

itxa-1179-2013-group

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1179 OF 2013

The Director of Income Tax (Exemptions)	]	
Piramal Chambers, Parel	]	
Mumbai 400 012.	]..	Appellant.
v/s.		
Tata Institute of Social Science	]	
Sion Trombay Road, Deonar	]	
Mumbai 400 088.	]..	Respondent.

WITH
INCOME TAX APPEAL NO.1322 OF 2016
WITH
INCOME TAX APPEAL NO.1321 OF 2016

The Commissioner of Income Tax (Exemptions)	]	
6 th Floor, Piramal Chambers, Lalbug	]	
Mumbai 400 012.	]..	Appellant.
v/s.		
Tata Institute of Social Science	]	
Sion Trombay Road, Deonar	]	
Mumbai 400 088.	]..	Respondent.

Mr. Tejveer Singh, for the Appellant in ITXA Nos. 1322 of 2016 and 1321 of 2016.

Mr. A. R. Malhotra with Mr. N. A. Kazi, fo the Appellant in ITXA No.1179 of 2013.

Ms. Alisha Pinto, for the Respondent in all the Appeals.

CORAM: AKIL KURESHI &
M.S.SANKLECHA, JJ.

RESERVED ON : 4th MARCH, 2019.
PRONOUNCED ON : 26th MARCH, 2019.

JUDGMENT:- (Per M.S. Sanklecha,J.)

These three Appeals under Section 260-A of the Income Tax Act, 1961 (the Act), challenge the two orders of the Income Tax Appellate Tribunal (the Tribunal) dated 26th September, 2012 and 16th September, 2015. The impugned order dated 26th September, 2012 relates to Assessment Year 2007-08 being Income Tax Appeal No.1179 of 2013. The impugned order dated 16th September, 2015 is a common order of the Tribunal, relating to Assessment Years 2004-05 and 2006-07. Thus the two appeals being Income Tax Appeal No.1321 of 2016 and 1322 of 2016 are in respect of Assessment Year 2006-07 and 2004-05 respectively.

2 On 12th February, 2019, Income Tax Appeal No.1322 of 2016 relating to Assessment Year 2004-05 was on board for admission. The following questions of law were urged in the appeal for our consideration :-

“(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal justified in confirming the order of the CIT(A) and directing the AO to allow exemption u/s. 10(23C)(iiiab) of the Act without appreciating the fact that the assessee is not wholly or substantially financed by the Govt. in view of explanation to sub section (1) of section 14 of the Comptroller and Auditor General (Duties, Powers and Conditions of Services) Act, 1971 as the total Govt. grant during the year is less than 75% of the total expenditure of the assessee?

“(b) Whether on the facts and circumstances of the case, the Tribunal was correct in holding Assessment under Section 147 of the Act in law?”

3 At that time, it was pointed out to us that, identical question of law had been raised by the Revenue in Income Tax Appeal No.1321 of

2016 relating to Assessment Year 2006-07, arising out of the common impugned order dated 16th September, 2015, urging identical question of law for our consideration. We were also informed that an identical question as referred in (a) above on merits, was a subject matter of Income Tax Appeal No. 1179 of 2013 and admitted on 3rd April, 2013.

4 It was submitted on behalf of the respondent that the issue (a) raised herein above being the major issue in all the these appeals, would now stand concluded in view of amendment made to Section 10(23C) (iiiab) of the Act by an addition of Explanation thereto. This amendment has clarified / explained the expression “*substantially financed*” in Section 10(23C) (iiiab) of the Act and was brought into the Act by the Finance No.2 Act of 2014 w.e.f. 1st April. 2015. In the above view, on 12th February, 2019 as agreed by the parties, we passed an order, directing the listing of Income Tax Appeal No.1322 of 2016 along with Income Tax Appeal Nos. 1179 of 2013 and 1321 of 2016, involving same question on merits for final disposal. This as the controversy appeared to be within a very narrow compass.

