

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI RAJESH KUMAR (ACCOUNTANT MEMBER) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA Nos.524 & 525/MUM/2020
(Assessment Years: 2008-09 & 2009 – 10)**

Income Tax Officer -23(2)(2), 111, Matru Mandir, Grant Road, Mumbai - 400007	Vs.	Maharashtra State Board of Technical Education, 49, Kherwadi, Aliyawar Jung Marg, Bandra (E), Mumbai 400 051
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PAN No. AAAJM0988M

(Revenue)

(Assessee)

Assessee by	: Shri Girish Dave, A.R
Revenue by	: Shri Rahul Raman, D.R

Date of Hearing	: 19/07/2021
Date of pronouncement	: 19/07/2021

ORDER

PER BENCH:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-32, Mumbai, dated 20.11.2019, which in turn arises from the respective orders passed by the A.O u/s 143(3) r.w.s 147 of the Income Tax Act, 1961 (for short 'Act') for A.Y. 2008-09 and A.Y. 2009-10. As common issue is involved in the captioned appeals, therefore, the same are being taken up and disposed off by way of a consolidated order. We shall first take up the appeal for A.Y. 2008-09. The assessee has assailed the impugned order on the following grounds before us:

- "1. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in considering the assessee, MSBTE, as State and immune from taxation as provided under Article 289(1) of the Constitution.

2. On the facts and circumstances of the case and in law, the Ld.CIT(A) failed to appreciate that the assessee board is granted exemption u/s 10(46) from F.Y. 2015-16 to 2018-19 with certain conditions.
3. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in considering the activity of the assessee board as imparting education or having interest of general public. The Ld.CIT(A) has failed to appreciate that major portion of income is received on account of MS-IT Exam Fees, Engg. GET project fees and interest accrued on FDs. None of the receipts can be said to have any connection with imparting Education of having interest in general public.
4. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in not appreciating that grant from government is negligible in respect of entire receipt of the Boards. The board is carrying out its activity in systematic manner which is yielding revenue and the said revenue is nearly 30-40% above cost, and the surplus amount is held by the Board which is commercial activity.
5. On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in considering the assessee board as State whereas as per section 4 of the MSBTE Act, the assessee board is "Body Corporate" and the assessee board is an Artificial Juridical Person as defined in section 2(31) of the I.T. Act, 1961.
6. The appellant prays that the order of the CIT(A) on the above grounds be set aside and that of the Assessing Officer be restored.
7. The appellant craves leave to add, delete, alter, amend and modify any or all grounds of appeal."

2. Briefly stated, the case of the assessee reopened u/s 147 of the Act. In compliance, the assessee filed its return of income declaring nil income. Objection filed by the assessee qua the reopening of its case was rejected by the A.O, vide his order dated 09.11.2015.

3. Assessment was completed by the A.O u/s 143(3) r.w.s 147, dated 16.02.2016 at an income of Rs.21,18,46,690/-. In the course of the assesment proceedings, it was observed by the A.O that the assessee was not covered under Article 289(1) of the Constitution of India, and thus, was a taxable entity to whom no exemption under the Income Tax Act was available. Accordingly, the A.O vide his order passed u/s 143(3) r.w.s 147, dated 10.02.2016 assessed the income of the assessee at Rs.21,18,46,690/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was observed by the CIT(A) that the Tribunal in the assessee's own case for A.Y. 2007-08 and A.Y. 2010 -11 had held that the assessee was not liable to tax under the provisions of the Income Tax Act, 1961 in view of Article 289 of the Constitution of India since it fell under the definition of "State" as per Article 12 of the Constitution of India and was engaged in public utility services. Accordingly, the

CIT(A) following the view take by the Tribunal in the assessee's own case for the aforementioned years vacated the addition of Rs.21,18,46,694/-.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. At the outset of the hearing of the appeal it was submitted by the Id. Authorized Representative (for short 'A.R') for the assessee Shri Girish Dave, Ld. Senior Advocate, that the issue involved in the present appeal was squarely covered by the consolidated order passed by the Tribunal in the assessee's own case for A.Y. 2007-08, ITA No. 6248/Mum/2016 and A.Y. 2010-11, ITA No. 2203/Mum/2016, dated 28.02.2019 (copy placed on record). It was submitted by the Id. A.R that the CIT(A) following the order passed by the Tribunal in the assessee's own case for the aforementioned years i.e A.Y. 2007-08 and A.Y. 2010-11 had vacated the addition made by the A.O. Apart from that, it was submitted by the Id. A.R that the Tribunal had thereafter while disposing off the assessee's appeal for A.Y.2011-12 in ITA No.508/Mum/2019, dated 27.05.2020 had followed its order for the aforementioned years and had held that the assessee is "State" under Article 289 Constitution of India and thus is entitled to immunity from taxation under the Income Tax, 1961. It was, thus, submitted by the Id. A.R that the issue involved in the present appeal was squarely covered in its favour by the aforementioned orders of the Tribunal passed in its own case.

6. Per contra, the Id. Departmental Representative (for short 'D.R') fairly admitted that the issue involved in the present case is squarely covered by the aforementioned orders of the Tribunal in the assessee's own case for A.Y. 2007-08, A.Y. 2010-11 and A.Y. 2011-12.

7. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record. As observed by us hereinabove, it is a matter of an admitted fact by the Id. Authorized Representative for both the parties, that the issue involved in the present appeal is now squarely covered by the decision of the coordinate bench in the assessee's own case for A.Y. 2007-08 and A.Y. 2010-11, viz. Maharashtra State Board of Technical Education Vs. ITO, 176 ITD 47 (Mum). In its aforesaid order, it is inter alia observed by the Tribunal, as under:

"26. We have examined the scheme of the Maharashtra State Board of Technical Education Act, 1997. The state legislature enacted the Maharashtra State Board of Technical Education Act, 1997 for the purpose for

established of State Board to regulate matter pertaining to Diploma Level Technical Education in the State of Maharashtra and for the matter connected therewith. The State Act received the assent of the Governor on 03.08.1997 and was published in State Government Gazette on 06.08.1997.

27. Section 5 of the State Act prescribed constitution of Board, which consist of the Director, Technical Education, Maharashtra State as the Chairman; the Director Maharashtra State Board of Technical Education as the Member Secretary and the other members, namely Ex-officio Members consisting of (i) The Chairman of the Maharashtra State Board of Secondary and Higher Secondary Education or his nominee not below the rank of the Chairman of the Divisional Board; (ii) The Director of Industries, Maharashtra State or his nominee not below the rank of Joint Director; (iii) One representative of the State Nodal Centre of National Technical Manpower information System; (iv) The Regional Officer (Western Region) of All India Council of Technical Education, New Delhi; (v) The Director, Board of Apprenticeship Training (Western Region), Government of India, Ministry of Human Resources Development, (vi) The Joint Secretary to Government, Higher and Technical Education Department or his nominee not below the rank of Deputy Secretary. Nominated Members (i) one senior most Principal from Government Engineering Colleges in the State to be nominated by the Government. (ii) Two members to be nominated by the Government from amongst the Principals and Heads of institutes, one each from Government or aided and un-aided Polytechnics, of which at least one shall be a woman, (iii) Two members to be nominated by the Government from amongst the teachers, one each from Government or aided and un-aided polytechnics, of whom at least one shall be from Backward Class Community, (iv) Three members to be nominated by the Government from the professional bodies, one from each revenue region by rotation. (v) Six members to be nominated by the Government from amongst the associations of industries, who are entrepreneurs of Small Scale Industries, Information Technology, Biotechnology, Gems and Jewellery, Pharmacy and Hotel Management, at least two of whom shall be from out of the Mumbai and Pune Regions.

28. Section 7A prescribed establishment of Governing Council which shall be an Apex Body to control and monitor matter pertaining to Diploma level technical education at the State Level. The Governing Council shall consist of the following; (i) The Minister of Higher and Technical Education Maharashtra State as President; (ii) The Minister of State for Higher and Technical Education as Vice- President; (iii) State Secretary Technical Education - Member (iv) three Industrialist nominated by the Government -Members (v) Director of Technical Education, Maharashtra State - Member, (i) Secretary, Maharashtra State Board of Technical Education - Member (vii) Director, Maharashtra State Board of Technical Education. The name of Persons other than the Ex-Officio Members, who have been nominated, from time to time as a Member of Council are published in official Gazette of State Government. The powers and duties of Board of Directors are defined under section 22 of the Act as explained by Id. AR of the assessee which we have already referred. Section 23 defined the duties of Board of Director.

