IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR (SMC)

BEFORE SH. SANJAY ARORA, ACCOUNTANT MEMBER

I.T.A. No. 478/Asr/2017
Assessment Year: 2010-11

Satnam Singh Memorial Trust, 611-R Model Town, Jalandhar	vs.	Income Tax Officer, (Exemptions), Jalandhar
[PAN: AADTS 2243J]		
(Appellant)		**(Respondent)**

Appellant by : Sh. Rohit Bhardwar (Adv.)
Respondent by: Sh. Charan Dass (D.R.)

Date of Hearing: 24.04.2019
Date of Pronouncement: 19.07.2019

ORDER

Per Sanjay Arora, AM:

This is an Appeal by the Assessee directed against the Order by the Commissioner of Income Tax (Appeals)-2, Jalandhar ('CIT(A)' for short) dated 19.04.2017, dismissing the assessee's appeal contesting its assessment u/s. 143(3) of the Income Tax Act, 1961 ('the Act' hereinafter) dated 28.3.2013 for the Assessment Year (AY) 2010-11.

2.1 It shall be necessary to recount the background facts of the case. The assessee, a trust registered as a charitable institution u/s. 12AA of the Act, filed its' return of income for the relevant year on 14.10.2010, at nil income; it's operating statement reflecting a loss of Rs. 29,530 (PB pg. 3). Examining the same in the assessment proceedings, the Assessing Officer (AO) found that while expenditure aggregating to Rs.18,29,435, i.e., on electricity, salary, bonus and EPF, was

properly vouched, the balance expenditure of Rs.18,03,397 – the total expenditure claimed per the income & expenditure account being at Rs. 36,32,832, was not verifiable. The assessee had, despite abundant opportunity, failed to produce the books of account, or even the vouchers in support of the claim for expenditure to that extent. He, accordingly, disallowed fifty per cent. (50%) thereof, i.e., Rs. 9,01,699, assessing the income for the relevant year at Rs. 8,72,169 (Rs. 9,01,699 – Rs.29,530), relying on the decision in *Safdarjung Enclave Educational Society v. Municipal Corporation of Delhi* [1990] 181 ITR 154 (Del). In appeal, the ld. CIT(A), after seeking a remand report, confirmed the same, holding as under:

'5.6. Having considered the submissions made in this regard and material available on record, I find that the appellant has not been able to produce any evidence to substantiate the claim of expenses in the course of the assessment proceedings. Further, *I find that in the course of remand proceedings the appellant has again failed to furnish any evidence to support the claim of having incurred the expenses*. The appellant has only made hollow submissions without bothering to file the evidence despite having been provided specific opportunity to do so. The income of the trust is exempt but it is subject to maintaining complete books of account with supporting documents and these books have to be duly audited. *This exemption of income does not mean making a claim of expenses which have not been incurred and for which no supporting documents/vouchers could be filed either at the assessment stage or at the appellate stage*.

5.7 In view of the above facts, I hold that (the) AO was fair and justified in making a disallowance of only 50% of the expenses claimed for which no corresponding vouchers/documents could be produced. Accordingly, I confirm the disallowance of Rs. 9,01,699 made by the AO under this head.'

(emphasis, supplied)

Aggrieved, the assessee is in second appeal, raising the following grounds:

'1. That no notice of demand valid in law has been served upon the appellant.

2. That the ld. Income Tax Officer has erred in making the impugned addition of Rs. 9,01,699/- on conjectures and surmises.

3. That while making the impugned addition of Rs. 9,01,699/-, the ld. Income Tax Officer has failed to point out even a single defect in the relevant accounts and failed to appreciate the factual aspects of the case.

4. That the ld. Commissioner of Income Tax (Appeals) and ld. Income Tax Officer failed to appreciate the fact of the case where the assessee filed for books of account and vouchers under rule 46A and not allowing the assessee file the documents at the time of the appeal proceedings and finalizing the order in sudden rush without proper opportunity to the assessee.

