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

\+ ITA 430/2023

COMMISSIONER OF INCOME TAX EXEMPTIONS DELHI ..... Appellant

Through: Mr. Abhishek Maratha, SSC along with Mr. Parth Semwal, JSC and Ms. Nupur Sharma, Adv.

versus

BALAJI MEDICAL AND DIAGNOSTIC RESEARCH CENTRE ..... Respondent

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Aniket D. Agrawal and Ms. Manisha Sharma, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

O R D E R

% **15.04.2024**

1. This appeal is directed against the order of the Income Tax Appellate Tribunal ["**ITAT**"] dated 08 February 2022. The appellants have posited the following questions of law for our consideration:-

> "(i) Whether the Hon'ble ITAT was justified in law and in the facts and circumstances of the case in allowing the appeal of the assessee by ignoring the fact that though the objects of the assessee seem to be charitable in nature but the activities which yielded the income to the assessee or commercial in nature?
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> (ii) Whether Hon'ble ITAT was justified in law and in the facts and circumstances of the present case in ignoring that the running of the hospital was governed by profit motive for the benefit of Max group and the society, which was allowed registration under section 12 A was seized to have any effective function, as far as the hospital is concerned and hence, claim of exemption under section 11 and 12 of the assessee is no longer justifiable?

(iii) Whether the impugned order passed by Hon'ble Income Tax Appellate Tribunal is perverse both in law and on facts?"

2. The ITAT in its order dated 08 February 2022 had observed as follows:-

> "7. We have heard the parties and perused the material on record. Undisputed factual position arising on record clearly demonstrates that while deciding identical issue, under similar facts and circumstances, in assessee's own case in assessment year 2008-09, the Tribunal in ITA No.4317/Del/2012 has upheld the decision of learned Commissioner (Appeals) in allowing assessee's claim of exemption under Section ll of the Act. Further, the fact that the First Appellate Authority in assessee's own case has allowed identical relief to the assessee in assessment years 2009-10, 2011-12 and 2012-13 is borne out from record. Thus, considering the fact that the Tribunal has upheld the decision of learned First Appellate Authority in allowing assessee's claim of exemption under Sections 11 and 12 in assessment year 2008-09 and taking note of the consistent view of learned First Appellate Authority on the issue in some of the subsequent assessment years, we do not find any justifiable reason to interfere with the decision of learned Commissioner (Appeals). This is for the reason that in absence of any material difference in factual position, Rule of Consistency must apply. Accordingly, we uphold the decision of learned Commissioner (Appeals) by dismissing the ground raised."

3. We, however, note that while dealing with an identical challenge, we had in ITA 155/2021 held as follows:-

> 8. As we note from the objects of the charitable society as set out in its Memorandum of Association, it had come to be constituted with the primary objective of engaging in medical, biological, social, environmental and allied sciences research. The incidental and ancillary objectives extended to the society promoting, establishing, maintaining and managing centres/institutions relating to health and medical sciences as also to create the necessary physical infrastructure and facilities to aid the principal objectives. It is in the aforesaid backdrop that the ITAT has come to hold that the establishment of a hospital cannot be said to be a venture violative of the principal objectives of the assessee. It has, and in our considered opinion, correctly come to conclude that the medical facility was to aid and facilitate the principal objective for which the trust had been constituted.
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> 9. The entering into of the service agreements with MHC and MMS was, as the ITAT has found, essentially aimed at enabling the assessee to establish a state of the art health facility. It was with that

avowed objective that it entered into a contractual service arrangement with MHC and MMS. The ITAT has also taken note of the service fee obligations which were discharged by the assessee and found on facts that the maximum expenditure incurred in that regard was 25% of the total expenditure pertaining to **Financial Year** 2005-2006 and which had come to be gradually reduced to 20% in FY 2013-2014.

10. The aforesaid facts clearly established that the society was incurring substantial expenses on its own account and thus the allegation of the service partners being either unjustly enriched or the funds of the society being diverted to a private entity would not sustain.

11. We further note that this is also not a case where the members of the governing body of the society or for that matter the Directors of MHC and MMS would fall within the definition of persons specified under Section 13(3) of the Act. It was on the aforesaid basis and together with the other facts which existed on the record that the ITAT ultimately came to hold that the service arrangement with the Max group of concerns did not amount to either a handover of management or a deprivation of the charitable character of a society.

