

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 6391 & 6392/Del/2017
(Assessment Year: 2006-07 and 2007-08)

Akash Education Society, RV Northland Institute, V&PO-Chittehra, Dadri, Gautam Budh Nagar, PAN: AABTA3590J (Appellant)	Vs.	JCIT, Range-3, Noida (Respondent)
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Assessee by :	Shri H. Hasnain, AR
Revenue by:	Shri NK Bansal, Sr. DR
Date of Hearing	23/08/2018
Date of pronouncement	/11/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the appeals filed by the assessee against the order of the Id CIT (A)-I, Noida dated 30.03.2017 for the Assessment Year 2006-07 and 2007-08.
2. The assessee has raised the following grounds of appeal for Assessment Year 2006-07:-

1. *Because the Hon'ble CIT(Appeals) has erred in law and on facts in issuing the Notice u/s 251(2) of I.T. Act in the guise of Notice u/s 251(1) conferring the powers of enhancement of income without taking into consideration the Explanation. In disposing of an appeal, the Commissioner(Appeals) may consider and decide any matter out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the Appellant.*

"The Explanation connotes that if any issue which was not raised by the Appellant before the Commissioner (Appeals) while filing the Appeal, it may be considered and decided by the CIT (Appeals) even if, it was not put up at the assessment stage.

The powers conferred in the Section 251 allows the CIT(A) to play around the issues taken up in the Assessment Order and not to move outside the Assessment Order, ie, not to raise the fresh

issues but he can decide any issue if, raised by the Appellant at the Appeal stage afresh.

In this case the Hon'ble CIT(A) embedded the soul of above explanation under the powers conferred to him in section 251(1) of I.T. Act, 1961.

- 2. Because the Hon'ble CIT(Appeals) has failed in raising any specific query to justify his finding that there was violation of provisions of sections 11,12 and 13 of I.T. Act, 1961 without appreciating the fact that the Appellant is a charitable (Society) Trust within the meaning of section 2(15) of I.T. Act and which has already been granted exemption under section 12A of I.T. Act by the Hon'ble Commissioner of Income tax.*
- 3. Because the Hon'ble CIT(Appeals) has erred in law and on facts in treating the Hostel & Transport facility to the students as purely commercial activity though it was the integral part of primary activity of the institution, which were not commercial activities rather than these were necessary activities ancillary to the attainment of the main objects.*
- 4. Because the CIT(Appeals) has erred in law and on facts in alleging that the Appellant failed to maintain separate Books of Accounts in respect of Hostel 86 Vehicle running expenses though it was clarified that the books of accounts were maintained on the basis of which the surplus from both the heads has been demarcated and declared in the Income 8& Expenditure Account.*
- 5. Because the Hon'ble CIT(A) has erred in law 8s on fact in not appreciating the fact, that "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 is very clear that, the genuineness of the purpose tested by the obligation created to spend the money exclusively or essentially on "charity".' This view is supported by Sole Trustee, Lok Shikshana Trust v. Cit, Mysore, 1976 1 SCC 254 that: (SCC pp. 274-75, para 41)*
- 6. Because the Hon'ble CIT(A) has erred in law and on fact ignoring the ITAT decision that Transport 8& Hostel Facilities surplus cannot be considered as Business Income of the Society if the same was an integral part of its objects.(ITANO.4639/Del/2015 Addl.CIT, Range-1, Ghaziabad Vs. Krishna Charitable Trust, Ghaziabad.*
- 7. Because the Hon'ble CIT(A) has erred in law and on facts in not allowing the exemption u/s 11 of I.T. Act, 1961 to the Appellant when all the terms and conditions were fulfilled by the Appellant.*
- 8. Because the Hon'ble CIT(A) has erred in law and on facts in not appreciating the facts that the Appellant is a charitable (Society) Trust within the meaning of section 2(15) of I.T. Act which is imparting education through its school and providing the students*

transport and Hostel facility, which is integral part of education because the whole function is run by the trust itself.

9. *Because the Hon'ble CIT(A) has erred in law and on facts in taxing the Appellant's income under section 56(1) of I.T. Act, 1961 while it could have been taxed under section 11 (4A) if the Appellant failed to maintain proper books of account in relation to any income of the (Society) trust being profits and gains of business, unless the business is incidental to the attainment of the objectives of the (Society) trust but in the case of the Appellant the facility of Transport and Hostel is not incidental, but a regular facility being integral part of the trust which cannot be taxed.*
10. *Because the Hon'ble CIT(A) has erred in law and on facts in separating the educational institution and the Trust while both are part and parcel of each other, the (Society) Trust runs the school and provide the transport & Hostel Facility to the students. Therefore, the provision of Transport and Hostel facility to the students are the integral part of the (Society) Trust and not the incidental business.*
11. *Because the Hon'ble CIT(A) has erred in law and on facts who opined that the income of Universities or the other educational institutions is to be dealt with for exemption from the incidence of tax u/s 10(23C)(iv) & 10(23C)(vi) of I.T. Act, 1961 and cannot be claimed under the provisions of sections 11 & 12 of I.T. Act, 1961, but the Appellant is not an University or Other Educational Institution, but is a (Society) Trust within the meaning of Section 2(15) of I.T. Act, which runs an Educational Institution to which Exemption under section 12A has also been granted by the Hon'ble Commissioner of Income tax with due and proper consideration of the whole activities of the (Society) Trust."*

3. The assessee has raised the following grounds of appeal for Assessment Year 2007-08:-

1. *Because the Hon'ble CIT(A) has erred in law and on facts in issuing the notice u/s 251(2) of the Act in the guise of notice u/s 251(1) conferring the powers of enhancement of income without taking into consideration the Explanation.—In disposing of an appeal, the Commissioner(Appeals) may consider and decide any matter out of the proceedings in which the order appealed against was passed, notwithstanding that such matter was not raised before the Commissioner (Appeals) by the Appellant.*

"The Explanation connotes that if any issue which was not raised by the Appellant before the Commissioner (Appeals) while filing the Appeal, it may be considered and decided by the CIT (Appeals) even if, it was not put up at the assessment stage.

The powers conferred in the Section 251 allows the CIT(A) to play around the issues taken up in the Assessment Order and not to move outside the Assessment Order, i.e, not to raise the fresh issues but he can decide any issue, if raised by the Appellant at the Appeal stage afresh.

In this case the Hon'ble CIT(A) embedded the soul of above explanation under the powers conferred to him in section 251(1) of I.T. Act, 1961.

- 2. Because the Hon'ble CIT(Appeals) has failed in raising any specific query to justify his finding that there was violation of provisions of sections 11,12 and 13 of I.T. Act, 1961 without appreciating the fact that the Appellant is a charitable (Society) Trust within the meaning of section 2(15) of I.T. Act and which has already been granted exemption under section 12A of I.T. Act by the Hon'ble Commissioner of Income tax.*
- 3. Because the Hon'ble CIT(Appeals) has erred in law and on facts in treating the Hostel & Transport facility to the students as purely commercial activity though it was the integral part of primary activity of the institution, which were not commercial activities rather than these were necessary activities ancillary to the attainment of the main objects.*
- 4. Because the CIT(Appeals) has erred in law and on facts in alleging that the appellant failed to maintain separate Books of accounts in respect of Hostel and Vehicle running expenses though it was clarified that the books of accounts were maintained on the basis of which the surplus from both the heads has been demarcated and declared in the Income & Expenditure Account.*
- 5. Because the Hon'ble CIT(A) has erred in law & on fact that "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 is very clear that, the genuineness of the purpose tested by the obligation created to spend the money exclusively or essentially on "charity". This view is supported by Sole Trustee, Lok shikshana Trust Vs. CIT, Mysore, 1976 1 SCC 254 that: (SCC pp. 274-75, para 41)*
- 6. Because the Hon'ble CIT(A) has erred in law and on fact igr. me ITAT decision that Transport & Hostel Facilities surplus cam.: t-e considered as Business Income of the Society if the same was an internal part of its objects.(ITANO.4639/Del/2015 Addl. CIT, Range-1, Ghaziabad Vs. Krishna Charitable Trust, Ghaziabad.*
- 7. Because the Hon'ble CIT(A) has erred in law and on facts in not allowing the exemption u/s 11 of I.T. Act, 1961 to the Appellant when all the terms and conditions were fulfilled by the Appellant.*
- 8. Because the Hon'ble CIT(A) has erred in law and on facts in not appreciating the facts that the Appellant is a charitable (Society) Trust within the meaning of section 2(15) of IT. Act which is*

imparting education through its school and providing the students transport and Hostel facility, which is integral part of education because the whole function is run . the trust itself.

9. *Because the Hon'ble CIT(A) has erred in law and on facts in taxing the Appellant's income under section 56(1) of I.T. Act, 1961 while it could have been taxed under section 11(4A) if the Appellant failed to maintain proper books of account in relation to any income of the (Society) trust being profits and gains of business, unless the business is incidental to the attainment of the objectives of the (Society) trust but in the case of the Appellant the facility of Transport and Hostel is not incidental, but a regular facility being integral part of the trust which cannot be taxed.*
 10. *Because the Hon'ble CIT(A) has erred in law and on facts in separating the educational institution and the Trust while both are part and parcel of each other, the (Society) Trust runs the school and provide the transport & Hostel Facility to the students. Therefore, the provision of Transport and Hostel facility to the students are the integral part of the (Society) Trust and not the incidental business.*
 11. *Because the Hon'ble CIT(A) has erred in law and on facts who opined that the income of Universities or the other educational institutions is to be dealt with for exemption from the incidence of tax u/s 10(23C)(iv) & 10(23C)(vi) of I.T. Act, 1961 and cannot be claimed under the provisions of sections 11 & 12 of I.T. Act, 1961, but the Appellant is not an University or Other Educational Institution, but is a (Society) Trust within the meaning of Section 2(15) of I.T. Act which run an Educational Institution to which Exemption under section 12A has also been granted by the Hon'ble Commissioner of Income tax with due and proper consideration of the whole activities of the (Society) Trust."*
4. Both these appeals are filed by the Aakash education Society, assessee on identical grounds for assessment year 2006 – 2007 and 2007 – 2008 , they are argued together and therefore disposed of by this common order.
 5. First, we state the facts for assessment year 2006 – 07 and the facts for assessment year 2007 – 2008 are similar. The assessee filed its return of income for assessment year 2006 – 2007 on 31/10/2006 declaring nil income in the status of Association of the person in the assessment was completed under section 143 (3) of the act on the returned income vide order dated 12/11/2008. Subsequently it was noticed that the assessee is engaged in providing of hostel facilities and transportation facilities to the

students during the year but has not maintained separate books of accounts for these business activities as per the provisions of section 11 (4A) of the act and therefore assessee was not eligible for exemption under section 11 on receipt from these activities and as such the assessee should have disclosed surplus generated from these activities for taxation in the return of income. such omission on failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment has necessitated the initiation of proceedings under section 147 of the act. Consequently notice under section 148 was issued to the assessee after obtaining approval of the Commissioner of income tax under section 151 (1) of the act. The assessee complied with the above notice and filed letter dated 17/10/2013 submitting that the return of income filed originally may be treated as return of income in response to the notice under section 148 and requested for issuance of notice for further compliance.

6. The learned assessing officer noted that assessee has provided transport facilities as well as hostel facilities to the students and have charged transportation fees and hostel fees from them. He noted that during the year assessee has collected a sum of ₹ 1 35700/- transportation charges and expenses incurred on transportation were merely 67500/-and similarly the hostel fees income was ₹ 2 08500/- whereas the expenses are only ₹ 1 42158/-. Therefore, both these activities have resulted into the surplus to the assessee. On enquiry, the assessee submitted that the transport facility and hostel facilities are part of the charitable activities connected with the education and not as business. The learned assessing officer rejected the explanation of the assessee and consequently held that it is a business activity and the assessee should have maintained separate books of account and should have offered this sum as income of the assessee. According to him, in short, these activities are not eligible for exemption under section 11 and 12 of the income tax act. Accordingly assessment under section 143 (3) read with section 147 of the income tax act 1961 was passed on 10/2/2014 wherein the net taxable income of the assessee was determined at ₹ 75200 as net profit from transportation

activities and net profit from hostel activities were determined at ₹ 74342/- totaling to ₹ 1 49542/-. Similarly for Ay 2007-08, assessment under section 143 (3) rws 147 of the income tax act was also passed on 23/3/2015 determining the total income of the assessee at ₹ 3 52842/- where the need returned income was rupees nil. The adjustment to the assessee income was also made on the similar grounds.

7. The assessee aggrieved with the order of the learned assessing officer preferred an appeal before the learned commissioner of income tax appeals. The learned commissioner appeals confirmed the assessment made by the learned assessing officer for assessment year 2006 - 2007 and 2007 - 08. Over and above he further enhanced the income of the assessee by applying the provisions of section 251 of the income tax act holding that the assessee is neither entitled to the benefit of exemption from incidence of tax under section 11 (1) (a) of the income tax act, 1961 nor under section 11 (1) (b) nor under section 12 of the income tax act in any manner. He therefore held that once the exception is withdrawn the entire income of the appellant was to be treated as taxable under the head income from other sources and not under the head business and profession. Accordingly he upheld that the gross receipt of the assessee of ₹ 3 44200 for assessment year 2006 - 07 and ₹ 9 31950/- for assessment year 2007 - 08 respectively has to be treated to be the income of the appellant liable to tax and not liable to the benefit of exemption from the incidence of tax under the provisions of section 251 (1) (a) read with the provisions of section 251 (2) of the income tax act 1961 and no further consideration of the action of the learned assessing officer as detailed in the impugned assessment order is required. Therefore, he enhanced the income of the assessee by determining the total income at the gross receipt of the assessee for both the years. Such order was passed on 30/3/2007 by the learned commissioner appeals.
8. Assessee aggrieved with the order of the learned commissioner of income tax appeals has preferred appeal for both these years before us. The assessee submitted that assessee is carrying on the charitable activities of education. For providing education, it is also providing to the students

of the trust transport facilities and hospital facilities. These are not the business activities of the trust but are the activities incidental to the main object of the trust. It was further stated that the learned commissioner of income tax appeals without affording any opportunity to the appellant issued a show cause notice under section 251 (2) of the income tax act and raised the fresh issues which were not there before the learned assessing officer. Even otherwise the stated that the requirement of maintenance of the separate books of accounts is with respect to the separate business activities carried on by the trust which is not in the case of the assessee. It was further stated that the issue is squarely covered in favour of the assessee by the decision of the coordinate bench in ITA number 4739/del/2015 in additional CIT, range – 1 Ghaziabad vs. Krishna charitable trust, Ghaziabad where at the identical issue has been decided by the coordinate bench holding that the educational and transfer facilities if provided to the students of the educational Inst then these activities are not in the nature of the business but are subservient to the main object of the education. In view of this, it was stated that the issue is solely covered in favour of the assessee.

9. The learned departmental representative vehemently supported the order of the learned assessing officer as well as the learned commissioner of income tax appeal stating that the hostel facilities and the transport facilities offered by the assessee are business activities and therefore the separate books of accounts should have been maintained by the assessee which is not maintained by the assessee and therefore the exemptions have been withdrawn on these income. Further, he relied upon the order of the learned commissioner of income tax appeals with respect to the enhancement and stated that there is no infirmity in his order.
10. We have carefully considered the rival contention and perused the orders of the lower authorities. The brief facts of the assessee trust shows that it is a charitable society within the meaning of section 2 (15) of the income tax act 1961 which has been granted exemption under section 12 A of the income tax act. The assessee society runs an institute namely RV Northland Inst pharmacy and provides hostel and transport facilities to

the students of R V Northland Inst pharmacy which is an integral part of the main activities of education but were not commercial activities rather than this were the necessary activities ancillary to the attainment of the main objectives , receipts for the respective year in the books of accounts were disclosed. It is not the case of the learned assessing officer that the hostel facilities and the transport facilities are provided to the persons who are neither the students nor the staff of the assessee trust. The identical issue has been decided by the coordinate bench in ITA No ITA No. 4639/Del/2015 Assessment Year: 2011-12) where one of us was the author holding that transport facilities and hostel facilities provided by the educational institutes to the students of that particular society and staff of the educational Institute cannot be considered as a separate business of the trust and no requirement of maintaining separate books of account under section 11 (4A) of the income tax act is required to be fulfilled. It was held as under:-

“11. We have carefully considered the rival contentions and perused the orders of the lower authorities and other judicial pronouncement placed before us. In the grounds No. 1 – 3 assessee is contesting that addition made by the Ld. assessing officer treating hostel places provided to college student as business of the society and text the alleged surplus of Rs. 9887873/- as business income of the appellant. It was not the case of the revenue that assessee has rented out these hostels to the students who are not parted education in the above institutes. It was also not the case of revenue that assessee is primarily engaged in the business of providing hostel facilities to the students. The above issue is no more res Integra in view of the decision of the Hon’ble Karnataka High Court in CIT versus Karnataka lingayat Page 5 of 20 education society in ITA No. 5004/2012 dated 15/10/2014 wherein it has been held that providing hostel to the students/staff working for the society’s incidental to achieve the object of providing education, namely the object of the society. In view of this, we are of the opinion that providing of hostel facilities and transport facilities to the student and staff member of the educational Institute cannot be considered as business activity but is subservient to

the object of educational activities performed by the society. We are also supported by our view by the decision of the Hon'ble Allahabad High Court in IIT versus state of UP, (1976) 38 STC 428 (All) wherein question arose in Indian Institute of Technology v. State of U.P. (1976) 38 STC 428 (All) with respect to the visitors' hostel maintained by the Indian Institute of Technology where lodging and boarding facilities were provided to persons who would come to the Institute in connection with education and the academic activities of the Institute. It was observed that the statutory obligation of maintenance of the hostel, which involved supply, and sale of food was an integral part of the objects of the Institute nor could the running of the hostel be treated as the principal activity of the Institute. The Institute could not be held to be doing business. Further meals being supplied in a hostel to the scholars, visitors, guest faculty etc. cannot be exigible to sales tax where main activity is academics as held in Scholars home Senior Secondary School 42 VST 530. Further, the reliance placed by the lower authorities on the decision of the Hon'ble Madras High Court in case of DCIT versus Wellington charitable trust is also misplaced because in that case, the only activity of that particular trust was renting out of the property and not education. We are also not averse to considering the latest legal developments too where in the recently introduced new legislation of Goods and service tax it is provided that no GST would be chargeable on the hostel fees etc recovered from the Students , faculties and other staff for lodging and boarding as they are engaged in education activities . Therefore, we reverse the finding of the lower authorities and held that transport and hostel facilities surplus cannot be considered as business income of the assessee society, which is mainly engaged in educational activities, and these activities are subservient to the main object of education of the trust. In the result 1 - 3 of the appeal of the assessee are allowed."

The learned departmental representative could not show that how the issue is not squarely covered in favour of the assessee. Therefore respectfully following the decision of the coordinate bench in case of

Krishna educational society vs. Additional Commissioner Of Income Tax (supra) , we allow the appeal of the assessee and hold that assessee is entitled to exemption under section 11 and 12 of the income tax act with respect to the hostel and transport facilities provided to the students of the educational society. In the result, the appeal of the assessee is allowed as per ground number three raised before us.

11. As we have already held that assessee is entitled to exemption under section 11 and 12 of the act and is not carrying on the business activities when it receives the hostel fees and transportation facilities from the students of the educational Inst, therefore, we reverse the order of the learned commissioner of income tax appeals. Further it is not required to adjudicate on the enhancement made by the learned commissioner of income tax appeals as the basis of the enhancement itself has been negated by us. Accordingly all the grounds raised by the assessee against the enhancement made by the by the learned commissioner of income tax appeals are also allowed.
12. In the result appeal for assessment year 2006 – 07 and 2007 – 08 filed by the assessee are allowed.

Order pronounced in the open court on 15/11/2018.

Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 15/11/2018

Neha

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	15.11.2018
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	