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

INCOME TAX APPEAL NO. 85 OF 2013

Commissioner of Income Tax-16. ..Appellant

Vs.

Shyam Co-op. Housing Society Ltd. ..Respondent

....

Mr. A.R. Malhotra a/w Mr. N.A. Kazi, Advocates for Appellant.
Mr. Ashok patil, Advocate for Respondent.

....

CORAM : M.S. SANKLECHA &
G.S. KULKARNI, JJ.
DATED : 2nd FEBRUARY 2015

P.C.:

1. This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (the 'Act') assails the order dated 8th June 2012 passed by the Income Tax Appellant Tribunal (the 'Tribunal') holding that the amount received for the transfer fees and non occupancy charges are not chargeable to tax in the hands of the respondent-assessee (Co-operative Housing Society) under the principle of mutuality.

2. The assessment year involved is Assessment Year 2003-04.

3. The appellant-revenue has raised following question of law for our consideration:

> *"Whether on the facts and in the circumstance of the case and in law, the Tribunal, was justified in upholding the CIT (A)'s order and dismissing the revenue's appeal and accepting the assessee's plea that the contribution of Rs.42 Lakhs paid towards the transfer fees and Rs.23,250/- being non occupancy charges are covered by the principle of mutuality and is not chargeable to tax?"*

4. We find that the Tribunal by the impugned order has followed the decision of this Court rendered in the respondent-assessee's own case for the Assessment Year 1999-00, 2000-01 and 2001-02 on an identical issue. Our Court by an order dated 17th July 2009 allowed the respondent-assessee's appeal on an identical questions (Income Tax Appeal Nos. 92/2008, 93/2008 and 206/2008) by placing reliance upon the decision of this Court in ***Sind Co-operative Housing Society Vs. The Income Tax Officer 317 ITR 47***.

5. The grievance of the revenue is that by virtue of the State Government Circulars dated 27th November 1989, 28th December 1989 and more particularly dated 1st August 2001 the respondent-assessee is prohibited from receiving any amount in excess of the limits specified therein. It is submitted that any amounts received in excess of the amounts specified in the Cirucular of State Government, has to be brought to tax. It is submitted that the decision of this Court in Sind Co-

operative Housing Society (supra) also observes if an amount received is more, than what is chargeable under bylaws, the society is bound to repay the same, failing which same is assessable to tax. Besides it was submitted that on identical issue with regard to the transfer fees even this Court has admitted two appeals viz. Income Tax Appeal No. 4918/2010 in the case of CIT Vs. M/s Samudra Mahal Premises Co-op. Housing Society Ltd. on 14th June 2012 and Income Tax Appeal Nos. 423/2012, 478/2012 and 500/2012 in the case of CIT Vs. M/s Panchratna Co-op. Housing Soceity Ltd. on 18th February 2013. In view of the above, it is submitted that these appeals need to be admitted on the issue of transfer fees.

6. Mr. Patil, learned Counsel appearing for Assessee points out that it has not been the revenue's case before the authorities that any amount in excess of amount referred to in the State Government Circular dated 9th August 2001 was charged by the respondent-assessee from its members. In his submission, the issue stands covered by the decision of this Court in its own case following Sind Co-op. Housing Society (supra) and also an unreported decision in Income Tax Appeal No. 1474/2012 in CIT Vs. Darbhanga Mansion Co-op. Housing Society Ltd. on 18th December 2014.

7. We find that so far as non occupancy charges are concerned the same has not been admitted by this Court in M/s Panchratna Co-op. Housing Society Ltd. (supra). No order has been shown to us admitting the issue on non-occupancy charges. However there are two appeals admitted on the issue of transfer fees on 14th June 2012 and 18th February 2013 as relied by the revenue. The very grievance raised by the revenue in this appeal in respect of transfer fees was raised by the revenue before this Court in Darbhanga Mansion Co-op. Housing Society Ltd. (supra). This Court by order dated 18th December 2013 did not accept an identical grievance by observing thus:

> *"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/-. <u>There has to be material brought and which will have a definite bearing on this issue</u>. 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 Soceity. 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. ....

.... 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."

8. In this case also, nothing has been brought on record to indicate that the respondent had received more amounts than allowed/permitted in the State Government Circular dated 9th August 2001. Further in the respondent-assessee's own case, this Court has

decided the issue in it's favour and in the absence of any distinguishing feature, the Tribunal was obliged to follow the same. This is precisely what the impugned order has done. Thus, as the issue is covered in favour of the respondent-assessee by order of this Court dated 17th July 2009 (Income Tax Appeal No. 92, 93 and 208/2008) no substantial question of law arises in this case.

9. Accordingly **appeal** is **dismissed.** No order as to costs.

[G.S. KULKARNI, J] **[M.S. SANKLECHA, J.]**

S.S.DESHPANDE