

*** THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN
AND
THE HON'BLE SRI JUSTICE N.TUKARAMJI
+ I.T.T.A.No.205 of 2005**

% Date: 04-01-2023

Jubilee Hills International Centre
Hyderabad

... Appellant

v.

\$ Income Tax Officer, Hyderabad

... Respondent

! Counsel for the Appellant : Mr. Challa Gunaranjan

^ Counsel for Respondent : Mr. J.V.Prasad, Standing Counsel,
IT Department

< GIST:

➤ HEAD NOTE:

? CASES REFERRED:

(2014) 13 SCC 459
(2008) 302 ITR 279
(1997) 5 SCC 394

THE HON'BLE THE CHIEF JUSTICE UJJAL BHUYAN

AND

THE HON'BLE SRI JUSTICE N.TUKARAMJI

I.T.T.A.No.205 of 2005

JUDGMENT: *(Per the Hon'ble the Chief Justice Ujjal Bhuyan)*

Heard Mr. Challa Gunaranjan, learned counsel for the appellant and Mr. J.V.Prasad, learned Standing Counsel, Income Tax Department for the respondent.

2. This appeal has been filed by the assessee under Section 260A of the Income Tax Act, 1961 (briefly 'the Act' hereinafter) against the order dated 09.08.2005 passed by the Income Tax Appellate Tribunal, Hyderabad Bench 'A', Hyderabad (briefly 'the Tribunal' hereinafter) in I.T.A.No.1135/Hyd/2004 for the assessment year 2001-2002.

3. We find that on 17.10.2005, this Court had admitted the appeal on the following substantial questions of law:

1. Whether the ITAT is justified in holding that the principal of mutuality does not apply with reference to transaction entered into by the

assessee with the non-permanent and non-life members ?

2. Whether by virtue of the definition of member in the memorandum of association of the assessee read with Section 13 of A.P.(Telangana Area) Public Societies Registration Act, the non-permanent and non-life members are also members to whom the principal of mutuality applies ?

3. Whether on the facts and in the circumstances of the case, for the assessee to avail the benefit of exemption for its income under the doctrine of mutuality, is it required that the non-permanent or non-life members participate in the day to day affairs of management of the association ?

4. Whether the order of the ITAT is perverse in dismissing the appeal without any discussion with regard to the liability of tax for the interest amounts received from banks, receipts from sale of scrap ?

5. Whether the ITAT is justified in dismissing the appeal with regard to the amounts received as interest from banks and also receipts from sale of scraps when under the memorandum of

association the said amounts are to be disposed
of in the event of dissolution by the members ?

4. In the hearing today, learned counsel for the appellant submits that he would confine his submissions to question Nos.1 and 3 only.

5. Sum and substance of the above two questions is whether the principle or the doctrine of mutuality would apply with reference to transactions entered into by the assessee with the non-permanent and non-life members ?

6. We may mention that appellant/assessee before us is the Jubilee Hills International Center, which is a club, but, registered as a society under the Andhra Pradesh (Telangana Area) Societies Registration Act, 1350F. It is basically a recreational club, facilities of which are to be availed of by the members.

7. In the assessment proceedings for the assessment year 2001-2002, assessing officer held that appellant would be

entitled to exemption from income tax on the principle of mutuality only in respect of transactions entered into by the appellant with the permanent and life members. As a result, amounts received by the appellant under five different heads related to non-permanent and non-life members were included in the income of the appellant and assessed accordingly.

8. On appeal, first appellate authority *i.e.*, Commissioner of Income Tax (Appeals) confirmed the finding of the assessing officer.

9. Thereafter, appellant preferred further appeal before the Tribunal. Tribunal noticed that non-permanent and non-life members do not have any voting right; they are neither part of the general body nor can they participate as members of the governing council; they therefore, cannot participate in the management of the appellant and have no right of disposal over the surplus in case of dissolution of the appellant. Therefore, Tribunal held that principle of mutuality does not

apply with reference to transactions entered into by the appellant with the non-permanent and non-life members. Thus, the order of the first appellate authority was confirmed. Hence, this appeal.

10. Learned counsel for the appellant submits that in the case of the appellant itself, Tribunal, for the preceding assessment year 2000-2001 and the subsequent assessment years 2002-2003 and 2003-2004, had taken a view in favour of the appellant. Such inconsistent view of the Tribunal in respect of the same assessee but for different assessment years cannot be justified. In this connection, learned counsel has placed reliance on a decision of the Supreme Court in **CIT v. Excel Industries Limited**¹ wherein Supreme Court held that revenue cannot be allowed to flip-flop on an issue in different assessment years; though the principle of *res judicata* is not applicable to income tax proceedings, it is expected that unless there is any material change justifying the revenue to take a

¹ (2014) 13 SCC 459

different view, it is not open to the revenue to take a different and contradictory view in another assessment year.

11. Learned counsel for the appellant has also placed reliance on a decision of the Bombay High Court in **CIT v. Willingdon Sports Club**².

12. Learned Standing Counsel, Income Tax Department, however, has supported the order of the Tribunal.

13. As already noted above, question for consideration in this appeal is as to whether principle of mutuality would apply with reference to transactions entered into by an assessee with non-permanent and non-life members in the context of a club, facilities of which are availed of by all members.

