

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

I.T.A. No.1952/DEL/2013
Assessment Years 2009-10

Association of State Road Transport Undertakings. ASRTU Bhawan, Plot No.4-A, PSP Block, Pocket-14, Sector-8, Dwarka	v.	Commissioner of Income Tax (Appeals)-XXI, New Delhi.
TAN/PAN: AAAAA0233A		
(Appellant)		(Respondent)

Appellant by:	Shri Tarandeep Singh, Adv. Shri Pulkit Verma, Adv.		
Respondent by:	Shri K.A Manu, Sr.D.R.		
Date of hearing:	18	08	2021
Date of pronouncement:	23	09	2021

ORDER

PER AMIT SHUKLA, A.M.

The aforesaid appeal has been filed by the Appellant Assessee against order dated 21stJanuary, 2013, passed by the Ld. Commissioner of Income Tax (Appeals)-XXI, New Delhi in Appeal No.368/11-12 for the quantum of assessment passed u/s 143 (3) for the AY 2009-10. The Grounds of Appeals raised in the appeal are as under :-

“1. That on facts and in law the CIT(A) erred in upholding an addition to total income of Rs.4,39,07,729/- being accumulation pertaining to FY 2003-04 when the

appellant was governed by regime under section 11 and 12 of the Act.

2. That on the facts and in law the CIT(A) erred in holding that accumulation of the past when no exemption was claimed or allowed under section 10(23C)(iv) applies.

3. That on the facts and circumstances of the case and in law the orders passed by both A.O. and CIT(A) are bad in law and void ab-initio.”

2. Brief facts relevant qua the issue involved are that, a return declaring NIL income was filed by the appellant on 30th March, 2010 however, vide order of assessment dated 28th December, 2011 passed u/s 143(3) of the Act, the ld. AO has assessed the total income of the appellant at a sum of Rs.4,39,07,729/-. Appellant is an Apex Coordinating Body of all Nationalized State Road Transport Corporations working under the Ministry of Road Transport & Highways. Appellant was established with main object of improving public transport systems in the country and to assist its members state transport undertakings by providing auto mobile part at the most economical and competitive rates. Appellant is registered u/s 12A of the Act vide Registration Order dated 27th April, 1982 and further vide Notification Order No.1348 dated 31st October, 2007 it is also registered under the provision of section 10(23C)(iv). Registration granted u/s 10(23C)(iv) of the Act is valid from assessment year 2007-08 onwards.

3. During the course of assessment, it was observed by the Ld. AO that appellant had set apart and accumulated surplus of Rs.4,39,07,729/- for FY 2002-03 which was in excess of 15%. This amount was carried forward in utilization in ensuing years. AO held that, since the appellant has not utilized the above amount within the stipulated period therefore, it is taxable in the year under consideration. In this regard, in the order of assessment it was held by the Ld. AO as under:-

“During the course of assessment proceedings it was seen that the assessee has applied 85% of the current income to the activities as per its aims and objects. However, an amount of rs.4,39,07,729/- set apart in F.Y.2003-04 and was accumulated and carried forward to be utilized in the next five years as per clause (a) given after 3rd proviso to section 10(23C)(iv) of the IT Act remained unutilized. Since the period of five years in this case has expired on 31.03.2009 and the accumulated amount has not been applied for charitable purpose, the said amount of Rs.4,39,07,729/- is found to be taxable as the income of the year under consideration. The representatives were confronted with this fact vide proceedings sheet noting dated 28.12.2011 the representatives only stated that the said sum has been utilized in the subsequent year. The submissions of the assessee is not found to be acceptable in view of the specific provisions of the Act, In this regard.”

4. In the appeal before the First Appellate Authority. Ld. CIT (A) dismissed the appeal by observing as under :-

“4.3 From the above analysis it is apparent that Sec.11 to 13 are general sections and Sec. 10(23C)(iv) is a specific section. There were various facilities available as per Sec.11 to 13 of the IT Act with appellant by virtue of registration u/s 12A, even though appellant has opted for Notification u/s 10(23C)(iv) and it has got it vide order of DGIT € dated 31.10.2007, effective from A.Y.2007-08 and for getting Notification u/s 10(23C)(iv) registration u/s 12A is mandatory. So, appellant has preferred to be Notified u/s 10(23C)(iv). So, this is a procedure of the IT Act as per which appellant was availing benefit of sec. 11(3) as well as provisions of sec.11(2) was available with the appellant. But after getting notified u/s 10(23C)(iv) by order of DGIT € it has chosen to be taxed u/s 10(23C)(vi) of the IT Act. The provisions of Sec. 10(23C)(vi) allow accumulation for five years, the period of which has expired as on 31.03.2009 as has been noted by AO and there is not dispute about this fact. After considering the various submissions and provisions of the At, and various commentaries, Journals in this regard, I found that appellant’s case falls under the purview of Sec. 10(23C)(iv) of the IT Act, wherein it has bene specifically mentioned that in no case accumulation shall exceed five years period. I am reproducing the relevant portion of the Act so as to clarify the issue :-

“Provided also that the fund or trust or Institution [or any University or other educational institution or any other hospital or medical institution] referred to in sub-clause (iv) or sub-clause (v) [or sub-clause (vi) or sub-clause (via)].

(a applies its income or accumulates it for application, wholly and exclusively to the objects for which it is established and in a case where more than fifteen percent of its income is accumulated on or after the 1st day of April, 2002, the period of the accumulation of the amount exceeding fifteen per cent of its income shall in no case exceed five years.]

4.4 From the above reading of Section and after analyzing the facts in detail, I am convinced that AO has rightly applied the provisions of Sec. 10(23C) on the facts of the case and has not allowed accumulation beyond five years period because his action is based on the provisions of IT Act and his action falls under the clause (a) which comes after 3rd proviso to Sec. 10(23C)(iv) of the IT Act which has been discussed above.”

5. Before us it was submitted by Ld. Counsel of the Appellant, Mr. Tarandeep Singh that notification under Sec. 10(23C)(iv) is applicable from the assessment year 2007-08 (Previous Year 2006-07) and is not applicable for the assessment proceedings prior to the assessment year 2007-08. It was also submitted that utilization of accumulated income for financial year 2003-04 is to be dealt with in

accordance with Sec. 11(3)(c) of the Act. That as per section 11(3)(c), the accumulated income in excess of 15% is taxable in the previous year immediately following the expiry of the period five years. Accordingly, it was his submission that the Ld AO has misapplied the provisions of clause (a) given after 3rd proviso to Sec. 10(23C)(iv) of the IT Act, 1961 which states that in a case where more than 15% of its income is accumulated, the period of the accumulation of the amount exceeding 15% of its income shall in no case exceed five years. In addition to the above, he also submitted that the undisputedly the accumulated income for the financial year 2003-04 has been fully utilized in the FY 2009-10.

6. On the other hand, ld. Sr. DR has supported the orders passed by the lower authorities. In this regard, it was submitted by him that the Ld. AO and Ld. CIT(A) have for appropriate reasons rejected the claim raised by the appellant and as such the instant appeal merits to be dismissed.

7. We have considered the facts of the case and material placed on record. We find that part surplus of FY 2003-04 (which was in excess of 15%) amounting to Rs.4,39,07,729/- was set apart and accumulated by the appellant. It is also not in dispute as by AO and Ld CIT (A) that the above surplus has been fully utilized in FY 2009-10. Before us the case of appellant is that, since the above surplus which pertains to FY 2003-04 (when exemption u/s 11 & 12 of the Act was claimed) its utilization should be tested only in accordance

with applicable provision of section 11(3) of the Act. On the other hand, it is the case of Income tax department that since appellant got registered u/s 10(23C)(iv) of the Act w.e.f. A.Y. 2007-08 the utilization of surplus though pertaining to FY 2003-04 should be examined only in accordance with provision of section 10(23C) of the Act.

8. We find that as per section 11(2) of the Act where 85% of the income referred to in clause (1) of section 11 is not applied or is not deemed to have been applied then the said sum can be accumulated or set apart for a period which shall in no case exceed 5 years. Sub section (3) of section 11 provides for an eventuality when the amount accumulated u/s 11(1) is not utilized. In this regard, section 11(3) provides as under:-

“11 (3) Any income referred to in sub-section (2) which

—

(a) is applied to purposes other than charitable or religious purposes as aforesaid or ceases to be accumulated or set apart for applicable thereto, or

(b) ceases to remain invested or deposited in any of the forms or modes specified in sub-section (5) or

*(c) is not utilized for the purpose for which it is so accumulated or set apart during the **period referred to in clause (a) of that sub-section or in the year immediately following the expiry thereof.***

*(d) is credited or paid to any trust or institution registered under section 12AA or to any fund or institution or trust or any university or other 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) of clause (23C) of section 10 shall be deemed to be the income of such person of the previous year in which it is so applied or ceases to be so accumulated or set apart or ceases to remain so invested or deposited or [credited or paid or], as the case may be, **of the previous year immediately following the expiry of the period aforesaid.***”

It apparent from provisions of section 11(3)(c) above that the amount accumulated and set apart u/s 11(1) of Rs.4,39,07,729/- pertaining to FY 2003-04 can be utilized within 5 years thereto i.e. up to FY 2008-09 or “*in the year immediately following the expiry thereof*” i.e., FY 2009-10 and if the same is not utilized then it shall be deemed to be the income “*of the previous year immediately following the expiry of the period aforesaid*”. Therefore, the provision of section 11(3) very clearly stipulate that any amount accumulated for financial year 2003-04 can be utilized up to financial year 2009-10 and if not utilized by then, then it is taxable in AY 2010-11 (applicable for FY 2009-10). Undisputedly in the present case, the sum of Rs.4,39,07,729/- has been utilized by the appellant in FY 2009-10 i.e., AY 2010-11.

9. On the other hand, in Section 10(23C) one of the stated conditions for claiming benefit of exemption as provided in third proviso to that section is as under :-

“Provided also that the fund or trust or institution [or any university or other 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)]-

[(a) applies its income, or accumulates it for application, wholly and exclusively to be objects for which it is established and in a case where more than fifteen per cent of its income is accumulated on or after the 1st day of April, 2002, the period of the accumulation of the amount exceeding fifteen per cent of its income shall in no case exceed five years; and]

Under third proviso to section 10(23C), surplus of FY 2003-04 in excess of 15% can be accumulated for a period which shall “*in no case exceed five years*”, i.e., the amount accumulated can therefore be utilized for a period up to five years i.e., FY 2008-09 i.e., AY 2009-10. We find that whereas provisions of section 11(3) provide for an additional year of grace period when utilization can be done, however, there is no such leverage given in section 10(23C) of the Act. If provision of section 11 are applicable then appellant is correct in submitting that the amount accumulated can be utilized till AY 2010-11, whereas if provision of section 10(23C) are applicable then the revenue is correct in holding that the

amount accumulated must be utilized on or before AY 2009-10.

10. We find from the orders of authorities below that the registration granted u/s 10(23C) of the Act is applicable from AY 2007-08 onwards. We also find that provisions of section 11 and 10(23C) are two parallel regimes. This is also stipulated by CBDT in their Circular No.14 dated 17th August, 2015 as under:-

“2. Necessity for registration u/s 12AA while seeking approval / claiming exemption u/s 10(23C)(vi)

*2.1 Section 10(23C)(vi) does not prescribe any stipulation which makes registration u/s 12AA a mandatory pre or post condition. In fact, provisions of section 11 and 10(23C) **are two parallel regimes and operate independently in their respective realms** although some of the compliance criteria may be common to both. Hence obtaining prior registration before granting approval u/s 10(23C) cannot be insisted upon.*

2.2 However, in case of a trust or an institution having obtained registration u/s 12AA as well as approval u/s 10(23C)(vi), if registration is withdrawn at some point of time due to certain adverse findings, the withdrawal of approval u/s 10(23C)(vi) shall not be automatic but will depend upon whether these adverse findings also impact the conditions necessary to keep approval u/s u/s 10(23C)(vi) alive.

11. Hon'ble Jurisdictional High Court in case of **Venu Charitable Society reported in 393 ITR 63 (Del)** has also held as under :-

*“The Revenue’s other contention was that the petitioner had applied for exemption under Section 11 as well as Section 10(23C) in the same year. Section 10(23C) does not prescribe any stipulation, which makes registration u/s 12AA a mandatory condition. **The provisions of Sections 11 and 10(23C) are two parallel regimes and operate independently in their respective realms.** In order to avail exemption u/s 11, 12 and 13, the entity should be registered u/s 12AA. The sections 11, 12, 12A, 12AA and 13 of the Income Tax Act constitute a complete code governing the grant, cancellation or withdrawal of registration, providing exemption to income, and also the conditions subject to which a charitable trust or institution is required to function in order to be eligible for exemption. The primary objective of providing exemption in case of charitable institution is that income derived from the property held under trust should be applied and utilized for the object or purpose for which the institution or trust has been established. In many cases it had been noted that trusts or institutions, which are registered and have been availing benefits of the exemption regime do not apply their income, which is derived from property held under trust, for charitable purposes. In such circumstances,*

when the income becomes taxable, a claim of exemption under general provisions of Section 10 in respect of such income is preferred and tax on such income is avoided. This defeats the very objective and purpose of placing the conditions of application of income etc. in respect of income derived from property held under trust in the first place. The provision of section 10(23C) also has similar conditions of accumulation and application of income, investment of funds in prescribed modes etc. Therefore, the Act was amended to provide specifically that where a trust or an institution has been granted registration for purpose of availing exemption under Section 11, and the registration is in force for a previous year, then such trust or institution cannot claim any exemption under any provision of section 10 [other than that relating to exemption of agricultural income and income exempt under section 10(23C) of the Income Tax Act. Similarly, entities which have been approved or notified for claiming benefit of exemption under section 10 (23C) of the Income Tax Act would not be entitled to claim any benefit of exemption under other provisions of section 10 of the Act; which means that one can claim exemption under Section 11 and Section 20(23C).”

