

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL No. 894 of 2007

With

R/TAX APPEAL No. 895 of 2007

FOR APPROVAL AND SIGNATURE :

HONOURABLE Mr. JUSTICE AKIL KURESHI

and

HONOURABLE Mr. JUSTICE B.N. KARIA

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

GUJARAT CO.OPERATIVE MILK MARKETING FEDERATION LTD

Versus

INCOME TAX OFFICER

Appearance :

Mr BS SOPARKAR for Mrs SWATI SOPARKAR, Advocates for the PETITIONER

Mrs MAUNA M BHATT, Advocate for the RESPONDENT(s) No. 1

CORAM: HONOURABLE Mr. JUSTICE AKIL KURESHI

and

HONOURABLE Mr. JUSTICE B.N. KARIA

9th May 2018

CAV JUDGMENT (PER : HONOURABLE Mr. JUSTICE B.N. KARIA)

These two appeals are preferred under Section 260A of the Income-tax Act, 1961 [**“the Act”** for brevity], challenging

an Order dated 4th October 2006 passed by the Income Tax Appellate Tribunal, Ahmedabad [**“the Tribunal”** for brevity] in respect of assessment years 2001-2001 and 2001-2002.

Since the issue involved in both these tax appeals is similar, the facts are being extracted from Tax Appeal No. 894 of 2007.

The appellant-assessee in both these appeals is a Cooperative Milk Marketing Federation, having its dairy at Anand. It had filed its return for A.Y 2000-2001 and 2001-2002 on 30th September 2005.

The Assessing Officer upon verification of return of income noticed that the assessee has not treated amount paid towards part payment of tuition fees of children of its employees made to Anandalaya Education Society, which imparts education and therefore, it amounts to perquisite to that extent in the hands of the employees of the assessee, as per provision of Section 17 [2] of the Act, and hence, liable for deduction of TDS.

Drawing attention of assessee to the said provision read with Rule 3 [5] of the Income-tax Rules, 1962 [**“the Rules”**]

for brevity], the Assessing Officer issued a notice under Section 201 [1] & 201 [1A] read with Sections 192, 194 of the Act on 5th October 2005 calling upon the appellant-assessee to explain why tax to the extent of short/no deduction of tax should not be recovered from the assessee under Section 201 [1] of the Act. In response to which, the assessee tendered its reply *inter alia* contending that the contribution to Anandalaya Education Society was a concessional education facility given to the employees to facilitate education of their children, no perquisite arose in the hands of the employees, and therefore, no tax was deducted at source. It was pointed out that by virtue of a new Rule 3 which came to be inserted with retrospective effect from 1st April 2001, exemption limit of Rs. 1,000/= was available for AY 2002-2003 onwards, and therefore, contribution for FY 2001-2002 [*ie.*, AY 2002-2003] would not give rise to perquisite in the hands of the employees. Distinction was sought to be drawn by the assessee between “free” and “concessional” education, emphasizing that education may be purely free or free to the extent of concession given. Assessee drew attention of AO by producing a tabular chart explaining that in each year, assessee had

incurred burden to the extent of Rs. 1,000/= per child per month.

This reply did not find favour with the AO, who ordered issuance of demand notice in the sum of Rs. 1,65,868/= and interest thereon under Section 201 [1A] of the Act. This gave rise to filing of first appeal before the CIT [A].

Before the Commissioner [Appeals], it was pointed out by the assessee that the AO had presumed that appellant had contributed amounts to Anandalaya Education Society for the purpose of meeting educational expenses in respect of children of its employee, whereas, the fact being that the contributions were made for recouping deficiency which the Institute suffered for providing educational facilities to the wards of employees of the appellant-assessee. And therefore, in no way, such amounts paid to Anandalaya could be termed as contributions made towards free or concessional educational facilities to the wards of the employees of the appellant. Attention of CIT [A] was also drawn towards provisions of Rule 3 [e] of the Act to point out that appellant met with only a part of educational expenditure, and therefore, the said provision would not apply in the facts and circumstances of the case.

