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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.2455 OF 2013

The Commissioner of Income Tax-3 ..Appellant
Versus
M/s. Air Cargo Agents Association of India ..Respondent

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Mr. Ashok Kotangale i/b. Ms. Padma Diwakar for the Appellant.
Mr. B. V. Jhaveri for the Respondent.

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CORAM: M. S. SANKLECHA &
A. K. MENON, JJ.

DATE : 31ST MARCH, 2016

P.C.:

1. This Appeal filed by the Revenue under Section 260A of the Income Tax Act, 1961 (the "Act") takes exception of the order dated 21st March, 2013 passed by the Income Tax Appellate Tribunal ("Tribunal"). The impugned order dated 21st March, 2013 relates to Assessment Year 2007-08.

2. Mr. Kotangale, the learned counsel for the Revenue urges the following question for our consideration:-

> "Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in applying the doctrine

of mutuality to delete the addition of Rs.54,07,484/- made by the Assessing Officer on the Assessee?"

3. The respondent-assessee is an association of Air Cargo Agents in India. During the subject assessment year 2007-08 it received subscription/contribution from its members in three forms i.e. annual subscription, member's annual convention and member's training programmes aggregating to contribution from the members of Rs.54.07 lakhs. In its Return of Income the assessee offered an amount of Rs.12.06 lakhs as its Income. However, the aforesaid contribution Rs.54.07 lakhs though credited to profit and loss account was not offered to tax by invoking the principle of mutuality. But the Assessing Officer by his order dated 20th November, 2009 did not accept the respondents contention and held that as its income over expenditure was of Rs.17.52 lakhs and out of it an amount of Rs.9.69 lakhs was invested in mutual funds. This investment not being the object of the association,the concept of mutuality would not apply. In the circumstances by the Assessment Order dated 20th November, 2009 the Assessing Officer brought the entire contribution of Rs.54.07 lakhs received from its members as income chargeable to tax.

4. Being aggrieved the respondent-assessee carried the issue in appeal to the Commissioner of Income Tax (Appeals). By order dated 14th

December, 2011 the Commissioner of Income Tax (Appeals) allowed the appeal holding that the petitioner has been assessed as mutual concern for earlier assessment years beginning from A.Y. 2001-2002 upto 2006-07 in assessment orders passed under Section 143(3) of the Act and the contribution from its members was not brought to tax. Besides, it relied upon the decision of this Court in the case of ***CIT v/s. Common Effluent Treatment Plant (Thane-Belapur) Association 328 ITR 362*** to hold that the surplus of income over expenditure would not be charged to income tax if the assessee is covered by the principle of mutuality. This is not lost merely because the excess of income over expenditure is invested in fixed deposits. Thus the contribution by members of the association would not result in the contributions being exigible to tax. Thus, the addition made by the Assessing Officer of Rs.54.07 lakhs in respect of contribution from members was deleted.

5. Being aggrieved, the Revenue carried the issue in appeal to the Tribunal. The Tribunal by the impugned order held that the contribution received by the members were utilized for the benefit of its contributors. The Tribunal held that the decision of this Court in Common Effluent Treatment Plant (Thane-Belapur) (supra) is applicable to the present facts wherein the Court had taken a view that depositing of its excess funds with the banks or financial institutions would not render in-applicable the

doctrine of mutuality so to subject the contribution made by the members to tax.

6. Mr. Kotangale, the learned counsel for the Revenue in support of the appeal placed reliance upon the decision of the Apex Court in ***Bangalore Club v/s. CIT 350 ITR 509*** and submits that in view of the aforesaid decision, the concept of mutuality will not be applicable/available to the respondent-assessee. This is for the purpose that some part of its excess of income over expenditure has been invested in Mutual Funds. On the other hand, Mr. Jhaveri, the learned counsel for the Assessee reiterates the reasoning in the impugned order of the Tribunal and further points out that the dividend received on the Mutual Funds have been offered to tax.

7. We find that the contributions made by the members to the respondent-assessee cannot be a subject matter of tax merely because the part of its excess of income over expenditure is invested in mutual funds. It is also not the case of the Revenue that the dividend received from mutual funds have not been offered to tax by the respondent-assessee. The concept of Mutual concerns not being subject to tax is based on the principle of no man can profit out of itself. Therefore the test to be satisfied before an association can be classified as a Mutual concern are complete identity between the members i.e. contributors and the

participants, the action of the mutual concern must be in furtherance of its objectives and there must be no scope of profiteering by the contributors from a fund. These tests have in fact been reiterated in Bangalore Club case (supra). However, the facts therein are completely distinguishable. Amongst the members of the Bangalore Club were certain banks. The Bangalore Club have invested its excess funds in member banks as well as non member banks in form of fixed deposits and earned interest thereon. The assessee thereon paid tax on the interest earned on fixed deposit with non member banks. However, so far as interest earned from member banks was concerned, the assessee therein sought to apply the doctrine of mutuality to contend that the interest on the fixed deposit received from the member banks would not be assessable to tax as the dealing was with members only. The Apex Court held that no sooner any amount is invested by an association claiming to be mutual concern in a fixed deposit with the banks the complete identity between the contributors and the participants in the fund on the amounts invested in member banks is ruptured. It held that till the surplus funds were generated and was used only amongst the members/contributors, the complete identity between contributors and participants continued. However the moment the funds are invested in fixed deposits with the banks and the funds are used for advancing loans etc. by the Bank to its customers, the identity of participants and contributors is sapped. Thus the interest earned on fixed

deposits is to be brought to tax. However, it is to be noted that it did not result in the Bangalore Club being taxed on all contributions of its members. The case of the Revenue here is that having invested excess amounts in mutual funds the concept of mutuality would not extend to the contribution made by the members of the association even though the contributions are used to achieve the objectives of the association. In fact as pointed out above the Apex Court in Bangalore Club (supra) did not hold so but only brought to tax the interest earned on fixed deposit with member banks. In this case it is not disputed that the income earned on account of investments made in Mutual Funds has been offered to tax. The respondent has in effect followed the decision of the Apex Court in Bangalore Club (supra). However as held in Bangalore Club (supra), it cannot result in the respondent being charged to tax on the contribution received from its members. In fact the decision of this Court in Common Effluent (supra) concludes the issue in favour of the respondent - assessee.

8. Accordingly the question as framed does not give rise to any substantial question of law. Thus not entertained.

9. Appeal is dismissed. No order as to costs.

(A. K. MENON, J.) **(M. S. SANKLECHA, J.)**

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