12. From the above, it is clear that both the provision of section 11 and 10(23C) are two parallel regimes which do not overlap with each other. We therefore, find substantial merit in the case made out by the appellant that for examining

utilization period of amount set aside and accumulated in excess of 15% pertaining to FY 2003-04 when it was not registered u/s 10(23C) of the Act will have to be examined only as per provision of section 11(3) of the Act and not as per provision of section 10(23C). The legislature in its wisdom has vide Finance Act, 2020 has now eliminated the scope of two parallel regimes as noted above. It is now very clearly provided that a trust can only obtained benefit of under either section 11 of the Act or section 10(23C) of the Act. In this regard, initially section 11(7) was inserted by Finance (No. 2) Act 2014 w.e.f 01-04-2015 and now first and second proviso's have been inserted to section 11(7) by Finance Act 2020 w.e.f 01-06-2020. The memorandum explaining provision of Finance Bill 2020 reported in 381 ITR 326 (St) relevant at 381-382 has stated as under :-

“Section 11 of the Act provides for grant of exemption in respect of income derived from property held under trust for charitable or religious purposes to the extent to which such income is applied or accumulated during the previous year for such purposes in accordance with the provisions contained in sections 11, 12, 12A, 12AA and 13 of the Act.

Sub-section (7) of section 11 of the Act, inserted by the Finance (No.2) Act, 2014 with effect from 1st April, 2015, provides that where a trust or an institution has obtained registration under section 12AA [as it stood immediately before its proposed amendment] or under section 12A [as it stood immediately before its amendment by the finance (No.2) Act, 1996] and said registration is in force for any previous year, then

exemption under section 10 [except under clauses (1) and (23C) shall not be allowed..

This sub-section was inserted on the basis that the provisions contained in sections 11, 12, 12A, 12AA and 13 of the Act constitute a complete code and that once any trust or institution has voluntarily opted for it by obtaining registration required for exemption of income, it should comply with the conditions of such exemption and in case of violation of such condition, if its income or part thereof becomes ineligible for exemption, no other provision of the Act should operate so as to exclude such income or part thereof from total income and that whether income which needs to be applied or accumulated under section 11 of the Act should include income which is exempt under section 10 of the Act.

It has been noted that there is some anomaly by providing exclusion to institutions or fund registered under clause (23C) of section 10, but the same exclusion is not available to entities claiming exemption under clause (46) of section 10 which are established or constituted under a Central or State Act or by a Central or State Government. Such entities are, thus, not able to get notified under clause (46) of section 10 if they are holding registration under section 12A/12AA.

The anomaly pointed out above, needs to be addressed. However, as the provisions relating to charitable entities constitute a complete code and that once any trust or institution has voluntarily opted for it by obtaining the requisite registration, it flows that the conditions in relation thereto should be complied with and the option of switching at convenience should not be available. Accordingly, while

request for exclusion of clause (46) may be acceded to for exemption thereunder even in those cases where registration under section 12AA or 12A remains n force, there should be only one mode of exemption available and also, that the switching may be allowed only once so that such switching is not done routinely and also it remains efficient to be administered.”

13. We are presently concern with a case for AY 2009-10 and the surplus pertains to FY 2009-10 when the appellant was not registered under provision of section 10(23C). The subsequent insertion of section 11(7) and its further amendment are though not applicable but are supportive to our interpretation that earlier provisions of sections 11 and 10(23C) were two parallel regimes which operated independently in their respective realms. As a result, the addition made of Rs. 4,39,07,729/-by the AO is deleted.

14. Accordingly the appeal filed by assessee is allowed.

Order pronounced in the open Court on 23rd September, 2021.

Sd/-

**[PRASHANT MAHARISHI]
ACCOUNTANT MEMBER**

DATED: 23rd September, 2021

PKK:

Sd/-

**[AMIT SHUKLA]
JUDICIAL MEMBER**