5 On 4th March, 2019, the three Appeals as directed, came up for hearing. We first took up Income Tax Appeal Nos. 1321 of 2016 and 1322 of 2016 (Assessment Years 2004-05 and 2006-07) filed by the Revenue for consideration. As identical questions of law were already admitted (save time bar) in Income Tax Appeal No. 1179 of 2013, on 2nd April, 2013, we admitted both the appeals on the following identical substantial questions of law:-

“(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal justified in confirming the order of the

CIT(A) and directing the AO to allow exemption u/s. 10(23C) (iiiab) of the Act without appreciating the fact that the assessee is not wholly or substantially financed by the Govt. in view of explanation to sub section (1) of section 14 of the Comptroller and Auditor General (Duties, Powers and Conditions of Services) Act, 1971 as the total Govt. grant during the year is less than 75% of the total expenditure of the assessee?

(b) Whether on the facts and circumstances of the case, the Tribunal was correct in holding Assessment under Section 147 of the Act in law?"

6 It was an agreed between the parties that we immediately take up all the three appeals for final disposal. Therefore, we took up the three appeals for final disposal in chronological order i.e. relating to the year of the appeal in this Court:-

7 **Income Tax Appeal No. 1179 of 2013- (A.Y. 2007-08):-**

(i) This Appeal by the Revenue, was admitted on 2nd April, 2013 on the following substantial question of law:-

“(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal justified in confirming the order of the CIT(A) and directing the AO to allow exemption u/s. 10(23C) (iiiab) of the Act without appreciating the fact that the assessee is not wholly or substantially financed by the Govt. in view of explanation to sub section (1) of section 14 of the Comptroller and Auditor General (Duties, Powers and Conditions of Services) Act, 1971 as the total Govt. grant during the year is less than 75% of the total expenditure of the assessee?

(b) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in holding that A.O. erred in importing the provision of another legislation in deciding whether the Assessee is substantially financed or not when the provision of the Income Tax Act is silent on the issue?"

It would be noticed that question (b) herein above is a mere facet of/ submission urged in support of question (a). Therefore, both the questions are subsumed in question (a) above. Therefore, our consideration of question (a) would include the submissions urged as question(b).

(ii) Briefly, the facts leading this Appeal, are as under:-

- (a) Respondent is registered under the Societies Registration Act and Bombay Public Trust Act, 1966. It is also registered as a Trust under Section 12-A of the Act.
- (b) For the subject Assessment year, Respondent-Trust has filed its return of income, seeking exemption from tax under Section 10(23C)(iiiab) of the Act. The Assessing Officer called upon the Respondent to explain its claim for exemption under Section 10(23C)(iiiab) of the Act on the issue of being solely for educational purposes and being wholly or substantially financed by the Government. The Respondent in its reply, pointed out that it was solely for educational purposes and the grants from the Government is in excess of over 50% of the total expenditure incurred during year. Further, the grants received from the Government were also in excess of 50% of the total receipts of the respondent. Thus, on both the above yardsticks, the Respondent claimed to be substantially financed by the Government. Therefore, entitled to the benefit of Section 10(23C)(iiiab) of the Act.
- (c) However, the Assessing Officer while accepting the claim that the respondent was existing solely for educational purposes yet denied

the benefit of Section 10(23C)(iiiab) of the Act on the grounds of not being substantially financed by the Government. It held that the amount of Government grant of Rs.12.79 Crores as received is less than 75% of the total expenditure of Rs.16.87 Crores. The Assessing Officer applied the above measure of 75% by taking aid of / referring to Section 14 of the Controller Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 ("CAG Act" for short). Thus, holding that Respondent is not substantially financed by the Government. Therefore, denied the Respondent's claim to exemption under Section 10(23C)(iiiab) of the Act by order dated 24th December, 2009 of the Assessing Officer under Section 143(3) of the Act.

