0N THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDIARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 931 OF 2004

Sind Coop. Hsg. Society,
a Cooperative Society under the
Provisions of the Maharashtra Cooperative
Societies Act, 1960 having its Registered
office at 548, Sadhu Vaswani Nagar,
Ganeshkhind Road, Pune 411 007 ... Appellant

Versus

Income Tax Officer,
Ward 1(7), Pune,
having his office at Aayakar Bhavan,
Pune ... Respondent

WITH

INCOME TAX APPEAL NO. 1063 OF 2004

Sind Coop. Hsg. Society ... Appellant

Versus

Income Tax Pune ... Respondent

WITH

INCOME TAX APPEAL NO. 464 OF 2005

Income Tax Commissioner ... Appellant

Versus

Sind Coop. Hsg. Society ... Respondent

WITH

INCOME TAX APPEAL NO. 465 OF 2005

The Commissioner of Income Tax ... Appellant

Versus

The Sind Coop. Hsg. Soc. Ltd. ... Respondent

WITH

INCOME TAX APPEAL NO. 7 OF 2006

The Sind Coop. Hsg. Society ... Appellant

Versus

Income Tax Officer .... Respondent

WITH

INCOME TAX APPEAL NO. 932 OF 2004

National Cooperative Housing Society,

a Cooperative Society under the

Provisions of the Maharashtra

Cooperative Societies Act, 1960

having its registered office at Bener Road,

Aundh, Pune ... Appellant

Versus

The Income Tax Officer

Ward 1(7), Pune,

having his office at Aayakar Bhavan,

Pune ... Respondent

Mr. S.N. Inamdar with Mr.A.K. Jasani for Assessee in Income Tax Appeal No.

931/04, 932/08, 1063/04, 464/05, 465/05, 7/06.

Mr. Vimal Gupta with Mr. Suresh Kumar, Mrs. Anuradha Mane, Mr. P.S. Sahadevan and Mrs. DevkiIyer for Revenue in all matters.

CORAM : FERDINO I. REBELLO &

J.H. BHATIA, JJ.

DATED : JULY 17, 2009

ORAL JUDGMENT (Per Ferdino I. Rebello,J.):

In all these appeals, the appeal is admitted on the following question :

> "Whether on the facts and in the circumstances of the case any part of transfer fees received by the assessee societies – whether from outgoing or incoming members – is not liable to tax on the ground of mutuality?"

2. As the question of law arises not only in these appeals but in several other companion appeals and writ petitions which were on board we have heard the learned counsel appearing also in those appeals and petitions while deciding these appeals. For the sake of brevity some of the facts from the appeals filed by Sind Coop. Housing Society Ltd. will be considered. The tribunal by its order dated 23.6.2004 in dismissing the appeal has placed reliance on the judgment of the

special Bench of the tribunal in Walkeshwar Triveni Coop. Housing Society Ltd. Vs. Income Tax Officer (21004) 88 ITD 159 (MUM)(SB). The Special Bench of the tribunal therein observed that amounts received as donations towards welfare fund, common amenities fund, is in fact a transfer fee. It held that in so far as the amount paid by the transferor member, the principle of mutuality would apply and that amount would not be subject to tax. The tribunal however, held that in so far as transferee is concerned, as at the time of effecting the transfer, the transferee being not a member, the amount received from the transferee would not be satisfying the test of mutuality and consequently is exigible to tax.

3. At the hearing of this appeal, on behalf of the appellants, their learned counsel contends that on facts there is no dispute that in none of the activities carried on by the society, is there any commerciality or taint of commerciality. It collects various funds as authorised by its bye-laws, strictly for the benefit of its members. In order to satisfy the test of mutuality, the contributers and the participants in the common fund must be identical. When one looks at the contributers or participant/s one must look to the class and not whether an individual member has contributed an "X" amount, or the very same member gets back the same amount. The members body is a fluctuating body. The members may come and go but as a class, they remain as contributers and participants in the common fund. The transfer fees paid by the incoming members are akin to admission fees and entrance fees paid by the incoming member of a club. The mutual concern it is submitted may take any form. It can be incorporated or unincorporated body and also a cooperative society. The word "participation" in that context does not mean actual distribution to the

members. It is enough if they have the right to decide how to distribute or pay the surplus on winding up. Section 110 of the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as "Act") read with Rule 90 of the M.C.S. Rules (hereinafter referred to as "Rules") provides, that the Liquidator shall distribute such surplus amongst the members or to any public charity etc as would be specified by them i.e. Members. It is submitted that the tribunal overlooked this principle while holding that the contribution by the transferee would not attract the principle of mutuality. In the case of a transfer the amount can only be adjusted if such transferee is admitted as a member. If the transferee is held to be a stranger and he make the payment of transfer fees, it would be in the nature of gift and certainly not income.

