

**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No.601/CTK/2005: Assessment Year : 2002-03
ITA No.602/CTK/2005: Assessment Year : 2003-04
ITA No.192/CTK/2008: Assessment Year : 1999-2000
ITA No.256/CTK/2008: Assessment Year : 2000-2001
ITA No.257/CTK/2008: Assessment Year : 2001-2002
ITA No.658/CTK/2008: Assessment Year : 2005-2006
ITA No.269/CTK/2009: Assessment Year: 2006-07

Board of Secondary Education, Cuttack	Vs.	The ITO, Ward-2(1), Cuttack	
PAN/GIR No. AAAJB 0510 e			
(Appellant)	..	(Respondent)	

Assessee by : Shri S.K.Jena, AR

Revenue by : Shri Kunal Singh, CIT, DR/ D.K.Pradhan, DR

Date of Hearing : 15/05/ 2017

Date of Pronouncement : 17 /05/ 2017

ORDER

Per Bench

These are the appeals filed by the assessee against the separate orders of CIT(A)-Cuttack, for the assessment years 1999-2000, 2000-2001, 2001-02, 2002-03, 2003-04, 2005-06 and 2006-07, in respect of assessments under section 143(3) and 143(3)/147 of the Income tax Act, 1961.

2. Since these appeals pertain to same assessee and the grounds raised therein are identical, they are heard together and decided by this consolidated order. For the sake of convenience, we take up ITA No.601/CTK/2015 for the assessment year 2002-03 and facts narrated therein for our adjudication and the decision will apply mutatis-mutandis to other appeals of the assessee.

3. Before we proceed for hearing, the Id Authorised Representative of the assessee has filed an adjournment application explaining the facts that the assessee has challenged the rejection of grant of exemption u/s.10(23C)(vi) of the Act by the Chief Commissioner of Income Tax, before the Hon'ble High Court of Orissa in a writ petition bearing W.P.(C) No.4777 of 2008, which has been admitted and pending for hearing. The Ld A.R. of the assessee emphasising for adjournment for the above aforesaid cases, irrespective of the fact that it pertains to assessment years 1999-2000, 2000-2001, 2001-02, 2002-03, 2003-04 , 2005-06 & 2006-07 and the appeals were numbered by the Tribunal in the year 2005, 2008 & 2009. When the Bench asked to Id A.R. of the assessee that sufficient time was provided to the assessee to obtain the approval from the Chief Commissioner of Income Tax u/s.10(23C)(vi), the Id Counsel explained that the applications were rejected and against the rejection of application, writ petition was filed and further as on date, no orders of approval is available with the assessee in spite of the fact that more than 10 years have passed

in respect of aforesaid assessment year and the assessee could not establish to get the approval from the Chief Commissioner of Income Tax or from the prescribed authority except mentioning that a writ petition has been filed before the Hon'ble High Court.

4. We also perused the order sheet notings and find that these appeals were posted for hearing on 17.1.2006 and adjournment was sought by the assessee explaining that writ petition is pending and also application is pending before the prescribed authority for approval. When we asked for copy of any approval obtained till date, Id A.R. of the assessee was not in a position to offer a valid explanation, which could convince us. We also perused the order sheet notings from 17.12.2006 to 30.9.2013. The appeals were not taken up for hearing due to earlier adjournments by the assessee and explanation discussed above recorded in the order sheet. Considering the ground of adjournment sought by the assessee and the appeals relating to the assessment years for more than 10 years old, we consider it appropriate to reject the adjournment application and in the interest of justice, we proceed to dispose of the appeals after hearing both the sides.

5. The assessee has raised the grounds of appeal as under:

"1. That the order dated 21.10.2005 of Ld. Commissioner of Income -Tax (Appeal) is unjustified, arbitrary, contrary to facts and bad in law.

2. That the Appellant being an instrumentality of Government is not coming under the purview of the provisions of the Income Tax Act and the Authorities have no jurisdiction to assess the Appellant.

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 ITA No.229/CTK/2009: Assessment year: 2006-07

Therefore the Assessment order passed by the Ld.A.O. is non application of mind, contrary to the provisions laid down under the law, therefore is a bad in law.

