

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ITA No. 690 of 2005 (O&M)

Date of Decision: 30.11.2015

The Commissioner of Income Tax, Panchkula

....Appellant.

Versus

M/s Gymkhana Club, Panchkula

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MR. JUSTICE RAMENDRA JAIN.**

1. Whether the Reporters of the local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

PRESENT: Mr. Yogesh Putney, Advocate for the appellant.

Mr. S.K. Mukhi, Advocate and
Mr. Rajiv Sharma, Advocate for the respondent.

AJAY KUMAR MITTAL, J.

1. This order shall dispose of a bunch of 12 appeals bearing ITA Nos. 690 of 2005, 70, 243 to 246, 420 of 2006, 209, 295, 553, 883 of 2008 and 331 of 2015 as according to learned counsel for the parties, common questions of law and facts are involved in all the appeals. For brevity, the facts are being extracted from ITA No. 690 of 2005.
2. Delay of 147 days in refiling ITA No. 690 of 2005 is condoned.
3. ITA No. 690 of 2005 has been filed by the revenue under

Section 260A of the Income Tax Act, 1961 (in short “the Act”) against the order dated 15.12.2004 (Annexure A-3) passed by the Income Tax Appellate Tribunal, Chandigarh Bench “A”, Chandigarh (hereinafter referred to as “the Tribunal”) in ITA No. 376/CHANDI/2001 for the assessment year 1997-98. All the appeals except ITA Nos. 209, 295, 553, 883 of 2008 and 331 of 2015 were admitted by this Court vide order dated 29.10.2007 for determination of the following substantial question of law:-

“Whether in the facts and circumstances of the case, the learned ITAT was right in law in treating the charges received from non-member/guests as not liable to tax?”

4. ITA No. 209, 553 and 883 of 2008 was admitted by this Court for determination of the following substantial questions of law:-

- a) Whether in the facts and circumstances of the case the Id. ITAT was right in law in holding that the interest income derived by the assessee-club on its FDRs with banks was not liable to tax?
- b) Whether in the facts and circumstances of the case, the Id. ITAT was right in law in treating the charges received from non-member guests as not liable to tax?
- c) Whether in the facts and circumstances of the case, the Id. ITAT was right in law in observing that the miscellaneous income on account of

sale of various items and commission is not taxable being incidental to the providing of facilities to the members, though the AO had made the addition on this count treating it as not covered by the doctrine of mutuality?

- d) If the above issues are decided against the assessee; whether the Hon'ble ITAT has erred in law in not dealing with the issue of setting off of the losses from services being provided to the members (non-taxable income) against the income from other sources including interest, guest charges and other receipts?

5. However, ITA No. 295 of 2008 was admitted for adjudication of substantial questions of law at (a) to (c) in para 4 above.

6. ITA No. 331 of 2015 was admitted by this Court vide order dated 28.10.2015 for determination of the substantial questions of law as referred to in para 6 of the appeal which are to the following effect:-

- i) Whether in the facts and circumstances of the case, the Ld. ITAT was right in law in holding that the assessee club is a mutual concern disregarding the finding of the A.O. that the financial and administrative control over the assessee club is in the hands of HUDA and that there is no identity between the contributors and the participants of the assessee club?
- ii) Whether on the facts and circumstances of the

case, the Ld. ITAT was right in law in treating the charges received from non-member guests as not liable to tax?

- iii) Whether in the facts and circumstances of the case, the Ld. ITAT was right in law in holding that the interest income derived by the assessee-club on its FDRs with banks was not liable to tax?

7. A few facts necessary for adjudication of the present appeal as narrated therein may be noticed. The assessee filed its return as charitable institution on 31.10.1995 for the assessment year 1997-98 declaring nil income. The case was taken up for scrutiny and notices under Sections 143(2) and 142(1) of the Act were issued. It had applied for its registration as charitable institution under Section 12A of the Act. However, the claim of the assessee for being declared a charitable institution was rejected by the Commissioner of Income Tax, Panchkula vide order dated 9.3.1998. The said order was not challenged by the assessee any further. During the year in question, the assessee earned ₹ 19,95,509/- on account of interest on bank deposits, ₹ 3501/- on sale of empty bottles and other receipts aggregating to ₹ 73,304/-. Accordingly, the Assessing Officer vide order dated 28.3.2000 (Annexure A-1) framed the assessment at a total income of ₹ 20,88,314/-. Feeling aggrieved, the assessee filed an appeal before the Commissioner of Income Tax (Appeals) [for brevity "the CIT(A)"]. The CIT(A) vide order dated 13.2.2001 (Annexure A-2) following her earlier order in the case of the assessee for the assessment year 1995-96 allowed the appeal.

Against the order, Annexure A-2, the revenue filed an appeal before the Tribunal. The Tribunal vide order dated 15.12.2004 (Annexure A-3) dismissed the appeal of the revenue following its earlier decision in the case of the assessee for the assessment year 1995-96. Hence, the present appeal by the revenue.

