

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

ITA No. 3872/Del/2015
(Assessment Year: 2010-11)

DCIT(E), Circle-2(1), New Delhi	Vs.	National Accreditation Board for testing and Calibration Laboratories (NABL), 3 RD Floor, BISCAIR, 14, Satsang Vihar Marg, New Mehrauli Road, New Delhi PAN: AAATN3528Q
(Appellant)		(Respondent)

Revenue by :	Shri Surender Pal, Sr. DR
Assessee by:	None
Date of Hearing	30/08/2018
Date of pronouncement	28/11/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the revenue against the Id CIT(A)-21, New Delhi dated 12.03.2015 for the Assessment Year 2010-11.
2. The revenue has raised the following grounds of appeal:-
 - "1. *That on the facts and circumstances of the case the Id CIT(A) has erred in ignoring that assessee's activities fall under the last limb of section 2(15) of the Act as the assessee is generating income from commercial activities.*
 2. *That on the facts and circumstances of the case and in law, the Id CIT(A) has erred in ignoring that though the objects of the assessee may seem to be charitable but activities carried out by the society which yielded income to the society are commercial in nature."*
3. Assessee assessee is a registered societies under the societies registration act, 1860 and also registered under section 12 A of the income tax act vide order dated 30/8/2006. The main object of the society is to promote, coordinate, guide, implement and maintain act addition system for laboratories suitable in the country in accordance with

the relevant national and international standards and guides. Further to ensure that all measurements either during calibration or testing by accredited laboratories are related to appropriate national and international standards. It filed its return of income gaming exemption under section 11 and 12 of the income tax act on 28/9/2010 declaring nil income. The learned assessing officer examined the income and expenditure account of the assessee society and found that it has received fees and subscription of ₹ 4.37 crores and grant and subsidy of ₹ 6 crores. On consideration of the reply of the assessee the learned assessing officer noted that the assessee trust is carrying on business as it is charging fees and therefore invoking the proviso to section 2 (15) held that activity undertaken by the assessee is capable of generating profit as seen from excess of income or expenditure since last few years and assessee has further accumulated ₹ 5 crores under section 11 (2) of the income tax act. During the year the assessee has also earned surplus of ₹ 2.84 crores. The learned AO was also of the view that assessee is also getting a grant from government therefore the learned AO held that assessee falls under the sixth limb of charitable activities that is advancement of any other object of general public utility and it cannot be given exemption under section 11 of the Indian income tax act. Hence the exemption under section 11 and 12 of the income tax act was denied to the assessee society and consequently assessment order under section 143 (three) of the act was passed on 12/3/2013 determining total income of the assessee at ₹ 7.91 crores.

4. The assessee aggrieved with the order of the learned AO preferred an appeal before the Commissioner of income tax (appeals) – 21, New Delhi. The learned Commissioner appeals passed in order on 12/3/2015 allowing the appeal of the assessee holding that where the business is the main activity and not the incidental to the charitable activities of such organisation the amendment to section 2 (15) of the act are hard. The learned Commissioner held that assessee is eligible for exemption under section 11 and 12 of the income tax act. He further relied on the decision

of the honourable Delhi High Court in Ay CAI vs DGIT (exemption) of the honourable Delhi High Court.

5. The learned AO aggrieved with the order of the Commissioner of income tax appeals has preferred an appeal before us.
6. The learned departmental representative submitted that as assessee is charging fees and receiving grant the assessee is carrying on business and therefore is not eligible for exemption under section 11 and 12 of the income tax act and according to the proviso inserted under section 2 (15) of the income tax act is carrying on business.
7. Despite notice none appeared on behalf of the assessee and therefore the issue is decided on the merits of the case as per information available on record.
8. We have carefully considered the rival contention and perused the orders of the lower authorities. Though the learned AO has taken two grounds of appeal however the solitary issue is whether the activities of the assessee is hit by the amendment made to section 2 (15) of the income tax act or not. Assessee (NABL) is an autonomous society registered under the societies registration act and formed by Department of science and technology, government of India and approved by Department of scientific and industrial research, New Delhi scientific and industrial research Organisation. The assessee is a society in the field of science and technology and the income of the society has been exempted from tax under section 10 (21) of the income tax act for each approval was granted earlier. Undisputedly the assessee is also registered under section 12 AA of the income tax act. The objectives of the assessee are already set out earlier. The activities of the assessee are spread all over India for the common benefit of public at-large and it provides act addition to testing and calibration laboratories in a nondiscretionary manner regardless of their ownership, legal status, size and degree of independence and other activities such as to plan, prepare, develop and disseminate certified reference materials for enhancement in quality and accuracy et cetera of testing, calibration, research and development of laboratories. Learned Commissioner of income tax (appeals) has

considered all the arguments of the assessee and considered the whole issue in para number five of his order as under:-

5. I have considered the order u/s 143(3) as well as the arguments put forth by the appellant's authorized representative. The appellant is registered u/s i2A(a). Its objects, as gathered from records, are

- a) To promote, coordinate, guide, implement and maintain a accreditation system for laboratories suitable in accordance with the relevant national and international standards and guides
- b) To ensure that all measurement either during calibration or testing by accredited laboratories are related to appropriate national / international standards maintained National Physical Laboratory (NPL) and at Bhabha Atomic Research Centre (BARC) through an unbroken chain of comparisons
- c) To encourage proficiency test / inter-laboratory comparisons in order to ensure accuracy, reliability and reproducibility of test results
- d) To ensure that the accredited laboratories adhere to all the conditions of accreditation, by periodic surveillance
- e) To oversee the quality requirements of Testing and Calibration Laboratories as per National and International Standards and to facilitate up-gradation of testing and calibration facilities and laboratories
- f) To ensure that activities of NABL are in conformity with the objectives of the Quality Council of India
- g) To help to establish credibility of the Testing and Calibration Laboratories to their users through the process of accreditation
- h) To organize Awareness on all aspects of laboratory accreditation for the laboratories by various means including seminars, workshops and laboratory-industry-accreditation body meets, etc.
- i) To promote Good Laboratory Practice for various discipline including hazardous materials
- j) To prepare and maintain a data base of Assessors and Experts in different disciplines of Calibration and Testing
- k) To acquire travelling standards and artefacts for conducting studies on measurements by the accredited laboratories and thereby to help improve reliability and reproducibility of results
- l) To maintain close linkage with industries /chambers of commerce/ institutions and laboratories dealing with testing related to the environment as per national and international guidelines

- m) To undertake appropriate training programmes for the purpose of laboratory accreditation, testing, calibration and related activeness as per requirements of national and international guidelines
- n) To undertake special studies related to testing and calibration e.g. proficiency testing, uncertainty of measurements
- o) To establish and maintain strong linkages with international and regional for a such as International Laboratory Accreditation Conference (hitherto referred to as EAL), Asia Pacific Laboratory Accreditation Cooperation (hitherto referred to as APLAC) etc. and to take active participation in Plenary Sessions, Committee Meetings etc. in order to keep pace with the latest developments and for promoting Bi-lateral /Multi-lateral Recognition Agreements
- p) To undertake all the activities which shall promote undertaking bi-lateral/ multi-lateral recognition agreements between NABL and laboratory accreditation bodies in other countries so that test results of NABL accredited laboratories become acceptable in all countries (q)
- q) To develop and operate an appeal mechanism to deal with complaints
- r) To raise or acquire funds, monetary assistance or property from Central Government and State Government(s), and other agencies including international organizations and non-government organizations or by taking loans from financial institutions. The funds, assets and all other resources in present and future shall be utilized only for the purposes or objects of NABL
- s) To invest funds or money entrusted to NABL upon such securities or in such manner as may, from time to time, be determined by the governing body
- t) To encourage industrial / applied research and development in the filed of quality in laboratory services and dissemination of its results in relevant publications including professional and trade journals
- u) To participate in trade fairs, exhibitions, seminars and other recognized national and international fora
- v) To publish books, literature and periodicals and disseminate information relevant and relating to the objectives of NABL
- w) To acquire by gift, purchase, exchange lease, hire or otherwise any property movable or immovable
- x) To construct, improve, alter, demolish or repair buildings and structures as may be necessary or convenient for carrying on the activities of NABL. Since the NABL would be substantially financed out of grants-in-aid given by the Government, provisions contained in GFR relating to such grants shall be followed particularly with

regard to utilization certificates, maintenance of accounts in respect of grant received, Audit by C&AG, disposal of assets as acquired out of grants with prior approval of the Central Government / Authority which sanctions grants

- y) To sell, assign, mortgage, lease, exchange and otherwise transfer or dispose of all or any, movable and immovable property of NABL for the furtherance of the objects of NABL
- z) To undertake Scientific and Industrial Research on the lines of DSIR
- (aa) Any surplus funds will be invested in terms of the following forms and modes:
 - a. Savings Certificates
 - b. Deposits in any account with Post Office, Saving Bank
 - c. Deposit in any account with a schedules Bank &
 - d. As per other DSIR guidelines
- (bb) To plan, prepare develop and disseminate Certified Reference Materials for enhancement in quality and accuracy etc. for Testing, Calibration, Research and Development of laboratories / Projects
- (cc) To do all such other lawful things as are incidental or conducive to attainment of all or any of the objectives of NABL

It may be seen from the above memorandum (of the appellant) that its main objects, which are highlighted, are mentioned (a), (c) through (e) above. However, as an impact on the users, the object at (g) above is equally important as it enhances sense of confidence.

5.1 It is gathered from records that accreditation of laboratories was initiated by Government of India as a Plan scheme under the Department of Science & Technology and accordingly the following three accreditation boards were constituted -

- National Accreditation Board for Testing and Calibrating Laboratories (NABL)
- Nation Accreditation Board for Products and Quality Systems Certifications (renamed as National Accreditation Board for Certification Bodies (NABCB) and
- National Accreditation Board for Quality Management Personnel Training Organization [renamed as National Registration Board for Personnel and Training (NRBPT)

National Accreditation Board for Testing and Calibration Laboratories (NABL) is an autonomous body registered under Societies Registration Act 1886. In fact, most advanced hospitals

and medical testing laboratories carry the accreditation from NABH/NABL. This ensures reliability of the procedures, competency of the medical / testing personnel and quality (accurate and dependable) medical care / medical test results from the users' (both patients and doctors) perspective.

5.2 Further, the amendment in Section 2(15) of the Act specially aims at business carried on by an otherwise charitable organization where business is the main activity and not incidental to the charitable activity of such organization. The legislative intent of the amendment stands clarified in the Budget Speech of the relevant assessment year [wherein the Hon'ble Finance Minister stated inter alia "Charitable purpose' includes relief of the poor, education, medical relief and any other object of general public utility. These activities are tax exempt, as they should be. However, some entities carrying on regular trade, commerce or business or providing services in relation to any trade, commerce or business and earning incomes have sought to claim that their purposes would also fall under "charitable purpose". Obviously, this was not the intention of Parliament and, hence, I propose to amend the law to exclude the aforesaid cases. Genuine charitable organizations will not in any way be affected." Of course, each case stands on its own legs and has to be scrutinized based on its objects and activity during the particular previous year in question.

5.3 It is further observed from the assessment order u/s 143(3) that for assessing the activity of the appellant in the last limb of Section 2(15) i.e. 'advancement of any other object of general public utility', the AO has not accepted the arguments adduced by the appellant for exemption u/s 11 & 12, on the following grounds

- i. the utilization of funds or income earned, whether for charitable purposes or otherwise is not relevant in view of the insertion of the first proviso to Section 2(15) and cannot be a determining factor for inclusion u/s 2(15)
- ii. an institution will not be regarded as established for charitable purpose/activity under the last limb, if cess, fee or any other consideration is received for carrying on any activity in the nature of trade, commerce or business or for any activity rendering any service in relation to any trade, commerce or business, even if the consideration or the money received is used in furtherance of the charitable purposes / activities
- iii. section 2 (13) of the Income tax Act defines business to include any trade, commerce or manufacture or any adventure of trade

commerce or manufacture and several courts have elucidated the term 'business' means some real, substantive, systematic or organized course of activity or conduct capable of producing profit

- iv. Hon'ble Delhi High Court in ICAI v DGIT Delhi (2011) observed that profit motive is not the sole or relevant consideration that has to be kept in mind. It is one of the aspects. Normally intention to earn profit is required. Emphasis, however, it does appear, has shifted and the concept and principle of 'economic activity' has gained acceptability. The definition of the term 'business' may also vary when one examines taxability under sales tax, excise duty, value added tax, etc., because these are not taxes on income but the taxable event occurs because of the 'economic activity' involved. Even if a person/ organization is carrying on Wading on the principle of 'no loss no profit', it may be liable to apply taxes or comply with the statute when the charge, or incidence of tax, is on the 'economic activity'... Normally the profit motive test should be satisfied but in a given case activity may be regarded as business, even when profit motive cannot be established. In such cases, there should be evidence and material to show that the activity has continued on sound and recognized business principles, and pursued with reasonable continuity
- v. Reliance placed on the judgement of the Hon'ble Andhra Pradesh High Court in Andhra Pradesh State Seed Certification Agency v CCIT (2012) where it was held that the petitioner's activity would fall within 'advancement of any other object of general public utility' but in view of the fact that certification of seeds by the petitioner facilitated trade, commerce or business in the certified seeds by the client of the petitioner, the proviso to section 2(15) would come into operation and hence the rejection of the petitioner's application for approval u/s 10(23C)(iv) by CCIT was rejected
- vi. The activity of the appellant was squarely under the ambit of the first proviso to Section 2 (15) of the Act as it was commercial in nature with a view to earn profits and involved rendering of services in relation to carrying on of commerce or business

5.4 It is mentioned in the judgement in ICAI v DGIT (E) in 2013, the Hon'ble Delhi High Court has taken cognizance of its earlier judgement in the case of ICAI v DGIT(E) (as referred to above), but the judgement rendered in 2013 is latter and goes on a step further in clarifying the legislative intent of the amendment in Section 2(15) of the Act by the Finance Act 2008 (applicable for AY 2009-10 onwards). As for the decision of the Hon'ble Andhra Pradesh High Court referred above, it is stated with utmost regard that the

appellant's argument regarding its applicability vis-a-vis its the organizations. Also, the appellant's reliance on the judgement of the Hon'ble Delhi High Court in the case of Bureau of Indian Standards (BIS) v DGIT(E) [(2013) 212 Taxmann 212 (Del)] strengthens its own argument regarding applicability of the first proviso to Section of the Act. In fact, in that case, the activity of which are similar to that of the present appellant (NABL), the Hon'ble Delhi High Court held, "It cannot be said that the public utility activity of evolving, prescribing and enforcing standards, 'involves' the carrying on of trade commercial activity [Para i6J'. It is further stated in the said judgement, inter alia. The primary object for setting up such regulatory bodies would be to ensure general public The prescribing of standards, and enforcing those standards, through accreditation and continuing supervision through inspection etc, cannot be considered as trade, bust commercial activity, merely because the testing procedures, or accreditation involves charging of such fees. It cannot be said that the public utility activity of evolving, prescribing enforcing standards, "involves" the carrying on of trade or commercial activity".

5.5 It would be in the fittest of things, even at the cost of repetition, to state the relevant portion of the judgement of the Hon'ble Delhi High Court in the ICAI case in 2013 clarifies the legislative intent behind the amendment brought about by the Finance Act 2008 in respect of Section 2(15) of the Act.

5.6 It is mentioned by the Hon'ble Delhi High Court, in July 2013, in the case of Institute of Chartered Accountants of India (ICAI) that a plain reading of section 2(15) of the Income-tax Act, 1961, indicates that the expression "charitable purpose" has been divided into six categories, namely, (i) relief to poor, (ii) education, (iii) medical relief, (iv) preservation of environment including watersheds (forest and wildlife), (v) preservation of monuments and places or objects of artistic or historical importance, and (vi) advancement of any other object of general public utility. The first proviso to section 2(15) of the Act carves out an exception which excludes advancement of any other object of general public utility from the scope of charitable purpose to the extent that it involves carrying on any activity in the nature of trade, commerce or business or any activity of rendering certain services in relation to any trade, commerce or business, for a cess or fee or any other consideration is irrespective of the nature of the use or obligation, or retention of the income from such activity. The expressions

“trade”, “commerce” and “business”, as occurring in the first proviso to section 2(15) of the Act, must be read in the context of the intent and purport of section 2(15) of the Act and cannot be interpreted to mean any activity which is carried on in an organized manner. The purpose and the dominant object for which an institution carried on its activities is material to determine whether the same is business not. The purport of the first proviso to section 2(15) of the Act is not to exclude entities which are essentially for charitable purpose but are conducting some activities for a consideration or a fee. The object of introducing the first proviso is to exclude organizations which are carrying on regular business from the scope of “charitable purpose”. The expression “business or “commerce” as used in the first proviso must, thus, be interpreted restrictively and where the dominant object of an organization is charitable any incidental activity for furtherance of the object would not fall within the expression “business”, “trade” or “commerce” (ICAI) V DGIT (E) (Del) 358 ITR 91)

6. Taking all the above into consideration, I agree with the arguments of the AR of the appellant as well as with the related judgments of the jurisdictional High Court on the applicability or otherwise of the proviso to Section 2(15) of the Act and accordingly, am inclined to agree with the arguments put forth by the AR of the appellant on the point of denial of exemption u/s 11 & 12 in the assessment order u/s 143(3) of the Income tax Act 1961.”

The learned departmental representative could not point out any infirmity in the order of the learned Commissioner of income tax appeals which is following the decision of the jurisdictional High Court in case of ICAI vs DGIT (exemption) . In view of this, we do not find any infirmity in the order of the learned Commissioner of income tax appeals and confirm his finding. Therefore assessee is eligible for exemption under section 11 and 12 of the income tax act and is not hit by the proviso to section 2 (15) of the income tax act. Accordingly the appeal of the revenue on both the grounds is dismissed.

9. In the result appeal of the learned assessing officer is dismissed.
Order pronounced in the open court on 28/11/2018.

-Sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated:28/11/2018
A K Keot

Copy forwarded to

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

ASSISTANT REGISTRAR
ITAT, New Delhi