4. On behalf of Revenue, their learned counsel have submitted as under.

It is necessary to see in what capacity the incoming member made the payment. It cannot be said that the incoming member is in the same class of persons as the existing members of the assessee society. The incoming member at the time of payment of premium does not enjoy any rights in the assessee society whatsoever. Considering various judgments on the principle of mutuality dealing with clubs, it is submitted that in the case of a club, there are different types of members and different types of membership can be given to the same class of members of a club but a non member of a class cannot be equated as being in a class of member of the same club. The society may have different types of members like associate members, nominal members, sympathizer members who constitute members of the

class. Similarly the club can have a class of members who may be permanent, temporary or honorary. Non members however, cannot be equated as belonging to the same class of members. The payment received by the society towards transfer fee is not voluntary payment, because if any incoming/outgoing member does not pay the premium, the flat/plot will not be transferred and the proposed transfer will fall through. There is no element of voluntary contribution in the payment of transfer fees. The premium represents the fixed amount charged by the assessee society to effect change in the membership of the society. The payment is a conditional payment and does not satisfy the test of mutuality. The premium is charged by the society to earn profits. There is absolutely no legal bar on cooperative societies to earn profit. What is required under the Act is that the objects of the cooperative society should not be to make profit. Cooperatives societies can earn reasonable amount of profit which should be assessable to tax. At the time the transfer fee is paid, the transferee is not a member of the society and his identity as a contributer is not the same as the identity of the recipient assessee society. The principle of mutuality is therefore, not satisfied.

Shri. P. S. Sahadevan has submitted that the principle of mutuality has not been defined in the Income Tax Act. There is separate provision for deduction in case of trade, profession or similar association under section 44A of the Act. Cooperative Societies are not included in this section though the aforesaid associations are looking after the mutual interest of the members thereof. Section 80(P) of the Income Tax Act would indicate that the societies are taxable. Reliance is placed in C.I.T. Vs. Presidency Coop. Housing Society Ltd. (Bom.H.C.) 216 ITR

321, to contend that the transfer premium received by the housing society is a revenue receipt. Though the Act of becoming or continuation of membership is voluntary, collecting of premium on transfer of the flat is not voluntary and is done with a view to earn profit for the society. Transfer is not allowed unless the premium is paid by the transferee. Similar amount is not collected from the existing members. Therefore, the contributions are not common. The participants are old members and new members. They are also not common. Therefore, the principle that there must be complete identity between the contributers and the participants breaks down. Profit is the prime object for making such charge. The essential difference between the working of the club and that of cooperative societies, it is submitted is that there exists various classes of membership and the main question in most decided cases was whether the entrance fees collected for certain services including from non members, retain the character of mutuality. The payment by the members are voluntary. In the case of housing societies, according to bye laws, the transferor has to make payment of premium and in some cases transferor and transferee equally. It is obligation on the transferor to pay the premium. It is submitted that receipt of premium in the case of society is a revenue receipt and devoid of principle of any mutuality and is exigible to tax.

Mr. Suresh Kumar appearing for the Revenue in Income Tax Appeal No. 1028 of 2004 and other appeals and petitions has reiterated what has been submitted by the other counsel. In addition it is submitted that the amounts charged are in excess of what is laid down by the bye laws or Government Notification. It is therefore, not voluntary. Similar arguments have been advanced in Income Tax

Appeal No. 92 of 2008 by Mrs. Anuradha Mane on behalf of the Revenue.