3. That the impugned orders have been passed hurriedly without proper appreciation of facts and implication of law and suffers from giving reasonable opportunity to the appellant, therefore totally unjustified and liable to be quashed.

4. That the Ld. Commissioner of Income -Tax (Appeal) should have held that the Assessee being an educational institution existing since several decades solely for educational purposes could not have existed for carrying profit separately when it is created controlled and supervised by the state Government.

5. That the Ld. Commissioner of Income -Tax (Appeal) should have given reasonable opportunity to explain its case and ,in the absence of such opportunity, justice in this case have grossly miscarried.

6. Without prejudice to the above, the Ld. Commissioner of Income -Tax (Appeal) should have allowed all the expenses claimed as admissible deduction.""

6. Brief facts of the case are that the assessee, Board of Secondary Education is established under the Orissa Secondary Education Act, 1953"and the main object is to provide education and establishment of Board to regulate, control and develop secondary education in the State of Orissa and also to publish and sale of textbooks for the use of students without any profit. The Board consists of office bearers and the members of the committee. The assessee has filed the return of income for assessment year 2002-03 on 31.3.2004 with a total income Rs. Nil. And the Return of income was processed under section 143(1) of the Act accepting the returned income. Subsequently,the case was selected for scrutiny and the Assessing Officer issued notices u/s.143(2) and 142(1)

and called for information. In compliance to the notices, Id A.R. of the assessee appeared before the Assessing Officer and produced books of account consisting of cash book, ledger books, expenditure register and collection register. The Assessing Officer on perusal of the financial statement and written submissions filed by the assessee observed that the assessee is emphasising that it has obtained approval under the prevailing law under section 10(22) of the Act and referred to the decision of Hon'ble High Court of Orissa in assessee's own case reported in (1972) 86 ITR 408 (Ori), wherein, the Hon'ble High Court considered the facts and objects of the assessee Board and gave a finding that any income of an University or other educational institution, existing for educational purposes and not for the purposes of profit is exempted from tax u/s.10(22) of the Act. Therefore, the income derived by the assessee is claimed as fully exempt. The Assessing Officer raised a valid reason to the Id A.R that the provisions of section 10(22) have been omitted w.e.f. 1999-2000 and a new section 10(23C) have been inserted for availing exemption for the following criteria:

- a) 10(23C) (iiiab) – any university or other educational institution existing solely for educational purposes and not for purposes or profit, and which is wholly or substantially financed by the Government, or
- b) 10(23C) (iiiad) – any university or other educational institution existing solely for educational purposes and not for purposes of profit, if the aggregate annual receipts of such university or educational institution do not exceed Rs.1 crore, and;

- c. 10(23C) (vi) – any university or other educational institution existing solely for educational purposes and not purposes of profit, other than those mentioned in (a) and (b) supra and which may be approved by the prescribed authority i.e. Central Board or Direct Taxes/Chief Commissioner of Income Tax.

7. The Assessing Officer found that on the subsequent to insertion of section 10(23C)(iiiad), the annual receipts should not exceed more than Rs.1 crore, where as the assessee is having income from examination fees, printing compilation and sale of text books, interest from FDR, bank deposits, etc and the receipts of the assessee has exceeded more than Rs.1 crore during the said financial year. Finally, the assessee should get a certificate of approval by the prescribed authority being Chief Commissioner of Income Tax and at the time of assessment, the assessee was not having any certificate of approval of exemption further and the assessee could not satisfy the conditions prescribed under the provisions of section 10(23C)(iiiad), therefore, the Assessing Officer considered the provisions of law and the facts that the assessee was not having any certificate during the assessment proceedings for claiming exemption, and treated the excess of income over expenses as total income and assessed income at Rs.3,82,26,140/- and passed order u/s.143(3) dated 31.3.2005, inter alia, with other additions.

8. Aggrieved by the order of the Assessing Officer, the assessee filed an appeal before the first appellate authority. In the appellate proceedings, the assessee argued the grounds and reiterated the submissions made in

the assessment proceedings and relied on the judicial decision in assessee's own case.

9. The Id CIT(A) having considered the submissions of the assessee and findings of the Assessing Officer and the amended provisions of law effective from 1999-2000 and also that there is no parameteria of exemption of section 10(22) shall continue to the assessee, irrespective of the fact that no application is made under the new provisions of section 10(23C), of the Act and observed that as on date, the assessee has not obtained approval from the prescribed authority and the Id CIT(A) concurred with the findings of the Assessing Officer, who has dealt on the facts and the legal provisions in denying the exemption and partly allowed the appeal of the assessee. Aggrieved by the order of the CIT(A), the assessee filed an appeal with the Tribunal.

10. Before us, Id Authorised Representative argued the ground and submitted that the CIT(A) has hurriedly confirmed the order of the Assessing Officer and also no proper opportunity was provided. Further, he submitted that the assessee is an educational institution existing from more than two decades and controlled by the State Government. Ld A.R. of the assessee explained that application made under section 10(23C)(iiiab) with the prescribed authority has been rejected by an order dated 18.1.2007 and similarly for the other assessment years also, since applications are rejected, a writ petition has been filed before the Hon'ble High Court.

11. We have rejected the adjournment application as we are satisfied that sufficient opportunities were provided to the assessee from 2006 to 2013 and the assessee could not make the proper use of time and procedures. Ld A.R. relied on the decision of Hon'ble Jurisdictional High Court in assessee's own case(supra) and also relied on the decision of Hon'ble Supreme Court in the case of Assam State Text Book Production and Publication Corporation Ltd vs CIT, (2009) 319 ITR4 317 (SC) American Hotel and Lodging Association Educational Institute vs Central Board of Direct Taxes and Others (2008) 301 ITR 86 (SC) and prayed for allowing the appeals.

12. Contra, Id D.R. supported the orders of the Id CIT(A) and further emphasised that the assessee was provided sufficient opportunities by the lower authorities to substantiate its case and to obtain certificate of approval from the prescribed authority, which, prima facie, the application of approval has been rejected.

13. We have heard the rival submissions and perused the orders of lower authorities and materials available on record and judicial decisions cited. The sole crux of the issue raised by Id A.R. that the assessee is a Board formed under the Government Statute to provide education, therefore, exempt from filing the return of income. Ld A.R.

emphatically relied on the order of the Hon'ble Jurisdictional High Court in assessee's own case, wherein, the Hon'ble High Court has directed total income of the Board is exempt from income tax under section 10(22) Act, which is as under:

"Where the law is clear and the assessing authorities have no power to make an assessment on account of exemption given under the Income Tax Act, there is no reason why the High Court should not exercise its power to quash the notices issued by the authorities.

Under the Orissa Secondary Education Act, 1953, the Secondary Board of Education, Orissa, has a fund. One of the sources of income of the Board is profits from compilation, publication, printing and sale of text books. The profits so earned enter into the Board fund. The income and expenditure of the Board is controlled and the entire expenditure is to be directed towards development and expansion of educational purposes. Even if there is some surplus, it remains as a part of the sinking fund to be devoted to the cause of education as and when necessary. Thus being the objective and there being various ways of control of the income and expenditure, the Board of Secondary Education cannot be said to be existing for purposes of profit. It exists solely for purposes of education. The income of the Board is, therefore, exempt from income tax under section 10(22) of the Income tax Act, 1961."

14. We find prima facie section 10(22) of the Act was omitted by Finance No.(2) Act 1988 w.e.f. 1.4.1999 and also perused section 10(23C)(iiiab), (iiiad) and (vi). On perusal of the provisions of section 10(23C)(vi) we find that the assessee has to obtain approval from the prescribed authority, and as per the records and submissions of the Id A.R., the assessee could not obtain the approval and agitating for granting of approval before the Hon'ble High Court. The Tribunal is final fact finding authority and we

observe that the assessee neither in the assessment proceedings or before the first appellate authority and even before us, could not submit the approval of grant for exemption. The Id A.R. to support his arguments relied on the decisions of Hon'ble Supreme Court in the case of American Hotel and Lodging Association Educational Institute (supra), which was rendered in respect of assessment year 1999-2000 and also gave the findings on the provisions of section 10(23C) (vi) as under:

"With the insertion of the provisions of section 10(23C)(vi) the applicant seeking approval has not only to show that it is an institution existing solely for educational purposes but it has got to obtain initial approval from the prescribed authority in terms of section 10(23C) (vi) by making an application in the standardised form as mentioned in the first proviso to that section. This condition was inserted because section 10(22) was abused by some educational institutions/universities. The proviso was inserted alongwith other provisions because there was no monitoring mechanism to check abuse of the exemption provision. With the insertion of the first proviso the prescribed authority is required to vet the application. While considering the approval application the prescribed authority is empowered under the second proviso before giving approval to call for such documents including annual accounts or information from the applicant to check the genuineness of the activities of the applicant institution. While judging the genuineness of the activities of the applicant, the prescribed authority has, under the third proviso, to ascertain as to whether the applicant applies its income wholly and exclusively to the objects for which it is constituted/established."

15. We find the Hon'ble apex Court has considered the facts of granting exemption u/s.10(22) as well as section 10(23C) and prima facie, due to change in the position of law from assessment year 1999-2000, the assessee is required to obtain the approval from the prescribed authority.

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Further, Id A.R.'s reliance on the decision in the case of Assam State Text Book Production and Publication Corporation Ltd(supra), wherein, the facts are that the main object of the assessee was to do research, printing and publishing of text books for school students as per the norms prescribed and approval by the Education Department of the State in respect of assessment years 1981-82 to 1988-89 and 1990-91 to 1996-97, where the provisions of section 10(23C) were not applicable and the issue in the present case relate to the year 1999-2000 onwards . The provisions of section 10(22) are only applicable to the assessment year 1988-89 and were omitted. Therefore, we find the assessee cannot rely on above decisions and we shall follow the law and rules in force from assessment year 1999-2000. Considering the apparent facts and materials on record, and the judicial decisions, we are of the opinion that the CIT(A) has considered the facts, legal provisions and judicial decisions and the working operations of the assessee and confirmed the order of the Assessing Officer. Accordingly, we are not inclined to interfere with the order of the CIT(A) who had dealt with the issue extensively and vis-à-vis the explanations of the assessee and we uphold the action of the CIT(A) and dismiss the grounds of appeal.

16. Similarly, the assessee has filed appeals for the assessment years 2003-04, 2005-06 and 2006-07, wherein, the issues are similar and identical, therefore we uphold the action of the CIT(A) and dismiss the grounds of appeal.

17. In assessment year 1999-2000, 2000-2001 and 2001-02, the assessee has also challenged the validity of reassessment proceedings and the provisions of section 10(23C) of the Act, which was dismissed by the CIT(A).

18. Even before us, the assessee has argued on the validity of reassessment proceedings. Prima facie, we find that the reopening of assessment is within a period of four years and we are of the opinion that the present Assessing Officer has relied on records and tangible material, which the predecessor has not verified and, therefore, believed that income has escaped assessment. When the Assessing Officer has not examined this aspect in the earlier assessment, the Assessing Officer is justified in reopening the assessment under section 147 of the Act. So, considering the apparent facts, we are of the opinion that the Assessing Officer was correct in law in making re-assessment applying the provisions of section 147 of the Act as the assessee was not having approval from the prescribed authority as envisaged u/s.10(23C) of the Act. Accordingly, we confirm the orders of the CIT(A) and dismiss the appeals of the assessee.

19. In the result, the appeals filed by the assessee are dismissed.

Order pronounced in the open court on 17 /05/2017 in the presence of parties.

Sd/-

sd/-

(N.S Saini)

(Pavan Kumar Gadale)

ACCOUNTANT MEMBER

JUDICIAL MEMBER

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Copy of the Order forwarded to :

1. The Appellant : Board of Secondary Education, Cuttack
2. The Respondent.
3. The CIT(A) Cuttack
4. Pr.CIT, Cuttack
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack