

आयकर अपील अथकरण, “डी” यायपीठ, चेनई

IN THE INCOME-TAX APPELLATE TRIBUNAL ‘D’ BENCH, CHENNAI

ी चं पूजार, लेखा सदय एवं ी धुवु आर.एल रेडी, यायक सदय के सम

Before Shri Chandra Poojari, Accountant Member &

Shri Duvvuru RL Reddy, Judicial Member

आयकर अपील सं./I.T.A.No.164/Mds/2015

नधारण वर्ष/**Assessment Year:2009-10**

M/s. Andhra Chamber of Commerce,

No. 23, Third Cross Street,

West CIT Nagar, Nandanam,

Chennai 600 035.

[PAN: AAACA7746C]

Vs.

The Assistant Director of

Income Tax [Exemptions] - III,

Chennai 600 034.

(अपीलाथ /Appellant) (यथ/Respondent)

अपीलाथ क ओर से/ Appellant by : Shri R. Vijayaraghavan, Advocate

यथकओर से/Respondent by : Smt. R. Ilavarasi, JCIT

सुनवाई कतारख/ Date of hearing : 11.04.2016

घोषणा कतारख /Date of Pronouncement : 06.07.2016

आदेश /O R D E R

PER DUVVURU RL REDDY, JUDICIAL MEMBER:

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals) VII, Chennai, dated 12.09.2014 relevant to the assessment year 2009-10. The first ground raised in the appeal of the assessee is with regard to denial of exemption under section 11 of the Income Tax Act [“Act” in short]. The Id. CIT(A) has erred in holding that the assessee is not entitled to exemption under section 11 of the Act and second ground relates to confirmation of disallowance of depreciation.

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2. The brief facts of the case are that the assessee is a company formed on 17.08.1928 and registered under Companies Act, 1956. The assessee was granted registration under section 12A(a) of the Income Tax Act, 1961 vide order dated 08.06.1992. The assessee filed its return of income on 01.10.2009 declaring income of ₹.48,75,933/- and claiming exemption under section 11 of the Act. The return filed by the assessee was processed under section 143(1) of the Act. The case of the assessee was selected for scrutiny and notice under section 143(2) of the Act was issued. After considering the details, the assessment was completed under section 143(3) of the Act determining the total income of ₹.20,07,632/-. During the course of assessment proceedings, the Assessing Officer found that the assessee was in receipt of fees for the issue of certificate of origin. The Assessing Officer also found that the assessee has in receipt of rental income, interest

on fixed deposits, miscellaneous income, etc. The Assessing Officer was of the opinion that the income of the trust was earned from the activities, which are of general public utility other than charitable, medical or educational activities and hence observed that the same is covered by proviso to section 2(15) of the Act. The Assessing Officer was also of the opinion that there was no concept of mutuality in this case as the assessee serves as nonmembers also. Therefore, the Assessing Officer denied exemption under section 11 of the Act to the assessee. The Assessing Officer has also brought to tax the corpus donation received during the year. Depreciation

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was allowed only on the capital assets purchased during the period relevant to the assessment year 2009-10.

3. Aggrieved by the order of the Assessing Officer, the assessee carried the matter in appeal before the Id. CIT(A). After considering the submissions of the assessee and considering the facts of the case, the Id. CIT(A) confirmed the order of the Assessing Officer and gave a finding that "in this case, the assessee was in receipt of fees for issuance of certificate of origin for the assessment year under consideration and hence hit by the proviso to section 2(15) of the Act. Since proviso to section 2(15) of the Act is attracted, the provisions of sections 11 and 12 of the Act become inoperative and the surplus of the assessee is subjected to taxation."

4. On being aggrieved, the assessee is in appeal before the Tribunal.

The Id. Counsel for the assessee has submitted that the issue is squarely covered in favour of the assessee by the decision of the Kolkata Benches of the Tribunal in the case of Indian Chamber of Commerce v. ITIO, Exemptions in I.T.A. Nos. 1491/Kol/2012 & 1284/Kol/2012 for the assessment years 2008-09 and 2009-10. The Id. Counsel for the assessee, by referring to the said decision of the Tribunal, submits that the key issue has been taken up before the Kolkata Benches of the Tribunal, wherein, it was held that the receipts reported by the assessee for meetings, conference & seminars, environment management centre and fees for

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issuing certificate of origin are incidental to the main object of the assessee. Further, the Id. Counsel for the assessee has relied on the decision of the Chennai Benches of the Tribunal in the case of The Southern India Chamber of Commerce & Industry v. JCIT in I.T.A. Nos. 2733 & 2734/Mds/2014 for the assessment years 2009-10 & 2010-11. Therefore, in view of the above decisions, the Id. Counsel for the assessee submits that denial of exemption under section 11 of the Act to the assessee, a charitable organization, is not justified.