14. Before we deal with this issue, we may first advert to the doctrine or principle of mutuality.

² (2008) 302 ITR 279

15. In **CIT v. Bankipur Club Limited**³, the question considered by the Supreme Court was whether in the case of a members' club, a species of mutual undertaking, in rendering various services to its members which result in a surplus, the club can be said to have earned income or profits? In that case, Supreme Court held that the receipts for the various facilities extended by the club to its members as part of the usual privileges, advantages and conveniences attached to the members of the club cannot be said to be a trading activity. The surplus *i.e.*, excess of receipts over the expenditure as a result of mutual arrangement cannot be said to be income for the purpose of the Act.

16. Again, in **CIT v. Venkatesh Premises Cooperative Society Limited**⁴, Supreme Court examined the doctrine of mutuality and held as follows:

The doctrine of mutuality, based on common law principles, is premised on the

³ (1997) 5 SCC 394

⁴ (2018) 15 SCC 37

theory that a person cannot make a profit from himself. An amount received from oneself, therefore, cannot be regarded as income and taxable. Section 2(24) of the Income Tax Act defines taxable income. The income of a co-operative society from business is taxable under Section 2(24)(vii) and will stand excluded from the principle of mutuality. The essence of the principle of mutuality lies in the commonality of the contributors and the participants who are also the beneficiaries. The contributors to the common fund must be entitled to participate in the surplus are contributors to the common fund. The law envisages a complete identity between the contributors and the participants in this sense. The principle postulates that what is contributed by a member. Any surplus in the common fund shall therefore not constitute income but will only be an increase in the common fund meant to meet sudden eventualities. A common feature of mutual organizations in general can be stated to be that the participants usually do not have property rights to their share in the common fund, nor can they sell their share. Cessation from membership would result in the loss of right to participate without receiving a financial benefit from the cessation of the membership.

17. Thus, it has been held that the doctrine of mutuality based on common law principles is premised on the theory that a person cannot make a profit from himself. The essence of the principle of mutuality lies in the commonality of the contributors and the participants who are also the beneficiaries. The contributors to the common fund must be entitled to participate in the surplus and the participators in the surplus are contributors to the common fund. The principle postulates that what is returned is contributed by a member. Any surplus in the common fund shall therefore, not constitute income but will only be an increase in the common fund meant to meet sudden eventualities.

18. In so far this issue is concerned, Bombay High Court in **Willingdon Sports Club** (2 supra) has held as follows:

The doctrine of mutuality, based on common law principles, is premised on the theory that a person cannot make a profit from himself. An amount received from oneself, therefore cannot be regarded as income and taxable. Section 2(24) of

the Income Tax Act defines taxable income. The income of a cooperative society from business is taxable under Section 2(24)(vii) and will stand excluded from the principle of mutuality. The essence of the principle of mutuality lies in the commonality of the contributors and the participants who are also the beneficiaries. The contributors to the common fund must be entitled to participate in the surplus and the participators in the surplus are contributors to the common fund. The law envisages a complete identity between the contributors and the participants in this sense. The principle postulates that what is returned is contributed by a member. Any surplus in the common fund shall therefore not constitute income but will only be an increase in the common fund meant to meet sudden eventualities. A common feature of mutual organizations in general can be stated to be that the participants usually do not have property rights to their share in the common fund, nor can they sell their share. Cessation from membership would result in the loss of right to participate without receiving a financial benefit from the cessation of the membership.

19. As a matter of fact, we find that in the case of the appellant itself, in three assessment years one preceding the

present assessment year and two succeeding the present assessment year, Tribunal by a common order has held as follows:

Applying the ratio of the above decisions to the facts of the present case, we find that it is not the case of the revenue that subscriptions and other receipts from non-permanent members and non-life members haven't gone to the common fund of the assessee-society or the assessee has earned any profit by trading it or the same has gone otherwise than the common fund of the Club. In the absence thereof, we respectfully following the decision of the Hon'ble Supreme Court in CIT v. Bankipur Club Ltd., (supra) and the decision of Hon'ble jurisdictional High Court in Addl. CIT v. Secunderabad Club (supra) and also the recent decision of Hon'ble Bombay High Court, in the case of CIT v. Willingdon Sports Club (supra) hold that even if there are non-permanent members, non-life members, temporary or honorary members who are not entitled to vote or offer themselves as candidates for any elective office or to the membership of the

council or have no right of disposal over the surplus in case of dissolution of the club, the assessee would not cease to be governed by the principles of mutuality. Once the assessee is governed by the principles of mutuality its income would not be income which would be assessable to tax and accordingly the additions of admission fees, interest received from banks and News letter sponsorship made by the AO and sustained by the Id. CIT(A) for the above asst. years are deleted. The grounds taken by the assessee in all the asst. years are therefore, allowed.

20. In the aforesaid decision, Tribunal has held that even if there are non-permanent members, non-life members, temporary or honorary members, they are not entitled to vote or offer themselves as candidates for any elective office, or have no right of disposal over the surplus in case of dissolution of the club, the assessee would not cease to be governed by the principle of mutuality. Once an assessee is governed by the principle of mutuality, its income would not

be construed to be an income within the meaning of the Act and liable to be taxed.

21. Following the above discussion, we are of the view that Tribunal was not justified in taking the view that the principle of mutuality would not apply with reference to transactions entered into by the appellant with the non-permanent and non life members. Question Nos.1 and 3 are accordingly answered in favour of the appellant/assessee and against the respondent/revenue.

22. Consequently, appeal is allowed. No costs.

As a sequel, miscellaneous petitions, pending if any, stand closed.

UJJAL BHUYAN, CJ

N.TUKARAMJI, J

Date: 04.01.2023
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