IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.09.2020

CORAM

THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE Mrs.JUSTICE V.BHAVANI SUBBAROYAN

T.C.A.No.98 of 2018
and CMP.No.1567 of 2018

M/s.Employers Federations of Southern India
2D, Eldorado Building (2nd Floor)
112, Nungambakkam High Road
Chennai - 600 034. .. Appellant / Appellant

Versus

The Commissioner of Income Tax (Exemptions) -III
M.G.Road, Nungambakkam
Chennai - 600 034. .. Respondent / Respondent

Prayer:- Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Chennai 'C' (SMC) Bench, dated 31.01.2017 in I.T.A.No.1854/Mds/2014, against the order passed by the commissioner of Income Tax,(Appeals) VII, Chennai-600 034, dt.08/04/2014 made in ITA.No.668/11-12 and against the order passed by the Assistant Director of Income Tax(Exemptions)-III, Chennai-34, dt-30/12/2011 made in PAN/GIR No.AAAAT0118M for the Assessment year 2009-2010.

For Appellant : Ms.Radhika Chandrasekar

For Respondent : Mr.J.Narayanaswamy
Senior Standing Counsel

JUDGMENT
[Order of the Court was made by T.S.SIVAGNANAM, J.]

This appeal filed by the Assessee, under Section 260A of the Income Tax Act, 1961 ('the Act' for brevity) is directed against the order dated 30.01.2017 passed by the Income Tax

Appellate Tribunal, Chennai 'C' (SMC) Bench, ('the Tribunal' for brevity), in I.T.A.No.1854/Mds/2014 for the assessment year 2009-10.

2. The appeal was admitted on 07.06.2019 on the following substantial questions of Law:

(i) Whether on the facts and circumstance of the case, the Tribunal was right in law in holding that the ratio of the decision of the Co-ordinate Bench shall apply only if the nature of income is one and the same even though the activities are incidental to the object?

(ii) Whether on the facts and circumstances of the case, the Tribunal was right in law in holding that the appellant is not entitled for the benefit of Section 11, merely because the appellant received certain additional amounts without considering the dominant object of the trust?

(iii) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the income received by the appellant such as advertisement income from the souvenir, seminar surplus etc., are in the nature of commercial transaction and cannot be considered as charitable purpose?

(iv) Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the receipt from members is outside the purview of the concept of mutuality?

3. We have elaborately heard Ms.Radhika Chandrasekar, learned counsel for the appellant-assessee and Mr.J.Narayanaswamy, learned Senior Standing Counsel for the respondent-Revenue.

4. The Assessee is registered Trust in the name and style of M/s.Employers Federations of Southern India, who enjoys registration under Section 12(A)(a) of the Income Tax Act, 1961. The assessee filed the return of income for the assessment year under consideration, AY 2009-10, on 22.09.2009, admitting the income of Rs.37,16,241/- and claimed exemption under Section 11 of the Act. The return was processed under Section 143(3) of the Act and subsequently, the case was selected for scrutiny and notice under Section 143(2) was issued to the assessee and details were called for. On perusal of the details, the Assessing Officer held that the Assessee is a Trust, a public charitable institution with a main object to consider all

questions concerning the relations between the employers and employees in Southern India and to protect their interests. Annual subscription is being collected from the members and delegate fee is collected for seminars conducted and receipts from advertisement is collected from souvenir brought out by the assessee. The Assessing Officer came to a conclusion that the assessee is carrying on activity of general public utility and receiving aggregate receipts of more than Rs.10,00,000/- in the nature of fees, as such, it would come within the purview of second proviso under Section 2(15) of the Act. The Assessing Officer treated the assessee as an Association of Persons (AOP) and the excess of income over the expenditure of it, was taxed. Further, the Assessing Officer referred the case to the Director of Income Tax (Exemptions), for consideration of withdrawal/cancellation of registration under Section 12AA of the Act.

5. The fact remains that the assessee is a non-profit entity viz., a charitable public trust and in the light of being a such organisation/institution, the registration of the assessee has not been cancelled or withdrawn till date.

6. The Assessing Officer after discussing the case with the authorised representative and on considering the details made available, had passed the assessment order on 30.12.2011, determining the total income as Rs.11,86,560/- and the tax payable as Rs.3,93,250/-.

7. Aggrieved by the assessment order dated 30.12.2011, passed under Section 143(3) of the Act, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals) -VII, Chennai [in short 'CIT(A)']. The CIT(A), vide order dated 08.4.2014, dismissed the appeal, by referring to Circular No.11/2008 dated 19.12.2008 issued by the Central Board of Direct Taxes (CBDT), and held that the assessee has been dealing with non-members by receiving advertisement income, income from conduct of seminars and miscellaneous receipts and interests from bank deposits etc., and therefore, they are not governed by the additional conditions stipulated in the second proviso under Section 2(15) of the Act.

