

AM
1287 SM
IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : G : NEW DELHI

BEFORE SHRI A.D. JAIN, JUDICIAL MEMBER
AND
SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER

ITA Nos.5706 & 5707/Del/2012
Assessment Years : NA

Shri Gian Ganga Vocational & Vs. CIT,
Educational Society, Rohtak.
Gyan Ganga Montessory &
Model School,
New Nandwani Nagar,
Sonapat.

PAN : AACAS6025J

(Appellant)

(Respondent)

Assessee by : Shri Ved Jain, Advocate
Revenue by : Shri G.S. Virk, Sr. DR

ORDER

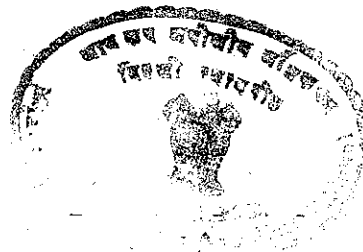
PER A.D. JAIN, JUDICIAL MEMBER

ITA No.5706/Del/2012

This appeal has been filed by the assessee against the order dated 17.10.2012 passed by the Id. CIT, Rohtak, u/s 12AA(1)(b)(ii) of the Income Tax Act, rejecting the application filed by the assessee for registration. The assessee has taken the following effective grounds of appeal:-

- "1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax (CIT) is bad both in the eye of law and on facts.
2. On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in rejecting the application of

9



the assessee for grant of registration under Section 12A of the Income Tax Act, 1961.

3. On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in rejecting the application of the assessee for registration under Section 12A despite the same being complete and was in compliance to the provisions of the Act.

4. On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in holding the aims and objects of the society not being charitable in nature.

5. On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in rejecting the registration under section 12A of the Act by making reference to the provisions of RTE Act.

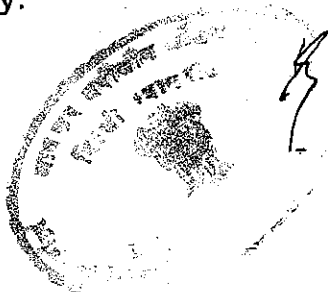
6. On the facts and circumstances of the case, the learned CIT has erred both on facts and in law in holding the activities conducted by the assessee as not being genuine, despite the assessee bringing all the material and evidence on record to prove the same."

2. The facts are that the assessee Society filed an application u/s 12AA (1)(b)(ii) of the Act in Form No.10A before the Id. CIT. As per the order under appeal, the assessee was required to submit the original instrument of its establishment along with a copy thereof. However, the assessee submitted only a photo copy of its amended constitution dated 01.05.2012 and did not file the original copy of instrument of its establishment.

3. The Id. CIT rejected the application, observing as follows:-

"4. The definition of 'Charitable Purpose' as given in the Income Tax Act, 1961 is reproduced below:-

"Charitable purpose includes relief of the poor, education, medical relief, [preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places of objects of artistic or historic interest,] and the advancement of any other object of general public utility:



Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity:]

The applicant's reply does not satisfy the very essence of charity which is necessary for earning the status of being charitable as is required in view of section 2(15) read with section 12AA of the Income Tax Act, 1961. The provisions of sec 11 and 12 do not envisage that a charitable institution shall provide charity by charging hefty and indiscriminate amount of fees from public at large. The fees received are outside the scope of sec 11 and 12 and shall, therefore, be taxable. Fees imply direct involvement of consideration for the services rendered. Fees can not be voluntary and are, therefore, taxable under the head profit and gains of the business or profession. In fact, the fact is that the educational institutions run by the society in question charge whopping fees

5. The aims and objects of the society itself may not expressly make profit making the object of the institution; but the absence of such a condition from instrument/deed could not determine its true character. That character is determined far more certainly and convincingly by the absence of the term which could eliminate or prevent profit making from becoming the real or dominant purpose of the institution. The copy of the revised constitution of the society does not contain any clause which could eliminate profit making from becoming the real or dominant purpose of the society while imparting education. The society/educational institution is making systematic profit year to year as under and diverting its profit towards corpus/capital to enhance its earning capacity through the acquisition of buildings & other fixed assets.

Thus, the society is running its institutions on purely commercial lines and earning profits/ surpluses systematically year after year by charging substantial fees from the students and making huge profits.

The Hon'ble Utrakhand High Court in the case of CIT Vs National Institute of Aeronautical Engineering & Educational Society reported in (2009) 226CTR/82 has held that mere imparting education for primary purpose of earning profits can not be said to be a charitable activity. Charity is the soul of expression "Charitable purpose". Mere trade or commerce in the name of education can not be said to be a charitable purpose.

9



6 In order to examine the case in the light of the fact that having some positive attempt to provide benefit of charitable activity (education), at least in part, to the poor, it was noted that Govt. of India has passed an Act, namely, the Right of Children to Free and Compulsory Education Act, 2009 (popularly known as RTE Act) which has come into force w.e.f. 01.04.2010. By way of Section 12(1), this Act mandates that aided schools as well as non-aided schools would provide free education to at least 25% students (in case of non-aided school these students are to be from weaker sections and disadvantaged group). The aided and non-aided schools are defined as per Section 2(n)(iii) and 2(n)(iv) of this act, respectively which are reproduced as under:

Aided School, "A school receiving aid or grants to meet whole or parts of its expenses from the appropriate Govt. or the local authority." Non-Aided School, "An unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority."

7 Since the society has applied for registration u/s 12AA, and is seeking tax exemption u/s 10(23C) which may indirectly aiding the society for running its school. Therefore, this case should be covered u/s 2(n)(ii) i.e. aided school. In any case, there is no argument against treating it as case of non-aided private school covered u/s 2(n)(iv). Now, by way of its judgment on 12.04.2012, in the case of Un-aided private schools of Rajasthan Vs. UOI & others (writ petition (C) No. 95 of 2010), Hon'ble Supreme Court upheld constitutional validity of the section 12(1) of the Right of Children to Free and Compulsory Education Act, 2009. Hence, since 01.04.2010, the school run by the assessee society is under obligation to provide free education to at least 25% of students (being from weaker section/disadvantaged group).

8 The assessee was asked the details of fee concession to poor and needy students during the financial years 2010-11 and 2011-12. However, assessee did not file such details, rather the assessee simply provide classwise amount of concession in fee during F.Yrs. 2010-11 and 2011-12. As the applicant has not furnished any details like name & financial status of the family of the students to whom fee concession was given, it can not be verified whether those students were is in the category of EWS (Economically Weaker Section) as per Right of Children to Free & Compulsory Education Act, 2009. Since, as per RTE Act, the state government is to fix norm for EWS qualification and as per notification of government of Haryana, children of parents who are Below Poverty Line (BPL) card holder are qualified under EWS category. As no evidence was produced regarding financial status of families of those students to whom fee concession was

given, it can not be verifiable whether these students falls under EWS category as per the criteria or not.

The fee concession to students is claimed at Rs.1,69,020/- & Rs. 2,33,380/- in financial years 2010-11 & 2011-12 respectively. The names of the students who have been granted fee concession is not furnished. However, total fee forgone in this account is claimed at Rs.1,69,020/- & Rs. 2,33,380/- in financial years 2010-11 & 2011-12 respectively. In absence of details of names, class etc. the same cannot be verified. In any case, amount of concession (Rs.1,69,020/- & Rs. 2,33,380/-) against total fee collection of Rs.29,39,670/- & Rs.71,58,820/- in financial years 2010-11 & 2011-12 is merely 5.75% & 3.26% of total receipts of respective years implied there by that number of students who are allowed fee concession is very much less than 25% as envisaged under RTE Act, 2009.

Keeping in view the aforesaid facts and circumstances, the rationale of the judgment of Hon'ble Utrakhand High Court in the case of CIT Vs National Institute of Aeronautical Engineering & Educational Society and observation of the Apex Court in the case of the Un-aided private schools of Rajasthan Vs. UOI & others (writ petition (C) No. 95 of 2010)(ibid) are applicable here.

Consequently, neither aims/objects and terms of memorandum are of the charitable nature, nor are there activities which may be put to a test of genuineness. With the result, the request of the applicant trust for registration u/s 12AA of the Income Tax Act cannot be acceded to and the application in form 10A is, therefore, rejected accordingly u/s 12AA(I)(b)(ii) of the Income Tax Act, 1961."

4. Aggrieved, the assessee has preferred this appeal.
5. Before us, the Id. counsel for the assessee has contended that the Id. CIT has erred in rejecting the application filed by the assessee by making the observations as contained in the order under appeal; that the Id. CIT has wrongly observed that the assessee Society does not satisfy the essence of charity; that the Id. CIT has erred in making reference to the provisions of Sections 11 and 12 of the Act; that the Id. CIT has failed to consider that the aims and objectives and activities of the assessee Society are entirely inline with the requirements of Section 2 (15) of the Act; that the order under appeal does not contain



any objection of the Id. CIT on the assessee's objects; that Condition (4) of the conditions as contained in the amended constitution of the assessee Society (copy at pages 7-20 of the assessee's paper book 'APB for short') stipulates that if upon the winding up or dissolution of the Society there remains any property, after satisfaction of all its debts and liabilities, the same shall not be paid to or distributed among the members of the Society, but shall be given or transferred to any other society having similar aims and objects as those of the assessee Society, to be determined by the Members of the Society at or before the time of dissolution; that as per Item 5 of the Sources of Income and Utilization of Funds, as contained in the said amended constitution (APB-17), the income and property of the Society shall be applied purely towards the promotion of the Society till its dissolution and no portion thereof shall be paid or transferred to the members of the Society till such dissolution; that apropos the observation of the Id. CIT regarding exorbitant fee being charged by the assessee Society, the expenditure of the assessee is about 95%, as available from the balance sheet of the assessee Society (APB 22-25), whereas Section 11 of the Act permits 85% expenditure; that so far as regards the observation of the Id. CIT that the amended constitution of the assessee Society does not contain any clause regarding elimination of profit making becoming the real or dominant purpose of the assessee Society, in 'Dera Baba Jodh Sachiar vs. Union of India & Anr.' 328 ITR 178 (P&H), it has been held that if the surplus is applied for the objects of the Society for charitable purposes, registration ought not to be refused; that the Id. CIT had no jurisdiction to make the observations regarding aided/unaided schools; that there is no requirement u/s 12AA of the Act; that the role of the Id. CIT while considering an application for grant of registration is to see whether the objects of the applicant are charitable and whether its activities are genuine; that in CBDT Circular No.11 of 2008 dated 19.12.2008 (copy placed on



record), it has been made clear (para 2.1) that the proviso to Section 2 (15) of the Act will not apply in respect of inter alia education and, consequently, where the purpose of a Trust or Society is education, it will constitute 'charitable purpose', even if it incidentally involves the carrying on of commercial activities; and that though the assessee remained unable to produce the original document of its establishment before the Id. CIT (the same has been now produced before us), the CIT may now verify the same and grant registration to the assessee. The Id. counsel for the assessee has sought to place reliance on the following case laws:-

- i) 'Shri Sain Ji Dharmarth Trust Vs. Commissioner of Income Tax', (2006) 8 SOT 446 (Del);
- ii) 'St. Don Bosco Educational Society vs. Commissioner of Income Tax', (2004) 90 ITD 477 (Lucknow);
- iii) 'CIT vs. Surya Educational & Charitable Trust', (2011) 203 Taxman 53 (P&H);
- iv) 'Baba Gandha Singh Education Trust vs. CIT', (2011) 138 TTJ (Chd) (UO) 1;
- v) 'Reliable Educational Alliance Society vs. CIT', (2009) 31 DTR 239 (Del); and
- vi) 'Dream Land Educational Trust vs. CIT', (2007) 109 TTJ (Asr) 850.

6. The Id. DR, on the other hand, has strongly supported the impugned order. It has been contended that though the Id. CIT specifically asked for the original document of the assessee Society, it was not produced and only its amended Constitution and Memorandum and Byelaws were produced; that the Id. CIT has rightly

3

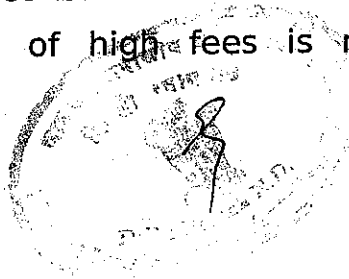


placed reliance on the Right of Children to Free and Compulsory Education Act, 2009 ('RTE Act', for short); that the assessee Society having not complied with the requirement of the RTE Act, it is against the public policy and the Id. CIT cannot be said to have erred in rejecting the application filed by the assessee.

7. We have heard the parties and have perused the material on record. We find that the Id. CIT has not raised any objection against the objects of the assessee Society. The main object of the Assessee Society is education, which, undeniably, is of charitable nature, in line with the provisions of Section 2 (15) of the Act. Further, the Id. CIT has taken recourse to the RTE Act to reject the assessee's application. Now, as correctly contended, it is not within the CIT's purview to do so. Under Section 12AA, what is required to be seen by the Id. CIT while considering an application for grant of registration, is as to whether the object of the applicant is charitable and as to whether its activities are genuine any further. The jurisdiction and competence to examine an issue under the RTE Act obviously lies with the authorities mentioned therein. Then, the CBDT Circular No.11 of 2008 (supra) clearly states, inter alia, that the proviso to Section 2 (15) does not apply in the case of education and where the purpose of a Trust or institution is education, it will constitute 'charitable purpose' *even if it incidentally involves in carrying on of commercial activities.*

8. In 'Shri Sain Ji Dharmarth Trust' (supra), it has been held, at the stage of granting or refusing registration, CIT is not required to examine as to what amount should form corpus of trust, in what manner accounts were maintained and what should appear in balance sheet.

9. In 'St. Don Bosco Educational Society' (supra), it has been held that mere charging of high fees is not no ground of refusing



45
registration, where the CIT has not doubted the objects and genuineness of the assessee's activities.

10. In 'Surya Educational & Charitable Trust' (supra) rendered by the jurisdictional High Court so far as regards the present assessee, it has been held that u/s 12AA of the Act, the CIT is only to examine the genuineness of the objects of the Trust and not the application of income for charitable purpose, which can be examined at the stage when the Trust files its return.

11. In 'Baba Gandha Singh Education Trust (supra), it has been held that merely because the assessee has generated surplus income after meeting expenditure on its educational activities, such activity cannot be regarded as 'education, trade and commerce in the name of education' so as to invite cancellation of registration; and that education is a charitable purpose in itself. While rendering this decision, the Id. Chandigarh Bench of the Tribunal took into consideration 'Aeronautical Engineering and Educational Society', 26 DTR (UK) 193 (relied on by the Id. CIT), wherein, it was held that mere imparting education for primary purpose of earning profits cannot be said to be a charitable activity. The Chandigarh Bench of the Tribunal held, following 'Pinegrove Internationala Charitable trust & Others vs. UOI & Ors.', 230 CTR (P&H) 477 (rendered by the Hon'ble jurisdictional High Court so far as regards the present assessee also), that merely because an institution has earned profits, it would not be a deciding factor to conclude that such an educational institution exists for profit and that merely because profits have resulted from the activity of imparting education, it would not result in change of character of the institution that exists solely for educational purposes.

12. In 'Reliable Educational Alliance Society' (supra) (authored by one of us - the JM), it has been held that at the time of granting



registration, the CIT is required only to satisfy himself about the objects of the Trust and the genuineness of its activities, and no further.

13. In 'Dream Land Educational Trust ' (supra) (authored by one of us – the JM), it has been held, again, in accordance with the Section 12dAA of the Act, the CIT is required to satisfy himself only about the objects of the Trust and the genuineness of its activities and where the CIT has recorded no dissatisfaction on either of these aspects, he is not justified in refusing grant of registration on extraneous considerations.

14. No decision to the contrary has been brought to our notice on behalf of the department.

15. In view of the above, the order passed by the Id. CIT is hereby cancelled. We direct the Id. CIT to grant registration to the Society on verifying the original document of establishment of the assessee Trust, which has been shown to us.

16. As such, the appeal filed by the assessee is allowed.

ITA No.5707/Del/2012

17. This appeal by the assessee has been filed against the order dated 17.10.2012 passed by the Id. CIT, Rohtak u/s 80 (G) of the Income Tax Act, rejecting the assessee's application for approval u/s 80(G) of the Act. The assessee has taken the following grounds of appeal:-

"1. On the facts and circumstances of the case, the order passed by the learned Commissioner of Income Tax rejecting the application for approval under Section 80G of the Income-tax Act is bad both in the eye of law and on facts.



2. On the facts and circumstances of the case, the learned Commissioner of Income Tax has rejected the application for approval under Section 80 G of the Act in an arbitrary manner, ignoring the explanation and evidences brought on record by the appellant.

3. That the order passed by the learned Commissioner of Income Tax rejecting the approval under Section 80G of the Act is bad despite the fact that the assessee is a society engaged in the charitable activities."

18. The Id. CIT rejected the application of the assessee Society for grant of exemption u/s 80G of the Act for the reason that the assessee is not registered u/s 12AA of the Act.

19. Since in the preceding portion of this order, we have allowed the assessee's appeal against rejection of its application for registration u/s 12AA of the Act, the matter of grant of exemption u/s 80(G) of the Act becomes consequential. Accordingly, the order passed u/s 80(G) of the Act is also cancelled and the appeal of the assessee is allowed.

20. In the result, this appeal of the assessee is also allowed.

21. To sum up, both the appeals of the assessee are allowed.

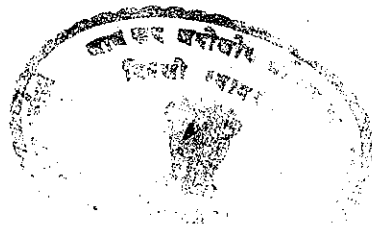
The order pronounced in the open court on 18.01.2013.

Sd/-
[SHAMIM YAHYA]
ACCOUNTANT MEMBER

Sd/-
[A.D. JAIN] &
JUDICIAL MEMBER

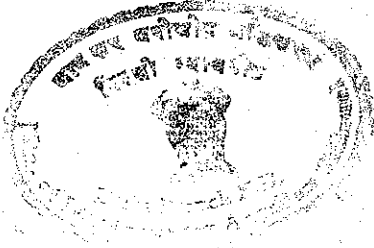
Dated, 18.1.2013.

dk



Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT



By Order,

Deputy Registrar,
ITAT, Delhi Benches

सहायक पंजीकार,

Assistant Registrar,

आयकर अपीलार्थी अधिकरण

Income-tax Appellate Tribunal

दिल्ली पीठ, नई दिल्ली

Delhi Benches, New Delhi.