

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1474 OF 2012

The Commissioner of Income Tax – 16 ... Appellant.
V/s.
Darbhanga Mansion CHS Ltd. ... Respondent.

Mr. A.R. Malhotra a/w Mr. N.A. Kazi for the Appellant.
Mr. F.V. Irani i/b Mr. Atul K. Jasani for the Respondent.

**CORAM: S.C. DHARMADHIKARI
AND
A.A. SAYED, JJ.**

DATED : 18 DECEMBER, 2014.

P.C. :

1 This Appeal by the Revenue challenges the order passed by the Income Tax Appellate Tribunal on 4th April, 2012.

2 Mr. Malhotra submits that the following question is a substantial question of law:

“Whether on the facts and circumstances of the case and in law, the ITAT was justified in upholding the CIT(A)'s order and rejecting the departmental appeal in accepting the Assessee's plea that the contribution of Rs.39,68,000/- paid towards 'heavy repair fund' is covered by the principle of mutuality and is not chargeable to tax.”

3 Mr. Malhotra complains that the Tribunal failed to notice the distinguishing features from the judgment of this Court in the case of **Sind Co-operative Housing Society vs. Income-Tax Officer** reported in **(2009) 317 ITR 47**. The Tribunal has applied and followed this judgment without adverting to the facts and circumstances therein and equally of the Assessee's case. Mr. Malhotra invites our attention to the order passed by the Assessing Officer and submits that the Assessing Officer has not committed any error in holding that the amount and which is to the tune of Rs.39,68,000/- has been rightly brought to tax. He submits that the contribution paid or made by the members is occasioned by transfer of the flat. It is nothing but transfer fees in terms of a Government Resolution which is extensively referred to by the Assessing Officer. The amount of transfer fees cannot exceed Rs.25,000/-. If it cannot so exceed then the judgment in the case of **Sind Co-operative Housing Society** (supra) was distinguishable. Mr. Malhotra has heavily relied upon the findings of the Assessing Officer. He submits that those findings are rendered after referring to the Resolution as also the bye laws of the Co-operative Housing Society. Mr. Malhotra has submitted despite the judgment of this Court in the case of **Sind Co-operative Housing Society** (supra) has admitted three Appeals on 18th February, 2013 and which are raising identical question. Therefore, the principle of

mutuality which has been invoked and applied cannot be straightaway applicable. The Appeal, therefore, deserves to be admitted.

4 On the other hand, Mr. Irani appearing on behalf of the Respondent relied upon the order passed by this Court in the case of this very Society, namely **Income Tax Appeal No.1453 of 2007** decided on 3rd August, 2010. Mr. Irani would submit that merely because the question as framed by the Tribunal and based on the ground raised by the Revenue does not bifurcate the amount of transfer fee and contribution to building heavy repair fund does not mean that the judgment in the case of **Sind Co-operative Housing Society** (supra) will not bind this Court. That squarely binds this Court and therefore, this Appeal does not raise any substantial question of law, it deserves to be dismissed.

5 He also relies upon an order passed on 11th October, 2010 by another Division Bench of this Court in the case of this very Assessee being **Income Tax Appeal (Lodging) No.1906 of 2010**. There the Revenue raised identical question but this Court held that the issue is answered already in favour of the Assessee and against the Revenue by the Division Bench Judgment in **Sind Co-operative Housing Society** (supra). For such reasons and in the case of this very Assessee this Court having already taken a view in favour of the

Assessee, it should not proceed to admit this Appeal, more so, when it does not raise any substantial question of law.

6 With the assistance of both advocates, we have perused the Memo of Appeal and all Annexures thereto. According to the Revenue, the Assessee is a Co-operative Housing Society. It received a sum of Rs.39,68,000/- on account of transfer of flat and garage and credited it to 'general amenities fund' as well as 'repair fund'. This receipt of Rs.39,68,000/- has been claimed as exempted from tax by the Assessee. The return of income was filed for Assessment Years 2005-2006 declaring nil income. The same was processed and later on upon compliance with the statutory formality the Assessment Officer held that if the Assessee's source of income is nothing but interest on fixed deposits and interest on saving bank account, then, this sum is nothing but receipt on account of transfer of flat and garage, namely Flat No.12B and 2A. The Assessing Officer disallowed the exemption by holding that the principle of mutuality will not apply. Once the bye laws of the society prohibit receipt of transfer fees Rs.25,000/- and that is the spirit of the Government Notification as well, then, the Society cannot claim any exemption from tax.

7 Aggrieved by such an order passed on 30th November, 2007 by the Assessing Officer the Society carried the matter to the

Commissioner. The Commissioner's order is dated 15th March, 2011. He relied upon the judgment of the Division Bench in **Sind Co-operative Housing Society** (supra). What the Commissioner held in this case by relying upon all the orders of this Court even in the case of this very Assessee that the dispute raised by the Revenue for three Assessment Years 1999-2000, 2001-2002, 2003-2004 have been subject matter of legal proceedings. The same have been decided in favour of the Assessee and against the Revenue following the Division Bench judgment in the case of **Sind Co-operative Housing Society vs. Income Tax Officer**. Therefore, the order of the Assessing Officer was set aside by the First Appellate Authority.

8 We find that when the Revenue approached the Tribunal, in its grounds of Appeal, it raised the following ground:

“The Ld. CIT (A) erred in deleting the addition of Rs.39,68,000/- made on account of contribution to heavy repair fund following the decision of Hon'ble High Court of Bombay in the case of Sind Co-operative Housing Society Ltd., wherein it has been held that the said contributions made by the members of the society are exempt from taxation under the principle of mutuality. The decision has not been accepted by the Department and the issue is sub-judice.”

