[1970] 78 ITR 548 (BOM.)

HIGH COURT OF BOMBAY

Royal Western India Turf Club Ltd.

v.

Commissioner of Income-tax

ABHYANKAR AND NATHWANI, JJ.

I.T. REFERENCE NO. 33 OF 1963

AUGUST 14, 1969

R.J. Kolah and F.N. Kaka for the Applicant.

G.N. Joshi and R.J. Joshi for the Respondent.

JUDGMENT

Abhyankar, J.—This reference has been made as a result of the order of this court passed on 20th March, 1961, in Income-tax Application No. 22 of 1959, directing the Income-tax Appellate Tribunal to refer to this court the following questions of law:

"1.Whether the Tribunal erred in law and/or acted without any evidence or contrary to the materials on record, in holding that in running the club house and the kiosks, the applicant was not carrying on a business activity ?

2.Whether the loss sustained by the applicant in running the said club house and the kiosks, and the depreciation on the fixed assets of the club house and the kiosks, were allowable while computing the applicant's profits from the business of running the race-course ?

3.If the answer to the above question is in the negative, whether the said loss and depreciation could be set off or adjusted against the said profits under section 10 of the Income-tax Act as loss and depreciation of a different business" ?

The case stated by agreement between the parties while referring the questions is as follows:

The assessee is a limited company incorporated in 1926, under the Indian Companies Act, 1913. The assessments under reference are excess profits tax assessments for the chargeable accounting period ended March 31, 1946, and income-tax assessments for the years 1948-49 to 1952-53 (both inclusive). The accounting period for the excess profits tax assessment is the year ending March 31, 1946, while the accounting periods for the income-tax assessments are the years ended June 30, 1947, June 30, 1948, June 30, 1949, June 30, 1950, and June 30, 1951.

The objects for which the company was incorporated were, inter alia, as follows:

1.to carry on the business of a race-course company;

2.to establish any clubs, hotels and other conveniences in connection with the property of the company; and

3.to carry on the business of hotel-keepers, tavern-keepers, licensed victuallers and refreshment purveyors.

The company was running a club house in Poona and refreshment kiosks both at Bombay and Poona race-courses. Up to December, 1956, the club house was open to the members and their guests and boarding and lodging was provided and was available exclusively for members, their wives and unmarried daughters. The company suffered a loss of Rs. 15,374 in the chargeable accounting period ending March 31, 1946, Rs. 60,982 in the assessment year 1948-49, and Rs. 64,906, in the assessment year 1949-50, Rs. 79,203 in the assessment year 1950-51, Rs. 94,244 in the assessment year 1951-52, and Rs. 45,351 in the assessment year 1952-53. In the earlier years also it had suffered losses, but it did not claim deduction of those losses because its claim was that it was a mutual concern and, therefore, none of its activities yielded income that was taxable. The matter went up to the Supreme Court for the assessment year 1940-41 and the Supreme Court held that the amount received by the company from its members in respect of the season tickets, daily admission gate tickets and the use of the private boxes by members were assessable to tax. It is thereafter that the company raised this claim for the deduction of loss in the running of the club house at Poona and the kiosks at Bombay and Poona from its profits chargeable to tax under section 10 of the Act.

In the excess profits tax assessment for the chargeable accounting period ending March 31, 1946, the corresponding income-tax assessment was completed much earlier and no claim was made by the company before the Excess Profits Tax Officer. The claim was, however, raised before the Appellate Assistant Commissioner when he heard the appeal against the excess profits tax assessment. For the income-tax assessment for the year 1948-49 also the claim was not made by the company before the Income-tax Officer in the course of the original assessment. It was, however, raised before the Appellate Assistant Commissioner for the first time by way of an additional ground. A supplementary assessment for the year 1948-49, however, was made to give effect to the Supreme Court decision referred to above, and in the course of these proceedings the assessee claimed the losses now in dispute; but they were not allowed. For the assessment years 1949-50 onwards the claim was made before the Income-tax Officer.

The Income-tax Officer, before whom the claim was made for the first time for the assessment year 1949-50, rejected the claim of the company. His grounds for rejecting the claim are given in paragraph 7 of his order, which is reproduced below:

"In the original return submitted by the club, they had themselves excluded a sum of Rs. 66,460 being loss in the turf club house. After the decision of the Supreme Court, they have now claimed that this amount should be deducted from their total income as the club is doing business of hotel-keepers, tavern-keepers, victuallers and refreshment bars keepers. A summary of income and expenditure for the 10 years ended 30th June, 1948, shows that the club started having separate accounts for the turf club house from 1944-45 accounting year onwards. The figures of the last four accounting years are as under:

Rs.

1944-45

86,193

1945-46

23,177

1946-47

69,732

1947-48

66,460

Earlier to 1944-45 separate accounts of the club house were not prepared. The above-mentioned amounts were neither claimed nor allowed, on the ground that the club members did not make loss or profits out of themselves. It was held that there was an identification between the contributors and the participators. The entrance fees received from the members and their annual subscriptions have also been exempted on the basis of complete mutuality between the contributors and the participators. The point regarding the turf club expenditure was not in appeal before their Lordships of the Supreme Court, and there is no clear indication in the judgment that the loss should be allowed. The club house caters to the needs of the members only, both in and outside the racing season. This excess of expenditure over income is, therefore, not allowed in this assessment".

For the other assessment years, namely, 1950-51, 1951-52 and 1952-53, the Income-tax Officer rejected the claim on substantially the same ground on which it was rejected by him for the earlier year. The orders of the Income-tax Officer for the years 1949-50, 1950-51, 1951-52 and 1952-53 are made annexures "A", "B", "C" and "D", respectively, and form part of the case.

The Appellate Assistant Commissioner of Income-tax considered this claim for the first time when hearing the appeal against the excess profits tax assessment for the chargeable accounting period ending March 31, 1946. He rejected the claim of the assessee and has discussed it in great detail in paragraphs 2, 3, 4 and 5 of his order, which are reproduced below for facility of reference:

"2. The claim for the loss in running the turf club house is made on the strength of certain observations of the Supreme Court in Commissioner of Income-tax v. Royal Western India Turf Club Ltd. [1953] 24 ITR 551 ; [1954] SCR. 289 (SC). According to the appellant, the Supreme Court held that the appellant is carrying on two types of businesses, one is the business of horse racing and the other is the business of hotel keepers, tavern keepers, licensed victuallers and refreshment purveyors. The appellant argues that the loss in running the turf club house was a loss in carrying on business as hotel keepers, tavern keepers, etc., and that the loss should have been set off against the appellant's income from all other sources.

3. The observations of the Supreme Court relied upon by the appellant are found on page 565. They are: 'On the contrary, we have here an incorporated company

authorized to carry on an ordinary business of a race course company and that of licensed victuallers and refreshment purveyors and in fact carrying on such a business'. But with respect, the reference, to business as hotel keepers is only an obiter dictum as the question before the Supreme Court was whether four items of receipt pertaining to the racing business were to be included in computing the appellant's total income.

4. I have discussed with the appellant's representative the facts regarding the running of the turf club house. In my view, it cannot be said that the appellant in running the club house is carrying on any business. The club house is open only to the members of the club and their guests. The charges for the guests are received from the members and not from the guests. Amenities like billiards, facilities for playing cards, etc., are provided. The club is being run at a heavy loss from year to year. The very fact that the appellant is running the club at a heavy loss year after year shows that this does not form a part of the appellant's business activity. It is only an amenity offered to the members of the club as part consideration of the subscription received from the members.

5. The running of the turf club house cannot also be regarded as an activity connected with the horse racing business. The club house is open not only on race days but also on other days during the Poona season. During some years the turf club was open throughout the year. The opening and the closing of the club house do not coincide in other years with the start or close of the Poona season. Activities like billiards or cards, etc., have no connection with horse racing. Part of this expenditure is for running two kiosks in the members 'enclosures at Bombay and at Poona. Even the expenditure incurred in running these two kiosks cannot be allowed as an expenditure for carrying on the racing business. It was not necessary for the appellant to incur this expenditure for carrying on the horse racing business. There are restaurant booths in the other enclosures which are not run by the club. These booths were given to contractors for running them. The appellant makes an income from these restaurant booths. The fact that this is not done in respect of the members enclosures and the appellant incurred avoidable expenditure shows that the appellant was not thinking in terms of business in conducting the kiosks. Business presupposes the existence of profit motive. In this case there is no profit motive in running the kiosks. Similarly, the privilege of using these kiosks and the club house is confined to the members of the club and their guests; the same privilege is not given to the members of the public. This privilege is, therefore, referable to the membership of the company for which an entrance fee on election as members and periodical subscriptions are paid, both of which are not taxed. In view of this, I hold that the expenses for running the turf club house and the two kiosks cannot be allowed either as business expenditure or as business loss".

In his orders regarding income-tax assessments for the years 1948-49 to 1952-53 (both inclusive) he has only made a reference to the discussion in his order regarding the excess profits tax assessment. The Appellate Assistant Commissioner's orders for the excess profits tax and income-tax for the chargeable accounting period ended March 31, 1946, and assessment years 1948-49 to 1952-53 (both inclusive), are made annexures "E", "F", "G", "H", "I" and "J", respectively, and form part of the case.

The assessee thereafter appealed to the Tribunal raising the following grounds:

"1.The Appellate Assistant Commissioner erred in disallowing the expenditure incurred or the loss suffered in running the turf club house and the kiosks. The Appellate Assistant Commissioner ought to have allowed the expenditure incurred or the loss suffered in running the turf club house and the kiosks in computing the business profits of the assessee under section 10 of the Indian Income-tax Act.

2.The Appellate Assistant Commissioner ought to have held that running the club house and the kiosks, or, in any event, running the kiosks was part and parcel of the business of running the race course and consequently the expenditure incurred or the loss sustained on the club house and the kiosks, or in any event, on the kiosks, should be allowed as a deduction in computing the profits of the race course business.

3.Without prejudice to the immediately preceding ground and, in the alternative, it is submitted that the Appellate Assistant Commissioner ought to have held that even assuming the club house and the kiosks did not form part of the race-course business, the loss incurred in running the club house and the kiosks was a loss incurred in a different business and should be set off under section 10 against the profits made in the race-course business.

4.The Appellate Assistant Commissioner erred in holding that the observations in the Supreme Court judgment were obiter and, therefore, he he was not bound to follow them.

5.The Appellate Assistant Commissioner erred in holding that running the club house and the kisoks was not a business activity but was merely an amenity offered to the members of the club as part consideration for the subscriptions received from the members.

6.The Appellate Assistant Commissioner applied an erroneous test, viz., the test of necessity and avoid ability of expenditure, in deciding whether the expenditure should be allowed as a deduction or not. The test adopted by the Appellate Assistant Commissioner for disallowing the expenditure or loss amounts to a misdirection in law.

7.Following on the above, the Appellate Assistant Commissioner should have also allowed depreciation on the fixed assets of the turf club house and kiosks".

The Tribunal in its consolidated order for all the years also rejected the contention of the assessee in the following terms:

"3. We concur in the view taken by the Appellate Assistant Commissioner that in running the club house and kiosks the assessee was not carrying on any business, but merely providing for amenities for its members. The club house and kisoks are not, unlike the business of racing, open to the public. They cater only to the members at less than cost price and thus incur losses every year. Business is a scheme of profit making. If one was always selling goods or services at below his cost it could not be business activity. If the contentions were to be allowed, it would be open to the assessee to minimize its profits in the racing business and reduce its tax liability by offering extra amenities to its members. Such losses should be met out of the membership fees which are not taxable. The loss shown by the assessee

in the club house and the expenditure incurred in running the kiosks cannot, in the view we have taken, be allowed as business loss or business expenses. For the same reason depreciation cannot be allowed on the fixed assets of the club house".

The order of the Tribunal is made annexure "K" and forms part of the case.

The assessee-company thereafter applied to the Tribunal under section 66(1) of the Act for a reference on certain questions of law to this court. But the Tribunal by its order dated December 11, 1958, rejected the applications. The assessee thereupon applied to this court under section 66(2) and it is in pursuance of this court's order on that application that this case is stated with reference to the questions of law already set out earlier.

All the necessary facts and the view taken by the different authorities have been incorporated in sufficient detail in the statement of the case, and it is not necessary for us to repeat any other facts.

In support of this reference, it is urged on behalf of the applicant that the view taken as regards the assessee-company carrying on the business of hotel-keeping when it runs the club house at Poona ignores the nature of the activities of the company and the business for which those activities are undertaken. A printed memorandum and articles of association of the Royal Western India Turf Club Ltd. was made available at the hearing, and amongst the objects for which the club is established, the one other clause (b) is as follows:

"(b) To carry on the business of a race-course company in all its branches and, in particular, to lay out and prepare any lands for the running of horse races, steeple chases, or races of any other kind and for any kind of athletic sports, and for playing thereon, and to permit the playing thereon of games of cricket, bowls, golf, lawn tennis, polo or any other kind of amusement, recreation, sport, exercise or entertainment, and to construct grand or other stands, totalizators, stabling for horses, paddocks, refreshment rooms and other erections, buildings and conveniences whether of a permanent or temporary nature, which may be directly or indirectly conducive to the objects of the club, and to conduct, hold and promote race meetings and athletic sports, polo, lawn tennis, golf and other games, agricultural, horse, flower and other shows and exhibitions and subject to such legislative restrictions as may from time to time be in force to work and maintain totalizators and otherwise utilise the property and rights of the club, and to give and contribute towards prizes, cups, stakes and other rewards".

Similarly, under clause (c) it is one of the objects for which the club is established, to establish any clubs, hotels or other conveniences in connection with the property of the club : and under clause (d) to carry on the business of hotel-keepers, tavern keepers licensed victuallers and refreshment purveyors. Under clause (h) it is one of the objects of the club ... to take any other steps or make any other arrangements which may be thought conducive to any of the objects aforesaid and clause (h2) provides even for carrying on in all its branches and methods the business of printing, publishing and circulating race cards, lists of runners, etc.; and which also includes conducting of competitions relating to racing and giving of prizes therefor. For doing all this the club has empowered itself to engage officials and other staff, acquire property and to construct or alter or keep in repair the

buildings of the club under proper state of repairs. The club is a limited company limited by guarantee, and no profits arising out of any of its activities are distributable or divisible amongst its members. It is common ground that there are no shares in this company, but a person can become a member of one of the several classes or of more than one class as provided in the articles of association. The various categories of members such as club members, stand members, temporary members, etc., are given in detail, and the privileges which each category of members can enjoy, the subscription and the entrance fee which each such category of members has to pay, are also elaborately provided. The manner in which a person can be elected a member has also been given in detail in the articles of association. In other words, it is an incorporated member club which is a term under the Companies Act and is a separate entity different from the members.

As stated in paragraph 4 of the statement of the case, the assessee is running a club house in Poona and also providing refreshments in kiosks both at Bombay and Poona, both facilities being for the benefit of members only. Year after year, and particularly in the years of assessment with which we are concerned in this reference, the assessee-company suffered loss in each of these years so far as the club house at Poona is concerned. There is no clear statement in the statement of the case whether the expenses over refreshment kiosks at Bombay and Poona were also an item of loss. But it was stated at the Bar on behalf of the assessee-company that so far as the running of the kiosks was concerned, they were not generally run at a loss.

The deduction claimed by the assessee-company so far as we have been given to understand is in respect of the loss suffered by them in running these two categories of activities, viz., (a) maintaining a club house at Poona, and (b) providing refreshment kiosks to members at Poona and Bombay. The claim is made for deduction on two distinct grounds. So far as the claim for deduction of expenses as allowable expenses suffered in the matter of providing kiosks is concerned, it is urged that this expense is a legitimate expense incurred by the assessee incidental to its business of carrying on horse races. So far as the loss sustained in maintaining the club house at Poona is concerned, the contention is that the running of the club house is itself a business undertaken by the assessee-company, and the fact that the business runs into loss year after year is no ground for not allowing the assessee-company to set off the loss incurred in that business of the company against the profits earned in the other business of the company, viz., the business of horse races. Alternatively, with respect to these expenses of running the club house at Poona, it is contended that this is an amenity provided to the members and their guests by the assessee-company in order to attract members who are large investors and from whose presence and bettings the company derives considerable profits; it is an incentive to its members in a place like Poona, which, at the relevant time, did not have adequate residential and boarding facilities of the standard to which these members were accustomed. Even though, therefore, the club house department is not run at a profit and is showing loss during the relevant years of assessment, that was an activity which was considered necessary to be undertaken to provide an amenity and a facility to the members of the club who would otherwise not be inclined to come to Poona to participate in the racing season there. Thus, even on this account, it is claimed that this necessary

expense should be allowed on the same basis as expense incurred for providing refreshment kiosks in Bombay and Poona to members.

The contention of the department, which is also reflected in the observations of the various authorities, is that the activity of the assessee-company in establishing and running a club house at Poona cannot be styled or considered as a business activity. It is strenuously urged that the facility of admission to the club house is restricted only to members and their guests, and there is no evidence to show that outsiders were admitted to the privileges of the club house or amenities provided in the club house at Poona. In paragraph 4 of the statement of the case it is stated that up to December, 1965, the club house was open to the members and their guests, and boarding and lodging was provided and available exclusively for members, their wives and unmarried daughters. According to the department, if the admission was so restricted to members, their wives and unmarried daughters, it could not be said that the assessee-company was doing business, viz., the business of hotel-keeping only for the purpose of benefit of such members as would come to Poona and occupy the hotel accommodation. In order that an activity may be properly considered to be a business, the argument runs, the facility must be open or the services must be available to outsiders, that is to say, to non-members or to whosoever wants to avail of the facility on payment of the charges which are fixed. It is also suggested that it is on this footing, that the activity carried on by the club of horse racing, where both members as well as non-members were admitted to enclosures for the same payment and charging the same entrance fee for seeing the horse races or participating by betting, that the contention of the department that the assessee-company was carrying on the business of horse racing was accepted in the Supreme Court. As there is no such element of outsiders being admitted in this activity of running the club house at Poona, the department says that running the club house at Poona is only a facility to members and that activity cannot partake of the nature of a business. It is also urged that so far as availing of the facility of the club house at Poona is concerned, there is no element of mutuality, inasmuch as the members come to Poona, avail of this facility and pay for it—others, i.e, outsiders not being permitted to any such privilege. Thus the members who contribute by way of hotel charges for the club house in turn get the facility required by them, whether for residence or for boarding ; and, therefore, this is an activity which partakes of a mutually beneficial activity in which no element of trading or business can be said to enter.

On behalf of the assessee-company, reliance was placed on the decision of the Supreme Court in a case arising out of the assessment of this very assessee. That case is reported as Commissioner of Income-tax v. Royal Western India Turf Club Ltd. [1953] 24 ITR 551 ; [1954] SCR 289 (SC). The judgment of the court gives in sufficient detail the nature of the activity carried on by the assessee. The learned counsel for the revenue strongly relied upon the observations at pages 560-561 in support of his contention that in order that an activity may partake of the character of a business activity or a business, it must be extended to both members and non-members in the case of an association like an incorporated club. At page 560, their Lordships observed as follows :

"What kinds of business other than mutual insurance may claim exemption from tax liability under section 10(1) of the Act, under the principles of Styles v. New York

Life Insurance Co. [1889] 14 App. Cas. 381; 2 TC 460 (HL), need not be here considered; it is clear to us that those principles cannot apply to 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".

The learned counsel wants to construe this passage as meaning that unless the activity was such as to give benefit to both members and non-members as well as outsiders to the same extent and on the same terms, it could not be said that the assessee was carrying on a "business".

Some other decisions were also relied upon in support of the contention that the activity of the club house run at Poona is not business activity, or does not amount to carrying on business for the assessee at Poona. Carlisle and Sillolh Golf Club v. Smith (Surveyor of Taxes [1912] 2 KB 177 ; 6 TC 48 (KB)), is a case where a golf club, unincorporated and, admittedly, a bona fide members' club, was bound under a clause under its lease to admit non-members to play on its course on payment of green fees to be fixed by the lessors but not to be below a minimum named in the lease. These green fees were paid by the non-members themselves and entered into the general accounts of the club, which showed an annual excess of receipts over expenditure. The Court of Appeal [1913] 3 KB 75 ; 6 TC 198 (CA) ultimately held that the club, for income-tax purposes, carried on a concern or business which is capable of being isolated and denned and in respect of which it received remuneration that is assessable. The point of distinction that was made was that that part of the revenue of the club earned by admitting non-members under the terms of the lease as fees, called green fees, was held alone to be income, and after deducting proportionate expenses the surplus, if any, was held liable to be brought to charge. At page 55 the following observations have been made:

".....under ordinary circumstances, at any rate, before one could fairly say that anything was being carried on which could be called a business assessable in respect of its profits or gains (I do not use 'business' in any technical sense), one would have to find that something was being done as to which it was possible to keep separate accounts so as really to ascertain whether there were profits or gains or not; and, of course, one would further have to ascertain that there were profits and gains in fact".

If this test were to be applied to the facts of the present case, there is no doubt that this activity of running the club house, though the amenity is provided only to the members, can partake of the character of running a business. However, when the matter went to the Court of Appeal Carlisle and Siloth Golf Club v. Smith [1913] 3 KB 75; 6 TC 198 (CA), another aspect was considered and at page 199 the Master of the Rolls observed as follows:

"It seems to me that there is a real difference between moneys received from members and applied for the benefit of members, and moneys received by the club from strangers. I cannot draw any distinction between gate moneys, which might be, and I believe sometimes are, received by a golf club, and green moneys. In each case the club would be assessable. Whether there have been any profits or gains as a matter of fact; and the answer will depend upon the mode in which the

expenses of maintenance and other outgoings ought to be attributed to the visitors. This is really a question of fact for the Commissioners, and not for this court".