8. The primary dispute that arises for adjudication in these appeals relates to whether the principle of mutuality would be applicable in the present case or not?

9. Learned counsel for the revenue submitted that there was no concept of mutuality that arises in these cases and, therefore, the Tribunal had erred in applying the doctrine of mutuality in the case of the assessee. Reliance was placed upon clause 5(d) of the Memorandum of Association which is as under:-

“5(d). If upon the winding up or dissolution of the society there remains after satisfaction of all its debts and liabilities any property whatsoever, the same shall not be paid to or distributed among the members of the society, but shall be given or transferred to some other Institution having objects similar to the objects of the society at or before the time of dissolution.”

10. It was also contended that the assessee was not mutuality concern and was, thus, not entitled to exemption on that ground. It was also pleaded that inspite of the fact that the revenue had cited certain judgments of Apex Court and various High Courts before the Tribunal but the Tribunal had preferred to follow its own decision dated 20.9.1985 in the case of Commissioner of Income Tax, Haryana, Rohtak v. Sirhind

Club Ltd., Ambala, ITA No. 451/Chandi/84, for the assessment year 1982-83. Support was gathered by the learned counsel for the revenue from the decisions of the Apex Court in **Chelmsford Club v. Commissioner of Income Tax (2000) 243 ITR 89 (SC)**, **Bangalore Club v. Commissioner of Income Tax and another (2013) 350 ITR 509 (SC)**, of this Court in **Haryana State Cooperative Labour and Construction Federation Ltd. v. Commissioner of Income Tax (2001) 252 ITR 265 (P&H)** and of Karnataka High Court in **Commissioner of Income Tax and another v. Bangalore Club (2006) 287 ITR 263 (Karn)**. Additionally, certain judgments of other High Courts were also relied upon by him. It was next urged that there were certain incidental issues as well which arise for consideration.

11. On the other hand, besides supporting the order passed by the Tribunal, the contentions of learned counsel for the revenue were opposed by the learned counsel for the assessee. Reliance was placed upon the judgments of the Apex Court in **Commissioner of Income Tax v. Bankipur Club Ltd. (1997) 226 ITR 97 (SC)**, **Chelmsford Club v. Commissioner of Income Tax (2000) 243 ITR 89 (SC)** of this Court in **Commissioner of Income Tax v. Haryana C.M. Relief Fund (2009) 309 ITR 275 (P&H)**, Delhi High Court in **Commissioner of Income Tax v. Delhi Gymkhana Club Ltd. (2011) 339 ITR 525 (Delhi)** and Karnataka High Court in **Canara Bank Golden Jubilee Staff Welfare Fund v. Deputy Commissioner of Income Tax (2009) 308 ITR 202 (Karn)**.

12. We have heard learned counsel for the parties.

13. The conditions for invoking the principle of mutuality have

been recently enumerated by the Apex Court in **Bangalore Club's case (supra)** wherein after considering various other pronouncements of the Supreme Court and the High Court on the subject, it has been laid down that principle of mutuality relates to the notion that a person cannot make a profit from himself. The concept of mutuality has been extended to defined groups of people who contribute to a common fund, controlled by the group, for a common benefit. Any surplus amount to that needed to pursue the common purpose is said to be simply an increase of the common fund and as such neither considered income nor taxable. Broadly, the following conditions have been laid down for the applicability of doctrine of mutuality:-

- (i) The first condition to invoke the principle of mutuality requires that there must be a complete identity between the contributors and the participators;
- (ii) the second feature demands that the action of the participants and the contributors must be in furtherance of the mandate of the association. However, in the case of a club, the steps have to be taken in furtherance of activities that benefit the club and in turn its members. The condition postulates a direct step with direct benefits to the functioning of the club. The mandate of the club requires to be examined in the factual matrix keeping in view the memorandum or articles of association, rules of

membership, rules of the organization etc. However, it cannot be construed myopically. In some situations, the benefit may be evident directly in the short run, in others, they may be accruable to an organization indirectly, in the long run and the space must be made for both such forms of interactions between the organization and its member;

- (iii) Further, there must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves and it is a difficult question of fact that at what point mutuality ends and commerciality begins.

14. We find that the Tribunal had not recorded any definite finding of fact on the basis of legal enunciations on the issue. Therefore, in such a situation, the issue being considered to be primarily a question of fact relating to applicability of doctrine of mutuality, it would be appropriate to set aside the order of the Tribunal and remand the case back to the Tribunal to adjudicate the same and pass a speaking order after hearing both the sides.

15. Accordingly, the appeals are allowed and the impugned orders passed by the Tribunal are set aside. The matter is remanded back to the Tribunal to adjudicate the same afresh and pass a speaking order after hearing both the sides without being influenced by any finding or observation made in the earlier orders. Needless to say that

anything observed hereinbefore shall not be taken to be an expression of opinion on the merits of the controversy.

**(AJAY KUMAR MITTAL)
JUDGE**

November 30, 2015
gbs

**(RAMENDRA JAIN)
JUDGE**