IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER

I.T.A. No.4165/DEL/2018
Assessment Year: 2007-08

Vikramaditya Educational Society, Rohtak.	v.	DCIT, Sonepat Circle, Sonepat.
TAN/PAN: AAAAV 9618E		
(Appellant)		(Respondent)

Appellant by:	Shri Gautam Jain, Adv & Shri Lalit Mohan, CA.		
Respondent by:	Shri S.L. Anuragi, Sr.D.R.		
Date of hearing:	08	01	2019
Date of pronouncement:	22	02	2019

O R D E R

The aforesaid appeal has been filed by the assessee against the impugned order dated 03.04.2018 passed by Ld. CIT(A)-II Gurgaon for the quantum of assessment passed u/s 144 for the Assessment Year 2007-08. Out of various grounds of appeal, the assessee has only challenged that the ld. CIT(A) has erred in law and on facts in upholding the addition of Rs.1,19,723/- and Rs.15,94,000/- by denying the claim of exemption u/s.10(23C)(iiiad). The legal ground relating to assumption of jurisdiction on issuance of notice u/s. 143(2) has not been pressed. Hence, the same is dismissed as not pressed.

2. The present appeal has a chequered history as this is third round of proceedings before the Tribunal. The assessee had filed its return of income at 'Nil' on 18.01.2008 which was

duly processed u/s. 143(1). The assessee-society is an educational society, running a B.Ed college imparting education up to B.Ed level situated at Village Baliyana, Dist. Rohtak, Haryana and is affiliated to MDU Rohtak. As per the profit and loss account for the year ending 31st March, 2007, it has shown the gross receipt at Rs.31,70,386/- and total expenditure debited to an income and expenditure amount for Rs.60,50,663/- and the surplus income was shown at Rs.1,19,723/-. The ld. Assessing Officer has assessed the surplus income at Rs.1,19,723/- after relying upon the decision of Hon'ble Uttrakhand High Court in the case of **CIT vs. Queen's Education Society, reported in (2009) 177 Taxman 386**. Apart from that, he has also made addition of Rs.15,94,000/- on account of receipt shown under the head 'Corpus Fund' on the ground that assessee has not furnished details and nature of donation shown under the corpus funds and accordingly, he has treated the same as anonymous donation to be taxed u/s.115BBC(i). One of the reasons given by the Assessing Officer for taxing the surplus income is that as per the Memorandum of Understanding and aims and objects, there are certain ancillary objects like development of people's physical and mental growth by conducting games and sports and eradication of social evils, like dowry, drug addiction, alcoholism, smoking, etc. Since assessee's object is not solely for educational purposes, therefore, exemption claimed u/s. 10(23C)(iiiad) is not allowable and further the

surplus shown by the assessee reveals that it is earning profit.

3. Against the said assessment order, assessee has filed 1st appeal before the ld. CIT(A) challenging the assessment order passed u/s.144 and that ld. Assessing Officer has wrongly relied upon the judgment of Hon'ble Uttrakhand High Court in the case of CIT vs. Queen's Education Society (supra). Further the assessee's entire receipt and operation is only from the field of education and simply because it has some other objects it will not disentitle for exemption so long as activity carried on by it in that assessment year was that of running an educational institution. Similarly, addition of Rs.15,94,000/- was also challenged and was categorically stated that Assessing Officer has not given sufficient opportunity to produce the details and accordingly all the details of the persons who have given the donations were filed. However, the ld. CIT (A) vide order dated 9.02.2011 without adverting to the assessee's submission filed before him has dismissed the assessee's appeal. In so far as details regarding anonymous donors who have contributed to the corpus fund, he held that assessee could not give sufficient reason as to why such details were not furnished before the Assessing Officer and accordingly refused to admit the additional evidences.

4. The Tribunal in the second appeal, vide order dated 12.04.2013 in ITA No.1698/Del/2011, categorically held that

the ld. CIT(A) has not addressed the grievance of the assessee that the fair and proper opportunity of hearing was not granted to the assessee either by the Assessing Officer or by the ld. CIT(A) and the order has been passed without adverting to the written submission filed by the assessee before the ld. CIT(A). Accordingly, in the interest of justice matter was remitted back to the file of the ld. CIT (A) to be decided afresh after giving due and adequate opportunity of hearing to the assessee.

5. Once again assessee filed detail written submission before the ld. CIT(A) along with affidavits of various donors in support of contention that none of the donations are anonymous. Apart from that, the assessee has also challenged the legality of the proceedings initiated u/s.143(2) on the ground that it was in violation of CBDT Instruction and guidelines for selection of such cases under scrutiny and in support of certain decision relied upon were also filed. Ld. CIT(A), held that issue of illegality of proceedings initiated u/s.143(2) was not a ground of appeal filed before the Tribunal as the Tribunal has restored only two issues before the ld. CIT(A), i.e., claim of exemption u/s.10(23C)(iiiad) and of corpus donation.

6. Ld. CIT (A) once again in second round, confirmed the additions made by the Assessing Officer and held that, firstly, the judgment of Hon'ble Punjab and Haryana High Court relied upon by the assessee in the case of CIT vs. Haryana

Warehousing Corporation; and Pine Grove International Charitable Trust vs. Union of India, which has been confirmed by the Hon'ble Supreme Court also are not applicable on the facts of the assessee's case and are distinguishable. Secondly, provision of section 10(23C)(iiiad) would be applicable only if the assessee-society is existing solely for the educational purpose and if there are some other objects of charitable purpose, then the benefit of Section 10(23C) could not be given. Thirdly, the assessee's society was granted registration u/s.12A only vide order dated 12.07.2012 by CIT Rohtak, and therefore, it was not allowable for any kind of benefit u/s.11 and 12 for the year under consideration and also not eligible for benefit of Section 10(23C)(iiiad). Lastly, on the issue of corpus donation he held that same is an income in terms of sub clause (2a) of Clause (24) of Section 2 and such corpus donation would be exempt only u/s.11(1)(d) and since Section 11 and 12 are not allowable to the assessee society in this year, therefore, same is not allowable. Accordingly, he dismissed the assessee's appeal.

7. Again, the matter went to the Tribunal in second round and the Tribunal vide order dated 31.01.2017 again remanded the matter back to the file of the ld. CIT (A) holding that the earlier direction of the Tribunal does not put any fetter on the powers of ld. CIT (A) to decide the jurisdictional issues raised before him and therefore, ld. CIT (A) was not justified in deciding the jurisdiction issue. Accordingly, the

appeal was remitted to the file of the ld. CIT (A) for deciding the issue raised before him.

8. Now again in the third round of proceedings, the ld. CIT (A) has decided the issue relating to legality of proceedings initiated u/s.143(2) against the assessee and this time he has not even decided the issues on merit. Thus, once again assessee was pushed for second appeal in third round of proceedings

9. Since, the legal issue has not been pressed before me, therefore, the only issue remains, whether the addition made by the Assessing Officer in the assessment order is sustainable or not.

10. Before me, at the outset, ld. DR submitted that, firstly, in the last order of the Tribunal, i.e., order dated 13.01.2017 the point of remittance to the ld. CIT (A) was only with regard to Section 143(2); and secondly, since the ld. CIT (A) has not decided the issue on merits, therefore, matter can be remanded back once again to deal and decide the issue on merits.

11. On the other hand, ld. counsel for the assessee, Shri Gautam Jain submitted that already three round of proceedings have gone by and almost more than nine years have passed since the last assessment order, therefore, the matter should not be remanded back to the file by the ld. CIT(A). He submitted that, all the issue relating to merits was

not only challenged before the ld. CIT (A) in the first and second round, but in third round also, which is evident from the written submissions filed before him. It would not be correct to interpret that ld. CIT (A) was not required to adjudicate the appeal on merits, because not only the entire issues were challenged before the Tribunal but also before the ld. CIT (A) and the Tribunal has set aside the entire issue though in the last paragraph they have held that ld. CIT (A) who adjudicated the issues raised by the assessee which has been incorporated by them at page 4 of his order. It does not mean that all the other issues have been dismissed by the Tribunal or ld. CIT (A) could not have decided the issues on merits.

12. He submitted that in so far as taxing the surplus amount of Rs.1,19,723/- by the Assessing Officer which has been confirmed by the ld. CIT(A) in the earlier two ordrers, the main reason given by the Department was that there were other objects of the assessee which shows that assessee was not solely for educational purpose. Secondly, the surplus means that it was for profit motive and in support strong reliance was placed by the AO and CIT(A) on the decision of Hon'ble Uttrakhand High Court in the case of CIT vs. Queen's Educational Society (supra). He submitted that judgment of Hon'ble Uttrakhand High Court has now been reversed by the Hon'ble Supreme Court in the case of **Queen's Educational Society vs. CIT reported in (2015) 372 ITR 699 (SC)** and

thus the reasoning given by the Assessing Officer and ld. CIT(A) that taxing the surplus does not hold any ground. In so far as addition on account of donation is concerned, he submitted that the entire details of the persons who have given donation was filed in the first round of proceedings before the ld. CIT (A) which was again duly supported by affidavits filed during the second round of proceedings, on which there is no rebuttal or adverse finding given by the appellate authorities. The only reason cited by the ld. CIT (A) on the first round is that these details were not filed before the Assessing Officer despite the fact that it was demonstrated from records before him that Assessing Officer has not given sufficient opportunity and the time allowed was very less. Once, these details have been filed which are also available in the paper book then same should have been considered, and from these details is evidently clear that the donations received by the assessee are not anonymous as these people have duly confirmed the donations given towards corpus. Hence, no addition could have been made.

13. After hearing both the parties and on perusal of the relevant material placed before me, I find it is really travesty of justice that for small addition, assessee carrying out educational activity has been litigating for last ten years and has to undergo several round of appellate proceedings. Since, the legal issue pertaining to jurisdiction of the Assessing Officer, issue notice u/s.143(2) in violation of guidelines issued by CBDT has not been pressed, therefore, this issue is

no longer matter of adjudication in this appeal. Though, ld. CIT(A) in the impugned order has decided this issue only and has not adverted to the merits of the addition despite assessee through its various submissions has challenged these additions. Even if we agree with the contention of the ld. DR that the merits of the additions should be sent back to the file of the ld. CIT (A) as he has not adjudicated the issues on merits, but in the interest of justice and looking to the fact that almost decade has been passed and the litigation is going, therefore to put an end to such a litigation, I deem it fit to decide the issues on merit.

14. It is an undisputed fact that assessee is running a B.Ed. college imparting education up to B.Ed. level and is affiliated with the MD University, Rohtak. The entire receipts shown by the assessee is from the fees collected from the students during the year which aggregated to Rs.31,70,3286/-; and the surplus income over expenditure was only Rs.1,19,173/-. Such a surplus income has been added by the Assessing Officer for the reason that, *firstly*, assessee did not exist solely for the education purpose as it has some other; and *secondly*, in view of judgment of Hon'ble Uttrakhand High Court in the case of CIT vs. Queen's Educational Society, the surplus implies that it is for the profits. Now, this view stands overruled by the judgment of Hon'ble Apex Court in the case of **Queen's Educational Society vs. CIT** wherein Their Lordships after analyzing the provisions of section 10(23C)(iiiad) have laid down the following principle:-

"(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 be cease to be one existing solely for educational purposes.

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

15. Ergo, if one applies the aforesaid principles, then what needs to be seen is the predominant object of the society and if such a predominant object is education then exemption u/s.10(23C)(iiiad) cannot be denied. Secondly, mere fact that there is a surplus it cannot lead to a conclusion that educational institution cease to exist solely for educational purpose or it has become an institution for purpose of making profit. Here, in this case, the entire receipts are from education which is far less than Rs.1 crore, i.e. Rs. 31.70 lac. Thus, if during the year, entire activity relates to carrying out

activity of education and reciepts being less than Rs.1 crore, then exemption u/s. 10(23C)(iiiad) cannot be disallowed. Accordingly, the addition made by the Assessing Officer on account of taxing the surplus stands deleted.

16. In so far as the addition on account of corpus donation is concerned, the Assessing Officer has treated it as anonymous donation and has brought to tax u/s.115BBC. As discussed above, the assessee has clearly pleaded before the appellate authority that Assessing Officer did not give any opportunity to file the details of donors and accordingly the assessee has filed additional evidence before the ld. CIT (A) giving the entire list of the donors and also pointed out that it had maintained the records giving particulars of identity, indicating the name and address of the person making such contribution. Not only that, affidavits of those donors were also filed which is also part of the paper book. Once, all these details have been filed before the appellate authority and also the reasons have been given as to why the same has not been filed before the Assessing Officer, then also till three rounds of proceedings, none of the appellate authorities have dealt and adjudicated this issue on merits. If any evidence has been filed which goes to the very root of the issue, then it is incumbent upon the appellate authorities to examine these details himself or by calling the remand report from the Assessing Officer. Thus, approach of the ld. CIT (A) in all the three rounds under the facts and circumstances of the case cannot be appreciated. Before taxing any donation which is

taxed u/s.115BC as an anonymous donation, the main condition as given in sub section (3) which defines the anonymous donation as; where the person receiving such contribution does not maintain the record of identity, indicating the name and address of the person making such contribution then only such an anonymous donation is taxable @ 30%. Here, in this case, assessee has not only filed the details of the donors but has also given the entire record including their sworn affidavits, disclosing their identity by indicating the name and address of the person making the contribution, therefore, such a donation towards corpus fund cannot be held to be anonymous donation to be taxed u/s.115BBC. It is only when any anonymous donation is treated as income when there is no details or identity of the donors. Here as held above, is not the case. Accordingly, we hold that such a corpus donation cannot be taxed u/s.115BBC and the same is directed to be deleted.

17. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 22nd February, 2019.

Sd/-
[AMIT SHUKLA]
JUDICIAL MEMBER

DATED: 22nd February, 2019
PKK