IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

Before Shri Sanjay Arora, Accountant Member and
Dr. S. Seethalakshmi, Judicial Member

ITA No. 159/Coch/2023
(Assessment Year: 2013-14)

The Nehru Memorial Education Society Lakshmi Nivas Kanhangad - 671315 Kasaragod [PAN:AABTT0633M]	vs.	The Income Tax Officer (Exemptions), Kannur
(Appellant)		(Respondent)

Appellant by:	Shri P.M. Veeramani, CA
Respondent by:	Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing:	12.12.2023
Date of Pronouncement:	07.03.2024

O R D E R

Per: Sanjay Arora, AM

This is an appeal by the Assessee directed against the disallowance of assessee's appeal contesting the rectification order dated 29.01.2016 rejecting its application u/s. 154 of the Income Tax Act, 1961 (hereinafter "the Act") for Assessment Year (AY) 2013-14 by the Commissioner of Income Tax (Appeals), Income Tax Department [CIT(A)] vide his order dated 20.01.2023.

2.1 The brief facts of the case are that the assessee, a society running a college by the name 'Nehru Arts and Science College', at Kanhangad, Kasaragod, Kerala, filed it's return of income for the relevant year on 26.09.2013 at nil income, claiming exemption on the entirety of it's gross receipt of Rs.144.39 lakhs for application of the same for educational (charitable) purposes, as under: (PB pg. 14)

(a)	Section 11(1)(a & b) toward application to the extent of 85%	Rs. 9.51 lakhs
(b)	Income accumulated to the extent of 15% u/s. 11(1)(a/b)	Rs. 1.68 lakhs
(c)	Corpus donation u/s. 11(1)(d)	Rs.133.20 lakhs
	Total	Rs. 144.39 lakhs

The same was denied on processing the said return vide Intimation u/s. 143(1)(a) dated 27.03.2015, raising a demand of Rs.56.58 lakhs, including interest at Rs.24.55 lakhs. The assessee moved an application u/s. 154 of the Act on 04.08.2015, stating that it's income for the relevant year was only Rs.11.19 lakhs, the balance being corpus donation, exigible for exemption u/ss. 10(23C)(iiiad) and 11(1)(d) of the Act respectively. Adverting to the Board Circular No. 320 dated 11.01.1982 (PB pages 23,24) it also claimed that the tax calculation was not correct. Per the said Circular the Board has clarified that where the members or trustees are not entitled to any share in the income of the Association of Persons (AOP), the provisions of s. 167A, imposing tax at the maximum marginal rate, shall not apply, and tax shall be payable in such cases at the rate ordinarily applicable to the total income of the AOP. The same did not find favour with the Assessing Officer (AO) as the assessee was not registered u/s. 12AA of the Act and, two, it's receipt being in excess of Rs. 100 lakhs, the benefit of exemption u/s. 10(23C)(iiiad) also could not be extended thereto. Even as the assessee sought, vide petition dated 05.02.2016, the disposal of it's rectification application per a speaking order, it filed an appeal before the ld. CIT(A) on 25.02.2016, raising the following grounds:

1. The order of proceedings u/s.143(1) and the Order u/s. 154 by the Income Tax officer (exemption) is incorrect and is against the provisions of Income Tax Act.
2. The Appellant has obtained Registration u/s. 12AA for the A.Y. 2015-16 and the benefit of which is applicable to all pending assessments as per the Provisions of Sec. 12A Amendment as per Finance Bill (No.2) 2014.
3. The Assessing Officer should have noted that the order u/s. 143(1) passed for A.Y. 2013-14 is not a final Order of Assessment and it is only an intimation proceedings u/s.

143(1) and hence the benefit of the Amendment to Sec. 12A in the Finance Act 2014 to be made applicable to the case of the Appellant for the A.Y. 2013-14 also.

4. The Tax charged u/s. 143(1) is at the Maximum Marginal Rate. In the case of a Society or a Trust it is chargeable under the rate chargeable to individual assessee as per the Circular of CBDT No. 320[F.No.131(31)/81- TP(Pt.)] dated 11-01-1982.

5. The benefit of sec. 10(23C)(iiiab) is also applicable to the Appellant as the Institution is an educational institution existing solely for educational purpose and not for the purpose of profit and which is substantially financed by the Government.

6. On an any other Grounds that may be adduced at the time of hearing of the Appeal, Appellant's Prayer to allow the Appeal.