5. On the other hand, the Id. DR supported the orders of authorities below.

6. We have heard both sides, perused the materials on record and gone through the orders of authorities below. Admittedly, the assessee is a charitable institution. The assessee was denied exemption under section 11 of the Act on the ground that the assessee was in receipt of fees for issuance of certificate of origin for the assessment year under consideration and hit by the proviso to section 2(15) of the Act. Similar issue has come up

for consideration before the Kolkata Benches of the Tribunal in the case of Indian Chamber of Commerce v. ITIO, Exemptions (supra), wherein, the Tribunal has observed and held as under:

“35. In view of the above we thus now turn to examine and analyse in full details the particular facts of the present case. That the assessee association is a Charitable Institution, duly registered as such u/s. 12A

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of the Act, carrying on its main object of development of trade, industries and commerce. The main objects for which the association came into existence, are clearly set out in clause 3 of the Memorandum of Association which duly records and reads as under:

‘3(a) To promote and protect the trade, commerce and industries and in particular the trade, commerce and industries in or with which Indians are engaged or concerned.’

The activities of conducting Environment Management Centre, Meetings, Conferences & Seminar and issuance of Certificate of Origin, being the activities stated to be ‘services in relation to trade, commerce or business’ were all well covered by the main object being fully connected, incidental and ancillary to the main purpose and were conducted solely for the empowerment, betterment and for creating awareness amongst the industrialists in order to bring about the development of trade and industries in India. Further it is to be noticed that the Memorandum has also specifically authorized the Chamber ‘to do all other things as may be conducive to the development of trade, commerce and industries, or incidental to attainment of the above objectives or any of them.’ Thus it was only for the purpose of securing its primary aims of proper development of business in India that the assessee was taking the said ancillary steps. The said activities were not carried out independent of the main purpose of the association of the institution being the development and protection of trade. There was no independent profit motive in any of the said activities. The surplus arising out of the same was merely incidental to the main object to charity. The majority of the receipts in the said activities were out of the sponsorships and donations. The expenses incurred on the said activities as and when incurred were all separately debited to the said accounts and the balance was shown as surplus over receipts. Thus in view of the above it is clear that the alleged activities were all merely incidental to the main object of the assessee and the predominant object of the association being the promotion development and protection of trade and commerce which is an object of general public utility, it can never be the case that it is engaged in ‘business, trade or commerce’ or in any ‘service in relation to business, trade or commerce’ The individual nature and purpose of the specific activities, it is stated that the activities held by AO and the (A) to be business in nature, were as follows:

(a) Meetings, Conferences & Seminars

(b) Environment Management Centre

(c) Fees for Certificate of origin

Facts relating to these activities are discussed in detail in para 23 to 25 of this order above, which need not be repeated.

36. From facts in entirety, now the question arises is whether principle of consistency will apply or not? From AY 1985-86 to 2007-08 exemption u/s 11 of the Act was allowed. Now, having extensively with the newly amended section 2(15) of the Act and its absolute inapplicability to the case of assessee supported by various judicial decisions, we will discuss this issue. We find that CIT(A) without appreciating that the basis principle underlying the definition of "charitable purpose" remained unaltered, and on amendment in the section 2(15) of the Act w.e.f. 01/04/2009, whereby the restrictive first proviso was inserted therein, lower authorities held that the same substantially changed the position of law and thus the principle of consistency did not apply. But we are of the view that a detailed reading of the various judicial decisions through the years, interpreting the definition of "charitable purpose" as laid out in section 2(15) of the Act and also the definition of "business" in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the Institution is Charitable in nature or not. Where the main object of the Institution was "charitable" in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non members, were all held to be "charitable" in nature. Hon'ble Apex Court in the earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an Institution was advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. It was laid out by the Court that, "That if the primary purpose be advancement of objects of general public utility, it would remain charitable even if an incidental entry into the political domain for

achieving that purpose, e.g. promotion of or opposition to legislation concerning that purpose, was contemplated."

It was only for the purpose of securing its primary aims that it was mentioned in the memorandum of association that the Chamber might take steps to urge or oppose legislative or other measures affecting trade, commerce or manufactures. Such an object ought to be regarded as purely ancillary or subsidiary and not the primary object." In connection to the above case it is

laid out the said case dealt with the assessment of the assessee in the A.Ys 1948-49 to wherein relevant to the said AYs 8-49 to 1952 -53, by the last paragraph of sub-section (3) of the IT Act, 1922”, charitable purposes” was defined as

“... In this sub-section ‘Charitable purpose’ includes relief of the poor, education, medical relief and the advancement of any other object of general public utility, but nothing contained in clause (i) or clause (ii) shall operate to exempt from the provisions of this Act part of the income from property held under a trust or other legal obligation for private religious purposes which does not ensure for the benefit of the public.”

The adding of the words ‘not involving the carrying on of any activity for profit: was introduced by the Income tax Act, 1961. Hon'ble Apex court in the earliest decision in the case of Surat Art Silk Cloth Manufacturers Association (Supra) held the theory of dominant or primary object of the trust to be the determining factor so as to take the carrying on of the business activity merely ancillary or incidental to the main object. It was held as follows:-

(i) That the dominant or primary purpose of the assessee was to promote commerce and trade in art silk yarn, raw silk, cotton yarn, art silk cloth silk cloth and cotton cloth as set out in clause (a) and the objects specified in clauses (b) to (e) were merely powers incidental to the carrying out of that dominant and primary purpose;

(ii) That the dominant or primary purpose of the promotion of commerce and trade in art silk, etc., was an object of public utility not involving the carrying on of any activity for profit within the meaning of s.2(15) and

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that the assessee was entitled to exemption under s 11(1)(a)”

Again the Hon'ble Apex Court in the case of Federation of Indian Chambers of Commerce & Industry (supra) held that ‘that the dominant object with which the Federation was constituted being a charitable purpose viz. promotion, protection and development of trade, commerce and industry, there being no motive to earn profits, the respondent was not engaged in any activity in the nature of business or trade, and, if any income arose from such activity, it was only incidental or ancillary to the dominant object for the welfare and common good of the country’s trade, commerce and industry, and its income was, therefore, exempt from tax under s.11 of the IT Act, 1961”

Again reiterating the dominant purpose theory, the Hon'ble SC in the case of Sai Publication Fund (supra) laid out as follows:

“...If the main activity is not business, then any transaction incidental or ancillary would not normally amount to ‘business’ unless an independent intention to carry on ‘business’ in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on ‘business’: connected with or incidental or ancillary sales will rest on the Department. Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of ‘business’. In the recent decision which deals specifically with the newly amended section 2(15) of the Act, in the case of Institute of Chartered Accountants of India v. Director General of Income - tax (Exemptions) [2012] 347 ITR 0099 Del HC, laying down the very same principle it was again laid:

‘that the fundamental or dominant function of the Institute was to exercise overall control and regulate the activities of the members/ enrolled chartered accountants. A very narrow view had been taken that the Institute was holding coaching classes and that this amounted to business.’

Again, Hon'ble Bombay High Court in the WP of Baun Foundation Trust (Writ Petition No. 1206 of 2010 in the High Court of judicature At Bombay 27 March 2012) it was held that ‘4... It is a well settled position in law that the dominant nature of the purpose for which the trust exists has to be considered. The Chief Commissioner has not doubted the genuineness of the trust or the fact that it is conducting a hospital.’

Thus from all the above it is seen that though the definition of ‘charitable’ purpose under section 2(15) has undergone changes, the principle underlying the same has remained the same In context of the above, with regard to the ‘principle of consistency’ it would be of relevance here to quote the decision of the Apex Court in the case of Radhasoami Satsang v. Commissioner of Income-tax (193 ITR 321 SC) wherein it was held that:

“... (ii) That, in the absence of any material change justifying the Department to take a different view from that taken in earlier proceedings, the question of the exemption of the assessee appellant should not have been reopened. Strictly speaking, res judicata does not apply to income-tax proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year; where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties

have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

37. Now coming to application of section 28(iii) of the Act. We find that section 28(iii) of the Act provides that the income derived by a trade, professional or similar association from specific services performed for its members will be brought to charge under the head 'profits and gains of business or profession'. The underlying idea behind s. 28(iii) is that there must be a business from which income is

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derived and that in the course of such business specific services must be rendered for its members. The concept behind s.28(iii) is to cut at the mutuality principle being relied on in support of a claim for exemption, when the assessee was actually deriving income or making profits as a result of rendering specific services for its members in a commercial way. The reason for the introduction of Section 28(iii) of Act, to ignore the principle of mutuality and reach the surplus arising to the mutual association and this is clear from the fact that these provisions are confined to services performed by the association 'for its members'. Such income would either be charged as business income or under the residual head, depending upon the question whether the activities of the association with the non-members amount to a business or otherwise. Section 28(iii) constitutes certain income of the association to be business income without affecting the scope of the exemption under Section 11. Section 2(15) which incorporates the definition of 'charitable purposes' simply shows that several mutual associations may also fall within the definition. The receipts derived by a chamber of commerce and industry for performing specific services to its members, though treated as business income under Section 28(iii) would still be entitled to the exemption under Section 11 r.w.s. 2(15) of the Act, provided there is no profit motive. Thus, assessee being a charitable Institution carrying on the object of promotion and development of trade and commerce and which is not involved in the carrying on of any activity in the nature of 'business', the said section 28(iii) of the Act does not apply.

38. In view of the above discussion, we are of the considered view that in the given facts and detailed reading of the various judicial decisions through the years, interpreting the definition of 'charitable purpose' as laid out in section 2(15) of the Act and also the definition of 'business' in relation to the said section amply reveals that the theory of dominant purpose has always, all through the years, been upheld to be the determining factor laying down whether the Institution is Charitable in nature or not. Where the main object of the Institution was 'charitable' in nature, then the activities carried out towards the achievement of the said, being incidental or ancillary to the main object, even if resulting in profit and even if carried out with non members, were all held to be 'charitable' in nature. Hon'ble Apex

Court in the earliest case of Andhra Chamber of Commerce (supra) had clearly laid out the principle that if the primary purpose of an Institution was advancement of objects of general public utility, it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose, was profitable in nature. In

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our view the basic principle underlying the definition of “charitable purpose” remained unaltered even on amendment in the section 2(15) of the Act w.e.f. 01/04/2009, though the restrictive first proviso was inserted therein. Accordingly, in the given facts of the case as discussed above in detail, the assessee association’s primary purpose was advancement of objects of general public utility and it would remain charitable even if an incidental or ancillary activity or purpose, for achieving the main purpose was profitable in nature. Hence, assessee is not hit by newly inserted proviso to section 2(15) of the Act. This issue of assessee’s appeal is allowed.”

7. By following the above decision of the Kolkata Benches of the Tribunal, the Coordinate Bench of the Tribunal in the case of The Southern India Chamber of Commerce & Industry v. JCIT (supra), decided the issue in favour of the assessee. Respectfully following the above decisions of the Tribunal, we set aside the order of the Id. CIT(A) and direct the Assessing Officer to allow exemption under section 11 of the Act.

8. The next ground raised in the appeal of the assessee is with regard to disallowance of depreciation. The assessee has claimed depreciation of ₹.9,94,918/- as per the accounting method followed by the assessee, which is mercantile system of accounting. However, the Assessing Officer denied the claim of depreciation on the ground that the depreciation is allowed only on the capital assets purchased during the year relevant to the assessment year 2009-10. On appeal, the Id. CIT(A) has held that the assets when purchased are claimed as application of income and claiming depreciation on the same assets would amount to double deduction and thus, confirmed

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the order of the Assessing Officer. On being aggrieved, the assessee is in appeal before the Tribunal.

9. We have heard both sides, perused the materials on record and gone through the orders of authorities below. With regard to allowing the claim of depreciation when the entire cost of acquisition of assets were treated as “application of income” for the purpose of claiming exemption under section 11 of the Act, in our opinion, similar issue was considered by the Hon’ble Supreme Court in the case of Nector Beverages Limited v. CIT 314 ITR 314, wherein, it was held that the depreciation is neither a loss nor expenditure. Depreciation is only an “allowance” and the view that depreciation is “expenditure” to be treated as “application of income” for charitable purposes is incorrect. The cost of assets was already allowed as application of income while granting exemption under section 11 of the Act in any earlier assessment year, the depreciation once again cannot be granted to the assessee in subsequent assessment years so as to consider it as application of income. In our opinion, the provision of section 11 of the Act

cannot override section 32 of the Act. If the assessee claimed exemption under section 11 under Chapter III of the Act, it cannot claim depreciation under section 32 of the Act. Therefore, the Assessing Officer has to examine whether the assessee has claimed the cost of acquisition of capital assets as application of income or not in any earlier assessment years and if it is

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claimed so, the assessee cannot claim depreciation as an application of income while claiming exemption under section 11 of the Act in subsequent assessment years. When the cost of asset become NIL, there is no question of allowing any depreciation. The cost of asset was allowed once again as application of income, it would amounts to double deduction, if depreciation is also allowed as application of income, which cannot be permitted.

Accordingly, we direct the Assessing Officer to examine this issue and grant depreciation if the assessee has not claimed the cost of acquisition of asset as application of income while claiming exemption under section 11 of the Act in any assessment year. Thus, this ground of assessee is allowed for statistical purposes.

7. In the result, the appeal filed by the assessee is partly allowed for statistical purposes.

Order pronounced on the 06th July, 2016 at Chennai.

Sd/- Sd/-

(CHANDRA POOJARI)

ACCOUNTANT MEMBER

(DUVVURU RL REDDY)

JUDICIAL MEMBER

Chennai, Dated, the 06.07.2016

Vm/-

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आदेश क तलप अ ेषत/Copy to: 1. अपीलार्थ/Appellant, 2.यथ/

Respondent, 3. आयकर आयुत (अपील)/CIT(A), 4. आयकर आयुत/CIT, 5.

वभागीय तनध/DR & 6. गाडफाईल/GF.