5. Before, we proceed to answer the issue, let us first consider the relevant bye laws of the Sind Cooperative Housing Society to the extent necessary. Byelaw 6A of the Regulations relating to lease to be granted by the society to the members reads as under :

> "6A. On every permitted disposition or devolution of or dealing with the said plot and buildings or any part thereof under or by virtue of these regulations the member shall pay to the society :
>
> (a) For a plot with completed constructions on its Rs.250/- per sq. meter in respect of the said plot and Rs.100/- per sq. meter of the total covered area of the building, taken floorwise on the said plot, provided that for hits purpose the building areas shall not include compound walls and canopies, or
>
> (b) For a plot with incomplete construction on it, (i.e. Where at least the slab is laid), the Member shall pay Rs.500/- per sq. meter in respect of the said plot and Rs.120/- per sq. meter of the total covered area of the building, taken floorwise, on the said plot, provided that for this purpose the building areas shall not include compound walls and canopies.
>
> (c) For a vacant plot : 17 percent of the declared/acquired value.

(d) No such payment shall, however, be made in case of transfer within a family, where family is defined as per Resolution raised under item No. 2 at Special General Body Meeting held on 15/29 March, 1992.

(e) "Plot' area will mean total plot area including the area occupied by construction, if any. "

Bylaw No. 3 sets out that the funds may be raised in any or all of the following ways which includes by entrance fees as also by donations. Transfer fees are therefore, recovered from members only.

6. In so far as National Cooperative Housing Society Ltd, Bylaw No. 81(d) reads as under :

> "81(d) : Transfer fee/Development Charges : The incoming member who has been duly admitted as a member of the Society according to the Act, Rules and these Bye-laws would pay to the Society "Development/Transfer fees" which would be decided at a flat rate/sq. Meter area of a particular year, with the exception that this stipulation will not apply if the transfer arises due to the death of the ordinary member or for a transfer to the next of kin or heir apparent, during the lifetime of a member."

Thus it is clear that the transfer fee/development fee is paid only after admission to membership.

7. We may also refer to the model bylaws of the Flat Owners/Plot Purchased Type Cooperative Housing Society Limited. Bylaw No. 38 (e) provides what documents that the transferor/transferee shall submit for compliance. Byelaw 38(e) (ix) reads as under; :

> "(ix) payment of amount of premium at the rate to be fixed by the general body meeting but within the limits as prescribed under the circular issued by the Department of Cooperation/Government of Maharashtra from time to time.
>
> No additional amount towards donation or contribution to any other funds or under any other pretext shall be recovered from transferor or transferee."

Bye-law 40 reads as under :

> "The transferee shall be eligible to exercise the rights of membership on receipt of the letter in the prescribed form from the society, subject to the provisions of the

MCS Act, 1960 and Rules made thereunder."

These bylaw therefore permit the charging of transfer fee in terms of the notification issued by the Government of Maharashtra. The latter part of byelaw 38(e)(ix) indicates that the transfer fee could be charged from both the transferor or transferee.

8. The Government of Maharashtra, Ministry of Cooperation and Textiles, has issued Notification dated 9.8.2001 cancelling the earlier notification dated 27.11.1989 and directed that the premium shall not exceed what is set out in the notification. The premium ranges from Rs. 5,000/- to Rs.25,000/- depending on the area. The earlier notification dated 27.11.1989 noted that byelaw No. 407 of the then new byelaws for payment of transfer premium to the society was maximum upto Rs. 1000/- while transferring the flat and was very less. It was also set out that if any member wants to transfer the flat to another person, he will have to pay the fee as transfer premium as set out therein which ranges from Rs.5,000/- to Rs.25,000/-. Thereafter by notification of 20.12.1989, it was pointed out that notification of 27.9.1989 would be effective from the date on which the amendment to the bylaw has been approved and suitable provisions to the effect be made by the societies.

9. Some of the relevant provisions of the M.C.S. Act and Rules need to be set out which are as under :

> "64. No part of the funds, other than (the dividend equalisation or bonus equalisation funds as may be prescribed or) the net profits of a society, shall be paid by way of bonus or dividend, or otherwise distributed among its members;

Provided that, a member may be paid remuneration on such scale as may be laid down by the by-laws for any services rendered by him to the society. “

> “67. No society shall pay dividend to its members at a rate exceeding 15 per cent except with the prior sanction of the Registrar.”

Section 110 of the Act reads as under :

“110. Disposal of surplus assets : The surplus assets as shown in the final report of the Liquidator of a society which has been wound up, may either be divided by the Registrar, with the previous sanction of the State Government, amongst its members in such manner as may be prescribed or be devoted to any object or objects provided in the bylaws of the society, if they specify that such a surplus shall be utilized for the particular purpose or may be utilized for both the purpose. Where the surplus is not so divided amongst the members and the society has no such by-laws, the surplus shall vest in the Registrar, who shall hold it in trust and shall transfer it to the reserve fund of a new society registered with a similar object, and serving more or less an area which the society, to which the surplus belonged was serving.”

Rule 90 reads as under :

“Disposal of surplus assets : Where the Registrar has to divide the surplus assets amongst members of the society which has been wound up,

he shall divide them in proportion to the share capital held by each of such members or in any other suitable manner sanctioned by the State Government in special cases."

10. In passing, section 72 of the Indian Contract Act may be referred to :

"Liability of a person to whom money is paid, or thing delivered, by mistake or under coercion : A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it."

11. Some of the judgments adverted to on the principles of mutuality and or pertaining to the receipts by Cooperative Housing Societies may now be referred to. C.I.T. Vs. Kumbhakonam Mutual Benefit Fund Ltd. (1964) 53 ITR 241 was in respect of a company limited by shares carrying on banking business restricted to its shareholders. A shareholder was entitled to participate in the profits as and when dividend was declared, even though he had not taken any loan from the respondent. The question was whether the respondent was assessable to tax on the profits derived from these transactions with its shareholders. The court observed that the essence of mutuality lies in the return of what one has contributed to a common fund, and if profits are distributed to shareholders as shareholders the principle of mutuality is not satisfied. The court there noted that the shareholder was entitled to participate in the profits without contributing to the funds of the company by taking loans. On these facts the court held that his position is no way different from the shareholders in the banking company limited by the shares and position of the assessee is no different

from an ordinary bank except that it lends money to and receives deposits from its shareholders and that by itself does not make its income any the less income from business within section 10 of the Indian Income Tax Act.

12. In C.I.T. Vs. Royal Western India Turf Club Limited, (1953) 024 ITR 0551 the assessee was a company carrying on the business of horse racing. In this context, the court observed that the principle of mutuality would not apply to an incorporated company which carries on business of horse racing and realizes money both from members and from non members for the same consideration, namely, by the giving of the same or similar facilities to all alike in course of one and the same business carried on by it. The company there was seeking to contend that certain receipts received by it should be excluded on the principle of mutuality. Right upto the High Court three items were held to attract the doctrine. The only item held to be exigible to tax was income from entries and forfeits received from the members whose horses did not run in the races during the season. In respect of these items, the High Court held that it was not taxable either under Section 10(1) or 10(6) of the 1922 Act and that the fourth item, which was income from entries and forfeits was taxable under both the sub sections. In the appeal filed before the Supreme Court, the court held that there was no mutual dealing and all the items of receipts from members were received by the assessee from business with its members within the meaning of Section 10(7) and therefore, assessable to tax. The Court there observed as under :

> "..... Here there is no mutual dealing between the members

> inter se in the nature of mutual insurance, no contribution to a common fund put up for payment of liabilities undertaken by each contributor to the other contributors and no refund of surplus to the contributors. There being no mutual dealing the question as to the complete identity of the contributors and the participators need not be raised or considered. Suffice it to say that in the absence, as there is in the present case, of any dealing between the members inter se in the nature of mutual insurance, the principles laid down in Styles' case and the cases that followed it can have no application here....."

The court further observed that the dealings discloses same profit earning motives and is tainted with commerciality.

13. Our attention was also invited to several judgments in so far as Stock exchanges are concerned. We may only gainfully refer to the judgment in Delhi Stock Exchange Association Versus C.I.T. (1961) 41 ITR 495. The Supreme Court there noted that the appellant was a company which was an association which carried on a trade and its profits were divisible as dividend amongst the shareholders. The object with which the company was formed was to promote and regulate the business in share, stocks and securities etc. and to establish and conduct the business of a Stock Exchange in Delhi and to facilitate the transaction of such business. The court accordingly held that the principle of mutuality would not apply.

14. In C.I.T. Vs. Presidency CHS Ltd. 1995 (216) ITR 321, in the lease deed of

the society, there was a clause whereby the member was to pay a portion of the excess amount received to the society while transferring their rights to another. The only issue considered there was the character of income. The court held that these were not capital receipts but were assessable to tax as income of the society. The issue of mutuality was neither argued nor considered.

In C.I.T. Vs. W.I.A.A. Club Ltd. (Bom H.C.) 218 I.T.R. 569, the court proceeded on the footing that the assessee club had been held to be a trading company. The issue was whether the membership fees received from the life member was taxable. The court held that the part of the fee was income and part of it was capital receipt. Considering that the assessee had been held to be a trading company, the issue of mutuality had not been addressed at all nor considered or decided.

15. In C.I.T. Vs. Bankipur Club Ltd. 226 ITR 97, the principle of mutuality was directly in issue. There the question was whether the assessee – mutual clubs are entitled to exemption for the receipts or surplus arising from the sales of drinks, refreshments etc. or amounts received by way of rent for letting out the buildings or amounts received by way of admission fees, periodical subscriptions and rent receipts of similar nature from its members.

The Supreme Court there quoted from a passage from British Tax Encyclopedia (I) 1962 Edition (edited by G.S.A. Wheatcroft) dealing with the doctrine of mutuality as under :

> " ..... For this doctrine to apply it is essential that all the contributors to the common fund are entitled to participate in the surplus and that all the participators in the surplus are contributors, so that there is complete identity between contributors and participators. This means identity as a class, so that at any given moment of time the persons who are contributing are identical with the persons entitled to participate it does not matter that the class may be diminished by persons going out of the scheme or increased by others coming in...."

The court then noted with approval from the Law and Practice of Income Tax (Eighth Edition, Volume I, 1990) by Kanga and Palkhiwala at page 113 thus :

> "..... The contributors to the common fund and the participators in the surplus must be an identical body. That does not mean that each member should contribute to the common fund or that each member should participate in the surplus or get back from the surplus precisely what he has paid. The Madras, Andhra Pradesh and the Kerala High Courts have held that the test of mutuality does not require that the contributors to the common fund should willy-nilly distribute the surplus amongst themselves; it is enough

> if they have a right of disposal over the surplus, and in exercise of that right they may agree that on winding up the surplus will be transferred to a similar association or used for some charitable objects...."

The court on the findings therein, held that the receipts for the various facilities extended by the clubs to their members, as part of the usual privileges, advantages and conveniences, attached to the membership of the club, cannot be said to be "a trading activity". The surplus-excess of receipts over the expenditure as a result of mutual arrangement cannot be said to be "income" for the purpose of the Act.

16. In C.I.T. Vs. Willingdon Sports Club, (2008) 302 ITR 279 (Bom), this court observed as under :

> "Once a finding is recorded that there is no commerciality and what is being offered are usual privileges, advantages and conveniences that would attract the principle of mutuality."

It may be noted that both in Bankipur and Willingdon case, the Supreme Court and this court was concerned amongst others with the admission fees/entrance fees paid by the incoming members. But this fact was not considered relevant so as to effect the principle of mutuality. In Willingdon, this court relied on the quoted

passage in the case in Judicial Committee of the Privy Council in Fletcher Vs. Income Tax Commissioner (1971) 3 ALL ER 1185 at page 1189 as under :

> "..... is the activity, on the one hand, a trade, or an adventure in the nature of trade, producing a profit, or is it, on the other, a mutual arrangement which, at most gives rise to a surplus?"

17. If the object of the assessee company claiming to be a "mutual concern" or "club" is to carry on a particular business and money is realized both from the members and from non members, for the same consideration, by giving the same or similar facilities to all alike in respect of the one and the same business carried on by it, the dealings as a whole disclose the same profit earning motive and are alike tainted with commerciality. On the other hand, if it is merely a mutual arrangement whether fees or subscriptions are collected for extending facilities to members like usual privileges, advantages and conveniences even if some surplus is generated, then that surplus cannot be regarded as profit as long as the contributers and participants as a class are the same and they have a say over the distribution of the surplus.

18. The judgments of the Calcutta and Gujarat High Courts, which have dealt with the principle of mutuality are now discussed, in so far as Cooperative Housing societies are concerned.

In C.I.T. Versus Apsara Coop. Housing Society Ltd. (Cal H.C.)204 ITR 662, the assessee was a cooperative Housing Society which provided residential premises to the members of the society which received transfer fees for transfer of flats. The Assessing Officer held that the receipt was taxable as income. The issue was whether the receipt was subject to tax. The Calcutta High Court held that the members formed themselves into a Cooperative Society for the purpose of having a Cooperative Housing Society and there was no question of any profit element in such association or in having a transfer fee. The assessee cooperative housing society was a mutual concern. The Court there found that there was complete identity in the character of those who contributed and those who participated in the surplus. In fact Calcutta High Court relying on the judgment in Bankipur (supra) and other judgments noted that the principles applicable to the members of the club will be equally applied to the cooperative Housing Society, particularly Housing Cooperative Society which does not carry on any business and where no element of profit is involved. The assessee cooperative housing society was a mutual concern. The court held that the transfer fee received by the society for transfer of flat was not taxable income of the assesee.

19. In C.I.T. Vs. Adarsh Cooperative Housing Society Ltd. (Guj) 213 ITR 677, the issue again was whether on transfer of lease, the amount received by the society from the member out of the premium received by him from the purchaser was exigible to tax. After considering the provisions of the Gujarat Cooperative Societies Act, 1961, the Gujarat High Court noted that the corpus of fund is not divisible as such pro rata between the members on the winding up of the society. However,

such surplus is to be devoted to any object or objects provided in the bylaws of the society if they specify that such a surplus shall be utilized for particular purpose. The court therefore, held that the right of the members to deal with the surplus was not destroyed and that did not detract from the concept of return of surplus to members which they had contributed. The court also noted that there was identity of contributors and beneficiaries. It was also reiterated that it is not necessary that the participants of the surplus need be the same individuals who have contributed but they must bear the same character, namely, contributor member.

20. Considering these principles, the question is whether on the facts before us, the principle of mutuality would be attracted in respect of the transfer fee received by the Housing Cooperative Societies governed by the provisions of the M.C.S. Act and rules. In Walkeshwar Cooperative Housing Society (supra), the tribunal itself has held that the amount received from the transferor member would not be exgible to tax. It is only the amount received from the transferee, that is exgibile to tax. We have noted that in so far as Sind CHS and National CHS Ltd. their bylaws provide that the amount has to be paid by the transferor member. The issue therefore, of transferor or transferee for those assessees really does not arise.

However, we will have to answer the issue considering what was considered in the case of Walkeshwar CHS and considering the model bye-laws which are now adopted by most housing societies. We have noted the bye-laws as also provisions under the Act and Rules. The transfer fee can be appropriated only if the transferee is admitted to membership. The fact that a proposed transferee may make payment in

advance by itself is not relevant. The amount can only be appropriated on the transferee being admitted as a member. As it is a transfer fee, if the transferee is not admitted as a member, the amount received will have to be refunded, as the amount is payable only on a transfer of rights of the transferor in the transferee. If it is held that payment of transfer fees is by a stranger, it will certainly be in the nature of gift and not income. If an amount is received more than what is chargeable under the bye-laws or Government directions, the society is bound to repay the same and if it retains the amount it will be in the nature of profit making and that specific amount will be exigible to tax. Considering the bye-laws, as the main activity of a housing cooperative Housing Society is to maintain the property owned by it and to render services to its members by way of usual privileges, advantages and conveniences, there is no profit motive involved in these activities. The amount legally chargeable and received goes into the fund of the society which is utilized for the repairs of the property and common benefits to its members.

21. We may now deal with some other submissions advanced on behalf of the Revenue. It was contended that the class of members means, members such as permanent, temporary, honorary etc. This is based on the assumption that there can be different classes of members. In a Cooperative Housing Society there can be members and associate members. We have already quoted from the judgments where reference is to members as a class and that class may be diminished by members going out or increased by the members coming in. But the class remains the same. As already noted by the Supreme Court in Bankipur Club (supra), the

identity must be as a class of contributers and participants and it does not matter that the class may; be diminished or increased by members going out or coming in. Similarly it is not necessary that each member should contribute or each member should participate in the surplus and get back from the surplus ... what he has paid, as long as they have control over the surplus.

22. It was also sought to be contended that the payment is not voluntary and at any rate the excess amount charged than what is permitted in the bye-laws will be exigible to tax. Firstly whether it is voluntary or not would make no difference to the principle of mutuality. Secondly payments are made under the bye-laws which constitutes a contract between the society and its members which is voluntarily entered into and voluntarily conducted as a matter of convenience and discipline for running of the society. If it is the case that the amounts more than permissible under the notification had been received under pressure or coercion or contrary to Government directions, then considering section 72 of the Contract Act, that amount will have to be refunded. At any rate if the society retains the amount in excess of binding Government notification or the bye-laws that amount will be exigible to tax as it has an element of profiteering.

23. It was then sought to be contended that the premium charged is a profit. As we have already noted and considering the bylaws, the society is registered with the object principally of looking after the property including building thereon. There is no trading or business transactions. The members by adopting the bylaws agree amongst themselves that a fee for transfer of flat/tenement when it is sold would be

paid to the society. It may be that both incoming or outgoing member have to contribute to the common fund of the society. The amount paid however, is to be exclusively used for the benefits of the members as a class.

24. It was next contended that there is no legal bar for the assessee to earn profits. There can be no dispute on that proposition but the profit must come from a commercial activity in the nature of trade, business or the like in which event the assessee then will have to pay tax on such profits. Charging of transfer fees as per bye-laws has no element of trading or commerciality. There therefore being no taint of commerciality, the question of earning profits would not arise when the housing society from the funds received applies the moneys received towards maintenance of the society and providing the members with usual privileges, advantages and conveniences.

25. It was also contended that the case should be covered by section 28(3) of the Income Tax Act. Section 28(3) would have no application to the facts of the case as it deals with the income derived by the member from professional or similar association from the specific services performed for its members. A cooperative society has no similarity whatsoever with a professional association. In CIT Vs. Apsara (supra) the Calcutta High Court there held that even if the case of member or professional association, general fees levied by the association on its members by way of entrance fees or periodical subscription or otherwise would not constitute business. Since these are not related to any specific services rendered by its members. We are in respectful agreement with that view.

26. In so far as Section 80P is concerned, the deduction is available in respect of the charges from certain commercial activities by the cooperative housing society. That is not relevant for the issue being answered.

27. An argument has been advanced that the societies are charging more than the amount as notified or permitted by the Government Notification dated 9.8.2001. The cases before us are for the assessment years previous to that. Earlier notification of 20.12.1989 provided that only if the bye-laws were amended in terms of the notification dated 27.11.1989, then the society could not charge more than what was set out in the notification. We really would not be concerned therefore, in this group of cases with notification as now notified by the Government. If therefore, any amount has been received beyond the amount notified by the Government and that amount has not been refunded to the members to that excess amount as already held, the principle of mutuality will apply.

28. Let us now apply the various tests which are to be considered for applying the principle of mutuality to a case of a cooperative housing society based on our earlier discussion.

(1) Is there any commerciality involved.

This has to be found from the byelaws of the cooperative housing society. In case of the cooperative Housing society, admittedly there is no commerciality involved. Once there is no commerciality involved the first test of profitability does not exist. The first requirement of mutuality is therefore,

met.

(2) From the moneys received are the services offered in the nature of profit sharing or privileges, advantages and conveniences.

In case of a cooperative housing society, the only activities which it can carry out in terms of its bye-laws are basically maintenance of its property which includes building or buildings. The subscription and or contributions received by the members can only be expended for the purposes of maintenance and providing other privileges, advantages and conveniences to its members in terms of its bye-laws. Another test of mutuality is thus satisfied.

(3) Are the participants and contributors identifiable and belong to the same class in the case of cooperative housing society.

The class of members are clearly identifiable. Members are ordinary members or associate members. The participants and contributers are the members. The members may come in or go out. The fact that only some members from those who contributed may participate in the surplus, as held by the Supreme Court is irrelevant as long as the class is identifiable. This test is also satisfied in the case of a Housing Cooperative Society.

(4) Do the members have the right to share in the surplus and do they have a right to deal with its surpluses.

In terms of the bye laws it is only the members who have a right to share in the surplus. Under the M.C.S. Act, no part of the funds, as provided in

section 64 can be paid by way of bonus or dividend or otherwise distributed among its members except as provided therein. Under Section 67, there is a limit on the dividend to be paid on liquidation. Under section 110 of the M.C.S. Act. The surplus can only be dealt with in the manner provided therein which includes any member or devoted to objects provided by the bye-laws or be transfered to another society with similar object. Rule 90 of the Rules provide how the surplus is to be divided. The surplus then can be distributed in terms of the bye-laws to members and or by operation of law to another society having the same objective. In other words yet another test of mutuality is satisfied.

29. Once these tests are satisfied, in our opinion, there can be no doubt that the principle of mutuality will apply to a cooperative Housing Society which has its predominant activity, the maintenance of the property of the society which includes its building or buildings and as long as there is no taint of commerciality, trade or business.

30. For all the aforesaid reasons, the questions as framed will have to be answered in favour of the assessee and against the revenue.

(J.H. BHATIA, J.) **(FERDINO I. REBELLO,J.)**