Meanwhile the assessee had also applied for registration u/s. 12AA of the Act on 18.02.2015, which was granted vide order dated 20.08.2015 w.e.f. AY 2015-16 (PB pgs. 6-7). In appellate proceedings, it was explained that it, hitherto claiming exemption u/s. 10(23C)(iiiad) (as it's turnover was below Rs. 1 crore), had applied to the CCIT, Kochi for approval u/s. 10(23C)(vi) of the Act on 27.09.2013 w.e.f. AY 2013-14, i.e., immediately after filing it's return of income for that year. However, as it's Memorandum also contained clauses other than *qua* the object/s of education, it was advised to seek registration u/s. 12AA of the Act, as also consider claiming exemption u/s. 10(23C)(iiiab) as it was financed substantially by the Government. The application u/s. 10(23C)(vi) was accordingly withdrawn.

2.2 The ld. CIT(A), after affording opportunity of hearing to the assessee, which was availed, rejected each of the assessee's pleas. As regards the contention that the assessment proceedings were pending on the date of grant of registration, i.e., 20.08.2015, the assessee, he opined, could not be extended the benefit of subsequent registration u/s. 12A(2) of the Act, which could only be if the assessment for an earlier year was pending on that date. Processing u/s. 143(1)(a), which was not an assessment, stood completed prior thereto. Verification of the Intimation u/s. 143(1) by him confirmed that the CPC had disallowed the assessee's claim, as made, i.e., u/ss. 11(1)(a/b) and 11(1)(d) of the Act. Referring to items B(i) & B(ii) of the 'Other Details' section of the return, he clarified that no exemption had been claimed u/s. 10

of the Act. That is, there was no claim u/s. 10 for the AO to have disallowed the claim u/s. 10(232C)(iiiad) per the rectification application, which is in any case not maintainable in view of the assessee's receipt being in excess of the threshold limit of Rs.100 lakhs. Further, as regards the assessee's claim for exemption u/s. 10(23C)(iiiab), the same requires satisfaction of the following conditions:

- institution existing solely for the educational purposes;
- nor for the purposes of profit; and
- wholly or substantially funded by the government,

which would in turn require reference to fresh material, not a part of the record. The assessee not claiming charge of tax at a higher rate before him – though found by him as charged at normal rate, the assessee's appeal was accordingly dismissed, so that, aggrieved, it is in second appeal before us, raising the following grounds:

1. The Order of the Commissioner of Income Tax (Appeals) is against facts and law
2. The Commissioner of Income Tax (Appeals) failed to appreciate that denying of exemption under section 11 could not be done as a prima facie adjustment while processing of the return u/s 143(1) and hence the demand is not correct. The Commissioner of Income Tax (Appeals) has concluded that no assessment proceedings were pending based on decided cases and hence the issue is debatable and hence could not be done as a prima facie adjustment.
3. The Commissioner of Income Tax (Appeals) erred in not granting exemption under section 11 on the finding that proviso to section 12A(2) extending the benefit of registration for earlier years as no assessment proceedings were pending on the date of granting the registration under section 12AA. Commissioner of Income Tax (Appeals) failed to note that petition seeking rectification of the assessment was pending before the assessing authority when the registration was granted and hence the proviso to section 12A(2) was applicable to the appellant. Commissioner of Income Tax (Appeals) also failed to appreciate that the objects and activities of such trust remained the same for preceding assessment year, which is also one of the conditions for application of proviso. Thus the appellant was entitled to exemption under section 11 for the assessment year 2013-14.
4. Without prejudice to the above, the Commissioner of Income Tax (Appeals) is not justified in not granting the alternate claim of exemption under section 10(23C)(iiiad). Commissioner of Income Tax (Appeals) failed to appreciate that in computing the gross receipts of Rs.1 crore for the exemption, corpus donations and interest income should not be considered.

5. Commissioner of Income Tax (Appeals) erred in not considering the alternate claim for exemption under section 10(23C)(iiiab) on the ground that the same was not made in the return of income. Commissioner of Income Tax (Appeals) failed to appreciate that his powers are co-terminus with that of the assessing authority and claim other than by a return of income could be entertained by him.
6. Without prejudice to the above arguments, CPC is not justified in levying tax on the gross receipts

3. We have heard the parties, perused the material on record, and given our careful consideration to the matter.

3.1 Elemental to a rectification u/s. 154 are the attributes of 'mistake' and 'apparent from record', excluding debatable issues, i.e., which do not admit of conceivably two views, and limiting the said view as on the basis of the record and the clear law in the matter. The law in the matter is well-settled, viz. *ITO vs. Volkart Bros*. [1971] 82 ITR 50 (SC); *CIT v. Hero Cycles Pvt. Ltd*. [1997] 228 ITR 463 (SC). That is to say, it should be a mistake and, two, glaring from the record. This, though may not be of much consequence in the instant case inasmuch as the scope for interference to the returned income u/s. 143(1)(a) is itself severely restricted, being limited to specified adjustments based on the record, i.e., the return and statements filed by the assessee or in his respect. Thus, the scope of the instant proceedings would be to see if the adjustment/s made by the AO in disallowing the claim u/s. 11 of the Act, could be in law made. The second aspect would be as to if the assessee's claim u/s. 10(23C)(iiiad) could be admitted in rectification proceedings.

