आयकर अपीलीय अधिकरण, इन्दौर न्यायपीठ, इन्दौर

IN THE INCOME TAX APPELLATE TRIBUNAL,
INDORE BENCH, INDORE

श्री डी.टी.गरासिया, न्यायिक सदस्य तथा

श्री ओ.पी.मीना, लेखा सदस्य के समक्ष

BEFORE SHRI D.T. GARASIA, JUDICIAL MEMBER
AND SHRI O.P. MEENA, ACCOUNTANT MEMBER

आ.अ.सं./ I.T.A. No. 194/Ind/2016
निर्धारण वर्ष /A.Y.: 2005-06

M/s.Jasleen Educational Service Society, Gram Limbodi, Khandwa Road, Indore. स्था.ले.सं./**PAN: AAAAJ 1218 L**	**Vs.**	**ACIT, 2(1), Indore.**
अपीलार्थी /Appellant		**प्रत्यर्थी /Respondent**

अपीलार्थी की ओर से/Appellant by	Shri S.N.Agrawal, C. A.
प्रत्यर्थी की ओर से/Respondent by	Shri K. G. Goel, DR

सुनवाई की तारीख Date of hearing	**12.01.2017**
उद्घोषणा की तारीख Date of pronouncement	**28.02.2017**

आदेश /O R D E R

PER O.P. MEENA, ACCOUTANT MEMEBR.

This appeal is filed by the assessee against the order of ld. Commissioner of Income-tax (Appeals)-22, holding

concurrent jurisdiction of CIT(A), Indore-1 [hereinafter referred to as the CIT(A)] dated 08.12.2015. This appeal pertains to assessment year 2005-06 as against appeal decided in respect of assessment order dated 31.12.2007 passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act" by the ACIT, 2(1), Circle 2(1), Indore (hereafter referred to as the AO).

2. Ground nos.1.1 and 1.2 relate to denying of claim of exemption u/s 10(23C)(iiiad) of the Act.

2.1 Succinctly, the facts as culled out from the orders of the lower authorities are that the assessee is an A.O.P. registered with Registrar of Society vide Registration No.IMD/2914/98 dated 09.12.1998. The Society is running an educational institution in the name of "Auckland Academy". The assessee has filed its return of income on 30.10.2003 showing income at Rs. Nil. The assessee has shown net profit of Rs. 2,62,971/- on the gross annual receipt of Rs. 41,99,249/- and claimed exemption of Rs. 2,62,971/- u/s 10(23C)(iiiad) of the Act. The AO examined the claim and held

that the assessee society registered on 09.12.1998, and applied for registration u/s 12A on 02.04.2007 before the CIT(A), Indore, which has not been decided, hence, the assessee is not eligible for benefit u/s 11 & 12 of the Act. With regard to exemption u/s 10(23C)(iiiad), the AO observed that in the assessment order u/s 143(3) dated 15.11.2006, for assessment year 2004-05, it was held that the assessee was not existed primarily for educational purposes as it has given loan of Rs. 1.25 crores to M/s. Sheetu Educational Services Pvt.Ltd., Indore, (for short – SESPL), hence, the assessee has diverted the funds to its sister concern. Further, the assessee had neither utilized/expanded its income/funds wholly and exclusively for educational purposes nor for the objects of the institution. The AO further observed that the assessee has shown receipts of Rs. 9,17,200/- for bus fee and also claimed depreciation of Rs. 2,76,872/- @ 40% on motor buses, which means that buses were for solely used for the business of running them on hire and not for other purposes. In view of this matter, the AO held that the assessee is not existed solely

for educational purposes during the accounting year under consideration, hence, the claim of exemption u/s 10(23C)(iiiad) of the Act is not allowable.