From these observations, it appears, the learned counsel for the revenue would want us to draw an inference that the test to determine whether the activity amounts to a business or not would be to find out whether there is income from the outsiders who are admitted to the services and privileges for which the business is run; and if there is no such outsider who is admitted to the privileges, it would not amount to a business, whatever else it may be.

The next case is Commissioners of Inland Revenue v. Westleigh Estates Co. Ltd. [1923] 12 TC 657 (CA) , Commissioners of Inland Revenue v. South Behar Railway Co. Ltd.'s case (supra) and Commissioners of Inland Revenue v. Eccentric Club Ltd.'s case (supra), which deals with three different kinds of assessees, but we are concerned here with the last one, viz., the case of the Eccentric Club Ltd. This case has been noticed by the Supreme Court in Commissioner of Income-tax v. Royal Western India Turf Club [1953] 24 ITR 551 ; [1954] SCR. 289 (SC). In that case of the Eccentric Club Ltd., a company, limited by guarantee, was incorporated, inter alia, to conduct a social club and to provide refreshments to members for payment. It was a members' club and not a proprietary club, the members of the company and the club being identical. By its memorandum and articles of association the income and property of the club were to be applied towards the promotion of the objects of the club, no member being entitled to receive any dividend or bonus out of the profits, and on winding up any surplus was not to be distributed to members, but was to be dealt with as the committee of the club might determine. There were no receipts from anything in the nature of trade from persons other than members, and the company had not been assessed to income-tax in respect of profits or surplus. At an earlier stage Rowlatt J. took the view that the club was assessable. When the matter went in further appeal a different view was taken, and the Master of the Rolls in his judgment at page 690 observed as follows :

"The business of the company is to carry on the club, and any profits must be devoted, in accordance with the memorandum of association, to the advancement of the objects of the club. It is argued on behalf of the Crown that the company is carrying on the business of the club; while the contention on behalf of the club is that, although in form it is a company, it does not carry on any trade or business in any just appreciation of those terms, that its object is not business, but to promote social intercourse, and that the club and the company do not seek gain, nor do their activities result in profits".

Accepting the company's contention, the Master of the Rolls held that it was somewhat far-fetched interpretation of the relevant section of the Act to hold that the association and the activities of the members of the club connote the carrying on of business. On a consideration of the different clauses of the articles of association the court held that the company did not carry on a trade or business in the sense intended by the section. Warring-ton L.J. put the matter even more clearly in the following observations at pages 696-697:

"The learned judge has held that the company is carrying on an undertaking similar to the trade or business of a club proprietor. With all respect I should have thought that if its profits could be charged with the tax at all it would be because the

company, regarded, as in law it is, as a separate entity or persona, is carrying on the actual trade or business of a club proprietor. But can this properly be said of it ? This club proprietor, whether an individual or a company, carries on a business with a view to profit as an ordinary commercial concern. This the present company certainly does not do. I think the proper mode of regarding the company in the present case is a convenient instrument or medium for enabling the members to conduct a social club the objects of which are immune from every taint of commerciality, the transactions of sale, and purchase being merely incidental to the attainment of the main object. What is in fact being carried on, putting technicalities aside, is a members' club and not a proprietary club, nor any undertaking of a similar character. That in such a case one may go behind technicalities and look at the substance is I think shown by the mode in which the House of Lords dealt with a question, similar in this respect, in New York Life Insurance Co. v. Styles [1889] 14 App. Cas. 381; 2 TC 460 (HL). That transactions of sale and purchase may be merely incidental to non-commercial objects and not regarded as in themselves a trade is in my opinion shown by the contrast recognised by the courts in Religious Tract and Book Society of Scotland v. Forbes [1896] 3 TC 415, between the book-selling business which was held to be a trade, and the colportage which was held not to be of that character; and in Young Men's Christian Association v. Groves [1903] 4 TC 613 (KB), between the public restaurant and the educational and religious undertaking, although the latter involved the taking of fees from members attending classes, and so forth".

Thus, it would appear that having regard to the objects for which the company was formed—which was a purely social and cultural object, the court took the view that its activity could not be said to partake of business or the character of a business.

Commissioners of Inland Revenue v. Stonehaven Recreation Ground Trustees [1929J 15 TC 419 , is the case on which reliance was placed. At page 426 the Lord President (Clyde), observed as follows:

"It is no doubt well settled that an association or club for the purposes of mutual assurance does not carry on a trade, because it does not deal with the public at all, and that any balance to the good on its accounts does not accordingly form a profit assessable to income-tax, as arising from trade (New York Life Insurance Co. v. Styles [1889] 14 App. Cos. 381 ; 2 TC 460 (HL)). An ordinary social or playing club to which its members subscribe—and some of whose advantages may perhaps only be enjoyed by members in respect of further payments— presents another instance of a mutual association, whose privileges are confined to the members, and which does not, therefore, carry on a trade. Any balance to the good on its accounts is really in no different position from a balance shown on the accounts of a housekeeper for a private householder who may happen to have supplied the housekeeper with more cash than the expenses of the year turn out to require. If, on the other hand, a club admits outsiders to its privileges or some of them for payment, it may lose its character as a mutual association either altogether or at least as regards its receipts from outsiders (Carlisle and Silloth Golf Club v. Smith [1913] 3 KB 75; 6 T.C. 198 (CA))".

National Association of Local Government Officers v. Watkins (H.M. Inspector of Taxes) [1934] 18 TC 499 (KB), is a well known case. The said association, an

unregistered trade union, was formed with the object of protecting the interests of employees in local Government service and with power, inter alia, to promote the physical and social welfare of its members. The association purchased an existing holiday camp to provide cheap holiday facilities for its members, but accepted bookings from non-members who had previously used the camp. In the assessment to income-tax in respect of the property for the period for which the camp was used, outsiders' income was brought to charge. The association contended that its liability should be confined to the profits made from non-members. The Crown contended that as the users of the camp were not identifiable with the whole membership of the association or even a part thereof, there was no mutual trading and the whole of the profits was properly assessed to income-tax. The court ultimately held that the association's liability was confined to the profits made from non-members. At page 503 Finlay J. observed as under:

"The point which arises, and on which I have had the benefit of a very full argument, is a point no doubt of importance and difficulty. I shall have to refer to the facts a little carefully, but there is this association, the National Association of Local Government Officers. It is an unincorporated association, and I think that is a matter of fundamental importance. The result, of course, is that the association is in the position of a club. The property belongs to the members, and it is a fallacy, as has been pointed out in several cases, one at least of which was cited to me, to say in the case of such a club that, where a member orders a dinner and consumes it, there is any sale to him. There is not a sale. The fundamental thing is that the whole property is vested in the members".

Then later, at pages 505, 506, referring to the Liverpool Corn Trade Association Ltd. v. Monks [1926] 2 KB 110; 10 TC 442 (KB), the learned judge observed as follows:

"The fundamental point there was that people cannot trade with themselves. There was no outside trade; it was simply the return to a subscriber of an amount in excess of what was necessary. That is the principle of the New York Insurance Company' s case (supra), and, though I repeat there was a company there, that was held by the Lords to be really an immaterial circumstance. I think that distinguishes the case at once from the class of cases more than once referred to in later cases. It is obvious, of course, that if a shareholder in a railway company goes and buys a ticket to travel by the railway, he is in the position of any other member of the public. He is buying a ticket from the company, a separate entity from himself, and the sum which he pays must come into the profits of the company. So, if a shareholder in any of the large shops in London goes into one of those shops and buys things, quite obviously the same principle applies. He is buying from the company, a separate entity, and the company is assessable to tax in respect of the sums which it receives from him. . . . . What was held by Mr. Justice Hamilton and by the Court of Appeal was that, while no assessment could be made in respect of the members ' subscriptions, it was possible to differentiate between them and the sums paid by visitors in respect of the right to play golf for a day and, I suppose, refreshments and so forth, and, in so far as the club was making a profit by affording these facilities for visitors, it was liable to assessment. That case is of obvious importance in the present case, as is shown by the circumstances that the argument addressed to the Commissioners for the appellants appears to have been based upon it. . . . . It may be that where you have a separate entity, where you

have a company, in a great many cases the test is that you have to look at the subscribers, look at the participants, and see if they are the same. Here, it seems to me to lie at the root of the thing that the property was not the property of the association, it was the property of the members themselves, and in a case such as that, I think it is impossible— at least, so it seems to me, with the utmost deference—to apply the Solicitor-General's principle".

We have carefully considered the arguments advanced on behalf of the revenue and the principles in the cases cited before us both from English courts and courts in India. But we are unable to hold that it cannot be said in this case that the assessee is not carrying on the business of hotel keeper or of running the club house at Poona merely because the facility of that hotel or club house is restricted to members, their wives and their unmarried daughters as also their guests. It has to be remembered that the objects of the association in no uncertain terms include the running of a hotel or a catering establishment or doing the business of licensed victuallers or hotel keepers or tavern keepers and this is one of the declared objects for which the company is formed. It is also one of the objects of the company to establish any clubs, hotels or other conveniences in connection with the property of the club. The association is an independent entity distinguished from its members. The charges that are levied for the services rendered by the club and the accommodation offered there are only payable on behalf of the members or their guests or their relations who actually use the premises and avail of the facilities of the club house, and not by any other member. In this state of affairs, therefore, the principle of mutuality and mutual benefit, which, in our opinion, is a true basis for exclusion of any activity as a business or a trading activity, cannot be found in the activity carried on by the assessee-company in running a club house at Poona. The learned counsel for the assessee has relied upon four principles which must be satisfied cumulatively before an activity can be properly considered as a mutual dealing or an activity of mutual benefit. There must be mutual dealing inter se between the members and not with the club. There may be common fund to which every one must contribute, and all those who contribute must participate in the benefit of the company. The surplus that may remain must be actually distributed to the contributors, and it is not enough that the contributors have a right to such surplus. Now, we posed a question as to what would happen if the club house activity of the assessee results not in a loss, as in the instant arrangement, but in profits ? Though the profits of any of the activities carried on by the club are not distributable according to the memorandum and articles of association, the profits, if any, must go to the swelling of the general fund. Can it really be said in that case that the assessee-company is not carrying on the business of running a club house at Poona ? So far as the memorandum and articles of association are concerned, there is an express power to the assessee-company to establish clubs, hotels and do the business of hotel keepers, tavern keepers, licensed victuallers and refreshment purveyors. It is not disputed that not all members but some members who are in need of residential accommodation at Poona avail of it. It also does not seem to be disputed that the hotel accommodation is provided not only during the racing season or on the meeting dates, but throughout the year. Thus there is no direct nexus between the holding of a race meeting and the provision of residential accommodation or boarding facility to the members who may attend such meeting. It is, therefore, to be seen whether the principle of mutuality, on which

considerable reliance is placed, is brought into play in this activity carried on by the assessee-company.

In this connection the learned counsel for the assessee-company brought to our notice a recent decision of the Supreme Court in Commissioner of Income-tax v. Kumbakonam Mutual Benefit Fund Ltd. [1964] 53 ITR 241 ; [1964] 8 SCR. 204 (SC). In that case the respondent, a company limited by shares, carried on banking business restricted to its shareholders. It received monthly contributions by way of recurring deposits from the shareholders and at the end of a fixed period returned an amount covering the deposits and guaranteed interest thereon for that period. Loans were granted to those shareholders who applied for them and interest was realised on those loans. 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 held that there was no such complete identity between the contributors and the participators in a common fund as attracted the principle of mutuality. The position of the company was not different from that of an ordinary bank and its income was income from business within section 10 of the Indian Income-tax Act, 1922, and was therefore taxable. A shareholder in the respondent- company was entitled to receive his dividend as long as he held a share. He did not have to fulfil any other condition. His position was in no way different from that of a shareholder in a banking company. It was further held 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. In this case the Royal Western India Turf Club's case (supra) and Styles' case (supra) have been referred. On a parity of reasoning it is contended on behalf of the assessee that it does not appear necessary in order to find out whether the activity of the assessee-company, as in this case, is that of a business or not, that outsiders must be participants or allowed the benefit of the business carried on. In this case under reference the advance of loans was restricted to members and not to others. It was not the case that every member either made deposits on which fixed rate of interest was assured or borrowed money at certain rate of interest. We are also unable to see why a company like the assessee-company could not be said to be carrying on the business of a hotel keeper when it runs a club house although for the benefit of members or their own family members, because the advantage is restricted to members alone. The observations in some of the cases cited before us, where the reference is made to outsiders not being permitted to take advantage of the activity, are of cases where generally an association of persons like a member club is involved. Cases have always made a distinction between an incorporated company which projects an entity distinct from the number of shareholders, and when it is the activity of such an incorporated entity that is under examination, the fact that the benefit accrues to members cannot be a decisive matter. It would not, therefore, be a proper test to apply to find out whether the activity can or cannot be regarded as business merely because the transactions are limited or confined to members or their friends, and, as in this case also, to wives and unmarried daughters. Another argument that was canvassed before us was that it was inconceivable that the assessee-company would decide to start or continue the business which year in and year out was showing loss. Though it is not necessary, it

is conceded, that a business must have profits as one of its objectives in all cases, normally no trading activity or business activity will be undertaken unless there was some profit to be expected in the end. This may be so where the business is confined to a single activity. But instances are not uncommon where a business may be conducted or continued even though it results in loss if the business to be secured by continuance of such a business activity is to ensure a steady stream of customers or to extend the facility to customers even though trading in that particular article may not result in profit. Instances in point would be a subsidised canteen or a cheap grain shop where there is always excess of expenditure over income and yet the activity is continued for the benefit of those who otherwise contribute to the prosperity of the undertaking. We are, therefore, unable to hold that the mere fact that the activity of running a club house at Poona showed a loss continuously during the different periods of assessment concerned, or that the facility or privilege was restricted to members, their guests and families, would rob the activity of its character as a business. We must, therefore, hold that the activity of running a club house carried on by the assessee-company at Poona was in the nature of carrying on a business, and the assessee was entitled to claim adjustment of the amounts incurred as loss in that business in the computation of income.

The other activity, which is the subject-matter of dispute between the parties, is the loss suffered on account of providing refreshment kiosks to members both at Poona and Bombay. This issue raises an aspect of the contention which is common not only to the kiosks but also to the activity of running a club house at Poona. On behalf of the assessee-company it is contended that this is an expense properly incurred for the business of the company, which is that of running races or maintaining and running a race course. In order to provide necessary amenities and facilities to members who spend on the days of the race meetings considerable time on the grounds, the facility of clean and wholesome nourishment is easily available on the premises to members. For this purpose refreshment kiosks are set up and the assessee-company maintains adequate staff of managers, caterers, cooks, bearers and other servants, to enable the members, their guests and families, who attend the race meetings, to be provided with refreshments, nourishments and permissible drinks on the premises. Before us not much serious dispute was raised that this is an expense in the nature of a facility or an amenity to the members. The view taken by the department, however, was that even the expenses incurred in running the kiosks could not be allowed as expenses for carrying on a racing business. According to the Appellate Assistant Commissioner, it was "not necessary" for the assessee to incur the expenses for carrying on the horse racing business. The Appellate Assistant Commissioner observed that there were restaurant booths in the other enclosures which are not run by the club ; that these booths were given to contractors for running them ; that the appellant made an income from these restaurant booths by way of trade, and that the fact that this was not done in respect of the members' enclosures and that the appellant incurred avoidable expenditure showed that the appellant was not thinking in terms of business in conducting the kiosks, because business pre-supposes the existence of profit motive. The Assistant Commissioner, however, observed that the privilege of using the kiosks is confined to members and this privilege is referable to the membership of the company for which an entrance fee on election as members and periodical subscriptions are paid, both of which are not taxed ; that in view of this,

this expense was not allowable as a business expense. The same view was taken in respect of the club house at Poona. The learned counsel relied upon several decisions such as Commissioner of Income-tax v. Royal Calcutta Turf Club [1961] 41 ITR 414 ; [1961] 2 SCR 729 (SC); Eastern Investments Ltd. v. Commissioner of Income-tax [1951] 20 ITR 1; [1951] SCR 594 (SC), Sree Meenakshi Mills Ltd. v. Commissioner of Income-tax [1967] 63 ITR 207 ; [1967] 1 SCR 392 (SC), Jamshedpur Engineering and Machine Manufacturing Co. Ltd. v. Commissioner of Income-tax [1957] 32 ITR 41 (Pat.), and Commissioner of Income-tax v. Nainital Bank Ltd. [1966] 62 ITR 638 (SC), where different kinds of expenses incurred for the purposes of maintaining, continuing, saving or increasing the business were held allowable. Thus, where the turf club established a school for training Indian boys as jockeys : Commissioner of Income-tax v. Royal Calcutta Turf Club [1961] 41 ITR 414 ; [1961] 2 SCR 729 (SC), where an investment company entered into an agreement to reduce its share capital for taking over another person's shares of the value of 50 Rs. lakhs and the vendor agreed to forgo cash payment and receive debentures of this value of equal amount and sanction of the court was obtained : Eastern Investments Ltd. v. Commissioner of Income-tax [1951] 20 ITR 1 ; [1951] SCR 594 (SC), or where the action of a textile mill in regard, to the expenditure incurred in fighting out a civil proceeding to obtain a decision in its favour regarding the interpretation of certain clauses in the Textile Control Order : Sree Meenakshi Mills Ltd. v. Commissioner of Income-tax [1967] 63 ITR 207 ; [1967] 1 SCR 392 (SC), or where the assessee-company carrying on the business of manufacturing and selling agricultural implements incurred expenses for constructing residential quarters and claimed expenses for repairing and maintenance of such quarters: Jamshedpur Engg. & Machine Mfg. Co. v. Commissioner of Income-tax [1957] 32 ITR 41 (Pat.), or where a bank incurred expenses for adjustment of claim of its client who had pledged certain ornaments which were stolen from its custody were concerned : Commissioner of Income-tax v. Nainital Bank Ltd. [1966] 62 ITR 638 (SC), it was uniformly held that the expenses were legitimately laid for the purposes of business. It is not suggested in the instant case that in fact the expenses have not been incurred either for providing refreshment kiosks for members or running the club house at Poona for members. According to the learned counsel for the assessee-company, both these activities are intended to give necessary facilities to those classes of race-goers or its members who usually bring large business and are found to be in need of adequate facilities of refreshment of an order to which they are usually accustomed and of residential and catering facility as well in Poona where there is insufficiency of such facility. It is also not suggested that the rates charged are unduly low, though it is true that the assessee is not able to recover fully by way of rates and charges for refreshments or the hotel charges laid for running those establishments. What is being claimed is essentially not the whole of the expenses, but the amount representing excess of expenditure over income or return from the activity. The assessee, therefore, claims that this is a properly incurred business expenditure, the activity is necessary for maintaining good business and attracting better business which comes mainly from members who invest large sums on racing days.

In our opinion, the character of both these kinds of expenses, viz., expenses over refreshment kiosks both at Bombay and Poona and the expenses for running the club house at Poona, also essentially partake of the nature of an amenity or a

facility provided to its members. In fact there is an express reference in the objects for which the club is established in paragraph 3(b) of the memorandum of association, viz., that the club is empowered to construct refreshment rooms and other erections and conveniences which may be directly or indirectly conducive to the objects of the club. The object of the club, among other things, being mainly to carry on the business of horse-racing, all these amenities which are incidental to the carrying on of this business must be considered as proper expenses and if the expenses are in excess of the income recovered by charging for the services, that itself cannot be considered but as expenses properly laid out for the purpose of the business.

It is not necessary that there is a direct quid pro quo between these services and facilities which are offered and made available to the members and the benefit which the assessee gets in the increase in the amount of betting or the business of running a race course. The advantage undoubtedly is indirect; but the need to provide these facilities in order to preserve the goodwill and co-operation of the members and to encourage them to patronise the activities for which the assessee-company is founded is obvious. In fact, in the case which came before the Supreme Court in respect of this very assessee-company, one of the items of income was use of private boxes for the members. Now, the provision of private boxes is a special facility to members. If this could be a source of income which goes into the calculation of total income earned by the assessee-company, every facility provided to members who seek admission to the members' enclosures and also rent private boxes, whether in Bombay or Poona, ought to be considered as a legitimate and proper expense made to provide this facility and amenity to the members of the club. We do not think that the contention of the assessee that the expenses over both these counts are also expenses properly laid out for the business of the assessee-company can be seriously challenged.

In our view, therefore, the questions referred to us will have to be answered as follows:

Question No. 1.—Our answer to this question is in the affirmative— viz., the Tribunal erred in law and/or acted without any evidence or contrary to the materials on record, in holding that in running the club house and the kiosks, the applicant was not carrying on a business activity.

Question No. 2.—In view of our answer to question No. 1, it is not necessary to answer this question ; but in view of the discussion above, we would say that the loss sustained by the assessee-company in running the said club house and the kiosks, and the depreciation on the fixed assets of the club house and the kiosks were allowable while computing the assessee's profits from the business of running the race course.

Question No. 3.—We have answered question No. 2 in the affirmative and not in the negative. But even if that question were to be answered in the negative, we hold that the said loss and depreciation could be set off or adjusted against the said profits under section 10 of the Income-tax Act as loss and depreciation of a different business.

As the references are answered in favour of the assessee, we direct that the assessee shall be entitled to get costs from the respondent.

The costs will be taxed as per rules.