3.2 The assessee being admittedly not registered u/s. 12AA for the relevant year, it's claim/s u/s. 11 could not be admitted, and stands to be rejected at the threshold, i.e., be it u/s. 11(1)(a), (b) or (d) (s. 12A(1)(aa) (also see: *U.P. Forest Corporation v. Dy. CIT* [2008] 297 ITR 1 (SC)). Further, the application for registration having been made by the assessee-society on 18.02.2015, it's registration on 20.08.2015, w.e.f. AY 2015-16, is opposite [s.12AA(2)]. The question here would be if the contribution by way of corpus donation, a capital receipt, could be regarded as part of the assessee's

income. The Hon'ble Apex Court in *Punjab Distilling Industries Ltd. v. CIT* [1965] 57 ITR 1 (SC) held that there is no conflict between a receipt being capital in nature and, by fiction of law, being an income chargeable to tax under the Act. Income, defined inclusively u/s. 2(24) of the Act, includes voluntary contributions received by a trust or institution created or established wholly or partly for charitable purposes [cl.(iia)]. The second aspect of the matter is if, as claimed, the entire gross receipt can be brought to tax, which can, by definition, only extend to income, i.e., net of expenditure there-against. A perusal of the Income & Expenditure Account for the year reveals the assessee to have in fact incurred an excess expenditure over income by Rs.21,82,190, i.e., other than capital expenditure (excluding depreciation) (PB pg. 18). Rather than, thus, income at Rs.11,18,953, the assessee has incurred 'loss' to the extent of rs. 21.82 lacs. Inasmuch as the same cannot be met out of the corpus donations, received at Rs.133.20 lakhs, the same has been out of the existing capital, which includes liquid capital (in the form of cash and cash equivalents) at Rs. 36.93 lakhs available at the beginning of the year. In fact, Rs.13.20 lakhs out of this excess expenditure being by way of depreciation, a non-cash 'expenditure', the excess cash outgo is limited to Rs.8.62 lakhs. The assessee has, thus, wrongly returned regular income at Rs. 11.19 lacs. Sure, and clearly, the financial statements being adverted to by us (PB pgs. 13-21) were not furnished along with the return of income. The same nevertheless are a part of the return of income. It is only, as explained by the Tribunal in *Sunil Kumar Maloo v. ITO* (in ITA 78/Jab/2022, dated 20/12/2022), as a record management exercise that their filing along the return is kept in abeyance, to be called for by the Revenue on demand, i.e., as and when required for the purposes of the Act (ss. 139C/139D). As such, where a claim is made, the same being a part of the return, are to be necessarily taken into account, exercising the enabling provision. It is both the right as well as the duty of the AO to do so. The matter shall go back to the AO for verifying the non-existence of regular income and, where so, deletion of the returned income of Rs.11.19 lakhs. There is no law, as explained in *Mytheenkunju*

Muhammed Kunju v. Dy. CIT (in ITA 872/Coch/2022, dated 21/2/2024) that income cannot be determined below that returned. Why, a simple arithematical or clerical error, as in the instant case, provided for u/s. 143(1)(a)(i), could result in a higher income being returned.

3.3 We are conscious that the assessee states of rectification proceedings being a part of the assessment proceedings. And which, being pending as on 20.08.2015, i.e., the date of grant of registration, benefit thereof should be available to it for AY 2013-14. The argument is untenable. There is no reference thereto in the rectification application dated 04.08.2015; nay, could not be inasmuch as the registration was granted subsequent thereto. Nor indeed any reference thereto in the rectification proceedings thereafter, i.e., subsequent to 20.08.2015, till its conclusion on 29.01.2016. How could the AO, oblivious of the developments, take that into consideration, which would, besides, require him taking into consideration material outside the record, impermissible u/s. 143(1) and, thus, u/s. 154. Equally, it would require him to call for and examine the assessee's objects and activities for the relevant year, and compare them with that obtaining as on 20.08.2015. That is, travel outside the ambit of s. 143(1), as indeed s. 154 of the Act. Processing u/s. 143(1), as afore-noted, cannot be regarded as an assessment inasmuch as hearing the assessee is not envisaged thereunder, nor indeed examining the material not referred to therein.