- (d) Being aggrieved with the above order dated 24th December, 2009 of Assessing Officer, the Respondent filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. By an order dated 4th January, 2011, the CIT(A) allowed the appeal of the Respondent on the issue of being substantially financed by the Government for purposes of Section 10(23C) (iiiab) of the Act. This conclusion was reached after holding that provisions of CAG Act will not be applicable to the Act in the absence of any reference to it. Besides, it held that the words 'substantially financed by the Government' was subject of consideration by the Karnataka High Court in the case of **CIT v/s. Indian Institute of Management, reported in 196 Taxman 276** which in turn relied upon CIT v/s. National Education Society (IT Appeal No.808 of 2009 unreported). In the above cases, a grant of approximately 37% from the Government out of the total receipts was held to

satisfy the meaning of the words '*substantially financed*' by the Government.

- (e) Being aggrieved with the order dated 4th January, 2012 of the CIT(A) on the above issue, the Revenue filed an appeal to the Tribunal. The impugned order of Tribunal records the fact that the Assessing Officer held that the Respondent was not an institution wholly or substantially financed by the Government by relying upon the meaning of the words '*substantially financed*' by the Government under Section 14(1) of the CAG Act. It held that, reliance upon the provisions of CAG Act, was not appropriate as for the purposes of the Act, the institutions had to be approved by the prescribed authority i.e. Commissioner of Income Tax or Director General of Income Tax before an exemption under Section 10(23C)(iiiab) of the Act can even be claimed. The impugned order further noted that reliance upon another legislation to negate the exemption under Section 10(23C)(iiiab) of the Act, is not permissible. It also noted that, the Karnataka High Court had in the case of National Education Society (supra) and Indian Institute of Management (supra) had taken a view that grant of 37% by the Government of the total receipts / revenue would mean that the institution is being substantially financed by the Government. In this case, the Tribunal noted that, the grant from the Government was approximately 56% of the total receipts. Therefore, much higher than the percentage yardstick / measure approved by the Karnataka High Court. It thus upheld the order of the CIT(A) and dismissed the Revenue's appeal.

(iii) Mr. Malhotra, in support of the Appeal, seeks that the substantial question of law be answered in favour of the Revenue and makes the following submissions :-

(a) In the absence of the words '*wholly or substantially financed by the Government*' being defined in the Act during relevant period, no fault can be found with the Revenue's resorting to the meaning of wholly or substantially financed provided in the CAG Act i.e. 75% of the total expenditure of the assessee; and

(b) The amendment made to Section 10(23C)(iiiab) of the Act by insertion of the explanation therein by Finance Act, 2014 w.e.f. 1st April, 2015 is only prospective. This is so as the legislation itself does not make it retrospective either by specifically stating that it is effective from an earlier date or the Explanation as introduced itself stating that it is for removal of doubts. Thus, it cannot be applied retrospectively for the subject Assessment Year 2007-08.

(iv) On the other hand, Mr. Naniwadekar, learned Counsel appearing for the Respondent in support of the impugned order, submits as under :-

(a) In the absence of words '*substantially financed by the Government*' being defined in the Act at the relevant time, one would have to adopt the general meaning and understanding of the words '*substantially*'. It is submitted that the normal meaning of the word '*substantial*' is ample/ large. This is how the words '*substantially financed*', has been understood by Karnataka High Court in National Education Society (supra) and Indian Institute of

Management (supra) while holding 37% of grant from the Government in context of total revenue was considered substantial. Further, as the Punjab and Haryana High Court in ***CIT v/s. Jat Education Society 383 ITR 355*** also held 44% of the total Revenue as grants from the Government would satisfy the test of substantially financed by the Government.

- (b) The absence of any definition of the words '*substantially financed*' in the Act will not permit the Revenue to import meaning given to the words '*substantially financed*' as provided in the CAG Act. This in the absence of any incorporation or reference to the CAG Act in the Act. It is to be note that, the Karnataka High Court in National Education Society (supra) had made reference to the Banking Regulation Act which provides that having more than 10% of the total capital, would mean to have substantial interest.
- (c) In fact, internal guidance of the meaning of the word '*substantial*' is found in the explanation to Section 40A(2) of the Act, having 20% voting power or 20% share in profits. This could be used as the benchmark meaning of the words '*substantial*'; and
- (d) In any case, after addition of Explanation to Section 10(23C)(iii ab) of the Act w.e.f. 1st April, 2015, the percentage of contribution by the Government as prescribed being 50% of the total receipts to qualify as '*substantially financed*' would relate back even to period prior to 1st April, 2015 i.e. the subject Assessment Year 2007-08.

