

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Case No. : I. T. A. No. 198 of 2011

Reserved On : September 01, 2016

Pronounced On : September 16, 2016

Commissioner of Income Tax, Faridabad Appellant

vs.

IILM Foundation Academy, Gurgaon Respondent

CORAM : HON'BLE MR. JUSTICE S. J. VAZIFDAR, CHIEF JUSTICE.

HON'BLE MR. JUSTICE DEEPAK SIBAL.

* * *

Present : Mr. Denesh Goyal, Advocate
for the appellant.

Mr. Rohit Jain, Advocate
for the respondent.

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DEEPAK SIBAL, J. :

Under Section 260-A of the Income Tax Act, 1961 (for short – the Act), the present appeal has been filed at the instance of the Revenue to challenge therein the order passed by the Income Tax Appellate Tribunal, Delhi Bench “C”, New Delhi (for short – the Tribunal), through which, the Tribunal, while setting aside the order of the Commissioner of Income Tax, Faridabad (for short – the Commissioner), has held the assessee eligible for registration under Section 12-AA as also for exemption under Section 80-G of the Act.

The appeal was admitted on the following substantial question

“Whether the Ld. ITAT was right in holding that since it has been held that the assessee is eligible for registration u/s 12AA of the Income Tax Act, 1961 whereas the CIT in his order u/s 12AA dated 21.12.2009 of the Income Tax Act, 1961 has given a detailed finding that the nature of the income derived or derivable would not be exempt u/s 11 & 12 of the Income Tax Act, 1961 ?”

After traversing the record, the relevant facts which have emerged, are that the assessee, which is a Company incorporated under Section 25 of the Companies Act, 1956 (for short – the Companies Act), to become eligible for the grant of exemption under Section 11 of the Act, made an application under Section 12-A(1)(a) of the Act for registration, which was rejected by the Commissioner as he was of the view that the ancillary objects of the respondent (hereinafter referred to as – the Company) empowered its members to invest and utilize its funds in the manner they wanted to. He also found ample scope with the members to utilize the funds of the Company in pursuance to its ancillary objects, which, according to him, were alien to its main object of imparting education. The Commissioner was further of the opinion that the ancillary objects permitted the Company to carry on activities in the nature of trade, commerce or business. Such powers with its members through the Company's ancillary objects were found by the Commissioner to be repugnant to the Company's main object of imparting education. The

Commissioner was also of the view that the ancillary objects would be pursued by its members independent of its main objects, as also against the provisions of the license granted under Section 25 of the Companies Act. In view of the aforesaid reasons, holding that the Company was not perfectly constituted to advance charitable activities, the Commissioner refused to register the Company under Section 12AA of the Act.

The order of the Commissioner was taken up in appeal by the Company before the Tribunal. The Tribunal applied the pre-dominant test and by holding that the main objects of the Company were to impart education to be carried on a non-commercial basis and that all its ancillary objects were incidental to the attainment of the main objects, over-ruled the view taken by the Commissioner. The Tribunal further placed reliance upon the license granted by the Government of India to the Company under Section 25 of the Companies Act to hold that the sole object of the Company was to impart education on a non-commercial basis. Drawing a distinction between primary and enabling objects, the Tribunal held the Company eligible for grant of registration under Section 12AA of the Act and as a consequence thereof, for exemption under Section 80-G of the Act.

It is in the above background that the Revenue has preferred the present appeal raising therein the afore-quoted substantial question of law.

Clause III of the 'Memorandum of Association' (hereinafter referred to as – the Memorandum) of the Company, which contains its objects, reads as under :-

“A. THE MAIN OBJECTS TO BE PURSUED BY THE COMPANY ON ITS INCORPORATION ARE :

- 1. To Promote Education in the field of Art, Commerce, Science by establishing, running institutes including primary, secondary, senior, graduate, postgraduate, technical, vocational, training and management levels schools, colleges, institutes.*
- 2. No object of the company will be carried out without obtaining prior approval/No Objection Certificate from the concerned authority wherever required.*
- 3. None of the objects of the company will be carried out on commercial basis.*

B. THE OBJECTS INCIDENTAL OR ANCILLARY TO THE ATTAINMENT OF THE ABOVE MAIN OBJECTS ARE :

- 1. To enter into any arrangement or agreement or contract with any person association firm or corporation whether in India or outside, for professional, technicians, or for such other purpose that may seem beneficial and conducive to the objects of the company.*
- 2. To organize fairs, seminars and conferences, sports festivals and other events which are required to be carried on for the purpose of proper execution of the main objects of the company.*

3. *To provide reading, writing material and newspapers rooms and library.*

4. *To promote the study practice and knowledge or music, art, science, commerce, literature and others to give or to arrange, concerts, musical, entertainment, programmes, shows displays, invite lecturers, writers, speakers, poets, composers, philosophers, preachers and to purchase copyrights, books, pamphlets, articles, magazines and to give prizes and awards for the implementation of the main objects.*

5. *To spread and promote education and learning in all its branches, to establish and support schools, colleges and other educational institutions or other education centers, study centers and research centers to carry on systematic research and encourage and get together competent scholars, teachers, lecturers or pundits for holding classes, seminars and lectures in all fields of education and author books and other publications and to issue books, journals, periodicals or other modern complications such as software and undertake generating the systematic study and teachings of all subjects for the implementation of the main objects.*

6. *To accumulate capital by means of monthly subscriptions or otherwise from members and also by borrowing money from members or any other persons on such security*

and on such terms as the company may from time to time arrange and accept and to accept donations, contributions, grants, either in cash or in kind from any persons, companies, corporations, institutions on such terms and for such objects which are in conformity with the objects of the company.

7. To establish and run hostels, dormitory, guest house and to provide any other kind of lodging/accommodation facility for the students, faculty and other staff, and to run cafeteria, mess, canteen or any other facility of similar nature.

8. To purchase, acquire, take on lease or mortgage, land and immovable properties and to construct, rejuvenate, rehabilitate and develop immovable property consistent with the object and to purchase, acquire, take on lease, any movable property including furniture, fixtures, books, conveyances, equipment, appliances, instruments, vehicles.

9. To invest the surplus funds and/or retain the investment and properties received as donations either in the shape of shares or securities or other form of movable or immovable properties and to permit the same to remain in the actual state of investments thereof so long as the Company may think fit and at any time or times to sell, call in or convert into money the aforesaid investments or any of them or any part thereof and with a power to change

or vary any investments for the time being forming part of the assets.

10. *To appoint committees, advisory boards, governing body for any institution, established, run and maintained by the Company.*

11. *To employ and discharge staff for the purposes of Company.*

12. *To borrow or raise moneys on the security of the Assets of the Company which may be needed in times of emergency and to pay the same.*

13. *To provide guarantee and security in respect of loans and advances availed by the company, its directors or any other company or persons and also create the charge by way of pledge/hypothecation/mortgage/assignment on any moveable/immovable properties/assets of the company.*

14. *To indemnify the employees and officers of the Company against proceedings losses, costs, damages, claims and demands under Law or Equity or otherwise in respect of accidents, injury, death, whether as workman, clerk, officer, technician and to appoint advisers, experts, agents or insurers to investigate the circumstances of accident, injury or damage and take steps to prevent the same and to oppose, resist, compromise or satisfy fully or in party such claims and demands.*

15. *To acquire real or personal property, both movable and immovable including shares, securities, debentures by way of investment or with a view to resale or otherwise and in particular in freehold leaseholds, mortgages, shares securities, debentures and other inevitable sources for attainment of main objects of the Company.*

16. *To provide education in academic, vocational and competitive examinations and to award scholarship, prizes in such form and manner as may be decided by the company.*

17. *To provide living accommodation or housing/developing units for workman and other and in connection therewith to provide such facilities and conveniences for washing, bathing, cooking, and writing purposes and sale of provision and stores and for the safe custody of personal belongings.*

18. *To sell, let, develop, dispose off or otherwise deal with the undertaking or any party of the property of the company.*

19. *To enter any arrangements with any Governmental Authority, Supreme, Municipal, Local or otherwise and to obtain from any such Government or Authority rights concessions and privileges that may seem conducive to the Company's objects or any of them.*

20. *To establish, maintain and procure contributory funds for the benefit of persons who are or were at any time in the employment*

or the services of the Company and who are or were at any time whole-time stipendiary directors, technicians, officers, employees, workmen of the company, wives, widows. Families, and dependents of such persons and to subscribe to any institution, association or club the funds collected for the benefit of or to advance the interest and well being of the members of the Company.

21. *To pay the costs, charges and expenses preliminary or incidental to the formation establishment and registration of the company, and all expenses which the company may lawfully pay, having regards to the provisions of the Companies Act, 1956, for or Incidental to the raising of money for the Company.*

22. *To sell or dispose of the undertaking of the company or any part thereof for such consideration as the Company may think fit and in particular for shares, debentures or securities or any other association or company having objects altogether or in part similar to those of the Company.*

23. *To enter into contracts necessary or desirable for the conduct of the Company's affairs, including contracts of indemnity or guarantee of any kind whatsoever with in India or outside India.*

24. *To open accounts with any banks/financial institutions and to draw, make,*

accept, discount, execute or issue Bills of Exchange, promissory notes, bills of lading, warrants, debentures and other negotiable instruments or securities.

25. To frame schemes, rules and regulations for attaining any of the objects of the company and bye-laws for conducting the affairs of the Company from time to time.

26. To engage the services of lawyers, bankers, architects, brokers or any other experts, technical or otherwise on such terms and conditions as may be determined.

27. To insure and keep insures the Company's property movable and immovable, as may be determined against any risk whatsoever.

28. The doing of all such other lawful things as are incidental or conducive to the attainment of the above objects.

Provided that the Company shall not support with its funds or Endeavour to impose on, or procure to be observed by its members or others, any regulations or restrictions which, as an object of the company would make it a Trade Union.

**C. THE OTHER OBJECTS ARE :
NIL.”**

Section 11 of the Act exempts from the payment of tax any income derived by a Trust set up wholly for charitable or religious purposes but for the grant of such exemptions, a Trust is required to be registered

under Section 12-A. The procedure for registration is prescribed under Section 12-AA of the Act. “Charitable Purpose” is defined under Section 2 (15) of the Act, the relevant portion of which reads as under :-

“2(15) “Charitable purpose” includes relief of the poor education, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest, and the advancement of any other object of general public utility.”

From a perusal of the above quoted definition, it is abundantly clear that imparting of education is charity. At the stage of registration under Section 12-A read with Section 12-AA of the Act, what is required to be examined by the Principal Commissioner or the Commissioner (as the case may be) is whether at the time of making the application and consideration thereof, the applicant fulfills the conditions prescribed under Section 12-A and that its main objects are charitable or religious in nature. At that stage, to consider the objects, which are merely incidental or ancillary to the attainment of the main objects, some of which in itself may not be charitable, as distinct and independent objects would taint such consideration. We have used the words ‘at that stage’ with a purpose because after the grant of registration, the Principal Commissioner or the Commissioner (as the case may be) should monitor the activities of the exemptee and if as a result thereof, it is found that the activities of the exemptee are non-charitable, then by taking recourse to the provisions of

Section 12-AA (3) of the Act, such registration should be withdrawn.

In Additional Commissioner of Income Tax, Gujarat vs. Surat Art Silk Cloth Manufacturers Association – 1980 (121) Income Tax Reports 1, the Apex Court opined as under :-

“The law is well-settled that if there are several objects of a trust or institution, some of which are charitable and some non-charitable and the trustees or the managers in their discretion are to apply the income or property to any of those objects, the trust or institution would not be liable to be regarded as charitable and no part of its income would be exempt from tax. In other words, where the main or primary objects are distributive, each and every one of the objects must be charitable in order that the trust or institution might be upheld as a valid charity: vide Mohd. Ibrahim Vs. CIT (1930) 57 IA 260 and East India Industries (Madras) P. Ltd. Vs. CIR (1967) 65 ITR 611 (SC). But if the primary or dominant purpose of a trust or institution is charitable, another object which by itself may not be charitable but which is merely ancillary or incidental to the primary or dominant purpose would not prevent the trust or institution from being a valid charity: vide CIT Vs. Andhra Chamber of Commerce (1965) 55 ITR 722 (SC). The test which has, therefore, to be applied is whether the object which is said to be non-charitable is a main or primary object of the trust or institution or it is ancillary or incidental to the

dominant or primary object which is charitable.”

Thus, the Apex Court was clearly of the opinion that if the dominant purpose of an institution or Trust is charitable, then other objects, which may not be by itself charitable, but which are merely ancillary or incidental to the main object, would not make the institution or Trust non-charitable.

In **Digember Jain Society for Child Welfare vs. Director General of Income-tax (Exemptions) – 2009 (185) Taxman 255**, a Division Bench of the Delhi High Court, while considering the claim of the petitioner therein, which filed the petition as a Charitable Society, to claim exemption under Section 10 (23C) (vi) of the Act, which had been denied by the Revenue, while following the judgment of the Apex Court in **American Hotel & Lodging Association Educational Institute vs. CBDT – (2008) 301 ITR 86**, held that when an application for exemption is moved by any Trust etc., the conditions prevalent at the time of making of such application and passing of order on the same, are to be considered. If at that time, all mandatory conditions so prescribed are fulfilled by the applicant, the exemption should be granted, but while granting the same, the Authority can make the grant of exemption subject to conditions, as deemed fit, but within the framework of law. Further, the Authority would continue to monitor the activities of the exemptee institution and if it is found at a later stage that such activities are not genuine or in violation of the prescribed mandatory conditions, it is up to the Monitoring Authority to

withdraw the exemption by following the procedure prescribed by law, by holding as under :-

“11. It follows from the aforesaid judgment that when an application for exemption is to be moved by any trust, fund, university or other educational institution, the threshold conditions which are to be examined at that stage are actually existence of an educational institution and approval of the prescribed authority, for which every applicant has to move an application in the standardized form in terms of first proviso. Insofar as newly added third proviso is concerned, which relates to the application of funds, namely to see whether such institution etc. has not invested/deposited its funds, in accordance with the conditions subject to which the approval is granted, would be a matter that would arise for consideration at a later stage as the third proviso contains mandatory conditions/requirements. It is only in the event that such conditions are not fulfilled, after the grant of exemption, the prescribed authority is empowered to withdraw the approval earlier granted after complying with the procedure mentioned therein.

12. In order to bind the institutions etc., to properly implement the rigours contained in the third proviso, the Supreme Court provided the solution also in the aforesaid judgment, which is this: on fulfilling the threshold conditions, approval could be granted with the stipulation

that conditions mentioned in the third proviso would be carried by the applicant. The Supreme Court also was of the view that while imposing such stipulation, subject to the approval as granted, the prescribed authority may insist on certain percentage or accounting income to be utilized/applied for imparting education in India, as it was a case of a foreign educational institutions.

We are in respectful agreement with the afore-quoted observations.

Learned counsel for the appellant relied upon a judgment of the Apex Court in **Yogiraj Charity Trust vs. Commissioner of Income-Tax, New Delhi – (1976) 103 ITR 777** to submit that where there were several objects of the Trust, some of which charitable and some not, then in such cases, the Trust was not entitled for exemption. In that case, however, clauses 11 and 16 of the deed gave an uncontrolled discretion to the trusts to spend the whole of the trust fund on any of the non-charitable objects of the trust. The non-charitable objects authorized the management to open and maintain commercial institutions where work at living wages could be provided to the poor and to contribute to commercial, technical or industrial concerns, institutions, associations or bodies imparting any type of training or providing employment to persons. The revenue contended that these clauses were non-charitable. What it is equally important to note is that according to the revenue itself in that case the clauses were neither ancillary

nor secondary to the primary and dominant purpose of the trust. Nor could it be said that the clauses sub served the main object of the purpose. It was found that some of the objects of the trust were non-charitable. The question was whether the exemption could be granted where some objects are charitable and some non-charitable. It was held that where some objects are charitable and some non-charitable, the whole trust fails and no part of income is exempt from tax. The test laid down by the Supreme Court was that if one of the objects of the trust deed is not of a religious or charitable nature and the trust deed confers full discretion on the trustees to spend the trust funds for an object other than of a religious or charitable nature, the exemption under section 4(3)(i) of the 1922 Act was not available to the assessee. The case is clearly distinguishable for there was a finding that the clauses there gave the trust an uncontrolled discretion to spend the whole of the trust funds on any non-charitable objects of the trust. Further the said clauses were neither ancillary nor secondary to the primary and dominant purpose of the trust. In the case before us the clauses objected to are expressly contained in Part-B which as the heading itself enumerates are ancillary and incidental objects. Further Mr. Rohit Jain's statements as recorded above are accepted. Further, still leaving scope for grievance we have left it to the department to impose any terms and conditions in accordance with law as a condition precedent to the grant of certificate.

A closer scrutiny of the judgment shows that the same does not further the case of the appellant as it has been held therein that the benefit of

exemption can be granted in cases where the primary objects of the Trust are of a charitable nature and even if ancillary or secondary objects exist, which are not of charitable nature, it would not prevent the grant of exemption under the Act, for the reason that such ancillary or secondary objects are intended to effectuate the main and primary objects.

It was held as under :-

“The only relaxation which may arise in some cases is that all primary objects of the trust must be of a religious and charitable nature and the existence of any ancillary or secondary object which is not of a religious or charitable nature but which is intended to subserve the religious and charitable objects may not prevent the grant of an exemption. This is because such an ancillary or secondary object, even though not of a religious or charitable nature, is intended to effectuate the main and primary objects of the trust.

If the primary or dominant purpose of a trust is charitable, another object which by itself may not be charitable but which is merely ancillary or incidental to the primary or dominant purpose would not prevent the trust from being a valid charity. A clear distinction must be drawn between the object of a trust and the powers conferred upon the trustees as incidental to the carrying out of the object.”

A Division Bench judgment of the Andhra Pradesh High Court

in Aurora Educational Society vs. Chief Commissioner of Income-Tax and others – (2011) 339 Income Tax Reports 333 was also cited on behalf of the appellant. That too does not support the case of the Revenue as it was held therein that if the dominant purpose of an institution is educational, then the other objects, which are ancillary or incidental to the dominant purpose, would not disentitle the institution from exemption. Paragraphs 17 and 18 of the judgment read as under :-

“17. If the dominant purpose of an institution is “educational” another object which is merely ancillary or incidental to the dominant purpose would not disentitle the institution from the benefit.

18. The test which has, therefore, to be applied is whether the object, which is said to be non-educational, is the main object of the institution or it is ancillary or incidental to the dominant object which is “educational” (Addl. CIT Vs. Surat Art Silk Cloth manufacturers Association (1980) 121 ITR 1 (SC). The test is the genuineness of the purpose tested by the obligation created to spend the money exclusively on “education”. If that obligation is there, the income becomes entitled to exemption (Sole Trustee, Loka Shikshana Trust Vs. CIT (1975) 101 ITR 234 (SC).”

A Division Bench judgment of the Jammu and Kashmir High

Court in Ghulam Mohidin Trust vs. Commissioner of Income-Tax –

(2001) 248 Income Tax Reports 587 was also cited. In that case, the issue

of non-grant of exemption under Section 11 of the Act vis-a-vis application of Section 13(1)(a) and (b) of the Act was considered and adjudicated upon. The assessee therein was a Trust, whose objects clearly showed that it had been created exclusively for the benefit of persons belonging to the Muslim community and for that reason, by applying the provisions of Section 13(1)(b) of the Act, exemption under Section 11 was denied. Thus, that case would have no application to the facts of the case in hand.

When the afore-referred settled position of law is applied to the facts of the case in hand, we find that as per Clause III-A the Memorandum of the Company, its main objects are for imparting education on a non-commercial basis. All other objects so mentioned under Clause III-B of the Memorandum, as its heading implies, are merely incidental and ancillary to the attainment of the afore-referred main objects.

The respondent was incorporated on 18.03.2009 under section 25 of the Companies Act, 1956. The respondent was granted a licence under section 25 issued by the Regional Director dated 21.01.2009. It would be convenient at this stage to note section 25 of the Companies Act and the relevant conditions of the licence. Section 25 of the Companies Act reads as under:-

“Section 25. Power to dispense with "Limited" in name of charitable or other company.

(1) Where it is proved to the satisfaction of the Central Government that an association-

(a) is about to be formed as a limited company for promoting commerce, art, science, religion,

*charity or any other useful object, and
(b) intends to apply its profits, if any, or other
income in promoting its objects, and to prohibit
the payment of any dividend to its members, the
Central Government may, by licence, direct that
the association may be registered as a company
with limited liability, without the addition to its
name of the word " Limited" or the words " Private
Limited..... "*

The conditions of the licence issued to the respondent under
section 25 in so far as they are relevant read as under:-

*“(2) that the income and property of the said
company whensoever derived, shall be applied
solely for the promotion of the objects as set forth
in its memorandum of association and that no
portion thereof shall be paid or transferred,
directly or indirectly by way of dividend, bonus or
otherwise by way of profit, to persons who at any
time are or have been members of the said
company or to any of them or to any persons
claiming through any one or more of them;*

*(3) that no remuneration or other benefit in money
or money's worth shall be given by the company
to any of its members whether officers or servants
of the company or not except payment of out of
pocket expenses, reasonable and proper interest
on money lent, or reasonable and proper rent on
premises let to the company.*

*(4) that no member shall be appointed to any
office under the company which is remunerated by*

*salary, fees or in any other manner not excepted
by clause (3)”*

The Tribunal rightly held that the registration granted under section 25 of the Companies Act is a recognition of the fact that the respondent is essentially established for the purpose of education. It was further held that the status granted by the Government by virtue of licence under section 25 itself recognises the fact that the respondent was essentially established inter-alia for the purpose of education. Even assuming that the licence is not conducive of the matter under the Income Tax Act, it is certainly an important factor in favour of the applicant for registration.

There can be no doubt that the main objects read by themselves entitle the respondent to registration under section 12AA of the Act. It was rightly not even contended otherwise. It was, however, contended that in view of the objects incidental or ancillary to the attainment of the main objects, the respondent is not entitled to registration under section 12AA of the Act. There are 28 incidental or ancillary objects.

To allay Mr. Goel's objections and apprehensions, Mr. Rohit Jain, learned counsel appearing on behalf of the respondent stated that all the ancillary and incidental clauses are those that are merely ancillary and incidental to the main objects and for no other purpose. He further stated that powers conferred by every clause in part-B would be subject to and solely for the purpose of, in connection with and in relation to the main objects of the respondent. We accept the statement and it is so ordered.

The clauses also must be read as a part of the entire memorandum of objects and not in isolation. We are satisfied that they confer powers only for the purpose of attaining the main objects and for no other reasons whatsoever. We, however, do not wish to leave anything to chance and provide two safeguards - firstly by accepting the statement made by Mr. Rohit Jain as aforesaid and secondly by permitting the appellant to obtain such clarifications and to impose such conditions as they desire upon the respondent to ensure that there is no misuse of any of the incidental and ancillary objects.

A perusal of the order of the Commissioner shows that he declined to register the Company by reading its ancillary objects as its main objects as also on the basis that in the future the Company may, under its ancillary/incidental objects, indulge in activities, which would be of non-charitable character. As of today, there is nothing on the record that the Company is indulging in any activity which is not in the nature of charity. Thus, at this stage, the order of the Commissioner can only be termed as presumptuous. There is also nothing on record to show that the Company does not meet any of the conditions prescribed under the Act for the grant of registration to make it eligible for the grant of exemption under Section 11 and consequently under Section 80-G of the Act. Thus, we find that the order of the Commissioner was rightly set aside by the Tribunal in the order impugned before us.

In view of the above, we order dismissal of the appeal.

However, while granting registration, it would be open to the Registering Authority to grant the same by imposing any condition, which would bind the Company to indulge in only charitable activities. It will also be subject to an affidavit or undertaking to be filed by the Company that it would not breach any of the imposed conditions and further that surplus funds would be utilized only for educational purposes and would not be diverted to any other non-educational objectives.

<i>Whether speaking/reasoned ?</i>	<i>Yes/No.</i>
<i>Whether reportable ?</i>	<i>Yes/No.</i>

(S. J. VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

September 16, 2016
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