

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL (IT) NO.1772 OF 2017

Pr. Commissioner of Income Tax-(Exemption), Mumbai... Appellant
Vs.
The National Health and Education Society ... Respondent

Mr. Sham Walve a/w. Mr. P. Chatterji for Appellant.
Mr. S. C. Tiwari a/w. Ms Rutuju Pawar for Respondent.

**CORAM : UJJAL BHUYAN,
MILIND N. JADHAV, JJ.**

DATE : FEBRUARY 05, 2020

P.C. :

Heard Mr. Walve, learned standing counsel Revenue for the appellant and Mr. Tiwari a/w. Ms Pawar, learned counsel for the respondent - assessee.

2. This appeal has been preferred by the Revenue under Section 260-A of the Income Tax Act, 1961 ('the Act' for short) against the order dated 17.08.2016 passed by the Income Tax Appellate Tribunal, Mumbai Bench 'B', Mumbai (briefly 'the Tribunal' hereinafter) in I.T.A.No.87/Mum/2015 for the assessment year 2010-11.

3. Assessee is a Trust running a hospital.

4. For the assessment year under consideration, respondent had filed return of income declaring total income at nil. Following scrutiny assessment, assessing officer noted that respondent runs a pharmacy store in the hospital and was selling drugs and medicines to the patients through this pharmacy store. In the process, it had turnover of Rs.37,29,09,641.00 and surplus of Rs.12,77,07,089.00. Taking the view that Section 11(4A) of the Act would not be applicable, the assessing officer vide the assessment order dated 30.03.2013 treated the surplus

amount on account of the pharmacy store as business income liable to be taxed.

5. Aggrieved by the above, respondent preferred appeal before the Commissioner of Income Tax (Appeals) - 1, Mumbai i.e., the first appellate authority. By the appellate order dated 30.10.2014, the first appellate authority held that running of the pharmacy was not a business activity of the respondent and therefore, application of Section 11(4-A) of the Act was not called for. Consequently, addition and taxability of the surplus amount from the pharmacy store was deleted.

6. Against the above decision of the first appellate authority, Revenue preferred appeal before the Tribunal. Tribunal noted that the case of the respondent was fully covered by its own order dated 27.05.2016 in the case of *Hiranandani Foundation* in I.T.A. No.561/Mum/2016 for the assessment year 2006-07 and following the said decision, upheld the order of the first appellate authority by dismissing the appeal of the Revenue.

7. Hence, the appeal by the Revenue before us.

8. In support of his contention, Mr. Walve has referred to the provisions of Section 11 of the Act, more particularly sub-section (4A) thereof and submits that assessing officer took the view that the pharmacy was a property held under the Trust and a business undertaking; therefore, the excess income of such undertaking was rightly held to be for purposes other than charitable. Accordingly, assessing officer had added the said amount as business income of the respondent.

9. On the other hand, learned counsel for the respondent at the outset submits that Chief Commissioner of Income Tax, Mumbai had passed an order dated 07.04.2011 granting approval under Section 10(23C)(via) of

the Act for the assessment year 2009-10 and onwards in respect of the respondent. When the Chief Commissioner had granted approval under Section 10(23C)(via), it is beyond comprehension as to how the assessing officer could have treated the income earned through the pharmacy store as business income.

9.1. Learned counsel has also referred to the stand of the respondent before the first appellate authority and contends that respondent is not carrying on any business activity. It does not sell drugs to outsiders but only charges for the drugs used in the treatment directly from the pharmacy. The admitted patient does not buy any drug. It is essentially part of the treatment process. The pharmacy is for in-house / captive consumption of the hospital and not for over the counter sale in general. It is not independent in nature.

10. Submissions made by learned counsel for the parties have been considered. Also perused the materials on record.

11. Section 10 of the Act deals with incomes not included in total income. It says that in computing the total income of a previous year of any person, any income falling within any of the clauses mentioned thereunder shall not be included. Sub-section (23C)(via) mentions any income received by any person on behalf of any 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. Though there are several provisos to the said clause, those may not be relevant for the purpose of the present appeal.

12. Before we advert to the orders passed by the revenue authorities and the case laws, we may also deal with Section 11(4A) of the Act.

12.1. Section 11 mentions the categories of income which are not to be included in the total income of the previous year of the person in receipt of income from property held for charitable or religious purposes. As per sub-section (4), for the purposes of Section 11, “property held under trust” includes a business undertaking so held and where a claim is made that the income of any such undertaking shall not be included in the total income of the persons in receipt thereof, the assessing officer shall have the power to determine the income of such undertaking in accordance with the provisions of the Act relating to assessment and where any income so determined is in excess of the income as shown in the accounts of the undertaking, such excess shall be deemed to be applied to purposes other than charitable or religious purposes.

12.2. Sub-section (4A) provides that provisions of sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the trust or the institution and separate books of account are maintained by such trust or institution in respect of such business.

13. In the instant case, as already noticed above, assessing officer had carried out the exercise under Section 11(4A) of the Act and taking the view that considering the nature, volume, frequency and surplus of transactions of the pharmacy store, held the same to be a systematic business activity of the respondent and declined to consider it to be incidental to the charitable activity of the respondent trust. Besides, respondent had not maintained separate books of accounts in respect of the pharmacy store. It is in these circumstances that assessing officer held that the conditions prescribed under Section 11(4A) of the Act were not satisfied by the respondent Trust and accordingly he treated the surplus amount accruing out of the pharmacy store as business income under Section 11(4A) and brought the same within the taxable amount.

14. In appeal, the first appellate authority noted that respondent was granted approval under Section 10(23C)(via) of the Act with effect from the assessment year 2009-10 on the satisfaction that respondent was existing solely for philanthropic purposes and not for purposes of profit. Therefore, the first appellate authority held that there was no basis to treat the running of pharmacy as a business venture. Running of pharmacy was part of philanthropic activity of running the hospital. No materials were brought on record by the assessing officer to justify the adverse view taken. Application of Section 11(4A) was not called for. Consequently, the first appellate authority held the addition and taxability of the surplus out of the pharmacy store to be erroneous and accordingly the same was directed to be deleted.

15. When the Revenue preferred appeal before the Tribunal, Tribunal relied upon its decision in the case of *Hiranandani Foundation* which in turn had relied upon the decision of the Supreme Court in *Aditanar Educational Institution Vs. Additional Commissioner of Income Tax*, (1997) 224 ITR 310 and a decision of this Court in *Baun Foundation Trust Vs. Chief Commissioner of Income Tax*, 2012 (73) DTR 45 and dismissed the appeal of the Revenue by affirming the order of the first appellate authority.

16. In the case of *Hiranandani Foundation*, Tribunal held that running of a pharmacy is a necessary requirement for running of a hospital. It is impossible from a medical point of view that a hospital can run without a pharmacy. Maintenance of a pharmacy is ancillary to the dominant object of running of a hospital and thus, it is an integral part of the hospital.

17. In the present case, Chief Commissioner of Income Tax, Mumbai had passed an order dated 07.04.2011 granting approval to the respondent for the purpose of Section 10(23C)(via) of the Act for the assessment year 2009-10 and onwards subject to the conditions

mentioned therein. When the Chief Commissioner of Income Tax had granted approval to the respondent under the aforesaid provision, it is not understood as to how the assessing officer could have invoked the provisions of Section 11(4A) of the Act to construe the activity of the pharmacy as a separate business activity and thereafter to tax the income accrued therefrom.

18. In Aditanar Educational Institution (*supra*), Supreme Court was considering exemption granted to an educational institution under Section 10(22) of the Act. As per Section 10(22) of the Act, any income of an university or other educational institution existing solely for educational purposes and not for purposes of profit is not to be included in the total income of the previous year of any person. In the facts of that case, Supreme Court held that after meeting the expenditure, if any surplus results incidentally from the activity lawfully carried on by the educational institution, it will not cease to be one existing solely for educational purposes since the object is not one to make profit.

19. In Baun Foundation Trust (*supra*) where exemption under Section 10(23C)(via) of the Act was in question, this Court referred to the decision of the Supreme Court in Aditanar Educational Institution (*supra*) and held that a hospital must of necessity have a section or department where medicines can be dispensed and it is not uncommon for a medical hospital which exists for philanthropic purposes to have a chemist shop where pharmaceutical products are sold. This is a facility which is intended to be used predominantly by patients and their relatives. Though members of the general public are not prohibited from using the facility, the crucial question to determine is whether the establishment of the chemist shop is incidental or ancillary to the dominant object and purpose which is to set up and conduct a hospital for philanthropic purposes. In the facts of that case it was held that running of the chemist shop was not the dominant object or purpose of the trust.

20. Applying the legal principles set out by the judicial pronouncements as above in the context of the statutory provisions to the facts of the present case, we are of the view that the pharmacy store of the respondent was ancillary to the main object of running the hospital. Therefore, income accrued therefrom was incidental to the dominant object of the respondent i.e., running of the hospital. Thus, the assessing officer was not justified in treating the pharmacy store of the respondent as a separate business entity and to hold the surplus amount accrued therefrom as business income under Section 11(4A) of the Act. The lower appellate authorities have rightly interfered with such decision of the assessing officer. We do not find any error or infirmity in the view taken by the first appellate authority as affirmed by the Tribunal.

21. Consequently, the appeal fails and is accordingly dismissed.

(MILIND N. JADHAV, J.)

(UJJAL BHUYAN, J.)

Minal Parab