29. Further as per section 24, the State Government has controlled and power to issue various directions after considering the advice of the Board for various matters as specified in section 22, for conducting anything or intense to conduct or do into communicate to the Board its view. The Board is under obligation to report to the Government such action, if any, as it propose to take and has taken upon communication and shall furnished an explanation, if it fails to take action. If the Board does not take action within a reasonable time to the satisfaction of the Government, the Government may after considering any explanation or representation of the Board in consistence with the provision of the Act and Board shall comply such direction. Further, the Government may, by order in writing specifying the reasons thereof, suspend the execution of any Resolution or order of Board and prohibit the action order to be purporting to be ordered to be done by the Board, if the Government is of opinion that such Resolution, order or Act, is a nexus of the power conferred by or under the Act upon the Board. In our view, as per section 24 of the State Act, the State Government have full control over the Board in its day to day affair in Regulation or business of the assessee's Board.

30. Sections 25 to 35 of the Act deals with the permission, affiliation, conference and autonomous status of the assessee. Further, sections 36 to 44 of the Act are prescribed about funds, finance, accounts and audit. The assessee's Board is under obligation to furnish the report and return and statement relating to any matter connected with its work as the Government may call for. Sections 45 to 53 deals with supplementary and miscellaneous provisions of the State Act with regard to manner of exercise of power delegated to Committee, power of Board to make Regulation with regard to examination, condition governing admission, passing marks in any subject and examination as hold including credit and distinction in any subject, fees for admission to the examination, other fees, charges payable in respect of other matters to the examination. Arrangement of conduct of examination, appointment of examiners including qualification disqualification, award of certificate, appointment of officers and servants of the Board in its own office including condition of their services, control administration, safe custody and management of finance of the Board or any other matter which may be prescribed. As per section 46, the Regulation made by Board requires sanction of the State Government. Initially, Regulation was prepared by Government shall continue in force, until new Regulation are made by Board. Further, if any questions arise regarding the interpretation or doubt arising of the by-laws the same is liable to be decided by the State Government and such decision are final. Section 51 provides the immunity against any Suit, Prosecution or legal proceeding against the Government, Governing Council, Board or Members or servant of the Government for anything which is done or purported or intended to be done in pursuance of this Act in good faith. From the perusal of various statutory provisions, we may conclude that there is complete control of State Government over the affair of assessee Board. The power and duties of the Board activities as prescribed under section 22, which we have mentioned in para 9 supra and are not repeated here for the sake of brevity shows that none of the activity under taken or entrusted to the assessee board are in the nature of trade commerce or business. In our view, the assessee is engaged in advancement of object of General Public Utility Services as set up by State Government. The receipt/income/source of income of assessee consists of grant from State Government, fees collected from candidate, who appears in various examinations, receipt from printed education material, receipt from other government bodies for conducting courses and exams like Common Entrance Test (CET) or interest on deposits. In our view, none of these items can be said to be carrying of any activities in the nature of trade, commerce or business. Further, at the cost of repetition, we may conclude that the assessee is not rendering any services in the nature of trade, commerce or business for a fees or any other consideration, rather, the assessee engaged in regulation of educational activities as per the statutory obligation conferred on the assessee Board. Even otherwise as we have noted earlier every activities of the assessee Board is subject to superintendence, instruction and control of the State Government. In our view, the assessee Board is completely controlled financially as well as administratively by the Government, thus, falls under the definition of "State" as per Article 12 of the Constitution of India.

