The Associated Hotels of India, Limited, etc. v. R. B. Jodha Mal Kothalia

Khosla, J.

to determine the proper law of the contract."

I would therefore hold that the decree-holder in this case has no *locus standi* to present an application for execution in India because he is not possessed of any interest in the decree now.

The last point argued before us related to the deposit of rupees three lacs in Court. With regard to this it is sufficient to say that the Custodian claims the deposit and although an order for its withdrawal was made in favour of the judgment-debtor the Custodian stepped in and applied for a review of that order. The review application has not so far been decided, and the ownership of this property will depend upon the ultimate decision of that review application. If the order is reviewed and the deposit is held to be evacuee property, neither the judgment-debtor nor the decree-holder will be entitled to withdraw it. If the review application is dismissed the decree-holder will have to go to the High Court of Lahore and make an application in reference to this deposit.

For the reasons stated above, this application must fail and I would dismiss it with costs.

Bhandari C.J.

Bhandari, C.J.—I concur in the order proposed by my learned brother.

CIVIL REFERENCE

Before Bhandari, C. J. and Khosla, J.

THE COMMISSIONER OF INCOME-TAX, DELHI, AJMER, ETC.,—*Applicant*

versus

DELHI STOCK EXCHANGE ASSOCIATION, LTD., DELHI,—*Respondent*

Civil Reference No. 6 of 1953.

1957

Jan., 22nd

Income-tax Act (XI of 1922)—Section 10—Mutual Society exempt from payment of income-tax—What is—Tests to determine stated—Income-tax—What is—Income—Essential ingredients of—Entrance fees received by a

society—Whether constitute profits and gains of business, profession or vocation—Entrance fees and Subscriptions—Meaning of—Delhi Stock Exchange Association Ltd., Delhi—Whether a mutual society exempt from payment of income-tax.

Held, that the admission fee of members or authorised Assistants received by the Stock Exchange is assessable income.

Held, that a mutual society is usually a voluntary association organised or conducted for the mutual benefit of its members. It is not formed with a view to the accumulation of wealth and the making of profit but solely for the purpose of reciprocal support, aid and assistance between the associates. The main object of an association of this kind is to accumulate from the contributions of members a fund to be used in their own aid or relief in the misfortunes of sickness, injury or death and the fund raised is practically a trust fund made up of their contributions. In the absence of a specific provision to the contrary the surplus accruing to a mutual organisation is exempt from the payment of income-tax.

Held, that before a society can claim exemption from the payment of income-tax in respect of the surplus arising from mutual transactions, it is essential that there should be complete identity between the contributors to the common fund and the participators in the surplus or that the ownership of the surplus should be restricted to those who provided it as a class. On the other hand surplus arising from such transactions is assessable where the parties are not identical or where the surplus is distributed wholly or partly among persons other than in their character of persons subscribing the surplus, for example, as share holders receiving dividend or as debenture-holders deriving interest, or where all the participating policy-holders are not members of the society.

Held, that income-tax, as the name implies, is a tax based on income, gross or net. The concept of income requires the realization of gain and presupposes the existence of two parties, namely the person who makes the income and the person from whom income is made. When these two parties are identical no assessable income can arise, for no person can make a profit out of himself. It

follows as a corollary that any surplus arising from transactions of any mutual association is returnable to the members and no income-tax can be charged on the said surplus.

Held, that it is not correct to say that as an admission fee is paid by a member only once, it lacks the element of periodicity. A member may pay an admission fee only once but the assessee company receives it again and again whenever a new member, authorised assistant or agent, is elected or appointed. It is thus clear that an entrance fee falls within the ambit of the expression "profits and gains of business, profession or vocation".

Held, that entrance fees and subscriptions are arbitrary sums charged as the price of the privilege of membership or *quasi* membership and not as remuneration definitely related to any specific services performed.

Held, that the Delhi Stock Exchange Association Ltd., Delhi is not a mutual society which is exempt from the payment of income-tax.

Reference by the Income-tax Appellate Tribunal, Bombay, under section 66(1) of the Indian Income-tax Act (Act XI of 1922).

A. N. KIRPAL and G. C. CHOPRA, for Applicant.

KIRPA RAM BAJAJ and J. L. BHATIA, for Respondent.

JUDGMENT.