8. Aggrieved by the said order of CIT(A) , the assessee preferred an appeal before the Tribunal, raising various grounds and in particular, contending that the CIT(A) did not give any findings that the activity carried on by the assessee was in the nature of trade, commerce or business; or carrying on any activity or rendering any service in relation to trade, commerce or business. The assessee relied on several decisions in

support of their claim. The Tribunal by the impugned order, has dismissed the appeal filed by the assessee. This is how they are before this Court, by way of present tax case appeal.

9. The Tribunal, while confirming the order passed by CIT (A), was also guided by the fact that the assessee conducts conferences, seminars, which are open to persons other than members of the Assessee-Trust and fees is collected from those persons, and this being their major activity as projected in their Annual Report, it cannot be considered as an activity incidental to its main objects, in order to claim that the income was exempted on the principles of mutuality. The decisions relied on by the assessee were distinguished assigning certain reasons, and in particular, the conduct of seminars and conferences was their predominant activity and substantial sums of money were received by the assessee.

10. The Central Board of Direct Taxes (CDBT), by Circular No.11 of 2008 dated 19.12.2008, clarified as to how the cases where the exemption is claimed under Section 11 of the Act, are to be dealt with. Paragraph Nos.3, 3.1 and 3.2 of the circular would be relevant, which are quoted hereunder :

> " 3. The newly inserted proviso to section 2(15) will apply only to entities whose purpose is 'advancement of any other object of general public utility' i.e. the fourth limb of the definition of 'charitable purpose' contained in section 2(15). Hence, such entities will not be eligible for exemption under section 11 or under section 10(23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on an activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity.
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> 3.1. There are industry and trade associations who claim exemption from tax u/s 11 on the ground that their objects are for charitable purpose as these are covered under 'any other object of general public utility'. Under the principle of mutuality, if trading takes place between persons who are associated together and contribute to a common fund for the financing of some venture or object and in this respect have no dealings or relations with any outside body, then any surplus returned to the persons forming such association is not chargeable to tax. In such cases, there must be complete identity between the contributors and the participants. Therefore, where

industry or trade associations claim both to be charitable institutions as well as mutual organizations and their activities are restricted to contributions from and participation of only their members, these would not fall under the purview of the proviso to section 2(15) owing to the principle of mutuality. However, if such organizations have dealings with non-members, their claim to be charitable organizations would now be governed by the additional conditions stipulated in the proviso to section 2 (15).

> 3.2. In the final analysis, however, whether the assessee has for its object 'the advancement of any other object of general public utility' is a question of fact. If such assessee is engaged in any activity in the nature of trade, commerce or business or renders any service in relation to trade, commerce or business, it would not be entitled to claim that its object is charitable purpose. In such a case, the object of 'general public utility' will be only a mask or a device to hide the true purpose which is trade, commerce or business or the rendering of any service in relation to trade, commerce or business. Each case would, therefore, be decided on its own facts and no generalization is possible. Assessees, who claim that their object is 'charitable purpose' within the meaning of Section 2(15), would be well advised to eschew any activity which is in the nature of trade, commerce or business or the rendering of any service in relation to any trade, commerce or business."

As could be seen from the above circular, the newly inserted proviso to Section 2(15) which was inserted with effect from 01.4.2009, would stand attracted to the entities whose activities have a commercial flavour in the nature of trade, commerce or business or rendering any service in relation to any trader, commerce or business.

11. Mr.J.Narayanaswamy, learned Senior Standing Counsel appearing for the respondent-Revenue would vehemently contend that the assessee has accepted the fact that the nature of its activity would fall within the fourth limb of charitable purpose as contained in Section 2(15) and having admitted the same, proviso (1) & (ii) of Section 2(15) would stand attracted. Even assuming that the first proviso is not applicable as contended by the assessee, the total income of the assessee for the assessment year 2009-2010, appears to be more than the monetary

limit fixed, i.e., Rs.10,00,000/-, thus the assessee is hit by the second proviso of Section 2(15) of the Act.

12. As a general preposition, the contention of Mr.J.Narayanaswamy would be right, but there is an important aspect which needs to be taken note of while applying the first proviso under Section 2(15). In fact, this has been brought out very lucidly in Circular No.11/2008. The CBDT explains it by stating that the entities which fall within the fourth limb of charitable purpose under Section 2(15) will not be eligible for exemption under Section 11, if they carry on commercial activity. Further, it is stated that whether such an entity is carrying on activity in the nature of trade, commerce or business, is a question of fact, which will be decided based on the nature, scope, expenditure and frequency of the activity. Further, it has been pointed out that whether the assessee has for its object 'the advancement of any other object of general public utility' is a question of fact. If the assessee is engaged in an activity in the nature of trade, commerce or business or render any service in relation to trade, commerce or business, it would not be entitled to claim that its object is 'charitable purpose' and in such a case, the object of general public utility will be only a mask to hide the true purpose. Thus the Board has clarified that each case would be decided on facts and no generalization is possible. Thus, the Assessing Officer as well as the Appellate Authority and the Tribunal are enjoined upon a duty to render a finding of fact, and in respect of the assessees, who fall within the fourth limb of "charitable purpose" under Section 2(15) to deny exemption, should examine facts and record a finding that the activity is a commercial activity, i.e., in the nature of trade, commerce or business or any activity of rendering any service in relation to trade, commerce or trade.

13. We have no hesitation to hold that the Assessing Officer nor the CIT(A) or the Tribunal has rendered any such finding. Thus, in the absence of a finding to the said effect, which is the most essential feature, any amount of legal interpretation or application of precedents of Courts or Tribunals, cannot be effected. This aspect of the matter has been dealt with in the case of India Trade Promotion Organization Vs. Director General of Income-Tax (Exemptions) and Others [(2015) 371 ITR 33 (Del)], wherein it was held as follows :

> " If the dominant and the prime objective of the institution, which claims to have been established for charitable purposes, is profit making, whether its activities are directly in the nature of trade,

> commerce or business or indirectly in the rendering of any service in relation to any trade, commerce or business, then it would not be entitled to claim its object to be a "charitable purpose". On the flip side, where an institution is not driven primarily by a desire or motive to earn profits but to do charity through the advancement of an object of general public utility, it cannot, but be regarded as an institution established for charitable purposes."

In Commissioner of Income Tax Vs. Fertilizers Association of India [(2017) 399 ITR 209 (Del)], the appeal filed by the Revenue was dismissed, on the ground that merely because fees was collected from members or non-members for rendering services like training, conduction seminars would not ispo facto lead to denial of exemption. In Commissioner of Income-Tax (Exemptions) Vs. National Internet Exchange of India [(2019) 417 ITR 436 (Del)], it was held that the services of said assessee were of general public utility and were towards membership and connectivity charges, which were incidental to its main objects, which was charity. In PHD Chamber of Commerce and Industry Vs. Director of Income-Tax (Exemptions) [(2013) 357 ITR 296 (Del)], while dealing with more or less identical facts, it was held as follows :

> " Having regard to the authorities which we have noticed above it is not proper to characterise the activities of the chamber as activities amounting to a business in the generally understood sense of the word, the most important feature of business being profit motive. It has not been suggested by the Income-tax authorities that the activities carried out by the assessee-chamber were propelled by any profit motive. In such circumstances, it is proper to view the activities as driven by a charitable motive in the sense in which a charitable purpose is defined in section 2(15) of the Act. 11(4)A are not attracted to the present case and a remand to the Assessing Officer for finding out whether the activities were incidental to the objectives of the trust and separate books of account were maintained for such business was unnecessary. We accordingly answer the substantial question of law framed by us in the negative, in favour of the assessee and against the Revenue."

14. We have referred to the above decisions to give a broad overview as to how the Courts have dealt with matters in respect of organisations which were having their objects of general public utility. Therefore, unless and until there is a

factual finding rendered by the authority, benefit could not have been denied to the assessee. As we have found that both the authorities or the Tribunal have examined this aspect and merely gone by the first proviso to Section 2(15) of the Act, we are inclined to interfere with the orders passed by the authorities and the Tribunal and remand the matter for fresh consideration.

15. In the result, the appeal is allowed and the impugned order passed by the Tribunal as well as the order passed by CIT (A) and the assessment order dated 30.12.2014 are set aside and the matter is remanded to the Assessing Officer to take a fresh decision in the matter and while doing so, the Assessing Officer to bear in mind the legal principles laid down by the Courts and Tribunal in various decisions, some of which we have referred to above. Consequently, the substantial questions of law framed for consideration are left open. No costs. The Miscellaneous Petition stands closed.

Sd/-
Assistant Registrar

//True Copy//
Sub Assistant Registrar

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To :

1.The Commissioner of Income Tax (Exemptions)-III
M.G.Road, Nungambakkam
Chennai - 600 034.

2.The Income Tax Appellate Tribunal
Chennai, 'C' (SMC) Bench.

3.The Commissioner of Income Tax(Appeals)VII,
Chennai-600 034.

4.The Assistant Director of Income
Tax(Exemptions)-III, Chennai-34.

T.C.A.No.98 of 2018

CA(CO)
CB(09/11/2020)