31. The co-ordinate bench of Tribunal in Smt. Sapna Sanjay Roisoni (supra) while considering the scope of Article 12 of the Constitution of India gave the following finding;

11. The definition of the State under Article 12 has come for the consideration on number of occasions before the Hon'ble Supreme Court. The State consists of three departments, the Legislature, the Executive and the Judiciary. We need not go into all the limbs of the State as only the limited issue before us is whether the term Government used in clause (b) to Rule 6DD includes even the autonomous bodies which partakes the character of instrumentalities of the Government. The core test to be applied whether a particular Corporation which is autonomous body is a part of Government, to be seen in the context of degree of control over management and policy decisions. We find that in the case of MSRTC as per the certificate of the share capital filed before us, the entire share capital is contributed by the State Government and the Central Government and there is no private participation. We further find that MSRTC is incorporated under special legislation i.e., Road Transport Corporation Act, 1950. We have examined the provisions of the said enactment. As per section 5 of the said Act, the State Government is only having power to appoint the Chairman and other Members in the Managing body. There is a full

control of the State Government on the policy decisions as well as management. In our opinion, if we apply the test of the control and management as well as the equity participation, MSRTC is a State within Article 12 of the Constitution. Applying the above test, the Hon'ble Supreme Court has held, as discussed hereinabove, that the autonomous bodies like State Road Transport Corporation or Warehousing Corporation where there is a full control by the Government, either Central or State, these are the instrumentalities of the Government only.

12. The term Government is very much wide under the constitutional set up. Government may be Central or State, or it may be Local Government which is envisaged by our Constitution, like Zilla Parishad, Municipal Corporations, Municipal Councils, Panchayat Samithis, etc. The Public Works Department is part of the Government. In our opinion, this aspect has not been considered by the authorities below and they have closed door to the assesseees to make out the case for examination under Rule 6DD. We are, therefore, of the opinion that in the light of our above discussion, the plea of the assesseees need reconsideration by the Ld. CIT(Appeals). We, therefore, set aside the issue in respect of the disallowance made u/s.40A(3) to the file of the Ld. CIT(A) to decide the same de novo in the light of our above observations and discussion. Accordingly, the relevant Grounds taken by the assesseees in all these appeals are allowed for statistical purposes. Needless to say the CIT(A) is directed to give opportunity of being heard to the assesseees as per the principles of natural justice.'

10. A bare perusal of Article 12 shows that the definition of "the State" given in Article is inclusive and not exhaustive. "The State" includes :

- (a) the Government and Parliament of India;
- (b) the Government and the Legislature of each of the States;
- (c) all local and other authorities within the territory of India; and
- (d) all local and other authorities under the control of the Government of India.

11. The expression "other authorities" used in Article 12 is neither defined in the Constitution of India nor in any other statute. Therefore, the Hon'ble Supreme Court of India and the Hon'ble High Court have interpreted this expression in various judgements. The Hon'ble Supreme Court of India while interpreting the expression "other authorities" in the case of Som Prakash Rekhi v. Union of India reported as AIR 1981 SC 212 have culled out certain tests to determine as to when a Corporation should be said to be an instrumentality or Agency of the Government. The tests laid down by the Hon'ble Apex Court are summarized as under :

- "1. If the entire share capital of the corporation is held by the Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of the Government.
2. Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality.
3. Whether the Corporation enjoys monopoly status which is State conferred or State protected.
4. If the functions of the corporation are of public importance and closely related to governmental functions. It would be a relevant factor in classifying the corporation as an instrumentality or agency of the Government.
5. If a department of a Government is transferred to a corporation, it would be a strong factor supporting this inference of the corporation being an instrumentality or agency of the Government."

After applying the cumulative effect of all the relevant factors mentioned above, if the body is found to be an instrumentality of the agency of the Government, it would be an authority included in term "State" under Article 12 of the Constitution of India. However, the tests indicated by the Hon'ble

Apex Court in the case of Som Prakash Rekhi are merely indicative and not absolute and thus, have to be applied discretely. If any body or organisation falls within the criteria as laid down by the Hon'ble Apex Court it can be considered that it falls within the term "State".

12. If these tests are applied on the MSRTC, we observe that the Corporation satisfies majority of the conditions. The entire share capital of MSRTC is owned by State and Central Government. The State has full control over the working, policies and the framework of the Corporation. The Corporation is providing public transport facility to the subjects of the State, even in for remote areas, where sometimes it is not economically viable to provide transport service. Thus, it is providing vital function of public importance.

13. The Hon'ble Bombay High Court in the case of Maharashtra State Road Transport Corpn. v. Diwakar Madhukarrao Malkapure and Others in Writ Petition No.2762/2012 decided on 12-11-2013 while dealing with an issue relating to payment of compensation to one of the employee of MSRTC has observed as under :

"The Petitioner employer is a body Corporate and is State within the meaning of Article 12 of the Constitution of India and therefore it has to act as a Model Employer."