Bhandari, C. J.

BHANDARI, C.J.—The following question has been referred to us under section 66(1) of the Income Tax Act, namely:—

> "Whether the admission fee of members or authorised assistants received by the assessee is taxable income in its hands?"

The assessee in this case is the Delhi Stock Exchange Association Limited, Delhi. It was incorporated in the year, 1946, to acquire and take over as a

The Commissioner of Income-tax, Delhi, Ajmer, etc. *v.* Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C.J.

going concern activities, functions and business of the Delhi Stocks and Shares Exchange Limited and the Delhi Stock and Share Brokers Association Limited and to promote and regulate the business of exchange of stocks and shares. It commenced business on the 1st March, 1948. The membership is limited by the number of shares issued by the Company since every member has to be a share-holder. A member is entitled to nominate not more than two persons as his authorised assistants or agents and one person as his authorised clerk on payment of a registration fee of Rs. 125 for each nomination. Monthly and other periodical subscriptions are payable by members, authorised assistants and agents.

While submitting its return for the assessment year 1950-51, the assessee company transferred a sum of Rs. 8,125 received as admission fees from the members and authorised agents directly to the balance-sheet instead of including it in the profit and loss account. The Income-tax Officer came to the conclusion that as the admission fee payable by a member or an agent is not refundable and constitutes the assessee's income it is a receipt of a revenue nature which is assessable to income-tax. This order was upheld by the Assistant Commissioner in appeal.

When the appeal was taken to the Appellate Tribunal it was argued on behalf of the assessee company that all sums recovered as entrance fees were being accumulated in order eventually to purchase land and to erect a suitable building and consequently that the said sums were exempt from taxation as capital receipts. This argument appears to have found favour with the Members of the Tribunal. Mr. Sehgal was of the opinion that as the membership is limited to the number of shares issued by the Company and as the assessee had from its very inception to arrange for funds sufficient to provide a

The Commissioner of Income-tax, Delhi, Ajmer, etc. *v.* Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C.J.

building and other permanent fixtures including proper housing space and furniture for the use of the members and their assistants, it had to charge not only an admission fee from every member but also a monthly subscription of Rs. 5. The accounts showed that the amounts received as admission fees had been kept separately earmarked and had not been expended in the normal running of the business. Mr. Sehgal accordingly came to the conclusion that the amounts received as admission fees were intended to be and were in fact treated as receipts in the nature of capital receipts and he accordingly directed that these sums should be excluded from the assessments. The other member, Mr. Rajagopal Sastri, was somewhat doubtful whether the intention of the assessee company as to the use to which it would put the membership and entrance fees collected by it can afford any guidance in the decision of the question whether the receipts are of capital nature. He was of the opinion that there is not in the receipts of entrance fees the requisite potential of periodicity to stamp it with the character of taxable income in the hands of assessee company. The members of the Tribunal accordingly allowed the appeal preferred by the assessee company and held that the admission fees received by the company were not liable to payment of income-tax. At the request of the Commissioner of Income-tax the Tribunal have referred to us for opinion the question which has been set out at the commencement of this order.

The learned counsel for the assessee company contends that his client is not liable to pay any income-tax in respect of entrance fees paid by members as the Company is a mutual concern which is exempt from the payment of income-tax. The learned counsel for the Department controverts the correctness of this allegation and contends that the entrance fees payable by the members fall within the ambit of section 10(1) of the Income-tax Act, inasmuch as they are profits

The Commissioner of Income-tax, Delhi, Ajmer, etc. *v.* Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C.J.

or gains of business, profession or vocation, or, in the alternative, that the assessee company is liable to pay the tax under the provisions of subsection (6) of section 10 of the statute which declares that a trade, professional or similar association performing specific service for its members for remuneration definitely related to those services shall be deemed for the purpose of this section to carry on business in respect of those services, and the profits and gains therefrom shall be liable to tax accordingly.

Now what exactly is a mutual society which is exempt from the payment of income-tax ? A mutual society is usually a voluntary association organised or conducted for the mutual benefit of its members. It is not formed with a view to the accumulation of wealth and the making of profit but solely for the purpose of reciprocal support, aid and assistance between the associates. The main object of an association of this kind is to accumulate from the contributions of members, a fund to be used in their own aid or relief in the misfortunes of sickness, injury or death and the fund raised is practically a trust fund made up of their contributions. An insurance company is a mutual company when there is no group but the policy-holders who have interest in it or over it. In *Ohio Farmers Indemnity Company* (1), it was said:—

> "The theory of a mutual insurance company is, that the premiums paid by each member for the insurance of his property constitute a common fund, devoted to the payment of any losses that may occur.............. The cash premium may as well represent the insured in the common fund as the premium note and the mutual principle is not abrogated by the taking of cash

(1) 36 U.S. B.T.A. 1152 affirmed 108 F, (2d) 665 (C.C.A: 6th 1940).

The Commissioner of Income-tax, Delhi, Ajmer, etc.
v.
Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C. J.

premiums. *Union Insurance Company* v. *Hoge* (1), *State* v. *Manufacturer's Mutual Fire Insurance Company* (2). A person paying a cash premium to a mutual insurance company at the time a policy is issued becomes a member of the company and interested in its fund in proportion to the amount of the policy, and to the extent of that interest he is an insurer of all other members. The term 'mutual' as applied to an insurance company 'does not import any peculiar or exact method of producing mutuality in the sense of equality among its members, but..............is simply significant of an association for the purposes of insurance, whose fund for the payment of losses consists, not of a capital mutually contributed by any uninsured parties, but of the premiums mutually contributed by the persons insured...... ....".

In the absence of a specific provision to the contrary the surplus accruing to a mutual organisation is exempt from the payment of income-tax. Income-tax, as the name implies, is a tax based on income, gross or net. The concept of income requires the realisation of gain and pre-supposes the existence of two parties, namely the person who makes the income and the person from whom income is made. When these two parties are identical no assessable income can arise, for no person can make a profit out of himself. It follows as a corollary that any surplus arising from transactions of any mutual association is returnable to the members and no income-tax can be charged on the said surplus. This proposition was brought out with admirable clarity in the well-known case of *Styles* v. *New York Life Insurance Company* (3), where the

(1) 62 U.S. 45, 65.
(2) 91 U.S. to 311.
(3) (1899) 2 T. C. 460.

House of Lords expressed the view that when a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities, or of capital sums, to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, they cannot be regarded as traders, and the contributions returned to them cannot be regarded as profits.

The Commissioner of Income-tax, Delhi, Ajmer, etc. *v.* Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C.J.

Before a society can claim exemption from the payment of income-tax under the rule laid down in *Styles' case* (1), it is essential that there should be complete identity between the contributors to the common fund and the participators in the surplus, for as pointed out by Lord Macmillan in *Municipal Insurance Ltd.*, v. *Hills* (2)—

> "The cardinal requirement is that all the contributors to the common fund must be entitled to participate in the surplus and that all the participators in the surplus must be contributors to the common fund; in other words, there must be complete identity between the contributors and the participators. If this requirement is satisfied, the particular form which the association takes is immaterial."

Our attention has been invited to a number of cases in which the requirement of identity between contributors and participators was not satisfied. The first of these cases is reported as *Liverpool Corn Trade Association Limited* v. *Honks* (3). In this case a company formed with the object of promoting the interests of the corn trade, was incorporated with a share capital upon which it had power to declare

(1) (1899) 2 T.C. 460.
(2) (1932) 16 T.C. 430, 448.
(3) (1926) 2 K.B. 110.

The Commissioner of Income-tax, Delhi, Ajmer, etc.
v.
Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C.J.

dividends. It provided a corn exchange, market, newsroom and facilities for carrying on business. Membership of the Association was confined to persons engaged in the corn trade and every member was required to be a share-holder of the company. Members on joining the Association had to pay an entrance fee. The company also charged the members and other persons making use of the market facilities, commercial accommodation and information which the Association provided, subscriptions which varied in amount according to the use made of such facilities, the subscriptions payable by members being less than those payable by outsiders. The bulk of the receipts of the Company were derived from the entrance fees and subscriptions paid by members. The Company having been assessed to Income-tax upon its profits, contended that it did not carry on a trade, and that so far as its transactions with its members were concerned it was a mutual association, and that the entrance fees and subscriptions paid by members should be disregarded in computing the Company's assessable profits. Rowlatt, J., held that the company was not a mutual association whose transactions with its members were incapable of producing a profit; that it carried on a trade the profits of which were assessable to income-tax; and that the entrance fees and subscriptions paid by members ought to be included in the Association's receipts for the purpose of computing its profits assessable to income-tax

The second case is reported as *Municipal Insurance Ltd.,* vs. *Hills* (1). In this case a company formed primarily for the purpose of mutual insurance against fiire carried on employers' liability and miscellaneous insurance business, the fire policy-holders alone being entitled to any surplus arising from any branch of the business. It was conceded that the fire insurance business was conducted on a mutual basis and that

(1) 48 Times Law Reports 301.

The Commissioner of Income-tax, Delhi, Ajmer, etc. *v.* Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C.J.

any surplus arising therefrom was exempt from payment of income-tax. The Company admitted that as regards so much of the employers' liability and miscellaneous business as was done with persons who were not fire policy-holders any surplus arising was taxable as such surplus did not arise from business conducted on a mutual basis. The House of Lords held that any surplus arising from employers' liability and miscellaneous insurance business done with fire policy-holders was taxable as it did not arise from mutual insurance business since there was not complete identity between the contributors to the common fund and the participators in the surplus.

The third case is that of the *English and Scottish Joint Co-operative Wholesale Society Limited* v. *Commissioner of Agricultural Income-tax, Assam* (1). In this case a Co-operative Society sold the tea grown and manufactured by itself to its members at market rates. The Society contended that it was a mutual association whose transactions with its members were incapable of producing a profit and it was not, therefore, liable to be assessed under the Assam Agricultural Income-tax Act. Their Lordships of the Privy Council held the Society to be non-mutual concern and declared that it was not exempt from liability to income-tax in respect of profits earned by it from the sale of tea to its members.

These and several other authorities were reviewed with care by their Lordships of the Supreme Court in the case of *Commissioner of Income-tax, Bombay City* v. *The Royal Western India Turf Club Limited* (2). In this case the assessee, the Royal Western India Turf Club Limited, was a company limited by guarantee and it carried on the business of a racecourse company and that of licensed victuallers and refreshment purveyors. The assessee had two main cate-

(1) (1946) 16 I.T.R. 270.
(2) (1953) 24 I.T.R. 551.

The Commissioner of Income-tax, Delhi, Ajmer, etc.
v.
Delhi Stock Exchange Association, Ltd., Delhi
———
Bhandari, C J.

gories of members who on their election as members paid an entrance fee and periodical subscriptions which were not charged to tax. Members were provided with separate enclosure to watch the races for which an admission fee was charged and non-members were not admitted in this enclosure. The assessee gave to non-members the same or similar amenities as it gave to members namely the use of an unreserved seat in a stand, the facility to watch the races and to bet on the horses in the races, use of the totalisator in that stand and the facility for refreshment. The daily ticket fee for admission into the members' enclosure was the same as that for the same into the first enclosure to which the public had access. The assessee claimed that in computing its total income the following receipts should be excluded, that is to say, receipts from season admission tickets from members, daily admission gate tickets from members, use of private boxes by members, and income from entries and forfeits received from the members whose horses did not run in the races during the season. The Supreme Court held that an incorporated company which carries on the business of horse-racing and realises money both from the 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, cannot be regarded as a mutual concern.

A careful consideration of the authorities concerning mutual trading appears to indicate that surplus arising from mutual transactions is not assessable where there is complete identity between the contributors and participators, or where the ownership of the surplus is restricted to those who provided it as a class. On the other hand surplus arising from such transactions is assessable where the parties are not identical or where the surplus is distributed wholly or partly among persons other than in their character

of persons subscribing the surplus, for example, as share-holders receiving a dividend or as debenture-holders deriving interest; or where all of the participating policy-holders are not members of the society.

The Commissioner of Income-tax, Delhi, Ajmer, etc.
v.
Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C.J.

Judged in the light of the tests propounded in the foregoing authorities I entertain no doubt in my mind that the assessee company is not a mutual society which is exempt from the payment of income-tax. This Company has a capital of Rs. 5,00,000 divided into 250 shares of Rs. 2,000 each on which dividends can be earned. Any person can become a share-holder of this Company by purchasing a share, but every share-holder cannot become a trading member unless he is duly enrolled or admitted or elected a member of the said Exchange and unless he had paid a sum of Rs. 250 as admission fee. A new member becomes entitled to exercise all rights and privileges of membership and is liable to all the liabilities and obligations of membership. Every member is at liberty to nominate not more than two persons as his authorised assistants or agents and one person as his authorised clerk. Every authorised assistant or agent must pay a registration fee of Rs. 125 and the member nominating him must also pay a monthly subscription of Rs. 5 for such authorised assistant or agent and Re. 1 for his authorised clerk. If these conditions are fulfilled the authorised assistant or agent is entitled to transact business like the member nominating him. The Company realises money both from members and non-members for the same consideration and in return for the same or similar facilities.

These facts make it quite clear that the identity between contributors and participators which is a "cardinal requirement" is completely absent. The real object of the Company is to carry on business as a Stock Exchange; it has issued shares carrying a right to dividends; it is an enterprise formed or operated with the object of making profits; the earnings and

The Commissioner of Income-tax, Delhi, Ajmer, etc.
v.
Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C.J.

profits, if any, go primarily to the share-holders who have invested capital and not to authorised assistants and agents who provide the income. What comes from the trading members and their authorised assistants and agents is distributed not only among the trading members but also among others who are merely share-holders of the Company. It seems to me, therefore, that this Company cannot by any stretch of reasoning be regarded as a mutual society profits accruing to which are exempt from payment of income-tax.

Mr. Bajaj, who appears for the assessee, on the other hand, relies strongly upon a decision of the Privy Council reported as *Commissioner of Income-Tax, Bengal* v. *Messrs. Shaw, Wallace and Company* (1), in which Sir George Lowndes declared that income in the Indian Income-tax Act, connotes a periodical monetary return, 'coming in' with some sort of regularity, or expected regularity, from definite sources not necessarily continuously productive whose object is the production of a definite return excluding anything in the nature of a windfall. He contends that as an admission fee is paid by a member only once, it lacks the element of periodicity. I regret I am unable to concur in this contention. A member may pay an admission only once but the assessee company receives it again and again whenever a new member, authorised assistant or agent is elected or appointed. I am clearly of the opinion that an entrance fee falls within the ambit of the expression "profits and gains of business, profession or vocation".

In view of this finding it is scarcely necessary to consider the argument which was put forward by Mr. Kirpal in the alternative that even if for any reason the entrance fees cannot be assessed to income-tax under

(1) 6 I.T.C. 178.

The Commissioner of Income-tax, Delhi, Ajmer, etc. *v.* Delhi Stock Exchange Association, Ltd., Delhi

Bhandari, C.J.

the provisions of section 10(1) they are liable to assessment under section 10(6). No specific services are being rendered by the Company and there is no remuneration charged for any specific services, As pointed out in *Calcutta Stock Exchange Association, Ltd.* v. *Commissioner of Income-tax, West Bengal, Calcutta* (1), entrance fees and subscriptions are arbitrary sums charged as the price of the privilege of membership or quasi membership and not as remuneration definitely related to any specific services performed.

For these reasons I am of the opinion that the question which has been referred to us by the Tribunal must be answered in the affirmative.

Khosla, J.

KHOSLA, J.—I agree.

APPELLATE CIVIL

Before Falshaw and Bishan Narain, JJ.

THE SARASWATI CO-OPERATIVE TRANSPORT SOCIETY, LTD.,—*Appellant*

versus

THE CHIEF COMMISSIONER DELHI STATE AND OTHERS,—*Respondents*

1957

Jan., 23rd

Letters Patent Appeal No. 37-D of 1955.

Motor Vehicles Act (IV of 1939)—Section 64(a)—Appeal under—Parties to the appeal—Right to be heard—Extent of the appeal—Considerations for grant of permits—Appellate Authority—Whether can grant additional permits.

Held, that there is no provision in the Motor Vehicles Act or in the rules, under which any person other than the appellant and the original authority is to be impleaded as a party to the appeal or heard. The Act does not contemplate that anybody else should be heard in appeal. The policy of section 64 is to give a right of appeal to persons aggrieved by the order of the Transport Authority refusing permits to them but not to get the permits granted to others cancelled. The stage carriage permits are to be

(1) (1956) 29 I.T.R. 687.