- (v) We have considered the rival submissions. It is the Revenue's case before us that in the absence of the words '*substantially financed*' by the Government being defined in the Act, the Assessing Officer was entitled to invoke the meaning of the words '*substantially financed*' as found in the CAG Act. We find that there is no basis for invoking the meaning of '*substantially financed*' found in the CAG Act for the purposes of Section 10(23C)(iiiab) of the Act. First of all, the provisions of the CAG Act are neither incorporated nor cited in section 10(23C)(iiiab) or in any other provisions of the Act. The scope and the purpose of the two Acts i.e. CAG Act and the Act are entirely different. The CAG Act is in respect of Institutions receiving funds from the consolidated funds of India and which would be subject to the Audit of the Comptroller and Auditor General of India. It has no application to funds received by an Institution from the Government through the University Grant Commission. The words '*substantially financed*' in Section 10(23C)(iiiab) of the Act are used in the context of Government grants of finance to the educational institutions. Therefore, we notice that the scope and the ambit of the two Acts i.e. CAG Act and the Act are completely different and cannot even be remotely said to be in pari materia.. In fact, the Supreme Court in ***MSCO Pvt. Ltd., v/s. UOI 1985(1) SCC 51*** has observed/ held that it would be hazardous to interpret a word in accordance with its definition in another statute, when it is not dealing with a cognate subject. Therefore, reading the provisions of one Act into another when not in pari materia will lead to what the Courts has observed in MSCO Pvt. Ltd. (supra) to a new terror in construction while quoting with

approval Crais on Statute Law (6th Edition).

- (vi) One may look into the meaning given to particular words in a different statute provided the other Act is in *pari materia* with the statute being interpreted. The two Acts can be said to be in *pari materia* when they relate to the same person or thing or class of persons or things i.e. have the same object and operate in the same field. As the scope and the purpose of the CAG Act and the said Act are completely different, they cannot be said to be *pari materia* so as to permit importing the meaning given in the CAG Act to the said Act. In fact, in the absence of the words '*substantially financed*' being defined in the Act at the relevant time, different methods / modes were being adopted by the Authorities under the Act to determine the manner in which the words '*substantially financed*' have to be measured. It is to be noted that, the Karnataka High Court in National Education Society (*supra*) has observed that in the Banking Regulation Act, 1949 a person having more than 10% of the total subscribed capital, is a person who has substantial interest. However, that provision has not been invoked by the Assessing Officer. For that matter internal guidance to the meaning of the words '*substantial*' can be found in Section 40A (2) of the Act as person having more than 20% of voting power or 20% share in profits. Nevertheless, the Revenue has not resorted to any of the above provisions and have invoked the provisions of the CAG Act. This in our view is not permissible in the present facts.
- (vii) Prior to the Explanation to Section 10(23C)(iiiab) of the Act being introduced, the method employed by the Officers of the Revenue

was either to determine the percentage of grant received from the Government in the context of total receipts or to determine the grants received from the Government in the context of total expenditure. After 2014, the measure of the words '*substantially financed*' has to be found only by determining the grants received from the Government as a percentage of total receipts received by an institution.

- (viii) Therefore, the meaning of the words '*substantially financed*' in the CAG Act could never have been invoked to understand the meaning of the words '*substantially financed*' in Section 10(23C)(iiiab) of the Act. Thus, no fault can be found with the impugned order of the Tribunal ignoring the meaning of substantially financed by Government as given in the CAG Act.
- (ix) We note that, in the present proceedings, the Assessing Officer had found on facts that the Respondent had received in the previous year relevant to the subject Assessment Year grant from the Government which were 56% of the total receipts of the institution i.e. in excess of 50%. Besides, it was also found that the Institution received grants from the Government of Rs.12.79 crores out of the total expenditure of Rs.22.49 crores. This was undisputedly in excess of 50% but less than 75% of the total expenditure. Therefore, on both tests i.e. percentage of Government grant in context of total receipts was in excess of 50% and percentage of Government grant in the context of total expenditure was also in excess of 50%. Thus, the respondent satisfies the requirement now introduced by the explanation. The