14. Thus, in view of the facts of the case and in the light of observations of the Hon'ble Bombay High Court, we are of the considered opinion that the CIT(A) has erred in holding that MSRTC is not a "State" and cash payments made to MSRTC are hit by the provisions of section 40A(3) of the Act.

32. Similar view was taken by Kolkata Tribunal in Narayan Rice Mill (supra).

33. We have further noted that the assessee Board made an application under clause (46) of section 10 for exemption of specified income to the assessee and CBDT vide its notification dated 29.03.2016 exempted the income of assessee Board arising from:

- (a) fees, fines and penalties;
- (b) receipts from Printed Educational Material;
- (c) receipts from Scrap or Waste paper;
- (d) receipts from other Government Bodies;
- (e) interest income from surplus funds kept in bank accounts and fixed deposits; (f) rent received from let out of properties';
- (g) royalty or License fees for providing technical knowledge and infrastructure; (h) dividend earned from Maharashtra Knowledge Corporation Ltd;
- (i) capital gains, if any, from disposal of assets as per Government financial guideline and rules of Government of Maharashtra.

34. The exemption in the CBDT notification dated 29.03.2016 is valid for Financial Year 2015-16 to 2018-19. Admittedly no return of income was filed by the assessee for the assessment year under consideration. The Id. AR initially argued that under bonafide mistaken belief that the assessee is being instrument of state is exempted from filing return of income, the assessee has not file return of income for the assessment year under consideration. Considering the facts that the assessee Board is under complete superintendence, and control of the State Government financially as well as administratively falls under the definition of "State" as per Article 12 of the Constitution of India. And in our view is entitled for immunity from the taxation of its income under the provisions of Income -tax Act. our view is further got the support that CBDT vide its notification date 29.03.2016 has granted exemption of taxation to the assessee board. Thus, the grounds No. 5 to 10 of appeal raised by the assessee are allowed

[4] We see no reasons to take any other view of the matter our esteemed colleagues. Respectfully following the same, we hold that the assessee is "State" under Article 289 of the constitution of India, and is entitled to immunity from taxation under the Income Tax Act 1961. The plea of the assessee is thus sustained.

(5) In the result, appeal is allowed in the terms indicated above. Order pronounced under rule 34(4) of the Income Tax (Appellate Tribunal) Rules, 1962, by placing the details on the notice board.”

As the issue involved in the present appeal, viz. that the assessee is “State” under Article 289 of the Constitution of India, and thus, is entitled for immunity from taxation under the Income Tax Act, 1961 is squarely covered by the aforesaid observations of the coordinate bench of the Tribunal, therefore, finding no reason to take a different view, we respectfully follow the same. Accordingly, finding no infirmity in the view taken by the CIT(A) who had by rightly relying on the order passed by the Tribunal in the assessee’s own case for A.Y. 2007-08 and A.Y. 2010-11 vacated the addition made by the A.O, we uphold the same.

8. The appeal filed by the revenue is dismissed in terms of our aforesaid observations.

ITA No.524/MUM/2020
(Assessment Year: 2009 –10)

9. As the facts and the issue involved in the appeal of the revenue for A.Y. 2009-10 in ITA No. 524/Mum/2020 remains the same as were there before in the revenue appeal for A.Y. 2008-09 in ITA No. 525/Mum/2020, therefore, our order passed while disposing off the appeal by the revenue for A.Y. 2008-09 shall apply mutatis mutandis for the purpose of disposal of the present appeal for A.Y. 2009-10 in ITA No. 524/Mum/2020. Accordingly, on the same terms the appeal of the revenue for A.Y. 2009-10 in ITA No. 524/Mum/2020 is dismissed.

10. Resultantly, both the appeals of the revenue i.e A.Y. 2008-09 in ITA No. 524/Mum/2020 and A.Y. 2009-10 in ITA No. 525/Mum/2020 are dismissed.

Order pronounced in the open court on 19.07.2021

Sd/-
(Rajesh Kumar)
ACCOUNTANT MEMBER

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;

Dated: 19.07.2021

PS: Rohit

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai