

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**INCOME TAX APPEAL NO. 328 OF 2014
WITH
INCOME TAX APPEAL NO. 372 OF 2014
WITH
INCOME TAX APPEAL NO. 407 OF 2014
WITH
INCOME TAX APPEAL NO. 636 OF 2014
WITH
INCOME TAX APPEAL NO. 961 OF 2014
WITH
INCOME TAX APPEAL NO. 1079 OF 2014**

Hatkesh Co.Op. Hsg. Society Ltd. .. Appellant.

v/s.

Ass. Commissioner of Income Tax
Circle 21(1), Mumbai .. Respondent.

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Dr. K. Shivram, Senior Advocate, a/w. Mr. Rahul Hakani and Mr. D. Shashank, for the Appellant.

Mr. Suresh Kumar, a/w. Ms. Samiksha Kanani, for the Respondent.

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**CORAM: M.S.SANKLECHA, &
S.C. GUPTA, JJ.**

DATE : 22 AUGUST, 2016.

P.C:-

. All these appeals under Section 260-A of the Income Tax Act 1961 (Act) challenge the common order dated 4 September 2013 of the Income Tax Appellate Tribunal (Tribunal). The common impugned order is in respect of Assessment Years 1996-97, 2000-01, 2001-02, 2002-03, 2006-07 and 2007-2008 which are taken exception to in all these six

appeals.

2. After hearing the Counsel, we admit all the six appeals on the following substantial question of law:

“Whether in the facts and circumstances of the case the Tribunal was justified in taking a view contrary to the decision of the co-ordinate bench of the Tribunal in appellants own case on identical facts without making a reference to the larger bench?”

3. The Counsel appearing for parties request that the appeal itself be disposed of at the stage of admission as the issue is within a narrow compass. Therefore, the appeals are being considered and disposal of finally.

4. We find that the impugned order makes reference to the appellant's submission that the issue arising in the appeal before it is covered by the order of a Co-ordinate Bench of the Tribunal dated 24 June 2011 in its own case in respect of Assessment Years 2003-04 2004-05 and 2005-06. The order dated 24 June 2011 of the Tribunal was with regard to the two issues, which arose for consideration before the Tribunal in these six Assessment Years, namely, the application of principle of mutuality in respect of transfer fees and TDR premium received by the Assessee from its members. The order dated 24 June 2011 *inter alia* considered the decision of this Court in **Sind Co. Op. Hsg. Society vs. ITO**¹ before coming to the conclusion that transfer fees as

1 (2009) 317 ITR 47 (Bom.) (High Court)

well as TDR premium received from Co-operative Societies is covered by the principle of mutuality.

5. The impugned order of the Tribunal after making a note of its Co-ordinate Bench's order dated 24 June 2011 seeks to take a different view. This different view was taken in the impugned order *inter alia* by relying upon the decision of this Court in **Sind Co.Op. Hsg. Society** (supra) which was also subjected to consideration in its order dated 24 June 2011. We are of the view that when an identical issue, which had earlier arisen before the Co-ordinate Bench of the Tribunal on identical facts and a view has been taken on the issue then judicial discipline would demand that a subsequent bench of the Tribunal hearing the same issue should follow the view taken by its earlier Co-ordinate Bench. No doubt this discipline is subject to the well settled exceptions of the earlier order being passed *per incuriam* or *sub silentio* or in the meantime, there has been any change in law, either statutory or by virtue of judicial pronouncement. If the earlier order does not fall within the exception which affects its binding character before a co-ordinate bench of the Tribunal, then it has to follow it. However, if the Tribunal has a view different then the view taken by its Co-ordinate Bench on an identical issue, then the order taking such a different view must record its reasons as to why it does not follow the earlier order of the Tribunal on an identical issue, which could only be on one of the well settled exceptions which affect the binding nature of the earlier order. It could also depart from the earlier view of the Tribunal if there is difference in facts from the earlier order of Co-ordinate Bench but the same must be recorded in the order. The impugned order is blissfully silent about the reason why it

chooses to ignore the earlier decision of the Tribunal rendered after consideration of **Sind Co. Op. Hsg. Society** (supra), and take a view contrary to that taken by its earlier Co-ordinate Bench. It is made clear that in case a subsequent bench of the Tribunal does not agree with the reasons indicated in a binding decision of a co-ordinate bench, then for reason to be recorded, it must request the President of the Tribunal to constitute a larger bench to decide the difference of view on the issue.

6. In the present facts, the impugned order of the Tribunal is not legally sustainable. We, therefore, set aside the impugned order and restore the appeal to the Tribunal for fresh disposal.

7. It is made clear that we have not considered the merits of the appeal before the Tribunal. Thus all contentions left open to be urged before the Tribunal.

8. Accordingly, while restoring the issue to the Tribunal, the substantial question is answered in the negative, i.e. in favour of the Appellant Assessee and against the Respondent Revenue.

9. Appeals disposed of in above terms. No order as to costs.

(S.C. GUPTE,J.)

(M.S.SANKLECHA,J.)