9 Upon perusal of this question itself, it is evident that the Revenue was of the opinion that a judgment delivered by the Division Bench of this Court would come in its way and the argument, therefore, was that the Revenue has not accepted this judgment and the principles laid down therein. When such was the position brought to the notice of the Tribunal, then natural response of the Tribunal was that a judgment of the jurisdictional High Court is sought to be distinguished. If it is sought to be distinguished then the distinguishing features should be pointed out and by bringing satisfactory and proper material. Merely arguing that the Assessee is a Co-operative Housing Society, it received this sum on account of transfer of flat and garage and credited it to the 'general amenities fund' as well as 'repair fund' was not enough. We do not see how this approach of the Tribunal can be faulted by the Revenue.

10 Mr. Malhotra trying to persuade us and by contending that the Division Bench in **Sind Co-operative Housing Society** (supra) was not concerned with the legal effect of Government Notification dated 9th August, 2001. That placed a cap or outer limit of Rs.25,000/- on receipt of transfer fee and occasioned by transfer of a flat. That amount has to be received and retained by the Society under that head. The submission is that the Division Bench has clarified the

matter in the judgment itself. In that regard our attention is invited to para 43 and preceding paragraphs of the report. Mr. Malhotra would submit that charging of transfer fees as per bye laws has no element of trading or commerciality, that is the principle on which the Division Bench proceeded. It also proceeded by holding that the contribution can come from both the outgoing or incoming members. However, so long as there was a principle of mutuality and which could be applied, then according to Mr. Malhotra this judgment must be seen as restricted to that aspect alone. More so, when in the case of **Sind Co-operative Housing Society** (supra) there was no restriction or outer limit on the transfer fees.

11 Upon careful perusal of the Judgment passed by the Division Bench and the order passed by the Tribunal impugned in this case, we see no merit in this contention of Mr. Malhotra. The very issue and the very question was raised repeatedly in the case of the Assessee Society. Repeatedly the Revenue has failed in convincing the Tribunal that **Sind Co-operative Housing Society** (supra) will not cover the Society's case. The contribution is made to the repair fund or to the general fund and credited as such. While it may be true that it is occasioned by transfer of a flat and garage, yet, we do not see how merely because there was cap or restriction placed on the transfer

fees or the quantum thereof, in this case the principle of mutuality cannot be applied. The underlying principle and of a co-operative movement has been completely overlooked by the Counsel for the Revenue. The Revenue seems to be of the view that a Co-operative Housing Society makes profit, if it receives something beyond this amount of Rs.25,000/-. There has to be material brought and which will have a definite bearing on this issue. If the amount is received on account of transfer of a flat and which is not restricted to Rs.25,000/- but much more, then different consideration may apply. However, in the present case, what has been argued and vehemently is the amount was received by the Society when the flat and the garage were transferred. Therefore, it must be presumed to be nothing but transfer fees. It may have been credited to the fund and with a view to demonstrate that it is nothing but a voluntarily contribution or donation to the Society, but still it constitutes its income. However, for rendering such a conclusive finding there has to be material brought by the Revenue on record. Beyond urging that it has been received at the time of a transfer of the flat and credited to such a fund will not be enough to displace the principle laid down in the decision of **Sind Co-operative Housing Society**. The attempt of the Revenue therefore is nothing but overcoming the binding judgment of this Court. In the present case, the Commissioner and the Tribunal both have held that

the receipt may have been occasioned by the transfer but the principle of mutuality will still apply. It is a typical relationship between the member of the Co-operative Society and particularly a Housing Society and the Society which is a body Corporate and a legal entity by itself that is forming the basis of the principle laid down by the Division Bench. Co-operative movement is a socio economic and a moral movement. It has now been recognized by Article 43A of the Constitution of India. It is to foster and encourage the spirit of brotherhood and co-operation that the Government encourages formation of Co-operative Societies. The members may be owning individually the flats or immovable properties but enjoying, in common, the amenities, advantages and benefits. The Society as a legal entity owns the building but the amenities are provided and that is how the terms "flat" and the "housing society" are defined in the statute in question. We do not therefore find any reason to deviate from the principle laid down in **Sind Co-operative Housing Society's** case and which followed a Supreme Court judgment. In the present case, therefore, the Tribunal following its earlier views and applying the ratio of this judgment, dismissed the Revenue's Appeal and confirmed the Commissioner's finding. The concurrent findings, therefore, in this case are in consonance with the factual materials brought on record. There is substance in the argument of Mr. Irani that the Assessing

Officer had before him the material in the form of the bye-laws of the Society. The bye- laws also are in consonance with the Government Resolution and stipulate a sum of Rs.25,000/- towards transfer fees. The Assessee in this case is presumed to have received nothing but transfer fees and it is that underlying presumption which has prevailed upon the Assessing Officer to take a particular view.

12 We find that the Assessing Officer has been therefore, rightly corrected by the Commissioner. Without any material, cogent and satisfactory, being produced, the sum and in its entirety as credited could not be assumed to be transfer fees. The receipt thereof may have been occasioned by the transfer of the flat and garage. In such circumstances, we do not find that the Tribunal committed any error of law apparent on the face of the record in dismissing the Revenue's Appeal. Its order cannot be termed as perverse as well. The Appeal is devoid of merits and is dismissed. No order as to costs.

(A.A. SAYED, J.)

(S.C. DHARMADHIKARI, J.)

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