object and purpose of an Explanation as held by the Supreme Court in ***S. Sundaram Pillai Vs. Pattabiraman, AIR 1985 (SC) 582*** is amongst other things to clarify any obscurity or vagueness in the main enactment. In fact, our attention was invited to the Explanatory Notes to the provisions of Finance (No.2) Act, 2014 by which the Explanation to Section 10(23C)(iiiab) of the Act was introduced as found in the Circular No.1 of 2015 dated 21st July, 2015 issued by the Central Board of Direct Taxes. In the above Circular, the *raison detre* to introduce the Explanation to Section 10(23C)(iiiab) of the Act was that in the absence of definition of the phrase '*substantially financed by the Government*' therein has led to litigation and varying decision of various judicial fora, leading to uncertainty in this regard. Thus, it is clear that the Explanation to Section 10(23C)(iiiab) of the Act was to clarify the position/meaning of the words '*substantially financed by the Government*'.

- (x) Thus, the vagueness attributable to the meaning of the words '*substantially financed*' is removed by the addition of the Explanation to Section 10(23C)(iiiab) of the Act read with Rule 2BBB of the Rule. The above Explanation states that grant from the Government should be in excess of the prescribed receipts in context of total receipts (including voluntary donations). Rule 2BBB of the Rules provides that the Government grant should be at 50% of the total receipts. This requirement, the respondent admittedly satisfies the test of substantially financed for the subject assessment year as the Assessing Officer records a finding of fact in his order and the same is not disputed before us.

Therefore, with effect from 1st April, 2015, there can be no dispute about what is meant by '*substantially financed*' by the Government in Section 10(23C)(iiiab) of the Act.

- (xi) However, the issue is whether the above Explanation which is introduced w.e.f. 1st April, 2015 could be read to be retrospective. Mr. Malhotra, learned Counsel for the Revenue contends that the Explanation as introduced does not state it is 'clarificatory' and/or '*for removal of doubts*'. Therefore, it is only prospective and it should not be given a retrospective effect. This view he submits is further strengthen by the fact that, it was made effective only from 1st April, 2015. The reason being that prior to the Explanation being introduced into the Act, the method of arriving at substantially financed could be different. In fact, it could be qua the total expenditure incurred by the institution or qua the total receipts received by the institution. Therefore, if the Explanation is to be read retrospectively, the orders of the Authorities under the Act would be required to measure the satisfaction of the words '*substantially financed*' in terms of an explanation i.e. qua total receipts and not qua total expenditure. Hence, for the purposes of this appeal, we proceed on the basis that the Explanation *per se* is not retrospective. Nevertheless, as held by the Supreme Court in ***State of Bihar Vs. S.K. Roy, AIR 1966 (SC) 1995*** that it is recognized principle of constitution that subsequent legislation may be looked at in order to see what is the proper interpretation to be put upon the earlier legislation, where the earlier Act is obscure or ambiguous or readily capable of more than one interpretation. The same principle would apply to an

amendment made to an Act to understand the meaning of an ambiguous provision, even when the amendment is not held to be retrospective. This has so been held by the Apex Court in *Thirui Menickan & Co. v/s. State of Tamil Nadu AIR 1977 SC 518*. In the above case, the Court held that an amendment to the Act which is not retrospective may yet be used as an exposition of the Parliamentary intent as contained in the Section even before its amendment. Thus, in the present facts, the same measure as has been clarified by the Explanation introduced by the amendment viz.- grant from Government is in excess of 50% of its total receipts, it is substantially financed by the Government could be taken as the exposition of the Parliamentary intent of the unamended Section. Thus, without holding the Explanation to Section 10(23C)(iiiab) of the Act, inserted into the Act w.e.f. 1st April, 2015, is retrospective, the same is being used as an aid in construing the ambiguous provision. Therefore, in the present facts the Revenue's appeal is required to be dismissed.