5. That despite being the case of a hospital, the ld. ITO has erred in not allowing exemption otherwise admissible under the provision of sec. 10(23)(iiiae) of the Act.

6. That the appellant hereby specifically makes the claim for exemption of its income under the provision of sec. 10(23C)(iiiae) of the Act at the strength in the case of M/s. Jute Corporation of India Ltd. v. Commissioner of Income Tax & Anr. (SC) decided on 04.09.1990 and reported at 1991 AIR 241, 1990 SCR Supl. (1) 340 and 1991 SCC Suppl. (2) 744 iT 1990 346.

7. That the ld. Commissioner of Income Tax (Appeals) erred while not dealing the application of the assessee under rule 46A.

8. That the appellant strongly objects to the income assessed and the further demand on account of tax and interest determined thereon.

9. That the ld. Income Tax Officer has erred in charging interest under section 234A, B, C and D.

10. That the ld. Dy. CIT has erred in initiating penalty proceedings by issue of penalty notice under sec. 271(l)(c).'

2.2 Before the Tribunal, the assessee's principal contention (through its counsel, Sh. Bhardwar), was that the ld. CIT(A) had failed to adjudicate Ground 4 of the assessee's appeal before him, which reads as under:

'4. That despite being the case of a hospital, the ld. ITO has erred in not allowing exemption otherwise admissible under the provision of sec. 10(23C)(iiiae) of the Act.'

The matter, accordingly, be remitted back to the file of the first appellate authority for the same. The assessee's receipt for the relevant year, it was argued by Sh. Bhardwar, drawing attention to the income and expenditure statement (PB pgs. 3), is at Rs.34.88 lacs, i.e., much below the prescribed limit u/s. 10(23C)(iiiae) (which is, u/r. 2BC, at Rs.100 lacs). In the alternative, he would add, the facts being admitted, and the issue being legal, exemption u/s. 10(23C)(iiiae) be allowed by the tribunal. He could not answer the question posed by the Bench as to how does the assessee justify its' existence for philanthropic purposes, and not for the purposes of profit, the two, mutually consistent, conditions precedent for the grant of benefit u/s. 10(23C)(iiiae), i.e., could not furnish any answer, much less satisfactory. The ld. Departmental Representative (DR) would submit that the ld. CIT(A) has also considered the assessee's claim u/s. 10(23C)(iiiae), referring to para 5.5 of his order, i.e., even as he may not have explicitly stated so in his adjudication, which accordingly covers the assessee's claim thereunder as well.

3. I have heard the parties, and perused the material on record.

3.1 As apparent from the fore-going, the following questions arise for determination:

(a) Whether the assessee had validly raised the question of exemption u/s. 10(23C)(iiiae) before the first appellate authority for the first time, i.e., in the facts and circumstances of the case;

(b) Assuming a valid raising before the ld. CIT(A), has he adjudicated the same and, if so, the merits of the said adjudication;

(c) Whether the assessee's claim u/s. 10(23C)(iiiae), even assuming as not raised before the ld. CIT(A), or not decided by him, could be raised before the Tribunal, the second appellate authority, for the first time, i.e., in view of the assessee's alternate plea; and

(d) in any case, is the disallowance, as effected, excessive.

3.2 I shall begin with question (b). This is as if the ld. CIT(A) has answered the assessee's Ground 4 before him, question (a) becomes facile as well as futile; the only question surviving in that case being the merits of the said adjudication. Vide para 5.5 of his order, the ld. CIT(A) clearly notes the assessee's claim u/s. 10(23C)(iiiae). He was, thus, clearly conscious of the assessee's said claim while deciding its' appeal. The findings by the ld. CIT(A) stand reproduced hereinbefore. In my clear view, though he has not explicitly stated of the assessee being not entitled to relief u/s. 10(23C)(iiiae), his adjudication covers the assessee's said claim as well. The reason is simple. The assessee has, despite sufficient opportunity, both at the assessment and the first appellate stage – which included remand proceedings as well, been unable to substantiate its' claim of having incurred expenditure for Rs.18.03 lacs, booked under various account heads, which being therefore unverifiable, was estimated as inflated at 50% thereof, i.e., does not represent expenditure incurred by the assessee. It is in view thereof that he holds (vide para 5.7 of his order) of the AO being fair and justified in making a disallowance of only 50% of the expenses claimed for which no corresponding vouchers/documents could be produced, having earlier (in para 5.6) noted the said failure to obtain at the appellate stage as well.

Unverifiable expenditure, it may be appreciated, by definition implies that the assessee is unable to show that the same had indeed been incurred, much less for the objects of the trust/society. How, one may ask, an entity, being in fact imbued with public character, unable to account for funds to the extent of Rs. 18.03 lacs, could be said to exist for philanthropic purposes? In fact, in the absence of books of account, it is difficult to say that expenditure to that extent was even 'booked'. *That is, though stated as an expense, could not be shown to be so, so that, by necessary implication, the amount stands siphoned off*. Could the assessee, thus, be allowed exemption either u/s. 11(1), or u/s. 10(23C)(iiiae) for that matter? Or at

least *qua* monies, admittedly available with it, and now no longer so, even as the same could not, despite abundant opportunity, be shown to have been spent for running the hospital, i.e., the stated purpose for which the same are claimed to have been spent/incurred. The answer to this question would clearly be in the negative. No doubt, Sh. Bhardwar, on being asked during hearing, admitted that the said moneys to the extent deemed not spent (Rs.9.02 lacs) could not be applied for charitable purposes in future. It is, in fact, for this very reason that section 11(4) clearly provides that the income of a charitable institution assessed in excess of that shown in the assessee's accounts, is to be deemed as applied for other than charitable purposes. Sure, though the deeming is applicable where the property held under trust is a business undertaking, the question is how could money, ostensibly and admittedly spent, possibly be expended or applied again, even as noted by the tribunal in *Maharaja Ranjit Singh War Museum Society v. ITO* (in ITA No. 618/Asr/2017, dated 28.8.2018).

The assessee has no case on merits, having been in fact allowed abundant opportunity both at the assessment and the first appellate stage. No contention in this regard was in fact made before me during hearing, nor any argument, much less material, led to rebut the definite findings by the ld. CIT(A). This is apart from the fact that an income of Rs.7.57 lacs (i.e., Rs. 8.72 lacs less miscellaneous income of Rs. 1.15 lacs), on a total receipt of Rs.34.88 lacs, only implies the hospital to be run on commercial lines, i.e., as a business venture, so as to be regarded as a business undertaking. However, being incidental to the attainment of the objects of the trust/society, i.e., medical relief, a charitable purpose by definition, its' income would, subject to the conditions of section 11 to 13, be exempt u/s. 11(1), even as clarified per a number of decisions, and toward which reference be made to the decision by the tribunal in *Lord Shiva Educational Welfare Society v. CIT(E)* (in ITA No. 605/Asr/2017, dated 10.09.2018), rendered

with reference to a host of decisions by the Hon'ble Apex Court as well as by the Hon'ble jurisdictional High Court, as in *Pine Group International Charitable Trust v. Union of India* [2010] 327 ITR 273 (P&H). The condition with regard to s. 10(23C)(iiiae) is, however, different, i.e., the assessee is to be shown to exist solely for philanthropy and not for profit. Much less this being shown, which are matters of fact, for it's claim under the said provision considered, monies to the extent of Rs. 18.03 lacs belonging to the assesse-trust could not be shown to have been, as claimed, expended for the purposes of it's objects. Funds to that extent, admittedly not available, are thus unaccounted for; the assessee being unable to account for the same – the stated manner of accounting being unproved. The same would impinge adversely both on its claim u/s. 11 as well as s. 10(23C)(iiiae). The assessee, and in fact not surprisingly, does not dispute the denial of the claim u/s. 11, raising an alternate claim u/s. 10(23C)(iiiae). In fact, the funds to that extent can only be regarded as siphoned off, to the same consequence, i.e., as far as the assessment proceedings are concerned. Question (b) is answered accordingly.

