

* IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA
PRADESH

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
* HONOURABLE SRI JUSTICE ABHINAND KUMAR SHAVILI

+I.T.T.A.Nos.71 & 391 of 2017

% Date: 09-10-2017

I.T.T.A.No.71/2017

#Between:

The Principal Commissioner of
Income Tax (Exemptions),
Hyderabad.

.... Appellant
(in both the appeals)

And

Institute for Development and Research in
Banking Technology,
Castle Hills, Road No.1,
Masab Tank, Hyderabad.

... Respondent
(in both the appeals)

! Counsel for the appellant : Mr. J.V. Prasad Sr. S.C for I.T

^ Counsel for Respondent : Mr. K. Vasanth Kumar

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? Cases referred

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

I.T.T.A.Nos.71 & 391 of 2017

COMMON JUDGMENT: (Per VRS,J)

Both these appeals are by the Revenue under Section 260A of the Income Tax Act, 1961. In I.T.T.A.No.391 of 2017, the following questions of law arise for consideration:

1. Whether, on the facts and in the circumstances of the case, and having regard to the amendment made to Section 2(15) of the Income Tax Act, vide Finance Act, 2008, with effect from 01.04.2009 and the provisions of the proviso inserted below that Section, clarifying the circumstances under which carrying on of activity falling under advancement of any other object of general public utility, would not be for charitable purpose, which is squarely applicable to the case of the assessee for assessment year 2011-12, the Tribunal is correct in law in holding that the assessee would be eligible for exemption under Section 11 of the Income Tax Act, 1961, for the assessment year?
2. Whether, on the facts and in the circumstances of the case, and having regard to the provisions of newly inserted Section 13(8) of the Income Tax Act, 1961, inserted vide Finance Act, 2012, with retrospective effect from 01.04.2009, which squarely applies to the facts of the case of the assessee, whether, the Tribunal is correct in law in holding that the assessee is eligible for exemption under Section 11 of the Income Tax Act, 1961 for this assessment year? and
3. Whether, in the facts and the circumstances of the case, when the income generating such assets was already treated as application of income and given exemption, thus leading to double deduction which is impermissible in law?

2. In I.T.T.A.No.71 of 2017, only the first two questions of law as arising in I.T.T.A.No.391 of 2017 arise. Since the assessee is the same in both cases and the appeals arise in respect of the assessment years 2010-11 and 2011-12, both the appeals were taken up together for disposal.

3. Heard Mr. J.V. Prasad, learned Senior Standing Counsel appearing for the Revenue and Mr. K. Vasanth Kumar, learned counsel appearing for the respondent.

4. Admittedly the assessee is an autonomous institution established by the Reserve Bank of India, way back in the year 1996. The assessee was granted registration under Section 12AA with effect from 01.04.2004. But the registration was cancelled subsequently by the Director of Income Tax (Exemptions), by an order dated 30.11.2011. The Tribunal set aside the said order by a judgment dated 20.06.2012 passed in I.T.A.No.147/HYD/2012. The said order of the Tribunal became the subject matter of an appeal before this Court in I.T.T.A.No.168 of 2015. By a judgment dated 04.11.2015 this Court answered the question of law in favour of the assessee and dismissed the appeal I.T.T.A.No.168 of 2015 filed by the Revenue questioning the order of the Tribunal setting aside the cancellation of registration.

5. For the purpose of completion of narration, it should also be brought on record that for the assessment years 2003-04 up to the year 2009-10, the assessing officer denied exemption, but the assessee succeeded before this Court.

6. But insofar as assessment years 2010-11 and 2011-12 are concerned, the assessing officer took umbrage under the proviso to Section 2(15) inserted under the Finance Act 2/2009, dated 01.04.2009, to distinguish the decisions in favour of the assessee with regard to the assessment years 2003-04 to 2009-10. This is how the questions of law that we have framed above have arisen for our consideration. As a consequence the whole dispute now revolves around the interpretation to

the proviso to Section 2(15). Incidentally, one more issue with regard to depreciation with reference to Section 11 has also been raised.

7. As we have pointed out earlier, the assessee is a society registered at the instance of the Reserve Bank of India for the purpose of assisting the banks and financial institutions, for the improvement of their performance. The assessee is also offering an M.Tech course and Ph.D degrees in banking.

8. Though the assessee claimed that the object for which it was established would come within the purview of “education”, the Tribunal did not accept it. However, the Tribunal held that the assessee would come within the purview of the definition of the expression “charitable purpose”, as an institution established for the advancement of an object of general public utility. Though Mr. K. Vasanth Kumar, learned counsel for the assessee attempted to argue on the basis of the finding recorded by this Court in I.T.T.A.No.168 of 2015 that the assessee should be considered as an institution established for the purpose of education, we do not think that we can now go into the question in view of the fact that the Revenue alone is on appeal against the finding recorded by the Tribunal.

9. Before proceeding further, we should point out one fundamental difference between the institutions, which would automatically fall within the purview of the expression “charitable purpose” under Section 2(15) and institutions which are established for the advancement of any other object of general public utility. Section 2(15) as it stands today after the last amendment under Finance Act, 2015, w.e.f., 01.04.2016 reads as follows:

Section 2 (15): “charitable purpose” includes relief of the poor, education, yoga medical relief, preservation of environment

including water-sheds, 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:

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, unless –

- (i) such activity is undertaken in the course of actual carrying out of such advancement of any other object of general public utility; and
- (ii) the aggregate receipts from such activity or activities during the previous year, do not exceed twenty per cent of the total receipts, of the trust or institution undertaking such activity or activities, of that previous year;

10. While institutions that are engaged in the relief to the poor, education, yoga, medical relief, preservation of environment and preservation of monuments or places or objects of artistic or historic interest are categorized under one type under Section 2(15); the institutions established for the advancement of any other object of general public utility, are treated under Section 2 (15) as a separate category. This is very clear from the proviso to Section 2(15). There were two provisos inserted under Finance Act, 2010, w.e.f., 01.04.2009. The said provisos read as follows:

“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:

Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is twenty-five lakh rupees or less in the previous year;”

11. Without going into the intricacies, it can be pointed out in general that the inclusion of an institution for the advancement of any other object of general public utility within the definition of the expression “charitable purpose” was actually conditional. The condition was that such

an institution should not be involved in the carrying on of any activity in the nature of trade, commerce or business. In other words, if an institution, established for the advancement of any other object of general public utility, which would otherwise come within the purview of Section 2(15), is involved in the carrying on of any activity in the nature of trade, commerce or business, such an institution will come within Section 2(15) only if two conditions laid down in the clauses are satisfied.

12. Now that the Tribunal has categorized the assessee not as an institution advancing the cause of education, but as an institution established for the advancement of any other object of general public utility, the first question that was required to be addressed by the Tribunal was as to whether the assessee was involved in the carrying on of any activity in the nature of trade, commerce or business. Now let us see how this question was addressed to by the Tribunal.

13. In paragraph 11 of its order, the Tribunal analyzed the two provisos that were originally incorporated under Section 2(15) under the Finance Act, 2008. After doing so, the Tribunal referred to (1) a Circular of the CBDT bearing No.11/2008, dated 19.12.2008; and (2) the speech of the Minister of Finance on 29.02.2008, made during the debate in the Lok Sabha on the Finance Bill, 2008.

14. Thus after referring to the plain language of the statutory provisions and after referring to the manner in which the provision was sought to be incorporated by the executive, the Tribunal came to the conclusion in paragraph 15 of its order that the assessee was not engaged in carrying on any activity in the nature of trade, commerce or business. As a matter of fact, the Tribunal referred to the decision of the Delhi High Court in Institute of Chartered Accountants of India v. Director

General of Income Tax (Exemptions)¹, before coming to the conclusion that the assessee was not carrying on an activity in the nature of any trade, commerce or business. The Tribunal also pointed out that the charging of a fee by the assessee was not with profit motive and that therefore, merely because the assessee derived income they cannot be held to be carrying on an activity in the nature of trade, commerce or business.

15. The relevant findings of the Income Tax Appellate Tribunal in this regard can be usefully extracted as follows:

“The circumstances under which the services rendered by the appellant society to the Banks make clear that there is no profit motive in such activities because these activities were entrusted to the appellant society by the Reserve Bank of India as a part of its supervisory role over the Banks in India. In our considered opinion, viewed from any angle, the objects, either main or ancillary, are not in the nature of business or trade or commerce. The banks merely used the expertise of appellant society in the banking operations. The question of the profit motive in undertaking such activities can not be imagined keeping in view the circumstances under which the appellant society is operated. The objects of the appellant society are totally charitable in nature and do not carry on any activity in the nature of trade, commerce or business. Therefore, the proviso to Section 2(15) of the Act cannot be applied to the Appellant society as clarified by the Circular No.11 of 2008 issued by the CBDT. It is worthwhile to mention here that the Hon’ble Finance Minister had also clarified, during the course of the debate in the Parliament, that the proviso to Section 2(15) of the Act is not intended to apply to genuine charitable organizations. It was further clarified by the Hon’ble Finance Minister that the Chambers of Commerce and similar organizations rendering services to their members would not be affected by introduction of this proviso. It is fairly settled law now that reference can be made to the speech made by the Hon’ble Finance Minister at the time of piloting the bill in the Parliament in order to ascertain the true meaning of the words and the language employed in the Statute.”

16. In the light of the categorical finding recorded by the Tribunal, we are of the considered view that though the assessee has been found by the Tribunal to be an institution established for the advancement of any other object of general public utility, the assessee does not fall under

¹ (2012) 347 ITR 99 (Delhi)

the category of such an institution, which is carrying on an activity in the nature of trade, commerce or business so as to attract the proviso to Section 2 (15) at all. Hence, the first question of law arising in both cases has to be answered against the appellant/Revenue.

17. Strong reliance is placed by the learned Senior Standing Counsel upon the decision of this Court in *Andhra Pradesh State Seed Certification Agency v. Chief Commissioner of Income Tax*². In the said case, the certification of seeds by the assessee was held to be in the nature of trade, Commerce or business as the assessee facilitated trade, commerce or business in the certified seeds.

18. But the distinction between the assessee in the said case and the assessee in the present case is that in the former the certification was done for the benefit of the private individuals and the private institutions. But in this case, the assessee was created by the Reserve Bank of India for the improvement of the performance of the banks and financial sector of the country, ultimately to have a bearing upon the economy of the country. Therefore, the said decision does not go to the rescue of the revenue.

19. Once the first question of law is answered against the appellant/Revenue, the second question of law revolving around Section 13(8) may not arise at all. Section 13(8) revolves around the quantum as stipulated in clause (i) and (ii) of the Proviso to Section 2 (15). If the proviso has no application, the invocation of those two clauses would not apply. Hence, the second question of law does not arise for consideration in the light of our answer to the first question of law.

² (2013) 356 ITR 360 (A.P)

20. Insofar as the third question of law is concerned, it is admitted by Mr. J.V. Prasad, learned Senior Standing Counsel for Revenue that several High Courts have taken the view favouring the assessee and that all Special Leave Petitions arising out of the judgments of those Courts are now pending before the Supreme Court, after the grant of leave. The learned Standing Counsel also submitted that even this Court is seized of several appeals, where the third question of law is under consideration.

21. There are two issues. The first is that Section 11(6) was amended w.e.f., 01.04.2015 under Finance (No.2) Act, 2014. The amendment was taken note of by a Bench of the Madras High Court in a decision recently rendered in Director of Income Tax (Exemption) v. Medical Trust of the Seventh Day Adventists³. Paragraphs 24 to 27 of the said judgment reads as follows:

“24. Truth to tell, this Court in the matter of Calavala Cunnan Charities, has decided the question now under consideration in favour of the assessee and we could well have decided this Batch of appeals simply on the strength of the aforesaid decision. We are however persuaded to proceed further with the discussion since a conflicting view has been expressed by the Kerala High Court in the case of Lissie Medical Institutions (supra). Though the attention of the Division Bench of the Kerala High court was drawn to the decision in Rao Bahadur Calavala Cunnan Chetty Charities (supra) and several decisions along similar lines, the court was persuaded to take a contrary view preferring to follow the rationale of the judgment of the Supreme Court in the case of Escorts (supra).

25. As noted by us earlier, the judgment of the Supreme Court in escorts turns on an entirely different position of law and would not impact the issue being discussed in the present case.

26. We are supported in our view by a plethora of decisions of various High Courts - the Bombay High Court in the case of CIT v. Munisuvrat Jain (1994 Tax Law Reporter 1084) and DIT (Exem) Vs. Framjee Cawasjee Institute (109 CTR 463); Karnataka High Court in CIT Vs. Society of the Sisters of St.Anne (146 ITR 28); Madhyapradesh High Court in CIT Vs. Raipur Pallottine Society (180 ITR 579); Gujarath High Court in CIT Vs. Sheth Manilal rachhnoddas Vishram Bhavan Trust 198 ITR 598; Punjab and Haryana High court in CIT Vs.

³ (2017) 156 DTR (Mad) 113

Market Committee Pipli (330 ITR 16) and CIT Vs. Tiny Tots Education Society (330 ITR 21); Madhyapradesh High Court in CIT Vs. Devi Sakuntala Tharal Charitable Foundation (358 ITR 452) and the Calcutta High Court in CIT Vs. Silluguri Regulated Market Committee (366 ITR 51). In addition, the Delhi High Court in DIT Vs. Vishwa Jagriti Mission 262 CTR 558 and the Karnnataka High Court in DIT (Exem) Vs Al-Ameen Charitable Fund Trust (2016) 67 taxmann.com 160 have accepted the claim of the assessee distinguishing both the judgment of the Supreme Court in Escorts as well as that of the Kerala High Court.

27. In view of the discussion above, the question of law is answered in favour of the assessee and against the revenue.”

22. After taking note of the amendment to Section 11(6) in paragraph 33, the Madras High Court also took note of the Circular bearing No.1 of 2015, dated 21.01.2015 and came to the conclusion that the provisions of Section 11 (6) inserted w.e.f., 01.04.2015 would operate only prospectively w.e.f., the assessment year 2015-16. Insofar as the cases that arose prior to the amendment are concerned, almost all High Courts have taken the same view. The position may be different after the amendment. But in the case on hand, the same relates to a period prior to amendment. Therefore, we do not wish to admit the appeals on the third substantial question of law, merely for waiting for the outcome of the decision of the Supreme Court. We respectfully agree with the views expressed by the other High Courts and answer the third question of law in favour of the assessee.

23. Accordingly the appeals are dismissed. As a sequel, miscellaneous petitions pending in these appeals, if any, shall stand closed. There shall be no order as to costs.

V. RAMASUBRAMANIAN , J.

ABHINAND KUMAR SHAVILI , J.

9th October, 2017

Js.

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HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

I.T.T.A.Nos.71 & 391 of 2017

(judgment of the Bench delivered by VRS,J)



9th October, 2017

Js.