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

\+ ITA 450/2018

THE COMMISSIONER OF INCOME TAX -EXEMPTION

..... Appellant

Through: Mr.Zoheb Hossain, Sr. St. Counsel

versus

ST. STEPHEN'S HOSPITAL ..... Respondent

Through: Mr.Tarun Gulati with Ms.Rachna Yadav, Advs.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

O R D E R

% 19.11.2018

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (‘Act’ for short) in the case of St. Stephen’s Hospital (‘respondent-assessee’ for short) pertains to assessment year 2008-09.

2. Impugned order dated 08.11.2017 passed by the Income Tax Appellate Tribunal ('Tribunal' for short) relies on their earlier order dated 11.05.2012 setting aside cancellation of registration of the respondent-assessee under Section 12AA of the Act. By order dated 26.9.2013 ITA No. 37/2013 filed by the Revenue challenging the order dated 11.05.2012 of the Tribunal was dismissed by the Delhi High Court for the following reasons:-

> “(i) The respondent society had made contribution of Rs.22,500/- in all, to eight churches/institutions for advertisement. Director of Income Tax (Exemption) held that this shows that the respondent was working for benefit of a particular religious community. In our opinion, the Tribunal’s finding, keeping in view the quantum, is justified and is not perverse. The amount involved is too meagre and does not show or establish that the respondent society was meant for benefit of any particular community.
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> (ii) The respondent society had sold medicines from their

pharmacy to the public. Director of Income Tax (Exemption) held that this amounts to business. Director of Income Tax (Exemption) has also stated that the respondent society had earned and operated the pharmacy at 50% profit margin. Tribunal has rejected the said contention observing that the respondent society was/is a hospital and has to dispense medicines to patients. Selling of medicines was not the predominant object of the respondent society and was only incidental. Tribunal noticed that the computation of profit margin was incorrect as only direct expenses had been taken into consideration, without accounting for salaries of pharmacy department, doctor's salary, contract employees payment, administration overheads including electricity, maintenance, other utilities, depreciation etc. Further this amount was ploughed back into the charitable activities. This issue is covered by the decision of the Supreme Court in the case of Addl. CIT vs. Surat Art Silk Cloth Manufacturers Association, (1980) 121 ITR 1, wherein it has been observed as under:-

> "The other interpretation is to see whether the purpose of the trust or institution in fact involves the carrying on of an activity for profit or in other words whether an activity for profit is actually carried on as an integral part of the purpose or to use the words of Chandrachud J., as he then was, in Dharmodawan's case [1977] 109 ITR 527 (SC), as a matter of advancement of the purpose. There must be an activity for profit and it must be involved in carrying out the purpose of the trust or institution or to put it differently, it must be carried on in order to advance the purpose or in the course of carrying out the purpose of the trust or institution.
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> The profit of the assessee could be utilised only for the purpose of feeding this charitable purpose and the dominant and real object of the activity of the assessee being the advancement of the charitable purpose, the mere fact that the activity yielded profit did not alter the charitable character of the assessee."

(iii) Director of Income Tax (Exemption) has observed that the respondent society received Rs.10,000/- per procedure, from an international organization for Smile Surgery Project. This amounts to commercial activity. Tribunal, on the other hand, has found that the respondent had conducted operations or correction surgery on children born with cleft lips and palate. An international organization had paid Rs.8,000 to Rs.10,000/- for each surgery performed, though the actual amount incurred on the surgery could be less. The Tribunal has observed that this did not show commercial or business activity, as alleged. We notice that the patients who underwent surgery were not charged. The decision in the case of Surat Art Silk Cloth Manufacturers Association (supra) is equally applicable.

(iv) Director of Income Tax (Exemption) has objected to surplus generated in the Fun Fair Fund. The Tribunal in the impugned order has held that the Fun Fair Fund activities were conducted by the employees of the society wherein the employees participated and held a lucky draw. The amount collected was used for ex-gratia payment to the ex-employees on retirement and exigencies. The said fund was reflected in the total income declared in respect of earlier years. It has been observed that this did not amount to non-charitable activity as the said fund was for the benefit of retired or ex-employees.

(v) Director of Income Tax (Exemption) has objected to the manufacture of medicines. Tribunal in this regard has observed that the respondent society had a pharmacy where compounding, mixing and diluting the medicines was done. This was required to reduce the strength of medicine and make it cost effective when smaller dosages were required. Drug Control Department had granted permission to sell, stock and run the pharmacy. The respondent's hospital had been in existence for past 125 years and the Drug Controller had conducted regular inspections. The gain, if any, from sale of medicines was utilised or applied for charitable activities of the society itself.

(vi) Director of Income Tax (Exemption) has referred to an

> incident relating to import of medical equipment. Tribunal has observed that the said occurrence had taken place in the year 1990. The import in question is certainly distant in point of time as the order of the Director of Income Tax (Exemption) was passed on 28.12.2011. Whether or not there was any violation of import conditions, is pending consideration before the Tribunal and the matter is still subjudice. There is no final affirmative finding against the respondent society.
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> (vii) On the question of alteration in Memorandum of Association and communication to the Revenue authorities, the Tribunal has examined the changes/amendments and held that these were minor in nature and did not detract or alter the main/basic purpose which was to provide medical relief".

3. Counsel for the parties accept that the decision dated 26.09.2013 was not challenged and has attained finality.

4. Learned counsel for the Revenue however submits that there are additional aspects or findings of the assessing officer which would require consideration. We would now refer and examine the new grounds raised by the Revenue, not considered in the order dated 26.09.2013.

5. The respondent-assessee had set up a bookshop in the respondent-assessee's hospital for displaying Christian literature, which were distributed free of costs. Although no rent or electricity charges were received, as per the Assessment Order, the respondent-assessee had violated and had incurred disqualification under Section 13(1)(b) of the Act. The argument of the Revenue fails to notice however that the primary function of the respondent-assessee was to operate and run a hospital and provide medical facilities to public at large. Medical aid and facilities were not denied on the ground of religion or restricted to persons of a particular religion. General public was the beneficiary. Book shop had also stored and was distributing books on philosophy, moral science etc. In cases of illness etc. patient and attendants do like to read religious books and pray.

To attract and fall foul of Section 13(1)(b) the trust or the institution should be created or established for the benefit of a particular religion or group. Display and distribution of religious books free of cost in a small book shop without charging any rent or electricity charges would not change the core and primary nature of charitable activity carried out by the respondent-assessee as to attract disqualification under Section 13(1)(b) of the Act.

6. The second objection raised by the Revenue relates to electricity, water and maintenance expenses incurred by the respondent-assessee on residential accommodation allotted to their employees at Rajpur Road and GT Road Flats and residential accommodation provided to doctors, nurses and other staff in the hostel and other areas within the hospital compound. The contention is that recovery of expenses from the employees was found to be much less than the actual expenditure incurred by the respondent-assessee and therefore Section 13(2)(b) of the Act was violated. This Court is of the opinion however, that part payment of electricity or water charges or incurring maintenance expenses for the residential accommodation for employees would not result in violation of Section 13(2)(b) of the Act. This provision is attracted when land, building or other property of the trust or charitable institution is made available to a person referred to in sub-section (3) to Section 13 without charging adequate rent or other compensation. The Assessing Officer has not pointed out any abnormal or high expenditure on the aforesaid account made to benefit a particular employee covered under Section 13(3) of the Act. It is not shown that the employees were not discharging duties of equal market value. Residential accommodation within the hospital and assets owned by the respondent-assessee had to be maintained. Payment of electricity charges etc. would depend on the terms of employment. The assessment order does not refer to the specific details of purported 'subsidy' paid/incurred and also how employees were covered under Section 13(3) of the Act.

7. Thirdly, our attention was drawn to the finding by the Assessing Officer on

the difference between the average cost of medicines for the patients in the General OPD, and cost of medicines for patient in the free OPD in the hospital and at Nandnagari. The assessing officer assumed that the respondent-assessee was charging differential prices at its own discretion and was not providing charitable services. The inference drawn is farfetched and based on surmises and conjectures. It was not disputed and challenged that the respondent-assessee was providing medical facilities including free medical facilities. Cost of medicine would depend on several aspects and assumptions should not be drawn. Purchase price of medicines was not disputed. Charging of market prices from those who can afford, and lower prices from others attending free OPD would in fact support the stand of the respondent-assessee. Even otherwise the assertion would not establish and show that the respondent-assessee was not providing or was not engaged in charitable activities. Income and revenue earned have not been diverted or misused.

8. Lastly, our attention was drawn to the finding recorded by the Assessing Officer on the Specific Purpose Fund of Rs.5.77 crores. The assessment order records submission that the respondent-assessee had treated the Fund as income. Without controverting the statement the Assessing Officer held that there was a possibility that the Specific Purpose Fund might have been credited to the corpus directly in earlier years. This possibility, he observed, could not be ruled out. This adverse finding was purely an assumption and not a finding in law. In case of doubt, the Assessing Officer should have examined and verified the issue in depth and detail. The respondent-assessee, as is apparent, had stated that the amount of the Specific Purpose Fund had been examined in earlier years and the addition was not justified.

9. We have to also observe that it is apparent the specific issues raised before us by the Revenue, were not argued or submitted before the Tribunal, and hence should not be allowed and permitted to be raised before this Court. We have

nevertheless examined them only to satisfy ourselves that no injustice has been done and issues have not been overlooked.

10. In view of the aforesaid discussion, we do not find a substantial question of law arises for consideration in the present appeal and the same is dismissed.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

NOVEMBER 19, 2018
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