

आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No.468/Ind/2018
Assessment Year: 2013-14**

DCIT (Exemption) Bhopal	<u>बनाम/</u> Vs.	M/s. Indore Education and Service Society 2 nd Floor, Income Tax Office Metro Walk Building E-5, Arera Colony Near Bittan Market Bhopal
(Appellant)		(Revenue)
P.A. No.AAATI3186K		

Appellant by	Shri S.S. Mantri, D.R.
Respondent by	Shri C.S. Padlia, A.R.
Date of Hearing:	17.10.2019
Date of Pronouncement:	19.11.2019

आदेश / O R D E R

PER KUL BHARAT, J.M:

This appeal by the revenue is directed against order of the CIT(A)-2, Indore dated 2.2.2018. The revenue has raised following grounds of appeal:

1. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in allowing the society benefits of the exemption u/s 10(23C)(vi) of Income Tax Act especially when it was found by the Assessing officer that the income of the society was used or applied for the benefit of the interested persons which is in contravention as per the 13th proviso of section 10(23C) of the Act and hence Society cannot be said to be existing solely for educational purposes and not for the purposes of profit?

2. Whether on the facts and in the circumstances of the case, the Ld. CIT(A) was justified in allowing the society, the benefits of the exemption u/s 10(23C)(vi) of Income Tax Act, when such claim of exemption u/s 10(23C)(vi) of the Act was neither made in the return of income nor before the assessing officer. Such claim is not allowable as per the decision of the Hon'ble Supreme Court in Goetze (India) Ltd Vs CIT reported in 284 ITR 323 SC [2006].

3. The revenue reserves the right to add, urge or alter all or any other ground/grounds on or before the date of hearing.

2. The facts giving rise to the present appeal are that case of the assessee was picked up for scrutiny assessment and the assessment u/s 143(3) of the Income Tax Act, 1961 (hereinafter called as 'the Act') was framed vide order dated 14.3.2016. While framing the assessment, the A.O. observed that the assessee Trust has given benefit to the specified person. Therefore, it violated the provisions of section 13(1)(c)13(3) of the Act. Hence, the A.O. made addition in respect of interest on the advances given to the

specified person in sum of Rs.4 Crores. It is noted by the A.O. that the assessee trust made payment of Rs.4 crores on 14.12.2010 in respect of agreement to purchase of land admeasuring 124646 Sq.ft. @ Rs.800/- per sq.ft. to Smt. Urmila Jain, W/o President of the Trust. It is further noted that Smt. Urmila Jain has declared interest income on the amount as loan to other persons and thus earned interest income. It is further noted that the sale deed was not registered till 31.3.2013. Hence, the A.O. opined that the assessee trust had diverted its fund to give benefit to the related parties. Hence, the A.O. made addition of interest, which was not charged @ 10% per annum.

3. Aggrieved against this, assessee preferred an appeal before Ld. CIT(A), who after considering the submissions allowed the appeal of the assessee.

4. Now, the revenue is in appeal. Ld. D.R. vehemently argued that Ld. CIT(A) is not justified in allowing the claim of exemption u/s 10(23C)(vi) of the Act without giving opportunity to the A.O. He submitted that the Ld. CIT(A) failed to appreciate the fact that this is a clear case of diversion of funds. He submitted that exemption granted u/s 10(23C)(vi) of the Act is subject to the condition embodied in the letter of approval for granting exemption u/s 10(23C)(vi) of the Act. He submitted that one of the condition is that the assessee trust would apply its income for accumulation of its income or application wholly and exclusively for the objects for which it is established and application of income must be in accordance with the mode specified in sub-section (5) of section 11 of the Act.

5. On the contrary, Ld. Counsel for the assessee reiterated the submissions as made in the written submissions, which are reproduced as under:

"In connection with appeal filed by the Department against the order of CIT-A-II Indore fixed for hearing on 16.05.2019 we beg to submit as under:

- 1. That the assessee filed his return of income on 19.09.2013 declaring total income of Rs Nil after applying the provisions of section 11 of the Act while computing the income chargeable to tax. Further the assessee has also been accorded approval of exemption of income u/s 10(23C) of the Act vide order passed by the Department of Revenue Central Board of Direct Taxes New Delhi vide order dated 23.04.2001. Thereafter the same was renewed from time to time and the last approval was granted vide CCIT order dated 06.11.2007 vide No F. No. CCIT/IND/Tech/10(23C) (vi)/15/07-08/ which has become perpetual in view of the amendment made in section 10(23C) by the Finance Act 2008. Since there was no income in the case of the assessee after applying the provisions of section 11 of the Act, at the time of submitting the return of income, therefore, question of claiming any exemption u/s 10(23C) does not arise at the time of submitting the return of income.*
- 2. That the learned A.O. while making the assessment has determined the income of the assessee at a total income of Rs.38650573/- prior to allow benefits of sections 11 and 10(23C)(via) of the Act, to the assessee for the reasons mentioned in the assessment order. Against which the assessee filed an appeal before Honourable Commissioner of Income Tax Appeals-II Indore who had decided the appeal in favour of the assessee by directing the Ld. A.O. to allow the benefits of section 10(23C) (via) to the assessee for which he has been accorded approval for exemption of income earned by him out of the Educational activities, vide his order dated 02.02.2018. Against which the Department has preferred appeal before the Honorable Bench for directions issued to allow the benefits of section 10(23C) (via) to the assessee.*
- 3. The Department seek the opinion of the Honourable Bench that when in the opinion of the Ld. A.O. that the assessee had contravened the provisions of section 13 of the Act as such heat by the proviso 13 to section 10(23)(vi) of the Act and also in absence of any claim made for such exemption either in the return of income or before the A.O. such exemption was allowed by honorable CIT-A in the appeal so filed by the assessee before him in the light of the decision of Honourable Supreme Court in Goetze (India) Ltd V CIT reported in 284 ITR 323. Thus the Department has the objections of allowing the exemption to the assessee which was neither claimed in the return of income nor claimed the same in the assessment proceedings before the Ld. A.O. as findings given by the Apex Court of India in the cited as above. The assessee wish to bring the following facts of the case before the Honourable Bench, the circumstances which restrain the assessee to claim the exemption as above.*

(i) IN THE RETURN OF INCOME FILED BY HIM

The assessee is duly registered as a Trust u/s 12AA of the Act. As such the provisions of section 11 of the Act applied to the assessee trust. At the time of filing the return of income the assessee has computed the income chargeable to tax before applying the provisions of section 10(23C)(via) of the Act. As per that computation of income there was no income earned by the assessee after applying the provisions of Section 11 of the Act as the trust has applied full income derived from the properties of the Trust towards the object of the Trust for which it has been established. In absence of any income to the assessee question of claiming such income for exemption u/s 10(23C) (via) of the Act does not arise. Therefore under the above circumstance of the case question of claiming any exemption does not arise.

(ii) NOT CLAIMING THE EXEMPTION BEFORE THE LD. A.O. IN ASSESSMENT PROCEEDINGS

This objection as raised by the Department in the Grounds of Appeal is not as per the facts of the case. The assessee put his claim of exemption before the Ld. A.O. in response to his letter dated 22.02.2016 the assessee put his claim of exemption u/s 10(23C)(vi) of the Act as mentioned by the Ld. A.O. in his order dated 14.03.2016 at page No 2 and 3. But rejected the same making his opinion that since the assessee has contravened the provisions of section 13 of the Act, therefore, he denied the benefits of section 11 but has not mentioned the reason of denying the benefit of section 10(23C)(vi) of the Act.

Now we beg to submit before the Honourable Bench as under in connection with directions of the Honourable CIT-A-II Indore in connection with allowing the exemption u/s 10(23C)(via) of the Act irrespective of the facts that the same was not claimed in the return of income.

The Honourable CIT-A after considering the submissions of the assessee and relying on Circular No 14 dated 11.04.1955 issued by CBDT in which it had been instructed to all the authorities engaged in collecting the revenue to allow all the benefits to the assessee irrespective of the fact that the same was claimed by the assessee or not. The Honourable CIT-A after emphasizing the contents of Para 3 of the above said circular which were in nature of instruction to all the authorities engaged in collecting the revenue about the approach of their working in favour of the assessee. And dealing the Duties and Responsibilities of the Assessing Authorities under the Income Tax Act has issued the directions to allow the benefits of section 10(23C) (via) of the Act to the assessee.

The instructions as mentioned in Para 3 of the above mentioned circular No 14 dated 11.04.1955 as issued to all the authorities engaged in collecting the revenue is reproduced as under for the your honors' kind consideration.

"3. Officers of the Department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a taxpayer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the Officers should take the initiative in guiding a taxpayer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the Department for it would inspire confidence in him that he may be sure of getting a square deal from the Department. Although, therefore, the responsibility for claiming refunds and reliefs rests with assessee on whom it is imposed by law, officers should:—

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;"

Thus the intention of Law is that to allow all the benefits to the assessee irrespective of the fact whether the assessee claims it or not but it is the duty of every officer to pass on the benefits to the assessee which is available to the assessee under the provisions of Law.

