आयकरअपीलीयअधिकरण, दिल्ली न्यायपीठ 'जी', नई दिल्ली
IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES 'G', NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND SHRI O.P.MEENA, ACCOUNTANT MEMBER
आ.अ.सं./I.T.A No.871/Del/2017
निर्धारण वर्ष/Assessment Year: 2010-11

Sanatan Dharam Shiksha Samittee, C/s. S. D. Public School, Narwana, Distt. Jind, Haryana-126116. **[PAN: AAETS 6172 P]**	Vs.	Income Tax Officer (Exemption), Rohtak.
अपीलार्थी / Appellant		**प्रत्यर्थी/Respondent**

निर्धारितीकीओरसे **/Assessee by**	Ms. Rano Jain, Advocate, Ms. Mansi Jain – CA and Pranshu Singhal –CA
राजस्वकीओरसे **/Revenue by**	Shri S. S. Rana – CIT(D.R.)

सुनवाईकीतारीख/ Date of hearing:	06.11.2019
उद्घोषणाकीतारीख/Pronouncement on:	18.11.2019

आदेश /O R D E R

PER O.P.MEENA, AM:

1. This appeal by the Assessee is directed against the order of Ld. Commissioner of Income Tax (Appeals), Rohtak, dated 25.10.2016 for the assessment year 2010-11.

2. Condonation of delay in filing of appeal before the Tribunal:

3. At the outset, the ld.Counsel submitted that there was delay of 41 days in filing of the appeal before the Tribunal. As the appeal

order was received on 02.11.2016 against which the appeal was to be filed within the statutory period, however, the same has been filed on 15.02.2017. Therefore, there is delay by 41 days in filing of the appeal. The assessee in its petition stated that the assessee trust has received the appeal order on 02.11.2016 and handed over the same to one of the clerks working on the office of its Chartered Accountant to draft the appeal to be filed before the ITAT. However, the said clerk kept the above order in his drawer and forget to file the appeal in the above-mentioned case. Later on, when the assessee enquired from its Chartered Accountant regarding the status of his appeal to be filed before the ITAT, it came in the light that at that the clerk to whom the order was handed over has not filed the appeal against the order of the ld.CIT(A). Thereafter, the appellant has taken immediate steps and filed the appeal before the ITAT with 41 delay. Thus, the delay has been caused due to unavoidable circumstances and beyond the control of the assessee. Therefore it was requested that the delay in filing of the appeal may be condoned as it was unintentional and beyond the control of the assessee.

4. The ld. CIT (DR) did not seriously opposed the condonation of the delay.

5. We have heard the rival submissions and perused the material available on record. It is a settled law that the courts as quasi-judicial

bodies are empowered to condone the delay, if the litigation satisfies the court that there were sufficient reasons for availing the remedy after the expiry of the limitations. Since, the assessee trust in had handed over the order of CIT (A) to the clerk of Chartered Accountant for filing of appeal, but that clerk from the office of Chartered Accountant has forgotten to take appropriate action in the matter within the time. It was only when the assessee contacted to its Chartered Accountant, this facts was noticed and appeal was filed with 41 days of delay. We find that the explanation provided by the assessee is satisfactory and reasonable and there was no malafide intention or negligence on the part of the assessee in filing of the appeal. Therefore, we condoned the delay of 41 days in filing of appeal and allow the appeal be admitted for decision on merit.

6. Grounds raised by the Assessee read as under:

> 1. On the facts and circumstances of the case, the order passed by the Ld. Commissioner of Income Tax (Appeals) and Ld. AO is bad both in the eye of law and on facts.
>
> 2. That the Ld. AO has erred both in the eyes of law and facts of the case while issuing the notice u/s 148 on the basis of audit objection, without independent application of mind, which is not reasons to believe as per law.
>
> 3. That the Ld. AO has erred both in the eyes of law and facts of the case in issuing notice u/s 148 of the Act despite the fact that assessment in the case of the appellant was already made u/s 143(3) of the Act and the same issue was discussed in detail during the original assessment proceedings. Thus reopening amounts to change of opinion, which is not permissible under the law.
>
> 4. That the Ld. AO has erred both in the eyes of law and facts of the case by recording reason, before issue of notice u/s 148 of the Act, without mentioning therein the failure on the part of assesse to disclose fully and truly

all material facts necessary for its assessment as provided in the first proviso to section 147 of the Act.

5. That the Ld. AO failed to dispose off any of the objections raised by the appellant against the issue of notice u/s 148 of the Act by passing a speaking order as which is against principles of reopening as laid by the Apex court in the case of GKN Drive Shafts (India) Pvt. Ltd.

6. That the Ld. AO has erred in reopening the assessment proceeding as the notice issued u/s 148 of the Act was sanctioned by appropriate authority without independent application of mind, which is a precondition for according sanction as per section 151 of the Act.

7. That the Ld. AO and Ld. CIT(A) has erred in the eyes of law and facts of the case in making addition of Rs.17,07,730/- by disallowing the claim of exemption u/s 10(23C)(iiiab) of the Act.

8. That the Ld. CIT (A) has not considered the legal issues involved in the reassessment as stated in Ground No. 1 to 6 above.

9. That the interest charged u/s 234B on the tax calculated on the reassessed income is not sustainable in law and facts of the case.

10. That the appellant craves leave to add, amend or alter any of the grounds of appeal before or the time of personal hearing or written submission."

7. Ground No.1 to 6 & 8 are relates to reopening of assessment u/s.147 of the Act and issue of notice u/s.148 based on audit report, which is bad in law and without application of mind and amounts to change of opinion.

8. Succinct facts are that the assessee is a Public charitable educational institution and assessed as AOP. The assessee has filed its return of income on 30.09.2010 disclosing income at Rs. Nil and it was processed u/s. 143(1) of the Act. Later on, the case was picked up for scrutiny and the assessment was made u/s.143 (3) on 23.11.2012 assessing the income at Nil (as returned). Thereafter, the

AO noticed that the assessee was not eligible for exemption u/s.10(23C)(iiiab) of the Income Tax Act. Accordingly, a notice u/s.148 was issued on 31.03.2015 after recording the reasons (reproduced in the body of assessment order) and after taking approval of JCIT (E) Chandigarh. In response notice under section 148 of the Act, the assessee vide letter dated 20.04.2015 submitted that the original return filed by it may be treated as return filed in response to notice u/s.148 of the Act. Accordingly, statutory notices u/s.143(2) and 142(1) of the Act were issued and the assessment was made u/s.143(3) r.w.s 147 of the Act on 17.12.2015 thereby disallowing the exemption of Rs.17,07,726/- claimed u/s.10(23C)(iiiab) of the Act.

9. Being aggrieved, the assessee filed this appeal before the ld. CIT (A) challenging the reopening of the assessment on the ground that it was reopened based on audit objection and it amounts to mere change of opinion, therefore, it was not warranted under the Law. Reliance was also placed on the decision of CIT vs. Lucas TVS Ltd., [2001] 249 ITR 306 (SC) wherein it was held that a opinion of the audit party regarding application or interpretation of law is not information, and as such, a reassessment based on opinion of audit party is not valid. It was further contended that the AO while framing assessment u/s.143(3) has considered the fact about the assessee

being charitable, existing solely for educational purpose and substantively financed by the Government, and therefore allowed exemption to the assessee u/s.10(23C)(iiiab) of the Act. Thus, no new facts had come in to the possession of the AO, on which notice under section 148 of the Act has been issued. Hence, it amounted to mere change of opinion, which is not warranted and tenable under the Law. Reliance was also placed on the decision of Apex Court in the case of ACIT vs. ICICI Securities Primary Dealership Ltd. [2012] 348 ITR 299 (SC) wherein it was held that where the assessee had disclosed full details in the return of income in the matter of dealing on shares and the assessment was reopened after four years rejecting the assessee's contention that the loss incurred was a business loss and not a speculative loss. It was clearly a change of opinion and the order of reopening assessment was not tenable. Reliance was also placed on plethora of case laws, which finds mentioned at page 3 of the order of ld. CIT (A). It was also contended that the AO failed to dispose-off the objections raised by the appellant against the issue of notice u/s.148 of the Act, therefore reopening is not valid. It was further submitted that sanction by the JCIT, as per provision of section 151 of the Act has been accorded without application of mind, which is against the spirits of the law and is unjustified and unwarranted. However, the ld.CIT (A) observed that the perusal of facts on record prove that there is no infirmity in the issue of notice u/s.148 of the Act, reasons have

been duly recorded, approval by the JCIT (E) has been accorded as per the procedure and the objections of the assessee for issue of notice u/s.148 have also been dealt with. Therefore, the assessee's objections are based on surmises. Moreover, the AO has clearly stated in his order that the assessee has received Government grant of Rs.49,32,102/- only and its gross receipts are at Rs.2,23,78,924/- which is only 22.03% of the gross receipts which is very much low than 50% of gross receipts, hence, it is not wholly and substantively financed by the Government and therefore the assessee is not entitled to exemption u/s.10(23C)(iiiab) of the Act.

10. Being aggrieved, the assessee filed this appeal before this Tribunal. The ld.Counsel referred point no. 9 of the notice u/s.142(1) dated 03.02.2012 issued by the AO [placed at Paper Book Page No. 1] in the original assessment proceedings, wherein the AO has made a specific query to substantiate the claim of exemption u/s.10(23C)(iiiab)/(aaiiad) of the Act. In response to which, the assessee has filed its reply vide letter dated 16.05.2012 [placed at paper book, page 3 and 4] wherein vide point no. 8, it has been explained that the assessee is an educational institution imparting education under the different courses and program, substantively/ wholly financed by the Government, therefore it is well covered for exemption u/s.10(23C)(iiiab) which stipulates that any university or

educational institution existing solely for educational purpose and not for the purpose of profit and which is wholly or substantively financed by the Government. Therefore, it was contended that point No. 9, 10 and 11 of impugned notice under section 142(1) were not applicable. Therefore, the question of allowability of exemption u/s.10(23C)(iiiab) was duly complied with by the assessee and the ld.AO in his original assessment order passed u/s.143(3) dated 23.11.2012 has given his clear opinion duly accepting the claim of the assessee in respect of exemption claimed u/s.10(23C)(iiiab) of the Act. The ld. Counsel further referred the reasons recorded by the AO, which are appearing in the assessment order at page 1, which says that the assessee was not eligible for the exemption u/s.10 (23C) (iiiab) of the Act as the assessee's receipts were at Rs.2,23,78,968/- and out of this grant of Rs.49,32,102/- only was received from the Haryana Government, thus the assessee was not wholly or substantively financed by the Government. Therefore, the assessee was required to get approval u/s. 10(23C)(vi) or to get registered u/s.12AA of the Act from the competent authority. The assessee has not done the same. Therefore, an amount of Rs.17,07,726/- has escaped assessment. The ld.Counsel contended that the AO has already made enquiry on the allowability or exemption u/s. u/s.10(23C)(iiiab), therefore, the reopening on the basis of same facts

as verified in original assessment, amounts to change of opinion only for which the assessee has placed reliance on the following case laws.

1. *CIT Vs. Kelvinator of India Ltd., 920100 228 CTR 0488, SC*
2. *CIT Vs. Usha International Limited, 92012) 253 CTR 0113 (FB), DHC*
3. *Unitech Holdings Ltd. Vs. DICT, (2016) 290 CTR 0201, DHC*
4. *Oriental Insurance Company Vs. CIT, (2016) 283 CTR 0078, DJHC*
5. *Turner Broadcasting Systems Asia Pacific Vs. DCIT,(2016) 380 ITR 0412, DHC*
6. *Ralson India Ltd. Vs. DCIT and Anr., W.P. (C) 142/1998, Delhi ITAT*

11. The ld.Counsel further submitted that the reasons recorded for reopening of assessment u/s.148 of the Act are nothing but based on audit note/objections raised by the Senior Audit Officer which could not be taken as ground for reopening assessment. The copy of audit objection raised by the auditor was filed which is placed at Paper Book, page 10. Therefore, it was submitted that the reopening based on audit objection is not a new information for reopening of the assessment u/s.147 of the Act as held by the Hon'ble Supreme Court in the case of CIT Vs. Lukas TVS Ltd., [2001] 249 ITR 306 (SC) wherein it was held that an audit opinion in regard to the application or interpretation of law cannot be treated as information for reopening of the assessment u/s.147 (b) of the Act. Similarly, the Hon'ble Delhi High Court in the case of CIT Vs. Simbhaoli Sugar Mills Ltd. [2011] 333 ITR 470 (Delhi) held that the assessee having made complete disclosure of particulars before the AO in the assessment proceedings u/s.143 (3), reassessment proceedings u/s.147 could not be initiated beyond the period of four years, merely on the basis of internal audit

report. Since, in the case of assessee, the particulars were already available before the AO which were examined by him, hence, the assessee had made complete disclosure of the particulars during the course of the assessment proceedings u/s.143 (3), therefore, reopening on the basis of Revenue audit objection is not permissible in law as per the ratio laid down by the Hon'ble jurisdictional Delhi High Court. Similarly, the ld.Counsel has placed reliance on the decision of Hon'ble Jurisdictional High Court in the case of CIT-8 Vs. India Iron Steel Company Ltd., [ITA No.88/2015 dated 13.02.2015] wherein placing reliance on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Simbhaoli Sugar Mills Ltd., (supra) and after applying the ratio of judgement of Hon`ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd. [2010] 320 ITR 561/187 Taxman 312 (SC) held that initiation of reassessment proceedings on the basis of audit report objection is impermissible. The ld.Counsel also supported his view by placing reliance in the case of Income Tax Officer Vs. Shri Satya Prakash Agarwal and Sons [ITA No.3792/Del/2011 dated 15.12.2013 of ITAT Delhi]. The ld. Counsel further referred paper book page No.14, which is the sanction letter for approval given by the JCIT(E) for issue of notice u/s.148 dated 31.03.2015 wherein it was mentioned "yes, I agree". Thus, the ld.Counsel contended that there is gross non-application of mind by JCIT (E), Chandigarh and that the approval has been granted

mechanically. In support of this view, the ld.Counsel has placed reliance in the case of PCIT Vs. N. C. Cables Ltd. [2013] 391 ITR 11 (Delhi) wherein it was held that the "Competent authority to authorize reassessment notice has to apply his mind and form an opinion, mere appending of expression "approved" says nothing, it has to record elaborate reasons for agreeing with the noting and at the same time satisfaction has to be recorded of the given case which can be reflected in possible manner." The ld. Counsel further relied in the case of CIT Vs. S. G. Lime and Chemicals Ltd., [CC.No.11961/2015] wherein the Hon'ble Supreme Court has dismissed the Revenue appeal and upheld the decision of Hon'ble Madhya Pradesh High Court where the sanction authority being JCIT, has only recorded approval as "yes, I am satisfied" for giving sanction for issue of notice u/s.148 which was held to be invalid. The ld.Counsel further submitted that various questions of allowability of exemption u/s.10 (23C) (iiiab) were asked during the course of original assessment proceedings and duly complied with by the assessee. Even on merit, the ld.Counsel submitted that the assessee has received gross receipt of Rs.2.23 crore whereas Government Grant was at Rs.49.32 lakhs which forms 22.03% of the total grants. The AO disallowed the exemption u/s. 10(23C) (iiiab) on the ground that assessee trust has not been substantively financed by the Government i.e. say that at least 51% of the gross receipts should be received from the

Government. However, the said percentage prescribed under the Rule 2BBB of Income Tax Rules, 1961 has been inserted vide notification no.79/2014 and came into force w. e. f. 12.10.2014 which is after the date of assessment was under consideration, therefore, the said Rule 2BBB is not applicable for the year under consideration. In view of these facts, reopening based on this reason is also not valid. The ld.Counsel has placed reliance on the following case laws in support of this contention:

> *"CIT vs. Deshiya Vidya Shala Samithi, ITA No.1133 of 2008, Karnataka HC*
> *Jat Education Society vs. ITO, ITA No.2542 & 25463/Del/201, ITAT Delhi*
> *CIT Vs. Jat Education Society, (2016) 383 ITR 0355 P & H HC-41%*
> *Director of Income Tax (Exemption) Vs. Dhamapakasha Rajakarya Prasakta, ITA No.232, 235, 237 & 251/2009, (2015) 372 ITR 0307, Karnataka HC-*
> *CIT Vs. Indian Institute of Management, ITA No.529 of 2008, Karnataka HC-*
> *ACIT Vs. Amar Shaheed Baba Ajit Singh Jujhar Singh Memorial College, ITA no.1065/chd/2011, dated 20.0.2016, ITAT Delhi*

12. *Per contra,* the ld.CIT (DR) submitted that the AO has failed to examine the case of the assessee that whether the grant received from state government were substantial and was more than 50% of the gross receipts. Therefore, the allowability of exemption u/s. 10(23C) (iiiab) was remained to be examined. Further, the assessee has not obtained registration u/s.12AA and the application made for registration u/s.12AA was rejected by the CIT, which has been affirmed by the ITAT [ITA No.363/Del/2016 dated 31.07.2019] on the ground that the by-laws of the society do not point out any charitable

activity and objection of the assessee include purchase and sale of immovable property as per societies needs. Further, the Tribunal also observed that the assessee has purchased shops from its surplus from where it is to receive the rental income. This shows that the assessee is having commercial activities. Therefore, reopening of assessment and denying the exemption is in accordance with law.

13. In rejoinder to above, the ld.Counsel submitted that the contention of the ld. D.R. that registration u/s.12AA has been rejected is of no consequence as the reopening of assessment is solely made on the ground of denial of deduction u/s. 10(23C) (iiiab) of the Act, hence this contention has no bearing on the ground of reopening of assessment.

14. We have heard the rival submissions and perused the material available on record. The perusal of original assessment order passed u/s.143(2) of the Act dated 23.11.2012 shows that the AO has duly examined and scrutinized the details submitted during the course of assessment proceedings and has applied his mind regarding exemption u/s.10(23C)(iiiab) of the Act. The AO had obtained necessary information and allowed the same by observing in para 2 of the assessment order which reads as under :

> *"2. The assessee is a public educational body constituted by the public in the year 1974-75 and is registered as a Society under the Society under*

the Societies Registration Act, 1860 vide No.64 of 1974-75 dated 12.11.1974. The assessee is running two schools at Narwana town of District Jind and is affiliated with Haryana Education Board, Bhiwani. The main object of the assessee, inter-alia include to run schools and to provide education to the general public at large. During the year, the assessee has declared Gross Receipts at Rs.2, 23, 78,964/- as per Income & Expenditure Account. The assessee was asked to substantiate its claim exemption under section 10(23C) (iiiab) of the I. T. Act, 1961. The assessee filed a written reply received on 21.11.2012, placed on record, contending, inter-alia, therein that it is an educational institution registered under Societies Registration Act, 1860 and solely exists for charitable purposes to run an educational institution. It was further stated that the institution is substantially financed by the Govt. of Haryana and complying with all the requirement as laid down under the section. Hence, income of the institution is exempt under section 10(23C) (iiiab) of IT Act, 1961. I have carefully considered the claim of the assessee. The institution solely exists for educational purposes and not for purpose of profit. The income is, thereof, exempt under section 10(23C) (iiiab) of the Act. Total income declared at NIL by the assessee is, therefore, accepted."

15. This fact of examination and disclosure of information is further supported by the reply furnished by the assessee in response to notice u/s. 142(1) dated 03.02.2012 vide letter dated 16.05.2012 [placed at paper book page no. 3 and 4] and letter dated 21.11.2012 [placed at paper book, page no. 5 to 7]. Therefore, the assessee has made compliance to the specific query raised by the AO to substantiate its claim that the assessee exists solely for educational purpose and substantively financed by the Government. Therefore, there was no new material which had come into possession of the AO

to form a belief that by reason of non-disclosure truly and fully all material facts, necessary for assessment, the income chargeable to tax has escaped assessment. The ld.Counsel has placed reliance on the decision of Hon'ble Delhi High Court in the case of CIT Vs. Usha International Ltd.[2012] 348 ITR 485 (Delhi) wherein by majority view, it was held that *"the assessment proceedings cannot be validly reopened u/s.147 of the Act, even within 4 years, if an assessee has furnished full and true particulars at the time of original assessment with reference to the income alleged to have escaped assessment, if the original assessment was made u/s.143(3). So long as the assessee has furnished full and true particulars at the time of original assessment and so long as the assessment order is framed under section 143(3) of the Act, it matters little that the assessing officer did not ask any question or query with respect to one entry or note but had raised queries and questions on other aspect. Section 114(e) of the Evidence Act can be applied to an assessment order framed under section 143(3) of the Act, provided that there has been a full and true disclosure of all material and primary facts at the time of original assessment. In such a case if the assessment is reopened in respect of matter covered by the disclosure, it would amount to change of opinion."*

16. Therefore, the fact in the instant case shows that it amounts to change of opinion, as the assessee has disclosed full and true particulars at the time of original assessment made under section 143 (3) of the Act. This view is further supported, by the decision of Hon'ble Supreme Court decision as relied by the ld.Counsel in the case of CIT Vs. Kelvinator India Ltd., [2010] 320 ITR 561 (SC) wherein it was held that the AO has power to reopen the assessment u/s.147 provided AO has reason to believe that income has escaped assessment and there is tangible material to come in to the possession of the AO, that there is escapement of income, mere "change of opinion" cannot per-se be reason to reopen the assessment. In the present case, there is no new tangible material, which had come into the possession of the AO, therefore, reopening on the same material amounts to mere change of opinion, which is not permissible under the law. Similarly, the ld.Counsel has placed reliance in the case of Oriental Insurance Company Vs. CIT [2015] 378 ITR 421 (Delhi) wherein it was held that it cannot be disputed that the exemption claimed by the AO in respect of the profit on sale /redemption of investment was duly disclosed and the AO has also opined on the merits of taxability of profits of sale / redemption of investment. The income from profit on sale/redemption of investments is now sought to be taxed as income, which had escaped assessment. Thus, in our view, clearly represents a change in the

opinion with regard to the taxability of the income in question. It was well settled that the power under Section 147 of the Act is not a power of review but a power to reassess. Permitting reopening of assessment on a change of opinion as to the taxability of the income of the Assessee is, thus, outside the scope of Section 147.

17. We further find that the reopening has been done in the present case on the basis of Revenue Audit Objection which does not constitute an information for the purpose of reopening of assessment as held by the Hon'ble Supreme Court in the case of CIT Vs. Lukas TVS Ltd., (supra), CIT Vs. Kelvinator India (supra) and Hon'ble Delhi High Court in the case of CIT Vs. M/s. India Iron and Steel Ltd., and M/s. Xerox Modi Corp. Ltd., Vs. DCIT (2013) 350 ITR 300 (Del).

18. We Further observed that before introduction of Rule 2BBB with effect from 12.10.2014, where the person having voting power not less than 20% was deemed to have substantive interest in the business of the company as per section 40(2)(a) of the Act as held by the Hon'ble Karnataka High Court in the case of CIT Vs. Deshiya Vidya Salal Samiti [ITA No.1133/2008 [PB-114-121]. Therefore, Rule 2BBB introduced with effect from 12.10.2014 is not applicable for the year under consideration. In view of these facts and circumstances, the reopening in the instant case amounts to change of opinion and

it is based on audit objection and as no new tangible material has been brought on record. Therefore, we hold that the reopening of assessment was not valid; accordingly, the same is quashed. In view of this, Ground No.1 to 6 & 8 of assessee's appeal are allowed.

19. Ground No.7 relating to making addition of Rs.17,07,730/- by disallowing claim u/s.(23C)(iiiab) of the Act.

20. Since, we have quashed the reopening of assessment of assessment itself, therefore this ground becomes an academic in nature and infructuous and hence not being adjudicated, accordingly this is dismissed as infructuous.

21. Similarly, Ground No. 8 related to interest u/s. 234B is consequential in nature.

22. In the result, appeal of the assessee is allowed.

23. Order pronounced in the open court on 18-11-2019.

Sd/-	**Sd/-**
(AMIT SHUKLA)	**(O.P.MEENA)**
(न्यायिक सदस्यतथा/JUDICIAL MEMBER)	**(लेखा सदस्यकेसमक्ष /ACCOUNTANT MEMBER)**

नई दिल्ली /New Delhi, दिनांक **Dated:** 18th November, 2019/*S.Gangadhara Rao, Sr.PS*

Copy of order sent to- Assessee/AO/Pr. CIT/ CIT (A)/ ITAT (DR)/Guard file of ITAT.

By order

/ / **TRUE COPY** / /

Assistant Registrar, New Delhi