

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 1847 of 2010
To
TAX APPEAL No. 1848 of 2010

For Approval and Signature:

HONOURABLE THE ACTING CHIEF JUSTICE MR.BHASKAR BHATTACHARYA

HONOURABLE MR.JUSTICE J.B.PARDIWALA

- =====
- 1 Whether Reporters of Local Papers may be allowed
to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy
of the judgment ?
- 4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?
- 5 Whether it is to be circulated to the civil judge
?

=====

COMMISSIONER OF INCOME TAX - IV, AHMEDABAD - IV -
Appellant(s)
Versus

MANEKBAUG COOPERATIVE HOUSING SOCIETY LIMITED - Opponent(s)

=====

Appearance :

MR KM PARIKH for Appellant(s) : 1,
 MR SN SOPARKAR, SR. COUNSEL WITH MRS SWATI SOPARKAR for Opponent(s) :
 1,

=====

CORAM : HONOURABLE THE ACTING CHIEF JUSTICE
MR.BHASKAR BHATTACHARYA

and

HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 07/05/2012

CAV JUDGMENT

(Per : HONOURABLE THE ACTING CHIEF JUSTICE MR. BHASKAR BHATTACHARYA)

1. These Appeals under Section 260A of the Income Tax Act, 1961 [“the Act”] are at the instance of the Revenue and are directed against order dated March 5, 2010 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench “B”, Ahmedabad [“the Tribunal”] in ITA No. 2133/Ahd/2006 and C.O. No. 262/Ahd/2006 in respect of the Assessment Year 2003-04 by which the Tribunal dismissed the appeal preferred by the Revenue and allowed the Cross-Objection filed by the assessee.

2. Being dissatisfied, the Revenue has come up with these appeals.

3. In Tax Appeal No.1847 of 2010, the Revenue has put forward the following questions for determination:

“[i] Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in confirming the order of the Appellate Commissioner in deleting the disallowance of expenses to the tune of Rs. 5,56,430/- claimed by the assessee as expenses made by the Assessing Officer?

[ii] Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting the addition of Rs. 2 lakhs made by the

Assessing Officer on account of transfer fee by transfer of plot received by the assessee?"

4. On the other hand, in Tax Appeal No. 1848 of 2010, the Revenue has raised the following question:

"Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal is right in law in deleting the disallowance of expenses to the tune of Rs. 7,61,826/- claimed by the assessee as expenses, made by the Assessing Officer?"

5. The facts giving rise to filing of these Appeals may be summed up thus:

5.1 The respondent filed its return on March 30, 2004 for the Assessment Year 2003-04 declaring total income of Rs. Nil along with statutory audit report. The said return of income was processed under Section 143[1] of the Act accepting the total income returned by the assessee.

5.2 The assessee is a Co-operative Housing Society and derives income for hiring of hall, catering services, commission etc. The assessee had shown gross receipts of Rs. 21,56,766/- against which, it had shown net income of Rs. 4,02,182/-.

5.3 In response to the notice under Section 142[1] of the Act, the assessee furnished the required detailed information, which was

verified and examined on test-check basis.

5.4 During the course of the assessment proceedings, the authorized representative of the assessee *vide* his letter dated December 29, 2005 claimed that the income derived by the assessee should be taken as “income from business” instead of “income from other sources” as shown by the assessee in its return of income. It was further contended that the Assessing Officer was required to draw the attention of the assessee to the lawful relief or deduction although the assessee did not claim the same.

5.5 *Vide* show cause notice dated March 6, 2006, the assessee was asked to explain why all the expenses claimed by it should be disallowed as it was deriving income from “other sources”. It was further asked to show cause that why the expenses claimed by the assessee should not be disallowed and added to the total income of the assessee.

5.6 *Vide* letter dated March 17, 2006, the authorized representative of the assessee filed written submissions which is as under:-

“ That by the mistake the income is shown under the head income from other sources. In fact the income is income from business and profession. In my earlier submission I have already requested to consider the income under the head business income and secondly on the ground of

principles of mutuality all expenses claimed be allowed in toto.

So far as transfer fees income i.e. premium on transfer of plot is concerned I have given my submission earlier that premium on transfer paid by the transferor and in past Hon'ble ITAT Ahmedabad had also deleted additions on account of transfer premium and also Hon'ble Gujarat High Court has also decided the case of Adarsh Coop Society in favour of the society that premium on transfer is not taxable income."

5.7 The Assessing Officer, by his order dated March 24, 2006 passed an order under Section 143[3] of the Act by which he held that the income of the assessee should be treated to be under the head "income from other sources" which had been rightly offered by the assessee in its return of income and consequently, all the expenses debited in its income and expenditure account cannot be said to be incurred for earning "income from other sources". The Assessing Officer was of the view that only expenses which can be considered allowable under Section 57[iii] of the Act for earning income from other sources are as follows:

i	Sanskrutik Kendra Repairing exp.	Rs. 700
ii	Sanskrutik Kendra Light exp.	Rs. 167244
iii	Sanskrutik Kendra Safai exp.	Rs. 31830
iv	Sanskrutik Kendra Borewell repairing	Rs. 11475
v	Pagar Kharch in absence of full details and proper bifurcation 50% of 388178 considered for Sanskrutik Kendra as against 90% claimed by the assessee	Rs. 194089

vi	50% of bonus for the reasons stated above	Rs. 4956
vii	Depreciation on Sanskrutik Kendra Bldg.	Rs. 22569
viii	Depreciation on shop bldg.	Rs. 3465
	Total	Rs. 436328

Accordingly, the Assessing Officer held that total expenses of Rs.4,36,328/- were allowable and other expenses amounting to Rs. 1318256/- [Rs.1754584 – Rs. 436328] claimed by the assessee were disallowed and added to the total income of the assessee.

5.8 The Assessing Officer also initiated penalty proceedings for furnishing inaccurate particulars.

5.9 The Assessing Officer further held that the sum of Rs. 2.00 Lac received by the assessee as transfer fees from its members should also be treated as its income and those were also added.

5.10 Being dissatisfied, the assessee preferred an appeal before the Commissioner of Appeals (Appeals) ("CIT [Appeals]") challenging the order passed by the Assessing Officer under Section 143[3] of the Act.

5.11 The first appellate authority by its order dated July 20, 2006 partly allowed the said appeal. The appellate authority was of the view that 90% of the salary and bonus should be considered as allowable against the income from Sanskrutik Hall instead of 50% as

allowed by the Assessing Officer. Over and above, the water expenses of Ra. 1,56,650/- should be allowed as deduction. Similarly, the other expenses claimed by the assessee, i.e. advertisement expenses of Rs. 28,342/-, service tax of Rs. 16,998/-, staff medical expenses of Rs. 5,250/-, municipal tax of Rs. 77,036/-, audit fees of Rs. 5,000/-, legal fees of Rs.64,000/-, 80% of stationary and printing expenses of Rs. 13,865/-, insurance premium of Rs. 4,474/- depreciation on electrical fittings of Rs. 243/-, depreciation on dead stock and furniture of Rs. 22,287/- and depreciation on substation construction of Rs. 3,190/- should be allowed as deduction against the income from hiring of Sanskrutik Hall and decorators and caterer's commission. As regards the other sources of income, i.e., interest from banks, the CIT [Appeals] held that as there was surplus of Rs. 10,870/-, the same should be taxed as income from other sources.

5.12 As regards the other ground of appeal against the addition of Rs. 2.00 Lac being transfer fees received by the assessee on transfer of plots as income of the assessee, the first appellate authority was of the view that the same should be deleted.

5.13 Being dissatisfied, the Revenue preferred an appeal before the Tribunal being ITA No. 2133/Ahd/2006 by which the Revenue challenged the order of the CIT [Appeals] reducing the disallowance of expenses made by the Assessing Officer from Rs. 13,18,256/- to Rs. 7,61,826/- and also challenged the deletion of addition of Rs. 2.00 Lac

being transfer fee of transfer of plots.

5.14 In the above appeal, the assessee preferred a Cross-Objection and thereby contending that the CIT [Appeals] committed error of law in not accepting the plea of the assessee that on the principle of mutuality as raised by the assessee, the assessee's income was not taxable at all and in any case, even the surplus of Rs. 4,02,182/- should not have been taxed because income of the assessee by way of interest from co-operative banks at Rs. 4,78,317/- was exempt under Section 80P[iii] of the Act.

5.15 The Tribunal, by the order impugned in these Appeals dismissed the appeal preferred by the Revenue and allowed the Cross-Objections filed by the assessee.

5.16 Being dissatisfied, these two Appeals have been preferred by the Revenue.

6. Since a Division Bench of this Court issued notice upon the respondent and as a result, Mr. S.N. Soparkar, learned Senior Counsel has entered appearance on behalf of the Revenue, we have heard out the Appeals on merits.

7. Mr. Soparkar, learned Senior Counsel appearing on behalf of the respondent, at the outset, raised a preliminary objection as regards

maintainability of the Appeals on the ground that according to the Standing Instruction No. 5 of 2008 issued by the CBDT, the Revenue should not have preferred these Appeals as the tax-effect in the Tax Appeal No. 1847 of 2010 is less than Rs. 4.00 Lac.

8. Mr. K.M. Parikh, learned counsel appearing on behalf of the Revenue, on the other hand, opposed the above contention by contending that if the total tax-effect of these two Appeals is taken into consideration, it would exceed Rs. 4.00 Lac. According to Mr. Parikh, the total tax-effect involved in these two appeals should be considered for the purpose of the above Standing Instruction, because, by the common order, the Tribunal disposed of both the appeal and Cross-Objection.

9. In order to appreciate the above question, it will be profitable to quote the clause-5 of the above Instruction No. 5 of 2008 as under:

"5. The Assessing Officer shall calculate the tax effect separately for every assessment year in respect of the disputed issues in the case of every assessee. If, in the case of an assessee, the disputed issues arise in more than one assessment year, appeal shall be filed in respect of such assessment year or years in which the tax effect in respect of the disputed issues exceeds the monetary limit specified in para 3. No appeal shall be filed in respect of an assessment year or years in which the tax effect is less than the monetary limit specified in para 3. In other words, henceforth, appeals will be filed only with reference to the tax effect in the relevant

assessment year. However, in case of a composite order of any High Court or appellate authority, which involves more than one year, appeal shall be filed in respect of all assessment years even if the "tax effect" is less than the prescribed monetary limits in any of the year[s], if it is decided to file appeal in respect of the year[s] in which the 'tax effect' exceeds the monetary limit prescribed."

[Emphasis supplied by us]

10. After hearing the learned counsel for the parties and after taking into consideration the Instruction No.5 of 2008, we find that by virtue of the said Instruction, the Revenue was prohibited from preferring any appeal before this Court under Section 260A of the Act at the relevant point of time against any order of the Tribunal, where the tax-effect by virtue of the order of the Tribunal for a particular Assessment year was less than Rs. 4.00 Lac. In case before us, if we take into consideration the total tax-effect involved in these two Appeals, it would definitely exceed Rs. 4.00 Lac. We are, thus, unable to accept the contention of Mr. Soparkar, the learned Senior Advocate appearing on behalf of the assessee, that we should not add the tax-effect of the two Appeals but should consider the tax-effect separately for each of the appeals.

11. In this case, the Revenue has preferred the two Appeals only because of the fact that before the Tribunal, not only its appeal was dismissed but also the Cross-Objection filed by the assessee was allowed. Therefore, by virtue of the final common order passed by the

Tribunal, the total tax-effect that the Revenue has suffered and which it wants to challenge in these two Appeals, is more than Rs. 4.00 Lac. In our opinion, on a plain reading of the Instruction No.5 of 2008 in its proper perspective, the intention of the CBDT was clear that if the Revenue suffered an order in the Tribunal by virtue of which the total-effect would be less than Rs. 4.00 Lac in respect of any assessment year, no appeal should be preferred before this Court against such an order. Thus, for the purpose of interpretation of the said Standing Instruction, we propose to adopt that amount as the tax-effect, which the Revenue would lose by way of tax for an Assessment year by virtue of the order impugned irrespective of the fact whether the same is challenged by filing one appeal or by more than one appeals. We, therefore, overrule the preliminary objection raised by Mr. Soparkar and propose to enter into the merit of the Appeals.

12. On merit, after hearing the learned counsel for the parties and after going through the materials on record, we find that there is no dispute that the assessee is a Co-operative Housing Society registered under the provisions of the Gujarat Cooperative Societies Act.