(xii) In the above view, the admitted substantial question of law is answered in the affirmative i.e. in favour of the respondent assessee and against the Revenue.

(xiii) Thus, the Revenue's appeal is dismissed.

8 Income Tax Appeal No.1321 of 2016 (A.Y. 2006-07):-

(i) This appeal was admitted today on the following two substantial questions of law, for our consideration:

“(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal justified in confirming the order of the

CIT(A) and directing the AO to allow exemption u/s. 10(23C) (iiiab) of the Act without appreciating the fact that the assessee is not wholly or substantially financed by the Govt. in view of explanation to sub section (1) of section 14 of the Comptroller and Auditor General (Duties, Powers and Conditions of Services) Act, 1971 as the total Govt. grant during the year is less than 75% of the total expenditure of the assessee?

(b) Whether on the facts and circumstances of the case, the Tribunal was correct in holding Assessment under Section 147 of the Act in law?"

(ii) **Re. Question (a):-**

- (a) It is an agreed position between the parties that, the question raised herein is identical to the question raised by the Revenue in Income Tax Appeal No.1179 of 2013 in respect of Assessment Year 2007-08. On facts and in law, there is no difference in this Assessment Year i.e. 2006-07 and that in the assessment year 2007-08 (Income Tax Appeal No.1179 of 2013). Therefore, there is no warrant to take a different view of this question from that taken by the us in Income Tax Appeal No.1179 of 2013, as discussed herein above.
- (b) Therefore, this question has to be answered in the affirmative i.e. in favour of the Respondent-Assessee and against the Appellant-Revenue.

(iii) **Re. Question (b):-**

- (a) Mr. Naniwadekar, learned Counsel for the Respondent- Assessee very fairly states that the impugned order of the Tribunal, holding

that the re-opening of an assessment for the Assessment Year 2006-07 is bad in law, is not correct. It is fairly conceded that the, reliance on the earlier order of the Tribunal for Assessment Year 2003-04 in case of the Respondent-Assessee was not correct as the re-opening of the assessment for Assessment Year 2003-04 had taken place in respect of the assessment which was completed under Section 143(3) of the Act. This is not so in this case as the earlier assessment for Assessment Year 2006-07 was completed under Section 143(1) of the Act.

- (b) In the above view, question (b) is answered in the negative i.e. in favour of the Appellant-Revenue and against the Respondent-Assessee.
- (c) Thus, Revenue's Appeal is partly allowed.

9 **Income Tax Appeal No.1322 of 2016 (A.Y. 2004-05):-**

- (i) This appeal was admitted by us today on the following two substantial questions of law:-

“(a) Whether on the facts and in the circumstances of the case and in law, the Tribunal justified in confirming the order of the CIT(A) and directing the AO to allow exemption u/s. 10(23C) (iiiab) of the Act without appreciating the fact that the assessee is not wholly or substantially financed by the Govt. in view of explanation to sub section (1) of section 14 of the Comptroller and Auditor General (Duties, Powers and Conditions of Services) Act, 1971 as the total Govt. grant during the year is less than 75% of the total expenditure of the assessee?”

“(b) Whether on the facts and circumstances of the case, the Tribunal was correct in holding Assessment under Section 147 of the Act in law?”

- (ii) It is an agreed position between the parties that question (a) has to be answered in the negative i.e. in favour of the Respondent and question (b) in the affirmative i.e. in favour of the Respondent. This for the reasons mentioned by us while dealing with Income Tax Appeal No.1321 of 2016 (A.Y. 2006-07) herein above.
- (iii) Thus, the Revenue's Appeal is partly allowed.

10 For the above reasons, Income Tax Appeal No.1179 of 2013 is dismissed. Income Tax Appeal Nos, 1322 and 1321 of 2016 are partly allowed.

(M.S.SANKLECHA,J.)

(AKIL KURESHI,J.)