3.3 If, however, it is assumed that the ld. CIT(A) has not adjudicated the assessee's claim u/s. 10(23C)(iiiae), in my view, the said issue could not be raised before him, given that the facts necessary for adjudicating the same are not borne out by the record, and, in any case, not undisputed. This, though, in view of the examination on merits (per para 3.2), is not required, and is considered only for the sake of completeness of this order.

Section 10(23C)(iiiae) reads as under:

'Incomes not included in total income.

10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

(1)……..

(23C) any income received by any person on behalf of—

(iiiae) any hospital or other institution for the reception and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation, *existing solely for philanthropic purposes and not for purposes of profit*, if the aggregate annual receipts of such hospital or institution do not exceed the amount of annual receipts as may be prescribed, or' (emphasis, supplied)

As afore-noted, an assessee has to be shown to be existing for, and only for, philanthropic purposes and not for profit, to be entitled to exemption on its income u/s. 10(23C)(iiiae). Much less this being shown, there is no claim to this effect in the instant case. That is, the assessee's case for benefit u/s. 10(23C)(iiiae) is a bald case. On the contrary, as argued, the earning of profit, for which the ld. counsel would make reference to the assessment orders for the subsequent years as well – and which implies charge for the services rendered at remunerative rates, is no bar for the claim of relief u/s. 11. This is clearly inconsistent with the terms of section 10(23C)(iiiae). The argument of the assessee being a public charitable institution would therefore be of no assistance to it in-so-far as it's claim u/s. 10(23C)(iiiae) is concerned, which requires it to exist only for philanthropic purposes and not for the purpose of profit, i.e., stipulates the twin conditions, which though are mutually consistent. Not so construing would be to disregard the clear and plain language of the provision, i.e., apart from the scheme of the Act, which provides for a condition of philanthropy and not for profit as the basis for exemption.

In fact, the facts on record resulting in the inference as to the siphoning of funds, disentitles the assessee's claim, both u/s. 11 and s. 10(23C)(iiiae). That is, the facts on record, rather than supporting, disprove the assessee's claim for benefit u/s. 10(23C)(iiiae). The raising of a legal issue for the first time before an appellate authority could only be, at the discretion of the said authority, where the claim is made *bona fide*, with all the facts necessary for the same on record and not

disputed (*Jute Corporation of India v. CIT* [1991] 187 ITR 688 (SC)). The assessee's claim suffers on both counts. There is clear lack of *bona fides* inasmuch despite abundant opportunity to prove its claim, based ostensibly on its' audited books of account, unproduced, is unable to do so, nay, improve its' case in any manner. The findings by the Revenue authorities remain unrebutted. There is also no explanation for not being able to substantiate its case before them and, concomitantly, of being allowed an opportunity to do so now, even as such a claim, even if made, would not be subject to an automatic acceptance, but only with reference to the settled law in the matter. Rather, as afore-noted, the assessee does not seriously dispute its' claim u/s. 11, making an alternate bid u/s. 10(23C)(iiiae).

The incurring of expenditure to the stated extent being unproved, implying siphoning of funds – which are to be regarded as public funds, the claim as to *bona fides* is even otherwise misplaced. There is no claim to philanthropy, nay, could not be under the circumstance, i.e., where a substantial part of the expenditure (Rs. 9.02 lacs) is unproved. The findings by the ld. CIT(A) have not been rebutted in any manner. The claim is under the circumstances inadmissible in law nor acceptable on merits. This answer questions (a) and (c).

3.4 Finally, I may address the assessee's case under question (d). The same stands neither raised per the Grounds of Appeal nor during arguments. The same is, nevertheless, included for the sake of completeness of this order, with a view to consider the matter in all its aspects. No basis for reckoning the same as excessive stands advanced at any stage of the proceedings. The matter is purely factual, with nothing having been brought on record to show as to how the expenditure being unverifiable, ought to be estimated for inflation at a rate lower than 50%. That is, why it should be regarded as excessive. A rate of 50% implies evening of scales, i.e., despite being not proved to have been incurred, the probability of it being not

incurred is restricted to 1/2, i.e., the same as of having been incurred. Clearly, an expenditure is either incurred or not, so that the said ratio in effect implies the extent to which the expenditure is regarded as not incurred. The same is, under the circumstances, fair and reasonable. I, accordingly, decline interference.

3.5 No other ground was pressed during hearing, with, in fact, all the issues possibly arising being discussed, with, as afore-stated, a view of giving a comprehensible and objective consideration to the issues emanating, including the Ground *qua* non-admission of additional evidence u/r. 46A. The same, though considered in the adjudication afore-said, is nevertheless, specifically addressed. The said Gd. is *de hors* any material on record; the assessee even not placing on record the application u/r. 46A, besides, as afore-stated, not rebutting the specific findings by the ld. CIT(A) in any manner.

4. *In sum*

The assessee, a trust registered u/s. 12AA of the Act as a charitable institution, was unable to, in assessment, substantiate or otherwise evidence expenditure to the extent of Rs.18.03 lacs, claimed per its' operating statement, and, accordingly, denied claim in its respect to the extent of 50% thereof, which was brought to tax. The assessee, despite the proceedings being remanded at the first appellate stage, could not improve its' case; the findings by the ld. CIT(A) remaining unrebutted. In fact, the asssessee's principal contention in second appeal is for being allowed exemption u/s. 10(23C)(iiiae) in-as-much as its', running a hospital, receipt was below the limit of Rs.100 lacs; a plea raised before the first appellate authority as well, who was contended to have not decided the same. The matter was accordingly examined from the standpoint of both, i.e., s. 11 and s. 10(23C)(iiiae), to find it as ineligible on both; the 'funds' to the extent of Rs.18.03 lakhs being

unaccounted inasmuch as the same could not be shown to be, as claimed, expended, much less for the stated purposes, i.e., the objects of the trust. The terms of sec. 10(23C)(iiiae) were in fact more stringent, requiring the entity to exist solely for philanthropic purposes and not for profit, on which there is no claim, much less material establishing the same. No claim on facts *qua* these two aspects, representing the perquisite conditions for the application of the provision, was made, much less shown. The claim was accordingly inadmissible at appellate stage. It was nevertheless also examined on merits. The expenditure being unproved had been rightly disallowed; with rather funds to that extent being, by necessary implication, unaccounted for. The books of account and the documents supporting the entries recorded therein, constitute the primary evidence with the assessee *qua* a claim, not furnished in the instant case. The claim as regards invocation of r. 46A, is again without merit, in view of the remand proceedings. Though not pleaded, the claim as to the disallowance being excessive, has also been considered, to find it as reasonable in the given facts and circumstances of the case. The assessee's case is thus without merit, requiring therefore no interference. I decide accordingly.

5. In the result, the assessee's appeal is dismissed.

Order pronounced in the open court on July 19, 2019

Sd/-
(Sanjay Arora)
Accountant Member

Date: 19.07.2019
/GP/Sr. Ps.
Copy of the order forwarded to:
(1) The Appellant: Satnam Singh Memorial Trust, 611-R Model Town, Jalandhar
(2) The Respondent: Income Tax Officer, (Exemptions), Jalandhar
(3) The CIT(Appeals)-2, Jalandhar

(4) The CIT concerned
(5) The Sr. DR, I.T.A.T

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By Order