13. As pointed out by a Division Bench of this Court in the case of ***Commissioner of Income Tax v. Adarsh Cooperative Housing Society, reported in [1995] 213 ITR 677***, a co-operative society registered under the Bombay Cooperative Societies Act, 1925 should

be treated as a mutual concern and by virtue of the income which it received from its members should be held to be “not liable to be taxed”. It appears that the Supreme Court in the subsequent decision in the case of ***Chelmsford Club v. Commissioner of Income-tax, reported in [2000] 243 ITR 89*** has adopted the same principle. As pointed out in the above decision, under the Income-tax Act, 1961, what is taxed is, the “income, profits or gains” earned or “arising”, “accruing” to a “person”. According to the said decision, where a number of persons combine and contribute to a common fund for the financing of some venture or object and in this respect, have no dealings or relations with any outside body, then any surplus returned to those persons cannot be regarded in any sense as profit. The Supreme Court further pointed out that there must be complete identity between the contributors and the participators. If these requirements are fulfilled, the Supreme Court proceeded, it is immaterial what particular form the association takes. Trading between persons associating together in this way, according to the said decision, does not give rise to profits, which are chargeable to tax. Where the trade or activity is mutual, according to the Supreme Court, the fact that, as regards certain activities, certain members only of the association take advantage of the facilities, which it offers, does not affect the mutuality of the enterprise. The law, according to the said decision, recognizes the principle of mutuality excluding the levy of income tax from the income of such business to which the above principle is applicable. The Supreme Court referred to section

2(24) of the Income-tax Act, 1961, which shows that the Act recognizes the principle of mutuality and has excluded all businesses involving such principle from the purview of the Act, except those mentioned in clause (vii) of that section. The three conditions, the existence of which establishes the doctrine of mutuality are (1) the identity of the contributors to the fund and the recipients from the fund, (2) the treatment of the company, though incorporated as a mere entity for the convenience of the members, in other words, as an instrument obedient to their mandate, and (3) the impossibility that contributors should derive profits from contributions made by themselves to a fund which could only be expended or returned to themselves.

14. In the said case, the assessee, a members' club, provided recreational and refreshment facilities exclusively to its members and their guests. Its facilities were not available to non-members. The club was run on "no profit no loss" basis and that the members paid for all their expenses and were not entitled to any share in the profits. Surplus, if any, was used for maintenance and development of the club. The club house was owned by the assessee. The assessee claimed that it was a mutual concern and so the annual letting value of the club house was not assessable. In such situation, the Supreme Court held that the assessee's business was governed by the doctrine of mutuality and it was admitted fact that the business of the assessee did not come within the scope of "business" referred to

in section 2[24][vii] of the Act. It was not only the surplus from the activities of the business of the club that was excluded from the levy of income-tax, according to the Supreme Court, even the annual value of the club house, as contemplated in section 22 of the Act would be outside the purview of the levy of income-tax.

15. By applying the aforesaid principles to the facts of the present case, we find that the CIT [Appeals] and the Tribunal below rightly applied the above principles so far as the addition of Rs. 2 Lac as transfer fees are concerned as all the three conditions indicated above are satisfied.

However, so far as the finding of the CIT[Appeals] as regards the amount of Rs. 10,870/- as surplus from the interest income of Rs. 4,83,449/- are concerned, we are of the view that there was no justification on the part of the CIT [Appeals] in limiting the deduction to 90% of the expenditures in terms of Section 57[iii] of the Act instead of 100%. It is not the finding of the CIT [Appeals] that any of the expenditure was of the nature of capital expenditure so as to bring the case within the purview of exceptions as indicated in Section 57[iii] of the Act. Thus, if 100% deduction is given to the expenditure, a sum of Rs. 4,02,182/- remains as net surplus of income over expenditure. But the above amount of Rs. 4,02,182/- will not be taxable because the income of the assessee by way of interest from co-operative bank of Rs. 4,78,317/- is exempt under Section 80P[ii] of

the Act which is more than Rs. 4,02,182/-.

Therefore, we find that the ultimate conclusion arrived at by the Tribunal below in dismissing the appeal by the Revenue and allowing the cross-objection by the assessee was quite justified.

16. We, thus, find that no substantial question of law is involved in these Appeals justifying interference. Consequently, we dismiss these Appeals preferred by the Revenue.

[BHASKAR BHATTACHARYA, ACTING CJ]

[J.B. PARDIWALA, J.]

pirzada/-