2.2 Being aggrieved, the assessee filed an appeal before the CIT(A). However, the ld. CIT(A) noted that the CIT(A)-II, Indore, vide order dated 31.12.2012 for assessment year 2004-05 in appeal no. 129/09-10/455 held that the exemption u/s 10(23C)(iiiad) is not available as the conditions u/s 10(23C)(iiiad) is not satisfied. According to the CIT(A), the institution should not be for the purpose of profit and this condition is not satisfied as held in the assessment year 2004-05. Therefore, following the decision of assessment year 2004-05, the ld. CIT(A) has upheld the order of the AO.

2.3 Being aggrieved, the assessee has filed this appeal before us. The Ld. Counsel for the assessee submitted that the assessee has not advanced loan to SESPL, Indore of Rs. 1,25,27,660/- but the entire amount was advanced for construction of school building, which was ultimately used by the assessee over running of school. The AO referred that the

amount of Rs. 4,01,947/- was further advanced by the assessee, but from the balance sheet of the company, it is clear that the said amount was utilized for the purpose of repayment of liability and maintenance of school building and furniture. The contention of the AO that amount was given to M/s. SESPL was diversion of funds by the assessee society is not correct. The assessee on lease hold land of individual family members is in possession of the company, constructed a school building society and the school building was also used for the purpose of running of school of the society. Hence, there was no diversion of funds of the society for non-educational purposes. As regards observation of the AO that advance to company tantamount to contravention of provisions of Section 13 of the Act is not correct, as the AO has failed to appreciate factual position that when company is in the lease hold land construct a school building for the assessee society and the said school building was also used for the purpose of running of the school of the society. Hence, the amount as advanced for the construction of the school

building was not contravention of the provisions of Section 13 of the Act. Thus, the assessee has properly utilized its entire income for the purpose of educational activities. Further, the bus fee and other receipts are directly linked with the educational activities of the society and, therefore, the assessee solely engaged in the educational activities. The AO's interpretation that bus used for the purpose of running on hire is factually not correct as the buses used for pick up and drop of the students and bus fee was separately charged from the students. Hence, for the purpose of allowability of depreciation, the same has been considered as bus run on hire otherwise all the buses are used for pick and drop of the students only.

2.4.1 The ld. Authorized Representative of the assessee further submitted that it is not in dispute that gross receipts of the assessee is Rs. 48,66,663/-, which is less than Rs. 1 crore and the assessee solely existed for educational purposes. Hence, it is eligible for exemption u/s 10(23C)(iiiad) of the Act. The ld. AO/CIT(A) disallowed the exemption by holding that

the assessee having surplus income and the same was used in advancing to M/s. SESPL, one of the group companies. However, the AO and CIT(A) has failed to appreciate that the assessee entered into a Deed of sub-lease on 28.08.1999 with M/s.SESPL for taking of the building of M/s. SESPL on lease for running of its school in that building. The land area was around 1.50 acres and built up area was around 15,000 sq.ft. The Deed agreement was executed between both the parties on 31.03.2000 whereas it was agreed that "the party referred to as tenant above has deposit with the owner of the amount which has been mutually decided by both the parties by way of security deposit. Against this deposit, the interest shall not be charged by the party referred to as tenant (Jasleen Educational Service Society) above and the parties referred to as owner (SESPL) shall not be charged rent on said building." Thus, the amount received by SESPL was not used for personal purposes but used for construction of building. The ld. Authorized Representative of the assessee further submitted that surplus earning of the assessee in the year of

appeal and also few previous year and subsequent years are as under :-

S.No.	Particulars	31.03.03	31.03.04	31.03.05	31.03.06	31.03.07
1.	Gross Receipt	6632783	7646452	4866664	4414765	4439171
2.	Net Income	3904546	2229702	262970	482906	670353
	% of Surplus	58.87 %	29.16 %	5.40%	10.94%	15.10

2.4.2 The ld. Authorized Representative of the assessee relied on the following decisions :-

(i) St. Joseph's Upper Primary School vs. ITO, 16 TTJ 389 (Hyd Bench – I.T.A.T.)

(ii) Addl CIT vs. Aditanar Educational Institution, (1979) 118 ITR 235 (Mad).

(iii) Governing Body of Rangaraya Medical College vs. CIT,(1979) 117 ITR 284 (AP).

(iv) Ereaut (H.M. Inspector of Taxes) vs. Girls Public Day School Trust Ltd., (1930) 15 TC 529 (HL) (English decision)

2.4.3 The Board itself seems to have accepted this view by their Instruction No. 1112 (F.No.194/16/77-IT (A-I) dated 29th October, 1977 in the following words :-

> *"However, there may be cases where the educational institution may be owned by the trusts or societies to whom the provisions of sections 11 may be applicable. Where all the objects of these trusts are educational and the surplus, if any, from running the educational institution is used for educational purposes only, it can be held that the institution is existing solely for educational purposes and not for the purposes of profit."*

2.4.4 The ld. Authorized Representative of the assessee further relied upon the following decisions :-

(a) OASIS Educational Society vs. ADIT (Exemptions), 132 TTJ 59 (Hyd Bench – I.T.A.T.)

(b) Aditanar Educational Institution etc. vs. Addl. CIT, 224 ITR 310 (S. C.)

(c) ACIT vs. VATSALYA Senior Secondary School, 130 TTJ 27 (Ind. I.T.A.T.)

2.5 The ld. Departmental Representative relied on the orders of the lower authorities.

2.6 We have considered the facts, rival submissions and perused the material available on record. The undisputed fact of the case are that the assessee society does not possess registration u/s 12A of the Act for the year under consideration. Therefore, exemption in Section 11 & 12 is not available to assessee. We find that the assessee is in possession of lease hold land which belongs to individual family member of trustees. The entire amount of Rs. 1.25 crore, given to M/s. SESPL by the assessee has been utilized for construction of school building on the land in possession of land. We also find that the assessee had utilized the said building for the purpose of running school, without paying any rent. Further, the amount of Rs. 4,01,947/- paid was for the purpose of repayment of liability and maintenance of school building and furniture. Therefore, we do not find any diversion of funds as alleged by the AO. As the funds so advanced were used for the purpose of education only. In view of these facts, we are of the view that the assessee has properly utilized the entire income for the purpose of educational activities. We also

find that the buses were used for pick up and drop of the students only for which fees were separately charged. Therefore, it cannot be said that the buses were used for running them on hire, as except pick and drop of student, these buses were used. Hence, it cannot be held that the assessee has derived any business profit from buses. However, for the purpose of allwoability, it was considered on running them on hire. We also note that the amount of Rs. 1.25 crore advanced to M/s. SESPL was for the purpose of construction of school building, as is evident from the facts that no interest thereon has been charged nor any rent of school building was given. This view is supported from the decision of Hon'ble Supreme Court in the case of Aditanar Educational Institution, etc. vs. Addl. CIT, (1997) 224 ITR 310 (S.C.), wherein it was held that " when surplus is utilized for educational purposes i.e. for infrastructure development, it cannot be said that the institution was having the object to make profit, that the surplus used for management and betterment of the institution could not be termed as profit."

2.6.1 We also find support of our view from C.B.D.T. Instruction No. 1112 dated 29.10.1977, wherein it has been laid down that where all objects of trust are educational and if there is any surplus from running of educational institute, which is used for educational purpose only and it can be held that the said institution is existing solely for educational purpose and not for the purpose of profit. We also find that the assessee and M/s. SESPL has entered into an agreement dated 31.03.2000 according to which the assessee is not to charge any rent on security deposit and M/s. SESPL will not charge rent from the assessee society.

2.6.2 We also find support from the decision relied by the ld. Authorized Representative of the assessee in the case of St. Joseph's Upper Primary School vs. ITO, 16 TTJ 389 (Hyd.-Trib), wherein the school was housed in two buildings owned by the society. The other belongs to Smt. Rajamma, who was daughter in law of Secretary of the Society, the first and second floor was constructed by borrowings from the society. But the society has benefit of housing of its school without

paying any rent. It was for this reason that interest was not charged. It was held that there was no misuse of any authority so as to make the society's professed objects as not being real and, therefore, society cannot be deprived of benefit of exemption u/s 13 of the Act. We find that the facts of the present case is identical as here the building was constructed on the amount given by society in which society is running school. Therefore, the assessee society is eligible for exemption u/s 10(23C)(iiiad) of the Act. The ld. Authorized Representative of the assessee also relied in the case of Oasis Educational Society vs. ADIT (Exemption) 132 TTJ 59 (Hyd), wherein the preamble read..... that it is found that merely because the land on which the school building was constructed belong to the sons and wife of the Principal/Secretary of the Society, it could not be said that the assessee society is running the educational society for earning profit and not for charitable purpose.... . The other case laws are relied and referred above in submission of ld. Authorized Representative of the assessee also support the case of the assessee society.

2.6.3 We find that a society can claim exemption u/s 10(23C)(iiiad) of the Act, if the condition enumerated therein are satisfied. We find that aggregate annual receipt of the society are at Rs. 48,66,663/- which does not exceed the amount of Rs. 1 crore for the assessment years under consideration. Therefore, the assessee is eligible for deduction u/s 10(23C)(iiiad) of the Act. The perusal of the assessment order shows that imparting of educational nature of activities carried on by the assessee has not been doubted by the AO. The provisions of Section 10(23C)(iiiad) of the Act reads as under :-

> *"(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 educational institution do not exceed the amount of annual receipts as may be prescribed; or……*

2.6.4 The perusal of the above provision shows that the exemption u/s 10(23C)(iiiad) of the Act is available to an

institution, which is solely exists for educational purposes. Therefore, the phrase used as "solely" means that not for the purposes of profit. Therefore, plain reading of the said Section means that an educational institution, which is engaged solely for the purpose of imparting education is solely for the purpose of imparting education is qualifies for the exemption u/s 10(23C)(iiiad). The "solely" words used therein means that the assessee institution is not carrying out other activities of earning of profit.

2.6.5 We have gone through the case laws relied upon by the ld. Authorized Representative of the assessee. We find that in the case of Addl.CIT vs. Aditanar Educational Institution, (1979) 118 ITR 235 (Mad), wherein it was held that if a society registered under Societies Registration Act, 1880, to run educational institution could be treated as an educational institution itself u/s 10(22) of the Act. This decision was approved by Apex Court in Aditanar Educational Institution vs. Addl. CIT, (1997) 224 ITR 310 (S.C.).

2.6.6 In the light of above discussion, facts and circumstances, we find that the assessee society is engaged in the running of school and amount of surplus has also been utilized by the assessee for construction of school building, which was also used by the assessee, hence, the society is engaged in the charitable purpose u/s 2(15) of the Act. Since the gross receipts of society is less than Rs. 1 crore, therefore, it is eligible for exemption u/s 10(23C)(iiiad) of the Act. We also find that the facts of the present case are squarely covered by the above decisions discussed above. Therefore, we are of the considered opinion that the lower authorities were not justified in not allowing the deduction to the assessee u/s 10(23C)(iiiad) of the Income-tax Act, 1961. Accordingly, the AO is directed to treat the Society as covered by Section 10(23C)(iiiad) of the Act and allow the relief accordingly. Accordingly, ground nos.1.1 & 1.2 are allowed.

3. Ground no. 2.1 & 2.2 reads as under:-

> "2.1 That on the facts and in the circumstances of the case, the ld. CIT(A) erred in maintaining disallowance of kitchen expenses by invoking

the provisions of Section 40(a)(ia) of the Act when the assessee has reimbursed the same to IMPERIAL ACADEMY.

2.2 That on the facts and in the circumstances of the case, the ld. CIT(A) erred in not allowing the claim of kitchen expenses as per 2nd proviso to Section 40(a)(ia) of the Act even when 2nd proviso having retrospective effect as per decision of the Hon'ble Delhi High Court in the case of Ansal Land Mark Township (P) Limited,(I.T.A.No. 160/161 of 2015)"

3.1 The AO found that the assessee has claimed Rs. 4,75,486/- as kitchen expenses out of which Rs. 1,89,000/- were reimbursed to Sheetu Eductional Society for the kitchen work carried out by Imperial Academy. The AO was of the view that these expenses were paid fixed @ Rs 1000/- per student for 189 students, hence, payment falls on services rendered under contract, on which, TDS was liable to be deducted u/s 194C of the Act. Since, no TDS was done, hence, payments were disallowed u/s 40(a)(ia) of the Act.

3.2 The ld. CIT(A) has observed that the payment has been made of round figure of Rs. 1000/- per annum per student,

hence, it is not reimbursement of actual expenses but lump sum payment for services, hence TDS was required to be made. As regards reliance by assessee in the case of Ansal Land Mark Township (P) Limited (I.T.A.No. 160-161/2015 dated 26.08.2015), the CIT(A) has held that second proviso to Section 40(a)(ia) r.w.s. 201(1) and Rule 31 ACB, specifies that Form 26A is required to be filed for claiming benefit of second proviso to Section 40(a)(ia), which has not been filed, hence, dismissed the appeal.

3.3 Being aggrieved, the assessee filed this appeal before us, the ld. Authorized Representative of the assessee submitted that the assessee has reimbursed kitchen expenses incurred by Imperial Academy, hence, not liable for TDS. Further, the receipt has duly considered the receipts in their books on which legitimate amount of tax due is paid, hence, as per second proviso to Section 40(a)(ia) having retrospective effect in the light of decision in the case of Ansal land Mark Township P.Ltd. (160-161/2015 dated 26.08.2015), the AO was not justified in disallowing the claim.

3.4 The ld. Departmental Representative relied upon on the orders of the lower authorities.

3.5 We have considered the facts, rival submissions and perused the material available on record. Since, the claim of assessee that the recipient has paid due tax in the light of second proviso to Section 40(a)(ia), we deem fit to restore this issue to the file of the AO for verification and if found correct allow the same as the ratio laid down in the case of Ansal Land Mark Township P.Ltd. [160 – 161/2015 dated 26.08.2015]

4. Ground No. 4 states as under :-

> "That on the facts and in the circumstances of the case, the ld. CIT(A) erred in maintaining disallowance of Rs. 28,648/- out of kitchen expenses without properly appreciating the facts of the case and submission made before him even when there was no specific defects were pointed out by the AO in the books of accounts of the assessee."

4.1 The assessee has claimed kitchen expenses of Rs. 5,75,486/- out of which Rs. 1,89,000/- were claimed as reimbursement to Imperial Academy and for balance of Rs. 2,86,484/- only ledger copy was filed. On spot inquiry, the

Inspector found that no meal was provided to students, considering the genuineness, the AO disallowed Rs. 28,648/- being 10% of expenses of Rs. 2,86,480/- as income for non-education activity.

4.2 The ld. CIT(A) has also confirmed the disallowance so made.

4.3 The ld. Authorized Representative of the assessee submitted that kitchen expenses relates to mess facility provided to student, teacher and staff, therefore, there was no justification for disallowance whether books of accounts are audited.

4.4 We have considered the facts and we are of the view that the AO was not justified in making ad hoc disallowance when books of accounts are audited, vouchers and accounts produced and there cannot be any expenses other than education purposes, hence, disallowance made by the AO is deleted. This ground is allowed.

5. In the result, the appeal is partly allowed for statistical purposes.

The order has been pronounced in open court on the 28th February , 2017.

Sd/-	Sd/-
(डी.टी.गरासिया)	(ओ.पी.मीना)
न्यायिक सदस्य	लेखा सदस्य
(D.T.GARASIA)	**(O.P.MEENA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

दिनांक /**Dated : 28th February, 2017.**

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