

IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN
BEFORE S/SHRI CHANDRA POOJARI, AM & GEORGE GEORGE K., JM

I.T.A. Nos. 435 & 436/Coch/2019
Assessment Years : 2014-15 & 2015-16

Sree Narayana Dharma Paripalana Yuvajana Samithy, Azhikode Post, Kodungallur, Thrissur-680 666. [PAN: AABAS 2078J]	Vs.	The Income Tax Officer (Exemption), Kochi.
(Assessee -Appellant)		(Revenue-Respondent)

Assessee by	None (Argument Notes filed)
Revenue by	Shri Shantam Bose, CIT(DR)

Date of hearing	24/09/2019
Date of pronouncement	25/09/2019

ORDER

Per CHANDRA POOJARI, AM:

These two appeal by the assessee are directed against the different orders of the CIT(Exemptions), Kochi dated 29/03/2019 passed u/s. 263 of the I.T. Act and pertain to the assessment years 2014-15 and 2015-16.

2. Since the issues involved in these two appeals were common, they were heard together and are being disposed of by this common order.

3. The facts of the case are that the assessment was completed u/s. 143(3) of the Income Tax Act, 1961 on 21.07.2016 assessing the total income at Rs.1,81,050/-. On examination of records, it was noticed that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of revenue for the reason that the Assessing Officer, while completing the assessment has not gone into the following issues:

3.1 It was found that the assessee's main source of income was by way of Kuri business. During the Assessment Years 2014-2015 and 2015-16, the assessee's income from Kuri business was Rs 24,52,012/- and Rs.36,41,592/- respectively. The assessments were made allowing exemption u/s. 11 on the income of Kuri business under the conviction that foreman's commission from Kuri business was less than Rs.25,00,000/- and therefore 1st proviso to Section 2(15) does not attract in the case of the assessee. On verification of the accounts it was found that receipts out of Kuri business exceeded Rs.25,00,000/-. The CIT(E) observed that the Assessing Officer had only considered foreman's commission out of Kuries. According to the CIT(E), as per proviso to Section 2(15) receipts out of the business is to be taken for consideration and total receipts out of Kuri business according to the Profit & Loss account for the financial year 2013-2014 was Rs.40,03,981/- and for the financial year 2014-15 was Rs.36,41,592/-. Therefore, the CIT(E) held that the assessment order was erroneous and prejudicial to the interest of revenue and invoked the provisions of section 263 of the I.T. Act.

3.2 Before the CIT(E), the Ld. AR submitted that the assessee is a charitable institution registered u/s. 12A of the Act. It was submitted that the predominant object of trust is relief to the poor and for meeting the requirement of Trust, the Trust was authorized to collect donations from the public, small savings schemes and kuri business and this kuri business was held under Trust as per Section 11(4) of the Act. It was submitted that well after the amendment to Section 2(15) by inserting a proviso, in the Asst. Year 2010-2011, it was clearly made on record that the main object of the trust is relief of the poor. For this purpose, the Ld. AR relied on the ratio of the decision in the case of Thanthi Trust reported in 247 ITR 785 wherein it was held that a business whose income is utilized by the trust for the purpose of achievement of object of the trust would be incidental to the object of the trust. It was submitted that the then Assessing Officer found that the income generated from kuri business had been utilized for charitable purpose and assessments were completed allowing the application of income u/s. 11 of the Act. According to the Ld. AR, as per Section 11 (4A) states that "Sub-section (1) or Sub section (2) Sub Section (3) or Sub Section (3A) shall not apply in relation to any income of a trust or an institution, being profits and gain of business, unless the business is incidental to the attainment of the objectives of the trust or, as the case may be institution and separate books of accounts are maintained by such trust or institution in respect of such business. The Ld. AR relied on the judgment of the Apex Court held in the cases of CIT v Andhra Chamber of Commerce (1965) 55 ITR 722 that only the predominant object for which the organization was created is alone to be considered for the purpose for determining whether the nature of

activities fall within the scope and ambit of 'charity'. Further, in *CST v. Sai Publication Fund* (2002) 258 ITR 70, it was held that if the main activity is not business, then any transaction incidental or ancillary would not normally amount to business.

3.3 The Ld. AR made reference to the reply of the Hon'ble Finance Minister to the debate in the Lok Sabha on the Finance Bill. 2008 that the intention is to limit the benefit to entitled which are engaged in activities such as relief of the poor, education, medical relief and any other genuine charitable purpose, and to deny it to purely commercial and business entities which wear the mask of a charity. With regard to the proviso to Section 2(15), it was pointed out that relevant Circular No. 11/2008 dated 19.12.2008 in no uncertain terms made clear that the proviso will apply only to entities whose purpose is 'advancement of any other object of general public utility', i.e. the fourth limb of the definition of 'charitable purpose' contained in Section 2(15). Hence, it was submitted that such entities will not be eligible for exemption under section 11 or under section 10(23C) of the Act if they carry on commercial activities and whether such an entity is carrying on an activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extend and frequency of the activity.

4. The CIT(E) observed that amendments made by the Finance (No.2) Act, 1991 w e.f. 1992 prohibits the carrying on of business, unless the business is incidental to the attainment of the objects of the Trust, for which separate books are to be

maintained. It was observed that the amendment has brought in a blanket prohibition and there was no total prohibition against the business old law. It was possible to carry on business, subject to specified exceptions and restrictions. The dividing line was that there should be no activity for profit. The CIT(E) observed that the income from Kuri business was directly hit by the provisions of Section 11 (4A) and also Section 2 (15). The provisions of section 11 (4A) reads as under:

4(A) sub-section (1) or sub-section (2) or sub-section (3) or sub-section 3(A) shall not apply in relation to any income of a trust or an institution. being profits and gains of business, unless the business is incidental to the attainment of the objectives of the Trust or, as the case may be, institution, and separate books of accounts are maintained such trust or institution in respect of such business".

4.1 On the plain reading of the provisions of Section 11(4A), two things are abundantly clear. That:

- a) The Trust can carry out business which is only incidental to the attainment of its objectives; and
- b) If the Trust carries out any business activity which is not incidental to the attainment of its objectives, then such income is taxable.

4.2 In the case of the assessee-Trust, the CIT(E) found that predominant objectives are relief of the poor. Thus, running a Kuri business is in no way incidental to the objects of the Trust. It was observed that even if the profit/surplus from the Kuri business are entirely utilized for the objects of the Trust, however, running of Kuri business itself comes either under the category of business

which is not incidental to its activities or qualifies to be "advancement of any public utility".

4.3 Now coming to the question of "incidental" business, for an educational trust, the CIT(E) was of the view that receivable incidental business could be running of stationery store, canteen, or even running school buses. Thus, if an educational institution runs these businesses, then it would not be treated as a business income, though they may run on commercial lines, in consonance with the provisions of section 11(4A). However, running a kuri business cannot in any manner be construed as incidental to the objects of the assessee. The provisions of Section 2(15) are reproduced here for further analysis:

"(15) "charitable purpose" includes relief of the poor, education medical relief preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects or artistic or historic interest] and the advancement of any other object of general public utility. "

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying of any activity in the nature of trade, commerce or business, or any activity of rendering service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention of the income from such activity.

4.4 On verification of the records, it was also noticed that the assessee's main income was from kuri business and other activities were very meagre. Hence, the CIT(E) was of the view that the assessment u/s 143(3) dated 21/07/2016 was erroneous and prejudicial to the interest of revenue and accordingly, set aside the

assessment to the files of the assessing officer to redo the same after giving sufficient opportunity to the assessee to be heard.

5. Against this, the assessee is in appeal before us. None appeared on behalf of the assessee. The Id. AR filed written submissions stating that the Commissioner of Income Tax either ignored or misapplied the ratio decidendi of the Supreme Court decision in the case of ACIT vs Thanti Trust (247 ITR 785) wherein it was held that a business whose income is utilized by the Trust for the purpose or the objectives of the Trust, the business is to be held as incidental to the attainment of the objects of the Trust. It was submitted that the CIT had no dispute that the assessee's main object was relief to poor. Secondly, he had also found that, the entire income from bad been utilized for the purpose of relief to poor. Reliance was placed on the following judgments of the Supreme Court and High Court:

1. Parashuram Pottery Works Co. Ltd. vs. ITO (106 ITR 1)
2. Excel Industries Limited (219 Taxman 379)
3. Ideal Publications Trust vs. CIT (305 ITR 143) (ker.).

In view of the above circumstances of the case, it was submitted that the order of the CIT(E) may be set aside.

6. The Ld. DR relied on the order of the CIT(E).

7. We have heard the Ld. DR and perused the record. Section 263 of the Income-tax Act seeks to remove the prejudice caused to the revenue by the erroneous order passed by the Assessing Officer. It empowers the Commissioner to initiate suo moto

proceedings either where the Assessing Officer takes a wrong decision without considering the materials available on record or he takes a decision without making an enquiry into the matters, where such inquiry was prima facie warranted. The Commissioner is well within his powers to treat an order as erroneous on the ground that the Assessing Officer should have made further inquiries before accepting the wrong claims made by the assessee. The Assessing Officer cannot remain passive in the face of a claim, which calls for further enquiry to know the genuineness of it. In other words, he must carry out investigation where the facts of the case so require and also decide the matter judiciously on the basis of materials collected by him as also those produced by the assessee before him. The Assessing Officer was statutorily required to make the assessment under Section 143(3) after scrutiny and not in a summary manner as contemplated by Sub-section (1) of Section 143. The Assessing Officer is therefore, required to act fairly while accepting or rejecting the claim of the assessee in cases of scrutiny assessments. The Assessing Officer should protect the interests of the revenue and to see that no one dodged the revenue and escaped without paying the legitimate tax. The Assessing Officer is not expected to put blinkers on his eyes and mechanically accept what the assessee claims before him. It is his duty to ascertain the truth of the facts stated and the genuineness of the claims made in the return. The order passed by the Assessing Officer becomes erroneous when an enquiry has not been made before accepting the genuineness of the claim which resulted in loss of revenue.

7.1 In the present case, the main object of the assessee is to offer relief to the poor. However, the assessee is running kuri business. Hence, it is a profit making activity and not incidental to the attainment of the objects of the Trust. By applying income from kuri business for charitable purposes, the assessee cannot say that its prime object is to give relief to the poor. In such circumstances, in our opinion, the CIT(E) is justified in setting aside the assessment order as erroneous and prejudicial to the interests of the Revenue with a direction to the Assessing Officer to redo the same after giving sufficient opportunity of being heard to the assessee.

8. In the result, the appeals of the assessee is dismissed.

Order pronounced in the open court on 25th September, 2019.

sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Place: Kochi

Dated: 25th September, 2019

GJ

Copy to:

1. Sree Narayana Dharma Paripalana Yuvajana Samithy, Azhikode Post, Kodungallur, Thrissur-680 666.
2. The ITO(Exemptions), Kochi.
3. The Commissioner of Income-tax(Exemptions), Kochi.
4. D.R., I.T.A.T., Cochin Bench, Cochin.
5. Guard File.

By Order

(ASSISTANT REGISTRAR)
I.T.A.T., Cochin