3.4 Next, we consider the assessee's claim u/s.10(23C)(iiiad), which 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—
>
> …….
>
> (23C) any income received by any person on behalf of— …….
>
> (iiiad) any university or other educational institution existing solely for educational purposes and not for purposes of profit if the aggregate annual receipts of such university or university or educational institution do not exceed the amount of annual receipts as may be prescribed;

The same has not been considered valid by the AO as the assessee's admitted gross receipt is in excess of Rs.100 lakh. The first issue in this regard is if the assessee's claim, admittedly made per sec.154, and not per the return of income, could be admitted in s. 154 proceedings. True, the AO has admitted the claim, but then his order provides no reason as to why he so does, i.e., is *sans* any finding *qua* the same. It is the correct legal position that is relevant, and not the view that the parties may take of their rights in the matter (*CIT v. C. Parakh & Co. (India) Ltd*. [1956] 29 ITR 661 (SC); *Parekh Bros. v. CIT* [1984] 150 ITR 105 (Ker)). Also see: *Kedarnath Jute Mfg. Co. Ltd. v. CIT* [1971] 82 ITR 363 (SC). Proceedings under the Act, it may be clarified, are not in the nature of a *lis* (*Gadgil (S.S.) v. Lal & Co*. [1964] 53 ITR 321 (SC)). An incorrect action by the AO, where so, would not bind the Tribunal. So however, in our view, the AO has rightly considered the assessee's claim u/s.10(23C)(iiiad) in the rectification proceedings. The assessee had in the past been claiming total exemption thereunder and, two, had referred thereto in the 'Other Details' section of the return. It is apparent that the assessee had not claimed the same for the current year on the basis that it's gross receipt exceeded the qualifying limit of Rs. 100 lacs, which is clearly, as we shall presently see, a misreading. The Board per it's Circular No. 14 (XL-35) dated 11/04/1955, which is binding on the Revenue (*Hero Cycles Pvt. Ltd*. (supra)), clarified that the Department must not take advantage of the ignorance of assessee to collect more tax than what is legitimately due, which is precisely the import of the decision in *Parekh Bros.* (supra), as well as others, as in *CIT v. K.N. Oil Industries* [1983] 142 ITR 13 (MP). That is, the law should be sought to be given effect to. The AO, however, went wrong in denying the assessee exemption u/s.10(23C)(iiiad). This is as the provision does not, as stated in the rectification order dated 29.01.2016, speak of "gross receipt", but "annual receipt", making the same mistake as the assessee had earlier. The difference in the language is marked, and the latter, clearly, denotes regular, recurring receipts of an educational institution. The same would not include voluntary contribution toward corpus, which

is not in the nature of a running, regular income. Excluding the same, the assessee's annual receipt is only Rs.11.19 lakh, i.e., far below Rs.100 lakh. We note that the income & expenditure a/c does not include tuition fee - the main source of income for a college; salary to staff, etc. The income and expenditure, however, pertains to the college, which is, further, supported by the Government. It is, however, impermissible under the processing provision of sec.143(1) to travel outside the record, i.e., audited financial statements on the basis of which the assessee has returned income, forming part of the return in terms of sec.139(9). We are also conscious that it is an admitted fact that the ld. CCIT had, on examination of the assessee's objects, found the assessee to have object clauses other than *qua* education, and on which basis therefore the assessee withdrew it's application for approval u/s.10(23C)(vi), and which, as indeed sec.10(23C)(iiiad), requires the assessee to exists solely for the purposes of education, which aspect thus cannot be said to be satisfied (*New Noble Education Society v. CCIT* [2022] 448 ITR 594 (SC)). There is, however, nothing on record to show that the assessee was engaged in any other activity, or of it's receipt being from any other. *There is, further, no scope, again, for reference to material other than specified in sec.143(1)(a) for making an adjustment there-under*. It is only under regular assessment that the said aspects, as indeed the two further aspects noted by the ld. CIT(A) with reference to the assessee's claim u/s.10(23C)(iiiab) before him, could be examined. It was within the purview of the AO to have taken recourse to either section 143(2) or section 147, which has not been done, so that he has to operate within the confines of sec.143(1).

3.5 The assessee is accordingly entitled to claim it's entire income of Rs.111.38 lakh (which is not at Rs.144.39 lakh) as exempt u/s.2(24)(iia) r/ws. 10(23C)(iiiad), which speaks of exemption of income of an educational institution and not it's annual receipt. There is, further, in this view of the matter, no need for restoration to the file

of the AO, which we had earlier directed for examining the exclusion of the income to the extent of Rs.11.19 lakh (para 3.2).

In Sum

4. Section 2(24)(iia) of the Act, defining income, makes no exception for a voluntary contribution received toward corpus, so that it is income by definition, though exempt u/s. 11(1)(d)). It is for this reason that capital expenditure is equally an application of income, entitling exemption u/s. 11(1) on income derived from property held under trust (*Tiruppani Trust v. CIT* [1998] 230 ITR 636 (SC)).

The assessee being not registered u/s. 12AA, it's claim for exemption u/s. 11, or for it being a capital receipt, not in the nature of income, is misplaced and, accordingly, stands rightly disallowed on processing the return u/s. 143(1)(a). It's plea for extension of subsequent registration, on the ground that rectification proceedings are a continuation of the assessment proceedings, is misconceived. *When processing u/s. 143(1) is itself not an assessment, how could rectification thereof possibly be*? That apart, 'rectification' u/s. 154 would necessarily restrict the 'record' to that which can be referred to u/s. 143(1)(a). It's final accounts, however, reflect a loss on operations, which stands mistakenly returned as income. The financial statements form part of the return of income (s. 139(9)) and, therefore, could validly be taken into account for processing it. The matter would accordingly have to travel to the AO for taking the audited final accounts, on the basis of which the assessee has returned income, on record and passing an order u/s. 154 of the Act.

As regards the assessee's, an accredited institution supported by Government, alternate claim for exemption u/s. 10(23C)(iiiad), the same stands rightly considered by the AO in the rectification proceedings. The same, it may be appreciated, is not a new claim, but incidental to it's activity of running an educational institution, and on which basis it had been claiming exemption in the past. It is true that equitable considerations are out of place in interpreting tax laws. However, as explained in *R.*

B. Jodha Mal Kuthiala vs. CIT [1971] 82 ITR 570 (SC), those laws, like all other laws, are to be interpreted reasonably and in consonance with justice. As it famously remarked in *CIT vs. J. H. Gotla* [1985] 156 ITR 323 (SC), that though equity and taxation are often strangers, attempts should be made that these do not remain always so, and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction. *How does an assessee, one may ask, make an alternate claim*? And for which, it therefore employs s. 154, subjecting itself thus to the limitations of the said provision. The premise of the Board Instructions as well as the decisions by the higher courts in this regard is that the assessee should get a fair deal. It is, further, irrelevant for the purpose of rectification whether the genesis or the cause of the mistake (in the order/intimation sought to be rectified) is at the end of the Revenue or the assessee, with, as afore-noted, both making the same mistake in the instant case. True, exemption provisions are to be strictly construed. There are however no procedural requirements in respect of a claim u/s. 10(23C)(iiiad), as was the case for s. 10B, as explained in *Pr. CIT v. Wipro Ltd.* [2022] 446 ITR 1 (SC), ousting a later claim thereunder by the assessee. The assessee's Balance Sheet and Income & Expenditure A/c clearly reflect it to be *qua* an educational institution, an aspect on which there is even otherwise no doubt, being the premise for a claim u/s. 10(23C)(iiiab/iiiad/vi). Non-allowance thereof by the Revenue is, thus, a mistake and, rather, as striking as by assessee in claiming exemption u/s. 11 and, further, not on income but on it's receipt. This is as the provision, in relation to the qualifying quantum of receipt, refers to 'annual receipts' and not 'gross receipt'. Corpus donation, being uncertain as to time and volume, is surely not a part of the regular, annual receipt of an educational institution. There is also no scope, while entertaining the said claim, for extending the purview of 'processing', or indeed of rectification proceedings in its respect, and probe further in the matter, examining, for instance, it's income profile; charter, etc. That is, the very

same reason for which the assessee's claim under *proviso* to s. 12A(2) did not find favour with either the Revenue or with us.

The assessee's alternate claim for exemption of it's income, including capital receipt, u/s. 10(23C)(iiiad), which extends to the entire income received by such person, and not it's annual receipt, is not exigible to being disallowed u/s. 143(1)(a). Its disallowance is, accordingly, directed for deletion. We decide accordingly.

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

Order pronounced on March 07, 2024 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-	Sd/-
(S. Seethalakshmi)	(Sanjay Arora)
Judicial Member	Accountant Member

Cochin, Dated: March 07, 2024
n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin