giving contribution to 'New Building Fund' was enclosed. It was submitted that the ceiling of Rs. 25,000/- in respect of transfer fees is applicable vide notification issued by the State of Maharashtra only to housing residential societies only and it is not applicable to Commercial Premises Co-operative Societies. In this connection, the assessee-society cited the following decisions:-

- A) Mittal Court Premises Co-operative Society Ltd. v. ITO (2010) 320 ITR414 (Bom).
- B) CIT v. Adarsh Co-operative Housing Society (1995) 213 ITR 677 (Guj.)
- C) CIT v. Apsara Co-operative Housing Society Ltd. (1993) 204 ITR 662 (Cal.)
- D) Sind Co-operative Housing Society v. ITO (2009) 317 ITR 47 (Bom)
- E) CIT v. Apsara Co-operative Housing Society Ltd. (1993) 204 ITR 662 (Cal.)

Thus it was submitted that the voluntary contribution received from members to 'New Building Fund' is covered by the principle of mutuality.

The A.O. stated that the decision of Hon'ble Bombay High Court in the case of Mittal Court Premises Co-operative Society Ltd. (supra) has not been accepted by the department and SLP is being filed before the Hon'ble Supreme Court. The decision in the case of Sind Co-operative Housing Society (supra) is also not accepted in principle by the department. It was stated by the AO that the Hon'ble High Court has held that if the amount received is more than what is chargeable under the bye-laws or government directions, the society is bound to repay the same and if it retains the amount, it will be in the nature of profit making and that specific amount shall be exigible to tax. The court held that the amounts received more than permissible under the notification had been received under pressure or coercion or contrary to government directions, then considering section 72 of the Indian Contract Act the amount will have to be refunded. Thus, it was held by the A.O. that the amount received in excess of the prescribed limit of notification, i.e. in excess of the amount of Rs. 25000/- is chargeable to tax. The Hon'ble High Court has not considered the Notification of 2001 as the above case was covered by the Notification of 1989. It was held by the AO that the 'New Building Fund' is opened only for collecting transfer fees in excess of notification limit of Maharashtra State

Government. Further , it was held by the AO that the principle of mutuality is not applicable when transfer fees are collected as per Resolution or Bye laws and when the same is not within the limit prescribed by the Government. Thus, it was held that in view of the Hon'ble High Court decision and moreover the SLP is being filed in the case of Mittal Court case (supra) whereby the Revenue has not accepted the above decision , the transfer fees collected from transferee members in the guise of voluntary contribution to new building fund amounting to Rs. 3,57,82,500/- is chargeable to tax and accordingly the same was added to the income of the assessee-society as income from other sources vide assessment orders dated 23.12.2011 passed by the AO u/s 143(3) of the Act.

4. Aggrieved by the assessment orders dated 23.12.2011 passed by the A.O., the assessee-society filed the first appeal before the learned CIT(A).

5. Before the learned CIT(A) , the assessee-society submitted that the assessee-society has received voluntary contribution from two members, the details are as under:-

i)	Bonanza Trading Company Pvt. Ltd.	Rs. 43,07,500/-
ii)	Samarjit Realities & Farms Pvt. Ltd.	<u>Rs.3,14,75,000/-</u>
	Total	Rs.3,57,82,500/-

It was submitted that pursuant to clause C.1.1 Page-2 of the Bye Laws -funds may be raised in any or all of the following ways viz:- (e) by donation. Copy of Bye-laws was submitted before the learned CIT(A).

The assessee-society submitted that the society building collapsed on 16-09-1997 and the same had to be refurbished / reconstructed under the

directions of the architect appointed by the Hon'ble Bombay High Court. The copy of the Hon'ble Bombay High Court order was submitted before the learned CIT(A), whereby the court held that any future repairs, alteration, renovations or change to the premises/units in possession of occupant after reconstruction of 'B' wing shall not be carried out except with the consent of the architect appointed by the Hon'ble Bombay High Court. Thus, it was submitted that this will rule out any profit objective. It was submitted that the premises are situated adjacent to sea and near Worli sewerage resulting into fast decay/corrosion of the structure and hence funds are needed to preserve the structure of the building. Initially these funds were generated through contribution by all the members in equitable proportion and subsequently the members voluntarily contributed to the 'New Building Fund' for maintenance of the structure. The funds voluntarily received from the members were utilized for the common benefit of all the members by way of proper maintenance and upkeep of the society building and no parts of the funds were utilized for personal benefit of individual member or group of members. There was no profit motive in the transaction and there is no intention to declare dividend. Thus it was submitted that the amount is not taxable as it is covered under the concept of principle of mutuality and also there is complete identity between the contributors and beneficiaries as class of members. In support, the assessee-society relied on the decision of *Mittal Court Premises Co-operative Society Ltd. v. ITO* (2010) 320 ITR414 (Bom), *Sind Co-operative Housing Society v. ITO* 317 ITR 47 (Bom) and the decision of Mumbai bench of the Tribunal in the case of *ITO v. Dmodar Bhuvan CHS* in ITA No. 1610/Mum/2010 to contend that the amount is not chargeable to tax on the principles of mutuality and in any case the restriction imposed by State of Maharashtra is not applicable to Commercial Premises co-operative societies. In the light of the above, the assessee-society submitted that the A.O. should have followed the decision of Hon'ble Bombay High Court and it was wrong on the part of the AO to contend that the SLP is pending before

Hon'ble Supreme Court . The assessee-society relied upon decision of CIT v. G.M.Mittal Stainless Steel Private Limited (2003) 263 ITR 255(SC) . It was also submitted that the notification of 1989 is applicable only to the housing societies and not to other societies. The assessee-society has not engaged into any profit making activity, the amount received from the members is covered under the concept of principle of mutuality. It was submitted that the amount contributed by the members is created for the mutual benefit of all the members of the society and is covered by the concept of mutuality and hence is not exigible to tax.

The learned CIT(A) called for the details from the assessee-society to verify the contention of the assessee-society such as audit report and balance sheets for the relevant financial year and subsequent financial years , copies of transfer agreements executed by the two parties namely Bonanza Trading Company Private Limited and Samrjit Realities and Farms Private Limited and details of New Building Fund etc. The assessee-society submitted the details like copy of new building repair fund, copies of agreement for sale of the premises etc.. The details of contribution received from financial year 2007-08 to 2010-11 were also submitted by the assessee-society. The copies of letters from two persons giving contribution during the year namely Bonanza Trading Company Private Limited and Samarjit Realities and Farms Private Limited were submitted. It was submitted that there was no resolution in respect of the voluntary contribution received during the financial year 2008-09. However it was submitted that on verification of the old records, it was noticed that one resolution was passed vide minutes of the meeting dated 10th June, 2003 whereby transfer charges of erstwhile Poonam Chambers Owners Association, North Wing the predecessors of Poonam Chambers 'B' wing Commercial Premises Society Ltd. were adopted and ratified. Copy of the notice, agenda and Resolution were submitted by the assessee-society before the learned CIT(A). It was submitted that the amount of contribution received

was deposited in the savings bank account of the assessee-society which were utilized to provide services, amenities and facilities to the members of the society in accordance with the bye-laws of the society. It was submitted that the objects of the society as per object clause are to maintain the property in accordance with the co-operative principles and enforce the obligation of the flat purchasers to the society and inter-se, to provide society and other amenities to members who have taken the flats. The copy of bye laws was submitted and it was submitted by the assessee-society that amount remaining unspent was invested in fixed deposits with banks in accordance with law. It was submitted that the limit of Rs. 25,000/- does not apply to commercial premises society as held by the Hon'ble Bombay High Court in the case of Mittal Court Premises Co-operative Society Ltd. v. ITO (2010) 320 ITR 414 (Bom). Hence, it was submitted before the learned CIT(A) that the appeal of the assessee-society be allowed as the case of the assessee-society is squarely covered by the decision of the Hon'ble jurisdictional High Court in the case of Mittal Court Premises Co-operative Society Ltd. (supra).

The learned CIT(A) observed that since the date of creation of the 'New Building fund' i.e. 12th February, 2008 and till the end of the financial year 2011, there were receipts of Rs. 5,30,99,500/- and there was no debit entry from this account except provision for tax of Rs. 17,64,000/- which shows that in three years no funds have been used from this account for repairs and maintenance of the building. The ld. CIT(A) observed that if the amount received is more than as permitted by the bye-laws or government directions, the society is bound to repay the same and if it retains the amount, it will be in the nature of profit making and will be chargeable to tax. It was observed that the assessee-society has relied on the decision of Hon'ble Bombay High Court in the case of Mittal Court Premises co-operative Society Ltd. (supra) and contended that notification issued by Government of Maharashtra putting restriction on amount of transfer fees to Rs.25,000/- when member

desired to transfer his shares or occupation rights is applicable to housing residential societies and not to the commercial premises co-operative societies, hence, government notification is not applicable in the instant case as the assessee-society is commercial premises society . It is contended by the assessee-society that the contributions received from the members are as per the bye-laws of the society more particularly clause C.1.1 and as such the same could not be taxed. The assessee-society contended that the voluntary payments made by the incoming and outgoing members should not be taxed and the contributions/transfer fees received by the society are covered under the principle of mutuality and the same is not exigible to tax.

The learned CIT(A) after considering the submissions held that as per the Notification no. 281 issued by the Maharashtra State Government dated 27th November, 1989 the limit of transfer fees while transferring **flat** was increased to Rs. 25,000/- which was earlier restricted to Rs. 1000/- . It was directed to all the cooperative societies to amend their bye-laws giving effect to the above notification. Vide further notification No. 283 dated 9th August, 2001 it was reiterated that in no case the rates should exceed the rates specified by the State Government i.e. Rs. 25,000/- in case of corporation area. The learned CIT(A) observed that the clause B.1.1 of the Bye-laws of the assessee-society stipulates as under :

“ The purpose of this society is to primarily constitute an organization of persons who has taken **flats** in the blocks or building of the flats known as Poonam Chambers ‘B Wing’.”

It was observed by the learned CIT(A) that the assessee-society’s Bye Laws refers to the word ‘flat’ and the Government notification also refers to the word ‘flats’. The learned CIT(A) referred to Bye Laws B1.2 which stipulate that the society shall become a member of ‘Greater Bombay/Thane District Co-

operative Housing Federation Ltd.’ . Therefore, the Government notification is applicable to a housing federation of which the assessee-society is a member.

The learned CIT(A) observed that the assessee-society is relying on judicial precedents applicable to housing societies and on the other hand the assessee-society is contending that the Government notification is not applicable to Commercial Premises Society . Hence the contention of the assessee-society that the Government Notification is not applicable to it cannot be accepted in totality , although some of the members used the flats for commercial activities but essentially the assessee-society is a housing society. It was observed by learned CIT(A) that there are two possible treatment that can be given to contribution received from incoming members :-

(a) As held by the AO, the total amount was actually transfer fees collected by the assessee-society in guise of contribution to “New Building Fund’ and in this case the receipts to the tune of Rs.25,000/- only can be treated as exempted and

(b) As claimed by the assessee-society that only Rs.25,000/- was transfer fees and the balance amount was voluntary contribution received from members towards ‘New Building Fund’ . In this case, Government notification is applicable to transfer fees and it is not applicable to contribution received in ‘New Building Fund’ . The transfer fee is well within the prescribed limits and taxability of the balance contribution to ‘New Building Fund’ would depend upon various factor as discussed hereinafter by learned CIT(A) in his order.

The assessee-society contended that the contributions received in view of bye-law C.1.1. was as under:-

- (a) by entrance fees
- (b) by shares
- (c) by raising loans including debentures and loan stock
- (d) by deposits
- (e) by donations and
- (f) by contribution towards the cost of flats and land.

The learned CIT(A) observed that there was no specific mention of contribution to be taken on transfer of flats in the assessee's society. These are only general sources from where funds would be received and these contributions cannot be said to be donations as they are not voluntary. The learned CIT(A) perused the bye-laws of the society whereby as per specific clause No. D.3.5 which is as below:-

“A member desires to sell his/her flat, shall contribute to the society for common maintenance fund @ Rs. 1/- per sq. ft. of the area of his/her flat before the sanction is granted to the transfer of the flat by the managing committee.”

In view of the above Bye-Laws it is clear that society is entitled to charge additional amount of only @ Rs.1 per square feet as the contribution to common maintenance fund from the outgoing member. It was observed that there is no mention in the bye-laws about the contribution to be received from incoming member and the amount of such contribution . Thus it was held by the learned CIT(A) that the assessee-society could have charged only Rs. 1/- per sq. ft. from the outgoing members as per the bye-laws and hence any amount collected in excess there-of is not collected as per Bye-laws. The learned CIT(A) observed that during assessment proceedings it was informed by the assessee-society that there was no resolution passed for creation of 'New Building Fund'. The assessee-society vide letter dated 10th December,

2012 stated that in the general body meeting held on 10th June, 2003 agenda No. 5 was passed whereby the transfer charges of erstwhile Poonam Chamber Owners Association, North wing were adopted and ratified. The learned CIT(A) held that this is an additional evidence which was not produced before the A.O. . The learned CIT(A) held that the assessee-society is not entitled to produce new additional evidence at this juncture as the assessee-society case does not falls under any of the categories of Rule 46A of the income Tax Rules, 1962 and hence additional evidences were not admitted by the learned CIT(A). The learned CIT(A) observed that the assessee-society has admitted that no Resolution was passed for creation of 'New Building Fund'. It was observed that the 'New Building Fund' was not created by passing any resolution of general body or even by the managing committee. Thus it was held by the learned CIT(A) that the contributions received in this fund are not according to the bye-laws of the assessee-society and according to the notification of the Government.

The assessee-society claimed that buyers and sellers of the flat have contributed voluntarily for the upkeep of the building. From the copies of agreements of the flats sold, the learned CIT(A) observed that in the case of Flat No. 102B sold by M/s Savitri & Company to Jindal Build Mart Limited on 08-02-2008 as per clause (n) of this agreement , Rs. 48,75,000/- shall be payable to the society as contribution to 'New Building Fund' and society transfer charges in equal shares . As per clause B(iii) of the agreement the buyer had also to pay an amount of Rs. 2,56,00,760/- towards the outstanding charges being cost of demolition of earlier building, removal of debris, cost of construction of new building and other outgoing and maintenance charges as payable by the transferor to the society. Thus, all the amounts outstanding towards demolition as well as new construction have been charged separately by the assessee-society . Thus the amount of Rs. 48,75,000/- received from the buyer and seller in equal proportion is

additional amount charged by the assessee-society to a fund which was not created as per Bye-laws. Thus, it was observed that the contributions have not been given by the members voluntarily and cannot be treated as donations by the members. It was also observed by learned CIT(A) that it is stated with respect to another transfer of Unit No 101, that the society had no objection for transferring rights and title in the flat from sellers to the buyers on payment of transfer fees and contribution towards building fund, which clearly shows that these payments are not voluntary payments. It was also observed that there is no clarity as to who will contribute towards the fund i.e. buyer or seller nor the contribution is fixed amount and is varying from case to case, which again shows that the contribution is not voluntary. It was observed that the 'New Building Fund' was created on 12th February, 2008 and the contributions have been received from outgoing and incoming members to the 'New Building Fund' in various years. The total contribution as on 31st March, 2011 stood at Rs. 5,30,99,500/- and after the creation of this fund no money had been used for the purpose of maintenance or repair of the building which shows that no money has been spent for common benefit of its members in four years after the fund was created and hence the claim of the assessee-society that the contributions are covered under the concept of mutuality cannot be accepted. The learned CIT(A) analyzed the various judicial decisions cited by the assessee-society and held that the amount collected by the assessee-society are not in accordance with the bye-laws or government direction and the A.O. was quite justified in treating the amount of Rs. 3,57,82,500/- as taxable income of the assessee-society and accordingly upheld/sustained the assessment orders dated 23.12.2011 passed by the AO u/s 143(3) of the Act, vide appellate orders dated 18.01.2013 .

6. Aggrieved by the appellate orders dated 18.01.2013 passed by the learned CIT(A), the assessee-society filed second appeal before the Tribunal.

7. The ld. Counsel for the assessee-society at the outset submitted that the charges have been received by the society from members at the time of transfer of the flat. Resolution was passed in the General Body Meeting of the society held on 10-06-2003 and the copy of the Resolution was submitted before the learned CIT(A) as additional evidence and learned CIT(A) erred in not admitting the same as additional evidence under Rule 46A of the Income Tax Rules, 1962. It was submitted that vide Resolution no 5 passed on 10-06-2003 in Annual General Body Meeting, the society adopted and ratified the mandated transfer charges of the erstwhile Poonam Chambers Owners Association, North Wing (PCOANW) as that of its successor the incumbent Poonam Chambers "B" Wing Commercial Premises Co-operative Society Limited whereby transfer charges of the erstwhile PCOANW were made applicable to the assessee-society. The said copy of Resolution passed at the General Body meeting held on 10-06-2003 along with the agenda, notice and the Resolution etc. are placed in the paper book filed with the Tribunal vide paper book page No. 41 to 45. The copy of bye-laws was also filed before the Tribunal vide paper book pages 1 to 40. The learned counsel drew our attention to the object clause in Bye-laws to contend that the objects of the assessee-society is not to earn profits. The learned Counsel submitted that the assessee-society is a commercial society and not a residential society. It was submitted that the authorities below erred in holding that the assessee is housing society. The notification issued by State of Maharashtra restricting transfer fee to Rs.25,000/- is applicable to residential housing society and is not applicable to the commercial society. It was also submitted that the building of the assessee-society collapsed on 16-09-1997. The premises is situated close to the sea as well Worli sewerage resulting into fast decay/corrosion of the structure and hence funds are required to preserve/substantial repairs of the structure of the building from time to time in view of the corrosion of the structure as it is close to the sea/sewerage in

Worli. The learned counsel submitted that the façade inspection report of the Building was obtained which suggested the corrosion and decay in the building for which substantial repairs of structure/building is required. The said facade inspection report dated 23-09-2014 is placed in paper book page 50-71 filed with the Tribunal. The learned Counsel submitted that the assessee-society had received an amount of Rs. 3,57,82,500/- which was shown in the balance sheet. This is a voluntary contribution received from the members as per bye-laws and the Resolution . The assessee-society submitted that the assessee-society is regularly spending money on repairs and maintenance and details are placed in paper book page 46 for the financial year 2008-09 to financial year 2012-13 and it was erroneous on the part of the authorities below to conclude that the assessee-society has not spent the amount on repairs and maintenance since the New Building Fund was constituted on 12-02-2008 till the end of the financial year 2012-13 . The amount is duly reflected in the balance sheet and the accounts are duly audited by the auditors and approved in the General Body meeting. The learned Counsel submitted that sufficient opportunity was not provided by the A.O. to the assessee-society before framing the assessment u/s 143(3) of the Act. The A.O. held that principle of mutuality is not applicable. Voluntary contributions have been received as per the bye-laws, hence, the concept of principle of mutuality is applicable to the society was the contention of the learned counsel for the assessee-society. The assessee-society relied upon the decision of Hon'ble Bombay High Court in the case of Mittal Court Premises Co-operative Society Ltd. v. ITO (2010) 320 ITR 414 (Bom), Sind Co-operative Housing Society v. ITO (2009) 317 ITR 47 (Bom) , CIT v. Darbhanga Mansion CHS Ltd. (2015) 273 CTR 0473(Bom.) . The assessee-society also relied upon decision of Mumbai Benches of Tribunal in the case of New Breach Candy CHS Ltd. v. ITO (2010) 2 ITR(Trib.)265(Mum.) and ITO v. Ashoka Apt. CHS Ltd. in ITA no 2845/Mum/2010 and also decision of Hon'ble Gujarat High Court in the case of CIT v. Prabhakunj Co-operative Housing Society Limited

(2015) 377 ITR 13(Guj.HC- FB) . The assessee-society submitted that the said voluntary contribution received by the assessee-society is not exigible to tax. The assessee-society also agitated about the leviability of surcharge by the A.O. while computing the tax liability , which was raised vide ground no 3 in grounds of appeal filed in the memo of appeal filed with the Tribunal. It is submitted that no surcharge is payable on the tax demand raised against the assessee-society as the assessee is a co-operative society and as per the provisions of the relevant Finance Act – The First schedule, no surcharge is payable by the co-operative society for the assessment year 2009-10 vide Paragraph B of part I of the first schedule to the Finance Act.

8. The ld. D.R., on the other hand, relied on the order of the ld. CIT(A).

9. We have considered the rival contentions and also perused the material on record along with various case laws cited by the assessee-society which are placed on record. We have observed that the assessee-society is a society whereby the assessee-society is claiming that it being a commercial premises society though the Revenue authorities have not accepted this claim. The Resolution was claimed to have been passed by the assessee-society vide Resolution no 5 passed on 10-06-2003 in Annual General Body Meeting , the assessee-society has claimed to have adopted and ratified the mandated transfer charges of the erstwhile Poonam Chambers Owners Association , North Wing (PCOANW) as that of its successor the incumbent Poonam Chambers “B” Wing Commercial Premises Co-operative Society Limited whereby transfer charges of the erstwhile PCOANW were made applicable to the assessee-society. The said copy of Resolution passed at the General Body meeting held on 10-06-2003 along with the agenda , notice and the resolution etc. are placed in the paper book filed with the Tribunal vide paper book page No. 41 to 45. The said Resolution along with the agenda, notice etc. was stated to be submitted before learned CIT(A) as additional evidences

which was not admitted by the learned CIT(A) by holding that the assessee-society is not covered under any of the categories of provisions of Rule 46A(1) of the Income Tax Rules, 1962 for admission of additional evidences. The assessee-society has though claimed that the mandated transfer charges of the erstwhile Poonam Chambers Owners Association , North Wing (PCOANW) as that of its successor the incumbent Poonam Chambers “B” Wing Commercial Premises Co-operative Society Limited whereby transfer charges of the erstwhile PCOANW were made applicable to the assessee-society but the Resolution passed by erstwhile PCOANW based on which the Resolution was passed by the assessee-society on 10-06-2003 are not placed before us to enable us to see the approved Resolutions of PCOANW which were later adopted by the assessee-society and its relevance in context of compliances of the requirements of law and also enabling the assessee-society to collect the transfer charges and ‘New Building Fund’. It is the averment of the assessee-society that the sufficient and adequate opportunity of being heard has also not been provided by the AO before framing the assessment orders dated 23.12.2011 passed u/s 143(3) of the Act and hence the assessee-society was prevented by a sufficient cause from producing the relevant evidences and explanations before the AO. The assessee-society had received an amount of Rs. 3,57,82,500/- from two parties as voluntary contribution to ‘New Building Fund’. The contention of the assessee-society that the premises is located near to the sea and Worli sewerage and due to corrosion there was a deterioration and decay in the structure of the building. The assessee-society has also placed on record one chart that the funds have in-fact been actually utilized for the purposes of repairs and maintenance of the building from financial year 2008-09 to financial year 2012-13, while the finding of the authorities below is on the other hand contrary that the assessee-society has not utilized any funds for repairs of the Building. The audited financial statements are not placed before us for verification. In any case these additional evidences and claims/averments of the assessee-society put forth

by the assessee-society which goes to the root of the matter needs verification, examination and enquiry by the revenue authorities. We are of the considered view that in the interest of substantial justice, these additional evidences, explanations and claims/averments made by the assessee-society goes to the root of matter which need to be admitted and considered before adjudicating the issues in the appeal as these are relevant evidences , explanations and claims/averments but these additional evidences, explanations and claims/averments made by the assessee-society requires verification, enquiry and examination by the Revenue authorities before adjudication of the issue on merits in accordance with facts and law and also keeping in view judicial decisions by the Hon'ble Courts. Keeping in view the peculiar facts and circumstances of the case, we are of considered view that interest of justice will be best served if the issue is restored to the file of AO to frame de-novo assessment on merits after admitting and considering the relevant evidences , explanations, claims and averments submitted by the assessee-society in its defense . The AO shall frame de-novo assessment on merits after admitting and considering all the relevant evidences, explanations, claims and averments submitted by the considering and also in light of the judicial decisions in accordance with law .The assessee-society is directed to appear before the AO and file all relevant explanations/evidences etc. in support of its contentions. Needless to say proper and adequate opportunity of being heard shall be provided by the AO to the assessee-society in accordance with the principles of natural justice in accordance with law.This disposes of ground no 1 and 2 raised by the assessee-society in grounds of appeal filed in the memo of appeal We order accordingly.

With respect to the second issue regarding levability of surcharge by the A.O. on the tax computed while computing the tax liability of the assessee-society , we are in agreement with the learned Counsel for the assessee-society that no surcharge can be levied on the demand of tax raised by the

Revenue as per the Finance Act, 2008 as applicable for the relevant assessment year under appeal on the assessee-society .We may clarify that , however, there was a provision to charge education cess as well secondary and higher education cess in the Finance Act, 2008 on the tax so computed which shall be applied by the Revenue as per law to the tax demand raised by the Revenue against the assessee-society.

10. In the result, the appeal filed by the assessee-society in ITA NO. 2470/Mum/2013 for the assessment year 2009-10 is partly allowed.

Order pronounced in the open court on 22nd June , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 22-06-2016 को की गई ।

Sd/-
(SANJAY GARG)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 22-06-2016

I

व.नि.स./ R.K., Ex. Sr. 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)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "C" Bench
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai