IN THE HIGH COURT OF KERALA AT ERNAKULAM

ITA.No. 561 of 2009()

1. THE COMMISSIONER OF INCOME TAX, TRICHUR
... Petitioner

Vs

1. M/S.BUS OPERATORS ASSOCIATION,
... Respondent

For Petitioner :SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)

For Respondent : No Appearance

The Hon'ble MR. Justice C.N.RAMACHANDRAN NAIR
The Hon'ble MR. Justice B.P.RAY

Dated :01/11/2010

O R D E R

C.R.

C.N.RAMACHANDRAN NAIR &
BHABANI PRASAD RAY, JJ.

.....

I.T. Appeal Nos.561, 1219 & 1145 of 2009

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Dated this the 1st day of November, 2010.

JUDGMENT

Ramachandran Nair, J.

These are appeals filed by the Revenue challenging the orders of the Tribunal declaring income tax exemption to the respondent as a mutual benefit association. We have heard Senior counsel Sri.P.K.R.Menon appearing for the Revenue and Adv. Sri.P.Balakrishnan appearing for the respondent assessee.

2. Respondent is an association of Private Bus Operators which is engaged in purchase and sale of quality tyres, automobile spares etc., to the members. Admittedly respondent is not engaged in any trade other than purchase and distribution of tyres, automobile spares etc. to it's own members. In other words, the contributors of the respondent are the beneficiaries or participants of the benefits derived by the Association. Even though respondent claimed exemption from payment of income tax on the profit derived by it, by claiming the

principle of mutuality, the Assessing Officer held that the assessee-Association is not entitled to exemption because the surplus derived by it amounts to business income falling under Section 28(3) of the Income Tax Act. Assessments involved in these cases are for the years 2001-2002, 2002-2003 and 2004-2005. Even though first appellate authority also confirmed the levy and demand of tax, the Tribunal accepted respondent's claim for exemption on the principle of mutuality and declared their eligibility, against which these appeals are filed.

3. The Tribunal allowed the appeals by following various decisions of the Supreme Court, particularly in COMMISSIONER OF INCOME-TAX VS. BANKIPUR CLUB LTD. reported in 226 ITR 97, CHELMSFORD CLUB VS. COMMISSIONER OF INCOME-TAX reported in 243 ITR 89 and COMMISSIONER OF SALES TAX VS. SAI PUBLICATION FUND reported in 258 ITR 70. It is clear from the judgments of the Supreme Court relied on by the Tribunal that the clubs were engaged in activities similar to the one carried on by the respondent-assessee. While the clubs purchase food articles, liquor, beverages etc. and sell the same to members which may yield profit, the respondent-assessee is engaged in purchase of quality tyres, automobile

spares etc. and supply the same to the members collecting price and the transaction involves some profit. In the case of the clubs as well as in the case of the respondent-Association, we do not find any distinction in the nature of activities in as much as the clubs and the respondent-Association are serving it's own members only. The question to be considered is whether the principle of mutuality declared to be applicable by the Supreme Court in the case of clubs is applicable to the respondent-assessee. In our view, the only test to consider whether the principle of mutuality applies is whether the contributors to the club or the organisation are the participants in the benefit derived from it. Admittedly the beneficiaries of the little profit derived by the respondent-Association as in the case of the clubs are the members. In other words, the purchases made by the members lead to profit to the Association which in turn goes to the members or for their own benefit. In our view, the principle of mutuality squarely applies to the case of the respondent-Association for the transactions carried on by them. So much so, we do not find any ground to deviate from the view taken by the Tribunal following consistent decisions of the Supreme Court in several cases relied on by the Tribunal, particularly those referred

above.

4. The next question to be considered is with reference to the scope of Section 28(iii) heavily relied on by the appellant-department. For easy reference, Section 28(iii) is extracted hereunder:

> "Profits and gains of business or profession.
>
> 28. The following income shall be chargeable to income-tax under the head "Profits and gains of business or profession",-
>
> .....
> .....
>
> (iii) income derived by a trade, professional or similar association from specific services performed for its members."

5. Standing Counsel for the Revenue relied on decision of the Supreme Court in COMMISSIONER OF INCOME TAX VS. CALCUTTA STOCK EXCHANGE ASSOCIATION LTD. reported in 36 ITR 226, wherein the Supreme Court has clarified the meaning of "specific service" as follows:

> "The words "performance of specific services" in Section 10 (6) mean conferring particular service i.e. conferring to the members some charged benefits which would not have been available to them unless they paid the specific fees charged for such special benefits".

Obviously the "specific services" performed by the Association to the

members referred to in the above provision will not cover the regular services rendered by the Association to all the members i.e. sale of tyres, automobile spare parts etc., purchased for distribution among the members at moderate cost. A specific service obviously will mean a service which is not available to members generally but specifically extended to a particular member or members against specific charges received. In our view, the department has no case that besides the purchase and distribution of automobile tyres, spares etc. by the Association to it's members, the respondent-Association is not involved in rendering any specific service to any particular member or members and they have also not charged any amount for any specific service from any member or members. So much so, in our view, the above provision does not apply to the facts of this case. The only other exception for assessment of mutual benefit concerns is only the income falling under Section 2(24)(vii) which provides for assessment of profits and gains of any business of insurance carried on by a mutual insurance company or by a Co-operative Society, computed in accordance with Section 44 or any surplus taken to be such profits and gains by virtue of provisions contained in the First Schedule to the Act.

This provision has no application so far as respondent-Association is concerned. So much so, in our view, the Tribunal rightly upheld the respondent's entitlement for exemption from payment of income tax by applying the principle of mutuality. We, therefore, uphold the orders of the Tribunal and dismiss the departmental appeals.

C.N.RAMACHANDRAN NAIR
Judge

BHABANI PRASAD RAY
Judge

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