

## Premium received by society on transfer of plots wasn't taxable as it was utilized for benefit of its members

**Summary – The High Court of Gujarat in a recent case of Prabhukunj Co-op. Housing Society Ltd., (the Assessee) held that where assessee-society received contribution from outgoing members as premium on sale of plot, since said amount was to be utilised for benefits of members of society, it could not be regarded as 'taxable income' in hands of assessee**

### Facts

- The assessee was a co-operative housing society. The assessee-society had given its plots on lease to its members for the purpose of constructing residential units. Bye-laws of the society provided that upon transfer of a plot of land allotted to a member to incoming member, the society would collect 50 per cent of the excess received by such outgoing member. During the relevant year, the society collected premium, on transfer of some plots and claimed such amount as capital receipt.
- The Assessing Officer held that the assessee was not a co-operative society but an association of persons engaged in the business and accordingly, added premium amount to the income of the assessee.
- The Commissioner (Appeals) as well as the Tribunal following the decision of the Tribunal in case of *CIT v. Adarsh Co-operative Housing Society Ltd.* [\[1995\] 213 ITR 677/81 Taxman 241 \(Guj.\)](#) allowed the appeal.
- On appeal :

### Held

- With background of case, undoubtedly all assesseees are co-operative housing societies. They own lands for residential use. Such lands are developed by the society by providing common amenities such as internal roads, drainage, street lights if need be, common plot and club house. Individual plots are allotted to its members who enjoy occupational right, but ownership of the land always remains with the society. On the plots of land so allotted, the member would be allowed to construct his residential unit. Upon transfer of the plot by a member, the society would collect 50 per cent of the excess or popularly referred to as 'premium'. The fund so collected would be appropriated in the common fund of the society to be utilised as per the bye-laws which envisage development of common facilities and expenditure for common amenities. A part of the surplus would be diverted to the reserve fund of the society. Surplus could also be utilised for waiver of the lease amount or for the health, education and social activities of the members. It can thus be seen that there is total identity of contributors of the fund and recipients from the fund. The contribution comes from the outgoing member in the form of a portion of the premium and it is utilised for the common facilities and amenities for the members of the society. Different modes of application of the funds make it clear that the funds would be expended for common amenities or for general

benefit of the members; or be distributed amongst the members in the form of dividend or lease rent waiver. It can thus be seen that it is impossible for the contributors to derive profit from contribution made by themselves to a fund since such fund could only be expended or returned to them. Creation of the society was primarily for the convenience of the members to create a housing society where individual members could construct their residential units and common facilities and amenities could be provided by the society. It was essential thus that a combined activity is carried on by a group of persons who would be the members in the co-operative society. All the test referred to in the Privy Council decision in case of *English & Scottish Joint Co-operative Wholesale Society Ltd. v. CAIT* [1948] 16 ITR 270, stand fulfilled.

- Reference to the provisions of Gujarat Co-operative Societies Act would not change the position. Such provisions and in particular section 115 only provide the modality of diverting the funds of the society upon its winding up. The court have already noted that the contributors from the members of the society are to be expended for their benefit or would be returned to them while the society is functioning. Merely because upon winding up of the society, the surplus fund would be utilised by the Registrar as provided under the Act and would not be returned to the members would not break down the relationship of mutuality since even in the eventuality of winding up, there is no scope of profiteering by the members.
- Division Bench of this Court in case of *Adarsh Co-operative Housing Society Ltd. (supra)*, under identical circumstances, held that principal of mutuality would apply.
- It can thus be seen that the revenue's reliance on this decision is wholly misconceived. As noted, it was a case where the association of persons deposited its funds with the banks, some of whom were members of the association and rest who were not the members. On the interest earned from such fixed deposits, the assessee claimed exemption from tax on the fixed deposits from the member banks. It was in this background the Supreme Court found that the third principle, that the contributor should not derive profit from the contributions made, was not satisfied. Though the fund was eventually returned to the club, nevertheless, before that they were expended on non-members, *i.e.*, clients of the bank and in turn the bank made profit in the process. It was purely a commercial transaction.
- In fact, all the three tests of mutuality laid down since the decision of Privy Council in case of *English & Scottish Joint Co-operative Wholesale Society Ltd. (supra)*, which were reiterated, highlighted and refined in the decision in case of *Bangalore Club v. CIT* [2013] 350 ITR 509/212 Taxman 566/29 [taxmann.com](http://taxmann.com) 29 (SC), stands satisfied in instant case.
- In the result, question is answered in the affirmative, *i.e.*, against the revenue and in favour of the assessee.