CIT [A] also did not accept the *plea* of assessee by upholding the order of AO passed under Section 201 [1] and 201 [1A] of the Act. Resultantly, the appellant-assessee moved the Tribunal against a consolidated order of CIT [A] dated 31st May 2006. The Tribunal vide *impugned* order dated 4th October 2006 upheld the order of CIT [A] and thereby dismissed the appeals preferred by the assessee, giving rise to these Tax Appeals.

This Court vide Oral Order dated 3rd April 2008, admitted these appeals for consideration of the following questions of law :

[a] “Whether in the facts and circumstances of the case, the contribution made by the appellant to the Anandalaya Education Society towards the deficit of education expenses of children of appellant’s employees is perquisite in the hands of the employees pursuant to the provisions of Section 17 [2] (iii) and (iv) of the Income Tax Act read with Rule 3 of the Income Tax Rules, 1962 ?”

[b] Whether in the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in law in confirming the action of the Respondent in levying penalty and penal interest under Section 201 [1] and 201 [1A] of the Act by holding that the contribution made by the appellant to the Anandalaya Education Society towards the deficit of education expenses of children of appellant's employees is perquisite in the hands of the employees pursuant to the provisions of Section 17 [2](iii) and (iv) of the Income Tax Act read with Rule 3 of the Income Tax Rules, 1962 ?”

We have heard learned counsel for the respective parties and perused the record.

Learned counsel Shri BS Soparkar appearing for the appellant-assessee submitted that the Tribunal has erred in upholding the order of CIT [A] and in dismissing the appeal of the assessee. He contended that the Tribunal has committed an error in holding that the assessee is incurring expenditure for providing educational facilities to the wards of its employees

only, and therefore, the contribution made by the appellant will squarely fall within the ambit of Rule 3 (e) of the Rules and could in no way be taxed as a perquisite in the hands of the employees. Counsel submitted that the contributions made to Anandalaya were to recoup the deficiency suffered by the said Society for meeting the educational requirements and therefore, the same ought not to have been treated as contribution for meeting the education expenditure of the children of the appellant's employees. Counsel emphasized that the contribution made by the appellant to the said Society could not be treated as a perquisite in the hands of the employees of the appellant, as the same could not be said to be the value of benefit to the employees resulting from provisions of "free education" facility within the meaning of Rule 3 [e] of the Rules, which eventually covers only "*free education facility*" and not "*the educational facility at concessional rate*".

Counsel drew attention of this Court to Rule 3 [e] of the Rules which, prior to amendment made *vide* I.T [22nd Amendment] Rules, 2001, covers only free educational facilities for the members of household of assessee and not the concessional educational facilities, which is specifically

included in substituted Rule 3 [5] inserted *vide* I.T [22nd Amendment] Rules, 2001 to contend that the contributions to Anandalaya towards deficit of education expenses of children of appellant's employees is not perquisite in the hands of the employees, pursuant to provisions of Sections 17 [2] (iii) and (iv) of the Act read with Rule 3 of the Rules. Counsel lastly contended to set aside the order of the Tribunal in confirming the order of levy of penalty and penal interest under Section 201 [1] and 201 [1A] of the Act.

On the other hand, learned counsel for the Revenue besides supporting the order passed by the CIT [A] as well as the Tribunal, relied on the decision of **Commissioner of Income-tax [TDS] vs. Director, Delhi Public School**, reported [2011] 14 taxmann.com 45 [P&H].