As such it is most humbly submitted that directions issued by the honorable CIT-A in his appeal order dated 02.02.2018 to the Ld. A.O. to allow the benefits of section 10(23C) (vi) to the assessee which were claimed by him through an application u/s 154 of the Act filed before the Ld. A.O. is as per intention of the Statue to pass on all the benefits to the assessee which are available to him as per the provisions of the Law, whether for which he was ignorant or not after considering the various observations of various Courts in the subject matter as under:

- (i) Sushil Kumar Das V Income Tax Officer (2011) 11 ITR(Trib) 17
146 Taxman 335 (Guj)*
- (ii) Raj rani Gulati CIT Central Tilak (2012) 346 ITR 543(All)*
- (iii) S.R.Koshti V CIT 146 Taxman 335(Guj)*
- (iv) K.P.Varghese V ITO 131 ITR 597*
- (v) UCO Bank V CIT 237 ITR 889*
- (v) CIT Bharat Aluminum Ltd 303 ITR 256 (Del)*
- (vi) CIT V Dhampur Sugar Ltd 90 ITR 236 (All)*
- (vii) Xerox India Ltd V DCIT New Delhi (ITA 158/2010)*

Further after relying on the validity of Circular No 14 dated 11.04.1955 as examined by Honourable Apex Court in the case of CIT V Makendm Mills reported in 234 ITR 56 in which the Honourable Court has examined the applicability of the above Circular in regime of 1961 Act. And it was opined that the said Circular is

still in force even though issued prior to 1961 Act as the Circular has not been withdrawn till date.

Further the honorable CIT-A after giving his findings that the provisions of Section 119(1) of the Act requires every officer to follow orders, instructions and directions of CBDT are binding in nature on the tax authorities, even if the directions given by CBDT are at variance with the provisions of Law. The Circular in effect is as good as law.

Further the honorable CIT-A also given his findings that Article 265 of Indian Constitution empowers the Government to levy and collect tax that it can through authority of Law only as such tax cannot be legitimately collected from the taxpayer which is collectable as per the provisions of Law only.

The Department in the grounds of appeal has strongly relied upon the ratio of case law as verdict by Honourable Supreme Court of India in the case of Goetze (India) Ltd 284 ITR 323. In this regard it is submitted that the decision of the Apex Court has not laid down as matter of Law that there is a bar for the assessing authority to entertain the claim for deduction otherwise than by filing a revised return. The above views have been taken by Honourable Allahabad High court in the case of Universal subscription Agency (P) Ltd V JCIT reported in 159 Taxman 64. The purpose and intention of Law is to make the correct assessment and to collect correct and legitimate tax from the assessee. If the rightful deduction or relief is not allowed to the assessee, the purpose and intention of the law will be defeated. Reliance is placed on the following case Laws.

- (i) CIT V Jai Parabolic Springs Ltd 172 Taxman 258 (Delhi)*
- (ii) CIT V Dhampur Sugar Ltd 90 ITR 236 (All)*
- (iii) Bharat Starch Industries Ltd V CIT (ITA No 1611/k/2003)*
- (iv) Thomas Kurian V ACIT 108 TTJ 439 (Cochin)*
- (v) Xerox India Ltd V DCIT New Delhi (ITA No 1580/Del/2010)*

In the case of CIT v. Mahalaxmi Sugar Mills Co. Ltd. (1986) 160 ITR 920 SC, it was observed that:

“There is a duty cast on the Income-tax Officer to apply the relevant provisions of the Indian Income-tax Act for the purpose of determining the true figure of the assessee’s taxable income and the consequential tax liability.

Thus, the assessee failing to claim the benefit of a set-off cannot absolve the Income-tax Officer of his duty to apply section 24 in an appropriate case.”

4. *That the Department in Ground No 1 of its appeal has raised that in the given facts of the case Ld CIT-A was not justified in allowing the society benefits of the exemption u/s 10(23C) (via) when it was found by the A.O. that the assessee has contra vended 13th Proviso of Section 10(23C) hence the society cannot be said to be existing solely for education purposes. 13th Proviso of section 10(23C) reads as under:*

Provided also that where the fund or trust or institution or any university or the educational institution or any hospital or other medical institution referred to in sub clause (iv) or sub clause (v) or sub-clause (vi) or sub-clause (via) does not apply its income during the year of receipt and accumulates it, any payment or credit out of such accumulation to any trust or institution registered under section 12AA or to any fund or trust or institution or any university or other educational institution or any hospital or other medical institution referred to in sub c-clause (iv) or sub-clause(v) or sub-clause(vi) or sub-clause(via) shall not be treated as application if income to the objects for which such fund or trust or institution or university or educational institution or hospital or other medical institution as the case may be is established.

Thus from the reading of the above proviso it is clear that the proviso comes into play if the eligible assessee does not apply its income towards the objects for which he is carrying out his activities and accumulates it, then any payments made out of such accumulation to any assessee registered u/s 12AA then such payment shall not be treated as application of income to the objects for which assessee carries out his activities.

Whereas in the case of the assessee who has applied the entire income during the year itself and has not opted any accumulation of income not only during the year under consideration but even since the inception of the assessee as such there is no force in the ground as raised by the Department contra vending the Proviso 13 of Section 10(23C) of the Act.

In the light of the above submissions and the Circular of the Board, it can be safely said that the Department is not permitted to ignore the due claim of the assessee and further is not expected to take advantage of the ignorance of the assessee and if any benefit is available to the assessee in accordance with law, that is expected to be extended to the assessee by the Assessing Officer as directed by honorable CIT-A in his order dated 03.10.2016 as such the same has to be upheld. 02.02.2018

Further in the last but not the least it is submitted that the Honourable Bench has considered above grounds of appeal in assessee's own case for the A.Y. 2011-12 vide ITA No 63/2017 order dated 15.03.2019 in which the Honourable Bench has confirmed the decision of the Honourable CIT-A giving the directions to the Ld. A.O. to allow the exemption u/s 10(23C)(vi) of the Act to the assessee irrespective

of the fact that the same was neither claimed in the return of income nor before the Ld. A.O. during the course of assessment proceedings giving findings that the Honourable CIT-A after following the binding precedents has issued the directions to the Ld. A.O. the copy of said order is placed at Page No..... of the Paper Book. Thus the matter as raised by the Department in the present appeal before the Honourable Bench is already decided one by the Honourable Bench, therefore the same view may be followed in the present appeal also."

6. We have heard the rival submissions, perused the materials available on record and gone through the orders of the authorities below. Ld. Counsel for the assessee relied on the orders of the Ld. CIT(A) and contended that merely because the assessee could not make claim of exemption should not be a ground to reject the eligible claim of exemption u/s 10(23C) of the Act. It is true that it is a settled position of law that the revenue authority should not deny claim of exemption, if it is available under the facts of a particular case. In such a case, the assessee is required to demonstrate that he is eligible for the benefit available under the law. We are of the view that the A.O. is not expected to allow each and every claim in a casual manner. For the purpose of availing benefit of exemption

u/s 10(23C) of the Act, the assessee is required to prove that all the conditions as set out in the letter granting registration has been fulfilled and also the assessee conducted its affairs in accordance with the statutory obligation as mandated under the law. In the present case, the A.O. has noticed that the assessee Trust had diverted its funds for the benefit of the related person. As the assessee Trust has not claimed any interest in respect of the advances given to the related person for purchase of her property, this inference is drawn on two grounds. One that there is inordinate delay for registration of sale deed of the property and secondly in the interregnum period i.e. the date when the advance was given and sale deed was executed, no interest was charged on the amount so advanced. The fact that no interest was charged on advance made to Smt. Urmila Jain is not disputed by the assessee Trust. We find that the Ld. CIT(A) has followed

his decision pertaining to the earlier year i.e. for the assessment year 2012-13 and the matter had travelled up to this Tribunal and the Tribunal had dismissed appeal of revenue in ITA No.63/Ind/2017. No change into the facts and circumstances are pointed out by the revenue. Therefore, undisputedly, A.O. in fact had noted the fact that the assessee Trust is registered u/s 10(23C) of the Act. Despite having recorded this fact, the A.O. did not give any specific finding as to why the assessee would not be entitled for exemption u/s 10(23C) of the Act. We therefore, under these undisputed facts, do not see any reasons to interfere into the finding of Ld. CIT(A). The grounds raised in this appeal are dismissed.

7. In the result, the appeal filed by the revenue is dismissed.

Order was pronounced in the open court on 19.11.2019.

Sd/-
(MANISH BORAD)
ACCOUNTANT MEMBER

Sd/-
(KUL BHARAT)
JUDICIALMEMBER

Indore; दिनांक Dated : 19/11/2019
VG/SPS

Copy to: Assessee/AO/Pr. CIT/ CIT (A)/ITAT (DR)/Guard
file.

By order

Assistant Registrar, Indore