

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.08.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case Appeal Nos.582 to 584 of 2009

Commissioner of Income Tax,
Chennai. ..Appellant in all Appeals

-vs-

M/s.Pentafour Software Employees'
Welfare Foundation,
Sekar Towers,
25, I Main Road, India Colony,
Kodambakkam, Chennai-600 024. ..Respondent in all Appeals

Appeals under Section 260A of the Income-tax Act, 1961 against the common order dated 08.07.2008 on the file of the Income-tax Appellate Tribunal, Chennai Bench 'B', Chennai, in I.T.A.Nos.751 and 752(Mds)/2007 and I.T.A.No.1007(Mds)/2007 and C.O.No.34(Mds)/2008 for the assessment years 1998-99, 1999-2000 and 2002-03 respectively, against the Order dated 19/01/2007 and 22/01/2007 made in ITA Nos.351,352 and 155/05-06 on the file of the Commissioner of Income Tax (Appeals)-V, Chennai-34 for the Assessment year 1998-99, 1999-00 and 2002-03 respectively, against the Assessment Order dated 30/09/2005 and 24/03/2005 made in PAN No.AAACP8885H on the file of the Assistant Commissioner of Income Tax, Company Circle V(2), Chennai for the Assessment year 1998-99, 1999-00 and 2002-03 respectively.

For Appellant : Mr.T.Ravi Kumar,
(In all Appeals) Senior Standing Counsel

For Respondent : Ms.Sree Lakshmi Valli
(In all Appeals)

COMMON JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

These appeals under Section 260A of the Income-tax Act, 1961 (hereinafter referred to as "the Act") have been filed by the Revenue challenging the common order dated 08.07.2008, passed by

the Income-tax Appellate Tribunal, Chennai Bench 'B', Chennai (for brevity, "the Tribunal"), in I.T.A.Nos.751 and 752(Mds)/2007 and I.T.A.No.1007(Mds)/2007 and C.O.No.34(Mds)/2008 for the assessment years 1998-99, 1999-2000 and 2002-03 respectively.

2.The above appeals have been admitted, on 14.07.2009, on the following substantial questions of law:-

T.C.A.Nos.582 and 583 of 2009 :-

"(i) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the amount received by the assessee towards corpus from the employer cannot be treated as income.

(ii) Whether on the facts and circumstances of the case, the Tribunal was right in holding that the amount received by the assessee towards corpus cannot be treated as income and therefore there is no escapement of income to invoke jurisdiction to reopen u/s 147."

T.C.A.No.584 of 2009 :-

"(i) Whether on the facts and circumstances of the case, the Tribunal was right in dismissing the appeal of revenue as infructuous.

(ii) Whether on the facts and circumstances of the case, the Tribunal was right in dismissing the Department's appeal with respect to CIT(A)'s direction to allow proportionate expenditure against corpus receipt of Rs.9.25 lakhs as revenue expenditure, as infructuous on the ground that the amounts received by the assessee towards its corpus was not treated as income."

3.The decision to be rendered in T.C.A.Nos.582 and 583 would cover the entire proceedings, if we uphold the order of the Tribunal. This is so because, if we uphold the order of the Tribunal, the re-assessment proceedings under Section 147 of the Act would be held to be invalid for those two years. In such an event, there may not be any necessity to answer the substantial questions of law framed in T.C.A.No.584 of 2009. If, on the other hand, we take a decision in favour of the Revenue in T.C.A.Nos.582 and 583 of 2009, we may be required to answer the substantial questions of law framed in T.C.A.No.584 of 2009. With this preface, we set out the factual details which are necessary for the disposal of these appeals.

4.The assessee filed their return of income for the assessment years 1998-99 and 1999-2000 wherein, it had been mentioned that the assessee is incorporated under Section 25 of the Companies Act, 1956. The return for the assessment year 1998-99 was processed and the Assessing Officer issued a notice

dated 09.08.2000 under Section 142(1) of the Act, and called for details, of which, what would be relevant for the purposes of this case is the ledger copy of the corpus. The assessee produces the relevant copy of the ledger and also letters given by Pentafor Software and Exports Ltd., dated 01.04.1997, 31.03.1998 and 31.03.1998; and copies of the ledger account. The letters given by Pentafor Software and Exports Ltd., stated that the contribution made by them is towards a corpus fund of the assessee which is to be invested in shares and securities and only the income from such investments is to be spent for achieving the objects of the foundation. The assessment for the year 1998-99 was completed under Section 143(3) of the Act, on 09.03.2001 and for the assessment year 1999-2000, it was completed under Section 143(3) of the Act, on 21.08.2001.

5. On a reading of the assessment order for the year 1998-99, it is seen that after the notice was issued under Section 143(2) of the Act, the authorized representative of the assessee appeared before the Assessing Officer, and the case was discussed and the assessment was completed.

6. Further, on a reading of the said assessment order dated 09.03.2001, it is seen that the Assessing Officer was fully aware that the assessee was incorporated under Section 25 of the Companies Act, 1956, and he has recorded the same in the assessment order. After four years, the Assessing Officer issued notice under Section 148 of the Act proposing to reopen the assessments for the assessment years 1998-99 and 1999-2000. The reason for reopening being that it was not brought to the notice of the Assessing Officer that the assessee had not been registered under Section 12A of the Act in order to claim exemption on income received as "corpus fund". Therefore, the Assessing Officer drew a conclusion that the assessee failed to disclose fully and truly all material facts necessary for the assessment.

7. The assessee submitted their reply dated 12.09.2005, firstly pointing out that the proposal to reopen the assessment is an outcome of a change of opinion and is impermissible. Further, the contribution received from time to time was with a specific direction to be invested in shares of group companies and only the income therefrom, viz., dividends, should be applied for the objects of the assessee company.

8. It was further submitted that the corpus receipts have the character of capital receipts and it is definitely not income. Reliance was placed on the decision in the case of CIT vs. Shaw, Wallace & Co. reported in (1932) 34 BOMLR 1033. These objections were dated 12.09.2005 and 19.09.2005 for the two assessment years respectively. Subsequently, another submission

was made before the Assessing Officer on 16.12.2004 stating that the expenses incurred were exclusively for cricket matches, which is one of the recreational facilities provided by the company.

9.The Assessing Officer passed the re-assessment orders on 30.09.2005 holding that any corpus fund is exempted from the charge of tax only under Section 11(1)(d) of the Act, and in order to claim exemption under the said provision, the assessee has to comply with the provisions of Section 12A of the Act and should have got itself registered under Section 12A of the Act. Thus, the Assessing Officer concluded that the assessee has not fulfilled the conditions required to claim exemption on the corpus fund under Section 11(1)(d) of the Act.

10.It was further pointed out that merely because the assessee company was registered under Section 25 of the Companies Act, 1956, the same will not automatically entitle the assessee for exemption from payment of income tax on the corpus fund received. Furthermore, it is pointed out that the onus is on the assessee to prove that the corpus fund is a capital receipt and the assessee has failed to establish the same and such contention raised by the assessee requires to be rejected.

11.The assessee preferred appeals before the Commissioner of Income-tax (Appeals)-V, Chennai (for brevity, "the CIT(A)"). The appeals were dismissed by orders dated 19.01.2007. Aggrieved by the same, the assessee preferred appeals before the Tribunal in I.T.A.Nos.751 and 752(Mds)/2007. The appeals were allowed by the impugned order.

12.The first issue to be considered is whether the Tribunal was right in upholding that there is no escapement of income, to invoke the jurisdiction under Section 147 of the Act.

13.Mr.T.Ravi Kumar, learned Senior Standing Counsel would vehemently contend that the assessee is a foundation, but does not have a registration under Section 12A of the Act and unless and until they obtain a registration under Section 12A of the Act, their claim for exemption under Section 11(1)(d) of the Act is not sustainable. Furthermore, the assessee has not satisfied the mandatory conditions which are required to be fulfilled for being entitled to exemption under Section 11(1)(d) of the Act.

14.Further, it is submitted that the Tribunal ought to have appreciated the fact that the proper test to be applied is whether the receipt is income or not and it has to be seen from the stand point of the person who receives it, to whom, it accrues by virtue of his office.

15.It is submitted that the factual position in the instant case is that the employees of the Pentafour Group of Companies are to be provided certain facilities for which, the assessee company was incorporated under Section 25 of the Companies Act, 1956, but for the said objectives, the assessee would not have been provided with such corpus by Pentafour Group of Companies. Since the amount received by the assessee towards corpus is required to be treated as income, which is escaped to assessment income tax, the reopening of assessments is valid.

16.In support of his contention that the receipt income is required to be viewed from the stand point of the person who receives it, reliance was placed on the decision of the Hon'ble Supreme Court in P.Krishnan Menon vs. CIT (1959) 35 ITR 48 (SC); Dr.K.George Thomas vs. CIT (1985) 156 ITR 0421; and Boeing vs. CIT reported in (2001) 250 ITR 0667 (Madras). This decision was pressed into service to explain as to what is income and how the Court has interpreted the definition of "income" as defined under Section 2(24) of the Act.

17.With regard to the validity of the reopening proceedings, reliance was placed on the decisions in Areva T & D India Ltd., vs. Assistant Commissioner of Income-tax reported in (2007) 294 ITR 233 (Madras); Consolidated Photo and Finvest Ltd., vs. Assistant Commissioner of Income-tax reported in (2006) 281 ITR 394 (Delhi); and P.S.Govindasamy Naidu & Sons vs. ACIT reported in (2010) 324 ITR 44 (Rajasthan). Therefore, it is the submission of the learned counsel that the order passed by the Tribunal requires to be set aside, as the amount received by the assessee as corpus from the three companies has been received without rendering any services and merely because the assessee is registered under Section 25 of the Companies Act, 1956, does not automatically exempt from levy of income tax and the exemption is available only if the conditions stipulated under Section 11(1)(d) are satisfied. This income having escaped from being taxed, the Assessing Officer was well justified in reopening the assessment. Furthermore, it is reiterated that the onus to prove that the corpus is not taxable is on the assessee, which burden was discharged by the assessee and consequently, the order passed by the Tribunal calls for interference.

18.Ms.Sree Lakshmi Valli, learned counsel for the respondent/assessee sought to sustain the order of the Tribunal by contending that it was never the case of the assessee that they are a charitable institution or a trust claiming benefit under Section 11(1)(d) of the Act and consequently, there is no requirement for the assessee to obtain registration under Section 12A of the Act. It is submitted that even assuming that the respondent/assessee had obtained registration, the voluntary

contributions received from the companies by the assessee was with a specific direction to be invested in shares and the assessee company was permitted to use only the dividends received and nothing more as pleaded by the Revenue.

19. Further, by referring to the typed set of documents filed by the assessee which contains the certificate of incorporation; memorandum of association of the assessee company; the return of income for the assessment years 1998-99, 1999-2000; notice issued under Section 142(1) of the Act; letters given by Pentafor Software and Exports Ltd., giving the voluntary contributions with specified condition; copies of the ledger account, etc., and the assessment orders passed under Section 143(3) of the Act, submitted that all the documents were placed before the Assessing Officer and there is no failure on the part of the assessee to fully and truly disclose the materials and therefore, the reopening of the assessments is a clear case of change of opinion.

20. Furthermore, it is submitted that though the assessee had given elaborate objections for the reopening of the assessments, the objections were not disposed of as mandated by the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd., vs. Income Tax Officer reported in (2003) 259 ITR 19 (SC).

21. The learned counsel placed reliance on the decisions of the Hon'ble Supreme Court in CIT vs. Kelvinator of India Ltd., reported in (2010) 320 ITR 0561 (SC); CIT & Anr. vs. Foramer France reported in (2003) 264 ITR 0566 (SC); CIT vs. S.R.M.T. Staff Association reported in (1996) 221 ITR 0234 (AP); and the decision of the Delhi Bench of the Tribunal in Income Tax Officer (Exemption) vs. Smt. Basanti Devi & Shri Chakhan Lal Garg Education Trust, I.T.A.No.5082 (Del)2010, dated 19.01.2011, which was affirmed by the Hon'ble High Court of Delhi in I.T.A.No.927/2009, dated 23.09.2009 and the appeal filed by the Revenue against the said order in C.A.No.007036/2011, which was dismissed by the Hon'ble Supreme Court on 17.09.2018.

22. We have heard the learned counsel for the parties and carefully perused the materials placed on record.

23. At the very outset, we wish to point out that the case as pleaded by the Revenue, before us, was never the case of the assessee before the Assessing Officer, at the first instance, while the assessments were completed under Section 143(3) of the Act. During the re-assessment proceedings, the assessee never claimed that it is a trust or an institution established for a charitable purpose, nor it is the case of the assessee that they have applied for or obtained registration under Section 12A of the Act. That apart, the assessee never pleaded that the

assessee is entitled to the exemption under Section 11(1)(d) of the Act. In such circumstances, the very premise based on which, notices for re-assessments were issued on 09.08.2000 and 29.03.2005 is absolutely without any basis. Admittedly, the notices were issued after four years, after the assessments were completed. Thus, unless and until there was a tangible material available with the Assessing Officer to show that the assessee has not made full and true disclosure and income assessable to tax had escaped assessment, re-assessments could not have been resorted to.

24. There can be no dispute on the above proposition, which has been laid down in several decisions and more particularly, in the decision in Kelvinator of India Ltd., (supra). This would have been sufficient for us to hold that the reopening of the assessments was bad in law. Nevertheless, since the learned Senior Standing Counsel for the Revenue made an elaborate submission before us, we are to examine as to how the assessments were completed.

25. The assessee upon filing the return of income for the relevant assessment years, notice was issued under Section 142 (1) of the Act for the assessment year 1998-99. In the notice, the assessee was called upon to furnish the following details:-

- "1. Details for repairs and maintenance with vouchers;
2. Details for travelling and conveyance & consultancy charges with vouchers;
3. Ledger copy for the following:
 - a) Corpus Fund
 - b) Non-Trade-Quoted-At Cost Investments in
 - i. Pentafor Communications Ltd.;
 - ii. Pentafor Products Limited;
 - iii. Pentafor Solec Technologies Ltd.;
 - iv. Pentafor Software & Exports Ltd.
4. Details for Current Liabilities;
5. Copy of invoices for furniture and computed acquired during the year."

From the above, it is seen that one of the documents called for was the ledger copy of the corpus fund.

26. The assessee's case was that, it received voluntary contribution from three companies towards the corpus fund of the assessee company with a condition that, it should be invested in shares and securities and only the income from such investment is to be spent for achieving the objects of the assessee. The copies of the letters given by the companies, which extended the voluntary contributions were enclosed. The copy of the ledger account for the corpus fund was enclosed for the entire period

along with all the details. After the receipt of the documents, notice under Section 143(2) of the Act was issued to the assessee, the assessee's authorized representative attended the hearing before the Assessing Officer and the assessment was completed under Section 143(3) on 09.03.2001.

27.The Assessing Officer in the said order clearly records the presence of the authorized representative of the assessee and that the case was discussed. Apart from that, the Assessing Officer was fully aware that the assessee company is registered under Section 25 of the Companies Act, 1956, and this is noted in the assessment order when the Assessing Officer considered the expenditure of a sum of Rs.87,350/- and held that it is also in the nature of capital expenditure and not mere repairs and maintenance, as the assessee itself has been incorporated under Section 25 of the Companies Act, 1956, on 22.01.1997. In this factual background, we need to examine the reasons for reopening.

28.The Assessing Officer while issuing the notice dated 29.03.2005, stated that the assessee had not been registered under Section 12A of the Act and therefore, cannot claim exemption on income received as corpus fund. As pointed out earlier, at no point of time, the assessee claimed to be a trust or an institution possessing a registration under Section 12A of the Act. Consequently, there was no claim for any exemption under Section 11(1)(d) of the Act. In such circumstances, the Assessing Officer misdirected himself in posing such a question and stating the same to be a reason for reopening. This is amply clear that it is only a case of change of opinion, but not a case of re-assessment. What the Assessing Officer has done is to review the scrutiny assessments, which were completed under Section 143(3), which is wholly impermissible. In the reasons for reopening, there is no reference to any tangible material which has come to the notice of the Assessing Officer after the scrutiny assessments under Section 143(3) of the Act warranting the reopening of the assessments. There is no finding as to how income chargeable to tax has escaped assessment and this was on account of failure of the assessee to fully and truly disclose all particulars. In the absence of any of these, the reopening has to be held to be wholly unsustainable and a clear case of change of opinion.

29.Having held so, it may not be necessary for us to refer to the decisions referred to by the Revenue, viz., P.Krishnan Menon (supra) and Dr.K.George Thomas (supra), nor go into the aspect as what would be the definition of "income", as such a situation does not arise for consideration, as we have held that the reopening is bad in law. One more issue, which was pointed out by the assessee was that no order has been passed by the

Assessing Officer after the assessee gave their objections to the reopening proceedings, vide their objections dated 12.09.2005, 19.09.2005 and 16.12.2004.

30.The learned Senior Standing Counsel for the Revenue pointed out that the objections given by the assessee were dealt with by the Assessing Officer in the re-assessment orders and even assuming that a separate speaking order was not passed by the Assessing Officer after objections were received from the assessee, that would at best be a curable defect and on that ground, the assessments cannot be nullified. In this regard, the learned counsel referred to the decision in the case of Areva T & D India Ltd. (supra). The Court while approving the decisions of the Allahabad High Court in Sant Baba Mohan Singh vs. CIT reported in (1973) 90 ITR 197 and that of the Rajasthan High Court in CIT vs. Gyan Prakash Gupta reported in (1987) 165 ITR 501, held that failure to pass an order on the objections given by the assessee to the reopening proceedings is only a procedural irregularity committed by the Assessing Officer and hence, the re-assessments cannot be annulled.

31.In Jayanthi Natarajan vs. Assistant Commissioner of Income Tax reported in (2018) 401 ITR 0215, one of us (TSSJ) was considering the validity of a reopening proceedings in a writ petition filed by the assessee. One of the grounds urged was that, in spite of specific objection being raised to the reopening proceedings by the assessee, the Assessing Officer failed to pass a speaking order disposing of the assessee's objections as per the principles laid down by the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. (supra) and the Assessing Officer passed an assessment order disposing of the objections while completing the assessment. The assessee contended that in the event of failure to dispose of the objections raised by the assessee, reopening proceedings under Section 147 of the Act is liable to be set aside.

32.In this regard, reliance was placed on the decision in the case of IOT Infrastructure and Energy Services vs. ACIT, reported in (2010) 329 ITR 547 (Bom) and Rabo India Finance Ltd. vs. DCIT reported in (2011) 346 ITR 81 (Bombay). Reliance was also placed on the decision of the High Court of Bombay in the case of KSS Petron Private Ltd. vs. Assistant Commissioner of Income Tax, Appeal No.224 of 2014, dated 03.10.2016.

33.The Revenue resisted the plea by referring to the decision in Areva T & D India Ltd. (supra) as done before us by the Revenue stating that if at all it is true that no speaking order is passed, it is a procedural error and that cannot annul in an assessment. The decision in Areva T & D India Ltd. (supra) was distinguishable on the ground that the Court had

held that both on the failure to issue notice under Section 143 (2) and failure to follow the procedure prescribed in GKN Driveshafts (India) Ltd. (supra) are procedural defects and can be cured.

34. It was pointed out that the fundamental basis for this conclusion has been overruled by the Hon'ble Supreme Court in ACIT vs. Hotel Blue Moon reported in (2010) 321 ITR 362(SC), which has been followed by the Division Bench in N.Ahamed Ali vs. Income Tax Officer in Tax Case (Appeal) No.766 of 2014, dated 19.11.2014. Apart from that, reliance was also placed on the decision of the Division Bench of the High Court of Andhra Pradesh in the case of B.F.Dittia vs. Appellate Authority, Income Tax Department and the Income Tax Officer (Public Relations) reported in (2008) 307 ITR 158 (A.P) in which, the decision of the Hon'ble Supreme Court in Sona Builders vs. Union of India reported in (2001) 10 SCC 280 (SC) was followed holding that an order in violation of principles of natural justice deserves to be quashed and not set aside and remanded. Further, it was pointed out that the decision in the case of Sona Builders (supra) was not considered by the Division Bench of this Court in Areva T & D India Ltd.

35. Further, reliance was placed on the decision of the Division Bench of this Court in the case of Sterlite Industries (India) Ltd. vs. Assistant Commissioner of Income Tax and another reported in (2008) 304 ITR (Mad), wherein, it was held that when a notice under Section 148 of the Act, is without jurisdiction, especially in cases beyond four years, where there is no failure on the part of the assessee, to fully and truly disclose all material facts, the proceedings deserves to be quashed simplicitor. After noting the above legal position, which was placed before the Court, the Court took into consideration the factual position and allowed the writ petition.

36. In our considered view, the decision arrived at in the case of Jayanthi Narayanan (supra) reflexes the correct position of law because, the procedure carved out by the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. (supra) not only binds the assessee, but also the Revenue. Filing of objections to the reasons for reopening is not an empty formality. If this is so, passing a speaking order on the objections cannot be treated as an empty formality and to be brushed aside as a procedural error. The purpose for passing a speaking order on the objections is to afford an opportunity to the assessee to question the same, in the event the assessee is aggrieved by such an order. Therefore, to state that it would be sufficient for the Assessing Officer to deal with the objections in the assessment order and thereafter, if the assessee is aggrieved,

he can file a statutory appeal, is a proposition which would be against the principles of natural justice. Therefore, if an order violates the law laid down by the Hon'ble Supreme Court, then it has to be necessarily held to be an order without jurisdiction. The law declared by the Hon'ble Apex Court is a binding character and is a source of law and to itself which will bind all authorities.

37. We are to bear in mind that the procedure carved out in GKN Driveshafts (India) Ltd. (supra) is with a view to provide the assessee an opportunity to put forth his submission. This is in the light of the fact that reopening of a concluded assessment after a period of assessment is a very serious matter. This would be evident from the observations of the Hon'ble Apex Court in Kelvinator of India Ltd. (supra) wherein, it was held that post 1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.

38. Further, it was pointed out that the conceptual difference between the power to review and power to reopen is to be kept in mind; the Assessing Officer has no power to review; he has the power to re-assess, but the re-assessment has to be based on fulfilment of certain pre-condition and if the concept of change of opinion is removed in the garb of reopening the assessment, review would take place. It was further held that one must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer and therefore, after 01.04.1989, the Assessing Officer has power to reopen, provided there is tangible material to come to the conclusion that there is escapement of income from assessment and reasons must have live link with the formation of the belief.

39. The Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. (supra) had clarified that when a notice under Section 148 of the Act is issued, the proper course of action for the noticee is to file a return and if he so desires, to seek for reasons for issuing such notice. Further, it was held that the Assessing Officer is bound to furnish reasons within a reasonable time, on receipt of the reasons, the noticee is entitled to file objections and the Assessing Officer is bound to dispose of the same by passing a speaking order.

40. We do not agree with the interpretation canvassed before us that assuming objections were not disposed of by a speaking order, it would be only a procedural error.

41. We have referred to Kelvinator of India Ltd. (supra), which has pointed out as to how serious is reopening of a concluded assessment, that too, after four years. The Hon'ble Supreme Court has laid down the law and it has been made mandatory for the Assessing Officer to pass a speaking order. The use of the word "bound" cannot be rendered meaningless. Therefore, we are of the clear view that if there has been a procedural error, it goes to the root of the matter thereby affecting the jurisdiction of the Assessing Officer to proceed further to give a fresh innings to the Assessing Officer on the ground that it is a procedural error, will not only dilute the decision of the Hon'ble Supreme Court in GKN Driveshafts (India) Ltd. (supra), but would lead to abuse of power conferred under Section 147 of the Act, which had been pointed out in Kelvinator of India Ltd. (supra). Therefore, this would be the one more reason to hold that the reopening of assessments are bad.

42. It would be beneficial to refer to the decision in the case of S.R.M.T. Staff Association (supra). The facts of the said case were more or less identical to the assessee's case except the fact that the assessee was registered as a society whereas, the assessee before us is a company registered under Section 25 of the Companies Act, 1956. The said society collected certain amounts from various businessmen for bringing out a souvenir requesting them to send advertisements for publication in the said souvenir. The Income-tax Officer assessed to tax the difference of the amount received and the expenses, treating as "revenue receipts" in the hands of the assessee society negating the claim of the society that it is a charitable institution and entitled to exemption and the amounts paid to the society by the businessmen were voluntary contributions.

43. The assessee filed appeal before the Commissioner of Income-tax (Appeals), who held that the amounts paid by the businessmen towards advertisements could not be considered as "donations". On appeal to the Tribunal, the Tribunal following the judgment of the Bombay High Court in CIT vs. Trustees of Visha Nima Charity Trust reported in (1982) 138 ITR 564 (Bom), held that the amounts received by the society could not be treated as "trading receipts" and they were mere voluntary contributions. Further, the Tribunal confirmed the finding recorded by the authorities that the society was not a charitable institution. When the matter was carried on appeal to the Bombay High Court, the question referred was whether the Tribunal was correct in holding that the amount received by way of advertising charges are voluntary contributions or donations and are not trading receipts. After taking note of Section 2 (24) of the Act, it was held that the assessee society has been held as not a charitable institution and it is not also one of

the institutions which are satisfied under Section 2(24) of the Act which are treated as "income" within the meaning of Section 2(24) of the Act and therefore, voluntary contributions received by the assessee society cannot be treated as "income" or "trading receipts". This decision applies with full force in support of the assessee herein and the Revenue is not able to put forth any submission to dislodge such conclusion.

44.It would be beneficial to refer to the decision of the Hon'ble Supreme Court in Income Tax Officer vs. TechSpan India (P.) Ltd. reported in (2018) 404 ITR 0010 (SC). The Hon'ble Supreme Court was considering the validity of a reopening proceedings under Section 148 of the Act on the ground that deduction under Section 10A of the Act had been allowed in excess and the income had escaped assessment. While dismissing the appeal filed by the Revenue, it was pointed out that the very basis of issuing show cause notice for reopening was that the assessee was not maintaining any separate books of account for the two categories of expenses and held that the conclusion of the Assessing Officer that the deduction under Section 10A of the Act was allowed in excess was based on nothing, but a change of opinion on the same facts and circumstances, which were already in the knowledge of the Assessing Officer even during the original assessment proceedings.

45.In the preceding paragraphs, we have noted the factual position in the assessee's case as well as the reasons for reopening mentioned in the notice dated 29.03.2005 and we find that there is absolutely no other material available with the assessee except the records which formed part of the assessment file. Therefore, the reopening was a clear case of change of opinion.

46.In the result, the appeals filed by the Revenue are dismissed and the substantial questions of law are answered against the Revenue and in favour of the assessee.

47.So far as T.C.A.No.584 of 2009 is concerned, this is pertaining to the proportionate expenditure against the corpus receipt of Rs.9.25 lakhs treated as revenue expenditure.

48.In T.C.A.Nos.582 and 583 of 2009, we have held that the reopening is bad. Consequently, the original assessments for the assessment years 1998-99 and 1999-2000 have been sustained. In the said assessments, the Assessing Officer has treated the corpus as not taxable. Consequently, the Tribunal has allowed the proportionate expenditure incidentally as revenue expenditure. We find no reason to interfere with the said finding.

49. Accordingly, the tax case appeal is dismissed and the substantial questions of law are answered against the Revenue and in favour of the assessee.

50. In the result, these tax case appeals are dismissed and the substantial questions of law are answered against the Revenue and in favour of the assessee. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

abr

To

1. The Assistant Commissioner of Income-tax,
Company Circle V(2), Chennai.
 2. The Assistant Commissioner of Income-tax,
Company Circle (2), Chennai.
 3. The Commissioner of Income-tax (Appeals)-V,
Chennai-600 034.
 4. The Income-tax Appellate Tribunal, Chennai Bench 'B',
Chennai.
- +1 cc to M/s.N.Muthukumar, Advocate, S.R.No.66843

RSV(CO)
SSM(17/09/2019)

T.C.A.Nos.582 to 584 of 2009

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