12. The ITAT has in this regard also taken note of its decision rendered on ITA No. 1721/Del/2008 while dealing with a similar service agreement and the challenge to which decision came to be dismissed by this Court in ITA 1021/2015 in the following terms:-

> "4. The ITAT has followed the earlier order passed by the ITAT in the case of the same Assessee for AY 2008-09 where the dismissal was on account of low tax effect. However, in the said order, the ITAT took note of the decision for AY 2004-05 which involved the same question as has been raised in the present appeals. The essential point raised is that the Respondent Assessee, which is a Trust registered under Section 12AA of the Act, has by virtue of an operation and maintenance agreement entered into with Fortis Healthcare Limited ('FHL') on 29th October 2013, transferred control of the Trust to FHL and by virtue of the said agreement has agreed to pay management fees at 35% of the gross billings of the hospital to FHL.
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> 5. The Commissioner of Income Tax (Appeals) ['CIT (A)'] has in the order dated 26th February 2010, common to both AYs, disagreed with the Assessing Officer ('AO') and held that there is no evidence to show that there has been any siphoning off of funds and that by virtue of the agreement control of the Trust has been transferred to FHL."

13. The ITAT has also chosen to rest its ultimate conclusions on the decision of the Supreme Court in **Queen's Educational Society vs.**

CIT where the following pertinent observations came to be made:-

> "**8.** In CIT v. Surat Art Silk Cloth Manufacturers' Assn. [(1980) 2 SCC 31 : 1980 SCC (Tax) 170 : (1980) 121 ITR 1] , this Court while construing the definition of "charitable purpose" in Section 2(15) of the Income Tax Act held: (SCC pp. 52-56, paras 17-19)
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> > "17. The next question that arises is as to what is the meaning of the expression 'activity for profit'. Every trust or institution must have a purpose for which it is established and every purpose must for its accomplishment involve the carrying on of an activity. The activity must, however, be for profit in order to attract the exclusionary clause and the question therefore is when can an activity be said to be one for [Ed.: The word has been emphasised in original.] profit? The answer to the question obviously depends on the correct connotation of the preposition 'for'. This preposition has many shades of meaning but when used with the active participle of a verb it means 'for the purpose of' and connotes the end with reference to which something is done. It is not therefore enough that as a matter of fact an activity results in profit but it must be carried on with the object of earning profit. Profit-making must be the end to which the activity must be directed or in other words, the predominant object of the activity must be making a profit. Where an activity is not pervaded by profit motive but is carried on primarily for serving the charitable purpose, it would not be correct to describe it as an activity for profit. But where, on the other hand, an activity is carried on with the predominant object of earning profit, it would be an activity for profit, though it may be carried on in advancement of the charitable purpose of the trust or institution. Where an activity is carried on as a matter of advancement of the charitable purpose or for the purpose of carrying out the charitable purpose, it would not be incorrect to say as a matter of plain English grammar that the charitable purpose involves the carrying on of such activity, but the predominant object of such activity must be to subserve the charitable purpose and not to earn profit. <u>The charitable purpose should not be submerged by the profit-making motive; the latter should not masquerade under the guise of the former. The purpose of the trust, as pointed out by one of us (Pathak, J.) in Dharmadeepti v. CIT [(1978) 3 SCC 499 : 1978 SCC (Tax) 193] must be 'essentially charitable in nature' and it must not be a cover for carrying on an activity which has profit-making as its predominant object</u>. This interpretation of the exclusionary

clause in Section 2 clause (15) derives considerable support from the speech made by the Finance Minister while introducing that provision. The Finance Minister explained the reason for introducing this exclusionary clause in the following words:

'The definition of "charitable purpose" in that clause is at present so widely worded that it can be taken advantage of even by commercial concerns which, while ostensibly serving a public purpose, get fully paid for the benefits provided by them, namely, the newspaper industry which while running its concern on commercial lines can claim that by circulating newspapers it was improving the general knowledge of the public. In order to prevent the misuse of this definition in such cases, the Select Committee felt that the words "not involving the carrying on of any activity for profit" should be added to the definition.'

It is obvious that the exclusionary clause was added with a view to overcoming the decision of the Privy Council in Tribune case [Tribune Press v. CIT, (1938-39) 66 IA 241 : (1939) 50 LW 339 : AIR 1939 PC 208 : (1939) 7 ITR 415] where it was held that the object of supplying the community with an organ of educated public opinion by publication of a newspaper was an object of general public utility and hence charitable in character, even though the activity of publication of the newspaper was carried on commercial lines with the object of earning profit. The publication of the newspaper was an activity engaged in by the trust for the purpose of carrying out its charitable purpose and on the facts it was clearly an activity which had profit-making as its predominant object, but even so it was held by the Judicial Committee that since the purpose served was an object of general public utility, it was a charitable purpose. It is clear from the speech of the Finance Minister that it was with a view to setting at naught this decision that the exclusionary clause was added in the definition of 'charitable purpose'. The test which has, therefore, now to be applied is whether the predominant object of the activity involved in carrying out the object of general public utility is to subserve the charitable purpose or to earn profit. <u>Where profit-making is the predominant object of the activity, the purpose, though an object of general public utility, would cease to be a charitable purpose. But where the predominant object of the activity is to carry out the charitable purpose and not to earn profit, it would not lose its character of a</u>

charitable purpose merely because some profit arises from the activity. The exclusionary clause does not require that the activity must be carried on in such a manner that it does not result in any profit. It would indeed be difficult for persons in charge of a trust or institution to so carry on the activity that the expenditure balances the income and there is no resulting profit. That would not only be difficult of practical realisation but would also reflect unsound principle of management. We, therefore, agree with Beg, J., when he said in Lok Shikshana Trust case [Lok Shikshana Trust v. CIT, (1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234] that: (SCC pp. 274-75, para 41)

'41. … If the profits must necessarily feed a charitable purpose, under the terms of the trust, the mere fact that the activities of the trust yield profit will not alter the charitable character of the trust. The test now is, more clearly than in the past, the genuineness of the purpose tested by the obligation created to spend the money exclusively or essentially on "charity".'

The learned Judge also added that the restrictive condition 'that the purpose should not involve the carrying on of any activity for profit would be satisfied if [Ed.: The matter between asterisks has been emphasised in original.] profit-making is not the real object [Ed.: The matter between asterisks has been emphasised in original.] '. We wholly endorse these observations.

18. The application of this test may be illustrated by taking a simple example. Suppose the Gandhi Peace Foundation which has been established for propagation of Gandhian thought and philosophy, which would admittedly be an object of general public utility, undertakes publication of a monthly journal for the purpose of carrying out this charitable object and charges a small price which is more than the cost of the publication and leaves a little profit, would it deprive the Gandhi Peace Foundation of its charitable character? The pricing of the monthly journal would undoubtedly be made in such a manner that it leaves some profit for the Gandhi Peace Foundation, as, indeed, would be done by any prudent and wise management, but that cannot have the effect of polluting the charitable character of the purpose, because the predominant object of the activity of publication of the monthly journal would be to carry out the charitable purpose by propagating Gandhian thought and philosophy and not to make profit or in other words, profit-making

would not be the driving force behind this activity. But it is possible that in a given case the degree or extent of profit-making may be of such a nature as to reasonably lead to the inference that the real object of the activity is profit-making and not serving the charitable purpose. If, for example, in the illustration given by us, it is found that the publication of the monthly journal is carried on wholly on commercial lines and the pricing of the monthly journal is made on the same basis on which it would be made by a commercial organisation leaving a large margin of profit, it might be difficult to resist the inference that the activity of publication of the journal is carried on for [From the Judgment and Order dated 24-9-2007 of the High Court of Uttarakhand at Nainital in Income Tax Appeal No. 103 of 2007] profit and the purpose is non-charitable. We may take by way of illustration another example given by Krishna Iyer, J., in Indian Chamber of Commerce case [Indian Chamber of Commerce v. CIT, (1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR 796] where a blood bank collects blood on payment and supplies blood for a higher price on commercial basis. Undoubtedly, in such a case, the blood bank would be serving an object of general public utility but since it advances the charitable object by sale of blood as an activity carried on with the object of making profit, it would be difficult to call its purpose charitable. Ordinarily there should be no difficulty in determining whether the predominant object of an activity is advancement of a charitable purpose or profit-making. But cases are bound to arise in practice which may be on the borderline and in such cases the solution of the problem whether the purpose is charitable or not may involve much refinement and present real difficulty.

19. There is, however, one comment which is necessary to be made whilst we are on this point and that arises out of certain observations made by this Court in Lok Shikshana Trust case [Lok Shikshana Trust v. CIT, (1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234] as well as Indian Chamber of Commerce case [Indian Chamber of Commerce v. CIT, (1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR 796] . It was said by Khanna, J. in Lok Shikshana Trust case [Lok Shikshana Trust v. CIT, (1976) 1 SCC 254 : 1976 SCC (Tax) 14 : (1975) 101 ITR 234] : (SCC p. 264, para 9)

'[I]f the activity of a trust consists of carrying on of a business and there are no restrictions on its making profit, the court would be well justified in assuming in the absence of some indication to the contrary that the object of the trust involves the carrying on of an activity for profit.'

And to the same effect, observed Krishna Iyer, J. in Indian Chamber of Commerce case [Indian Chamber of Commerce v. CIT, (1976) 1 SCC 324 : 1976 SCC (Tax) 41 : (1975) 101 ITR 796] when he said: (SCC pp. 332 & 335, paras 14 & 23)

'14. … An undertaking by a business organisation is ordinarily assumed to be for profit unless expressly or by necessary implication or by eloquent surrounding circumstances the making of profit stands loudly negatived.

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23. … A pragmatic condition, written or unwritten, proved by a prescription of profits or by long years of invariable practice or spelt from [some] strong surrounding circumstances indicative of anti-profit motivation — such a condition will qualify for "charitable purpose".'

Now we entirely agree with the learned Judges who decided these two cases that activity involved in carrying out the charitable purpose must not be motivated by a profit objective but it must be undertaken for the purpose of advancement or carrying out of the charitable purpose. But we find it difficult to accept their thesis that whenever an activity is carried on which yields profit, the inference must necessarily be drawn, in the absence of some indication to the contrary, that the activity is for [From the Judgment and Order dated 24-9-2007 of the High Court of Uttarakhand at Nainital in Income Tax Appeal No. 103 of 2007] profit and the charitable purpose involves the carrying on of an activity for profit. We do not think the Court would be justified in drawing any such inference merely because the activity results in profit. It is in our opinion not at all necessary that there must be a provision in the constitution of the trust or institution that the activity shall be carried on no profit no loss basis or that profit shall be proscribed. Even if there is no such express provision, the nature of the charitable purpose, the manner in which the activity for advancing the charitable purpose is being carried on and the surrounding circumstances may clearly indicate that the activity is not propelled by a dominant profit motive. What is necessary to be considered is whether having regard to all the facts and circumstances of the case, the dominant object of the activity is profit-making or carrying out a charitable purpose. If it is the former, the purpose would not be a charitable purpose, but, if it is the latter, the charitable character of the purpose would not be lost."

(emphasis supplied)

9. Coming closer to the section at hand, in Aditanar Educational Institution v. CIT [(1997) 3 SCC 346 : (1997) 224 ITR 310] this Court while construing the predecessor section, namely, Section 10(22) of the Income Tax Act, held: (SCC p. 352, para 8)

> "8. … The High Court has made an observation that any income which has a direct relation or incidental to the running of the institution as such would qualify for exemption. We may state that the language of Section 10(22) of the Act is plain and clear and the availability of the exemption should be evaluated each year to find out whether the institution existed during the relevant year solely for educational purposes and not for the purposes of profit. 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. The decisive or acid test is whether on an overall view of the matter, the object is to make profit. In evaluating or appraising the above, one should also bear in mind the distinction/difference between the corpus, the objects and the powers of the entity concerned."

11. Thus, the law common to Sections 10(23-C)(iii-ad) and (vi) may be summed up as follows:

(1) Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

(2) The predominant object test must be applied—the purpose of education should not be submerged by a profit-making motive.

(3) A distinction must be drawn between the making of a surplus and an institution being carried on "for profit". No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.

(4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not cease

to be one existing solely for educational purposes.

(5) The ultimate test is whether on an overall view of the matter in the assessment year concerned the object is to make profit as opposed to educating persons."

We thus find no justification to interfere with the view as expressed by the ITAT."

4. In view of the aforesaid and for reasons assigned therein, we find no substantial question of law which can be said to arise. The appeal fails and shall stand dismissed.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

APRIL 15, 2024/RW