Counsel for the Revenue submitted that the assessee had made payment of part of fees of children of its employees to Anandalaya Education Society for educational fees which would attract Section 17 [2] of the Act and therefore, the assessee is liable for TDS as perquisite in the hands of the employees. Learned counsel for the Revenue drew attention of this Court to Section 17 [2] (iii) and 17 [2](iv) of the Act to

contend that the School run by the Society has never given any concession in fees to its students, but on the contrary has recovered full fees [in part from the students/children of the employees of the assessee and part from the assessee, in case of children of its employees]. It is submitted that these were paid in part by the employer and part by the employees, and therefore, arguments advanced by the assessee that sub-rule 3 [5] refers to free as well as concessional educational facility would not be applicable to the facts of this case. That, the issue of free or concessional education would arise only where it is being offered as free/concessional facility granted by the Institute and provided by the assessee. Here, there is no issue of free or concessional facility provided by the employer. That, provisions of Rule 3 [e] would not be applicable in the case of the assessee for the year under consideration. That, the assessee has taken false shelter of Rule 3 [e] and 3 [5] which are not at all applicable to the case of the assessee. Hence, it was requested by the learned counsel for the Revenue to dismiss the Appeal.

Having considered facts of the case, submissions made by learned counsel for the respective parties, it appears from the

record that as per the chart below, assessee has shown its income and expenditure in detail.

Financial Year of Deficit	No. of Students	Total Deficit Contributed	Contributed per student per month
1999-2000	55	Rs.5,91,030	Rs. 896
2000-2001	62	Rs. 6,43,126	Rs. 864
2001-2002	58	Rs. 6,36,202	Rs. 914
2002-2003	63	Rs. 6,72,903	Rs. 890
2003-2005	61	Rs. 7,32,122	Rs. 1000

If we peruse the aforesaid chart, it is not in dispute that the children of the employees of appellant-assessee are studying in Anandalaya Education Society and are paying fees at a subsidized rate. It is equally true that the recurring deficit of the Society is being recouped by the contributions made by the assessee based on number of students representing the employees' wards, and it is under these circumstances that the assessee contributed Rs. 5,91,030/= and Rs. 6,43,126/= for AY 2000-2001 and 2001-2002 respectively. Thus, the burden borne per child per month has never crossed Rs. 1,000/= by the assessee, and therefore, there would be no question of any perquisite arising in the hands of the employees of the assessee, and therefore, deduction of TDS would also be not permissible. The contribution as shown in the chart cannot be said to be

perquisite in the hands of the employees for any of the years mentioned above.

Learned advocate for the assessee drew attention of this Court to the provisions of Rule 3 [e] of the Rules, which is reproduced hereunder :

“Rule 3 (e) *The value of the benefit to the assessee resulting from the provision of free education facilities for any member of his household shall be determined as the sum equal to the amount of the expenditure incurred by the employer in that behalf, but where the educational institution itself is maintained and run by the employer for the benefit of all his employees as a group, the value of the perquisite to the assessee shall be determined with reference to the reasonable cost of such education in a similar institution in or near the locality.*”

From the wordings of Rule 3 [e] above, it can be said that it would be applicable only for free educational facilities, as nothing is mentioned therein of concessional educational facilities. Contributions to the Anandalaya Education Society is towards the deficit of the fees towards wards of the employees, and therefore, rule 3 [e] would not apply to the facts of this case and hence, no perquisite would arise in the hands of the employees for the assessment years in question. The legislation amended the said rule only for subsequent period to include

even concessional education facility. Therefore, Rule 3 [2] read with Section 17 of the Act cannot be said to have been violated and the assessee cannot be held liable to recover tax under Section 201 [1] to the extent the tax is due from its employees. Hence, findings of the Tribunal that assessee has failed to deduct tax at source on such contributions in terms of provision 192 read with Section 17 of the IT Act appears to be not correct or legal. Assessee cannot be said to be a defaulter of the amount and liable under Section 201 [1] of the I.T Act or to make payment of interest leviable under Section 201 [1A] of the Act. The judgment relied upon by the learned counsel for the Revenue would not be applicable to the facts of the case on hands.

In the result, Tax Appeal is allowed. The judgment of the Income Tax Appellate Tribunal, Ahmedabad dated 4th October 2006 passed in ITA No. 1825 & 1826 for A.Y 2000-2001 and 2001-2002 is hereby *quashed* and set-aside.

[Akil Kureshi, J.]

[B.N Karia, J.]

Prakash