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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 02.01.2017

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ITA 454/2004

M/S SKIN INSTITUTE AND PUBLIC SERVICES
CHARITABLE TRUST

..... Appellant

Through: Mr. C.S. Aggarwal, Sr. Adv. with Mr.
Ravi Pratap, Adv.

versus

COMMISSIONER OF INCOME TAX
(EXEMPTION)

..... Respondent

Through: Ms. Vibhooti Malhotra, Adv.

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CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

S. RAVINDRA BHAT, J. (Oral)

1. At the outset, it is stated by the learned counsel for both parties that another appeal i.e. ITA No. 417/2005, also concerns the same question of law. With their consent the said appeal was also taken up for hearing.
2. Following common questions of law were framed in these appeals, which pertain to assessment years 1993-94, 1994-95 and 1995-96:

“.....Whether the Income Tax Appellate Tribunal on the basis of material on record was correct and justified in law in holding that the assessee institution which is duly registered under the Indian Societies Act, was not entitled in law to the claim of the exemption of its income, u/s 10(22A) of the Income Tax Act, 1961 in view of the fact that Dr. P.N. Behl who is the Managing Trustee and also founder Director in the Trust was participating in the profits of the income of the Trust and the same disentitle the institution to claim aforesaid exemption?”

3. The appellant/ assessee is a society; prior to its constitution, the institution was established by late Dr. P.N. Behl. Upon the establishment of the society, entirety of the hospital set up by Dr. Behl was made over to it to be run for entirely charitable purposes. There is no dispute that the primary activity i.e. granting medical services to the general public is an essential charitable object. A certificate under Section 12A of the Income Tax Act, 1961 (in short the Act) was granted to the assessee on 28.11.1973. The Memorandum of Association was duly registered subsequently on 21.10.1976. The assessee was also granted exemption certificate from inception i.e. first being on 01.08.1973. The assessee's hospital treats those suffering from illness and also provides convalescence to those requiring medical attention and rehabilitation. It is not in dispute that consistently for

the period 1974-75 to 1992-93, the assessee's claims of the income and receipts were being charitable were accepted and not brought to tax. During one of the earlier years i.e. 1975-76 the assessee's income was sought to be taxed; on that occasion its revision under Section 264 of the Act was accepted.

4. For the first time in 1992-93 the Assessing Officer (AO) formed the opinion that the society was disentitled to the benefit under Section 10(22A) of the Act. He did so based upon the fact that Dr. Behl, the settler, had received ₹ 3,09,370/- for that assessment year. The assessee had contended that this receipt, could not in any manner undermine the charitable nature and functioning of the institution, and rather the patients/ clients from whom the assessee benefited had brought in much larger amounts of which only a percentage was given to Dr. Behl. By way of comparison, amounts paid to certain other consultants/ doctors, was also shown, to say that they received a much higher proportions of such fees given to the hospital.

5. The assessee had appealed unsuccessfully to the Commissioner of Income Tax (Appeals) [CIT(A)] and later to the Income Tax Appellate Tribunal (Tribunal). In the circumstances, a reference was made to this Court being ITR No. 46/1998. However, that reference was returned unanswered, and was dismissed for non-prosecution.

6. Following his reasoning, the AO sought to bring to tax the assessee's income for the succeeding years i.e. 1993-94, 1994-95 and 1995-96. The CIT(A) and the Tribunal followed their previous orders and reasoning. Therefore, the present appeals.

7. Mr. C.S. Aggarwal, the learned Senior Counsel urges that the

Tribunal fell into an error in holding that the assessee had ceased to provide charity or services that amounted to a charity under Section 10(22A) of the Act. He urges that even though Dr. Behl was paid sums of ₹ 3.7 lacs and ₹4.7 lacs and a similar amount in the concerned assessment years, these were out of a more substantial billing. He also justified those amounts on account of Dr. Behl's involvement with the society; it was submitted that previously Dr. Behl was not charging any amount and the services were by and large gratis and entirely without a fee. However, having regard to the fact that the institution had expanded its activities and expenditure had also proportionately increased, he felt that it would be in a position to collect some reasonable fees from customers who could be attributed to his services especially in regard to consultations vis-a-vis equipment that was owned by him. According to the arrangement, Dr. Behl could charge in any given year sums not exceeding 50% of the amounts so received.

8. The learned counsel also contrasted the amounts received by Dr. Behl with those received by other such consultants in terms of percentage and submitted that Dr. Behl, in fact, received similar percentage even though in absolute terms the amounts may have been more.

9. The learned counsel submitted that the Tribunal fundamentally misconstrued the law in reading into section 10(22A) as it were the provisions of Section 13(1) and 13(3) of the Act. It was stated that section 13(1) of the Act specifically states that the benefit of section 11 or section 12 would not operate, if certain prohibited categories of expenditure were incurred. Most specifically section 13(3) refers to income received by the author or the founder of the institution or the society. It was stated that section 10(22A) has no co-relation with section 13(1) or section 13(3) and in

overlooking this aspect the Tribunal fell into error. It was, secondly, urged that having regard to the finalized assessments for all preceding years, and even subsequent years, such as AY 1994-95, 1997-98 and 1998-99 onwards the revisiting of the issue and bringing to tax amounts received by the assessee is unsustainable.

10. Ms. Vibhooti Malhotra, the learned counsel for the Revenue argued that the Tribunal's findings are justified. She relied upon the ruling of this Court in ***Director of Income Tax (Exemption) vs Charanjiv Charitable Trust 267 CTR 305 (Delhi)*** as well as ***Director of Income Tax vs Bharat Diamond Bourse (2003) 179 CTR 225 (SC)***. It is submitted that as long as any benefit passed to a settler or founder of the institution, regardless of whether the larger purpose of the charity was sub-served, its entitlement to receive the benefit under law so as to exclude exempted incomes, ceased. She, therefore, submitted that the Tribunal's finding should not be disturbed.

11. Section 10(22A) of the Act, excluded income received by hospitals or other institutions, for the reception and treatment of persons suffering from illness. It was on the statute book for the period 01.04.1970 to 31.03.1999. It *inter alia* read as under:

" 10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included-

(22A) any income of a hospital or other institution for the reception and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation, existing solely for philanthropic purposes and not for purposes

of profit. "

12. The Tribunal in this case was influenced by the text of Section 13 which contains conditions imposed upon income which is otherwise excluded by virtue of Section 11 or Section 12 from taxation. Section 13, to the extent it is relevant, reads as follows:

".....13. (1) Nothing contained in section 11 (or section 12) shall operate so as to exclude from the total income of the previous year of the person in receipt thereof-

(a) any part of the income from the property held under a trust for private religious purposes which does not enure for the benefit of the public.

(b) in the case of a trust for charitable purposes or a charitable institution created or established after the commencement of this Act, any income thereof if the trust or institution is created or established for the benefit of any particular religious community or caste;

(c) in the case of a trust for charitable or religious purposes or a charitable or religious institution, any income thereof-

(i) if such trust or institution has been created or established after the commencement of this Act and under the terms of the trust or the rules governing the institution, any part of such income enures, or

(ii) if any part of such income or any property of the trust or the institution (whenever created or established) is during the previous year used or applied,

Directly or indirectly for the benefit of any person referred to in sub-section (3).....

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(2) Without prejudice to the generality of the provisions of clause (c) [and clause (d)] of sub-section (1), the

income or the property of the trust or institution or any part of such income or property shall, for the purposes of that clause, be deemed to have been used or applied for the benefit of a person referred to be in sub-section (3), -

(a) if any part of the income or property of the trust or institution is, or continues to be, lent to any person referred to in sub-section (3) for any period during the previous year without either adequate security or adequate interest or both;...

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(3) The persons referred to in clause (c) of sub-section (1) and sub-section (2) are the following, namely:-

(a) the author of the trust or the founder of the institution;

(b) any person who had made a substantial contribution to the trust or institution, [that is to say, any person whose total contribution up to the end of the relevant previous year exceeds {fifty} thousand rupees];

(c) whether such author, founder or person is a Hindu undivided family, a member of the family;

[(cc) any trustee of the trust or manager (by whatever name called) of the institution;]

(d) any relative of any such author, founder, person, [member, trustee or manager] as aforesaid;

(e) any concern in which any of the persons referred to in clause (a), (b), (c) [(cc)] and (d) has a substantial interest....”

13. A plain reading of section 13 of the Act, which sets out rules of exclusion, as it were (from the entitlement or eligibility of certain income the immunity of taxation) opens with the exception “*Nothing contained in section 11 (or section 12) shall operate*”. What is immediately apparent is

that the exclusion of amounts received by virtue of section 10(22A) is not the subject matter of section 13(1) of the Act or any of its further conditions. In other words, the disqualification which attaches in absolute terms by virtue of provisions of section 13(1) especially through section 13(3) to the income out of which some benefit flows to a settler/ founder, does not *per se* apply to institutions covered by section 10(22A) of the Act.

14. Section 13 was brought into force in its present form on 01.04.1989. Concededly, the provision refers to all manner of charitable income which would otherwise be not subject matter of exclusion under section 10. The later provision specifically deals with receipts, that should not bear the character of income at all. Like section 10(22A), the Parliament provided for other receipts which would otherwise have fallen in the category of income, but which are deemed not to be part of the total income, such as Sections 10(1), 10(2), 10(2A), 10(3), 10(4), 10A, 10B and so on. These provisions operate in a *sui generis* manner, so to speak. There is no window for the tax administrator to import disqualifications applicable to categories of income that may otherwise be eligible to exemption, into these amounts which are *per se* entitled to be treated as not forming part of the total income.

15. In this Court's opinion this fundamental error led the Tribunal to hold that since Dr. Behl received significant amounts, the entire charitable basis of the assessee stood undermined by reason of Section 13 of the Act. This error persisted for the three assessment years in question. Having regard to the specific nature of the income which till 31.03.1999 could not be included as part of the total income, which the Parliament later subsumed through sections 10(23C) and 12A of the Act (subject to conditions) by deleting

section 10(22A), in the present case there was no question of confusion the amount received by Dr. Behl as benefits that could debar the assessee to the eligibility it fundamentally had under section 10(22A) of the Act.

16. For these reasons, the question of law framed is answered against the Revenue and in favour of the assessee for all the three years. The appeals are, consequently, allowed.

S. RAVINDRA BHAT, J.

NAJMI WAZIRI, J.

JANUARY 02, 2017/kk

