

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.07.2016

<i>Date of Reserving the Order</i>	<i>Date of Pronouncing the Order</i>
13.06.2016	05.07.2016

Coram

The Hon'ble Mr. Justice **T.S. SIVAGNANAM****W.P.Nos.23341 & 23342 of 2015**

Prathyusha Educational Trust,
D-1, (Ground Floor),
Thiru.Vi.Ka.Industrial Estate,
Guindy, Chennai – 32.
Rep., by its Managing Trustee,
Shri.P.Raja Rao

... Petitioner in both W.Ps.,

Vs

- 1.The Assistant Commissioner of Income-Tax
Central Circle -2(3),
No.46, M.G.Road,
Nungambakkam, Chennai – 600 034.
- 2.The Joint Commissioner of Income Tax,
Central Range -2,
No.46, M.G.Road,
Nungambakkam, Chennai – 600 034.
- 3.The Commissioner of Income Tax,
Central-2, No.46, M.G.Road,
Nungambakkam, Chennai – 600 034.

4.The Commissioner of Income Tax (Appeals)-19,
No.46, M.G.Road,
Nungambakkam, Chennai – 600 034.

5.The Director General of Income Tax
(Investigation),
No.46, M.G.Road,
Nungambakkam, Chennai – 600 034.

... Respondents in both W.Ps.,

Common Prayer :- These Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus to call for the records of the first respondent in PAN: AAATP5521H and quash the impugned Corrigendum, dated 22.01.2015, issued to assessment order passed under Section 143(3) r.w.s. 153A of the Act for the Assessment Years 2010-11 and 2011-12, and direct the fourth respondent not to pass an order on appeal based on the impugned corrigendum for the assessment year 2010-11 and 2011-12.

For petitioner .. Mr.P.S.Raman Senior counsel for
M/s.Subbaraya Aiyar Padmanabhan &
Ramamani

For Respondents .. Mr.T.Pramod Kumar Chopda

COMMON ORDER

The petitioner, a public Charitable Trust running educational institutions, is registered under Section 12AA of the Income Tax Act (Act), by an order dated 22.10.2002. The petitioner had also obtained

approval under Section 10(23C)(vi) of the Act, vide notification dated 30.04.2008. A search under Section 132 of the Act was conducted by the Investigation Wing of the respondent Department at the premises of the petitioner on 02.07.2010. Pursuant to which, a notice dated 17.10.2011, was issued under Section 153A of the Act, proposing to assess the total income for the assessment years 2010-11 and 2011-12. The petitioner was called upon to file their correct return of their total income in respect of those two years within a period of 15 days from the date of service of notice. The petitioner had filed their return of income on 09.11.2011, declaring the total income as "NIL". Subsequently, notices under Section 143(2) and 142(1) of the Act, were issued for the assessment years 2010-11, and 2011-12.

2. The first respondent passed the assessment orders dated 28.03.2013, for the assessment year 2010-11 under Section 143(3) read with Section 153A of the Act and for the assessment year 2011-12 under Section 143(3) of the Act. The first respondent came to the conclusion that amounts were diverted to interested parties and hence, the petitioner becomes ineligible for exemption under Section 11/10(23C) of the Act. The petitioner has preferred appeals as against the assessment orders before the fourth respondent on 22.04.2013

and subsequently, filed stay application before the Assessing Officer/first respondent under Section 220(6) of the Act on 26.04.2013. The prayer for stay was rejected by the first respondent by order dated 07.05.2013. The petitioner filed an application for stay before the second respondent dated 13.05.2013. The fifth respondent issued a show cause notice to the petitioner dated 16.07.2013, calling upon them to show cause as to why the approval granted under Section 10(23C)(vi) of the Act should not be withdrawn on the ground that during the course of search and seizure operations, it came to light that the petitioner exists only for the purpose of profit and not solely for educational purposes and the contribution received are not voluntary, thus violating the provisions of the Act justifying withdrawal of the approval granted to the petitioner under Section 10(23C) of the Act. It was stated an amount of Rs.1,57,42,700/- has been collected from the students in cash at the time of admission, without issuing any receipt and without entering in the regular books of accounts thereby setting apart the funds for the purposes other than the objects of the Trust and thus, the petitioner collected capitation fee for giving admissions under the management quota, which is a clear violation of law. The fifth respondent opined that the capitation fee are to be classified as business income falling under the ambit of Section 28(iv),

thereby dis-entitling them for exemption. The sworn statement recorded from the Managing Trustee and relevant officers of the Trust during the course of search were relied on to state that it has been admitted that the amounts so collected, was collected in cash for which, no receipts were issued and no entries were made in the books of accounts, even after two years; the Audit reports did not reflect the affairs of the Trust and the huge amounts collected in cash without giving any receipts have been diverted outside the trust's books of accounts and control. Further, it was stated that even accounted portion of the collection of the Trust were seen to have been not utilised as per the objects of the Trust. Therefore, the fifth respondent stated that the petitioner Trust has collected the capitation fee and is thus carrying on a profit making activity contrary to the objects for which it was established and approval under Section 10(23C)(vi) of the Act was granted.

3. The petitioner submitted their reply on 19.08.2013, stating that the total fees received in the form of advance fees, etc., have been entered in the books of accounts and they stated that they never collected capitation fee and never carried on any other activity other than educational activity. Placing reliance on certain decisions of the

Hon'ble Supreme Court and this Court, it was claimed that the collection of capitation fee or higher amount of fees cannot be a basis to cancel the registration under Section 12AA or withdraw the approval granted under Section 10(23C)(vi) of the Act. The details pertaining to the assessment orders passed for the relevant years and the pendency of the appeal before the Appellate Authority were set out in the reply, that apart, various factual issues were pointed out.

4. The fifth respondent after affording an opportunity of hearing, which appears to have prolonged for more than one year, passed the order dated 18.11.2014, withdrawing the approval granted and holding that the petitioner would not be eligible for exemption under Section 10(23C)(vi) of the Act.

5. Earlier by notice dated 28.10.2014, the petitioner was called upon to show cause as to why penalty should not be levied under Section 221(1) of the Act. The petitioner submitted their reply on 19.11.2014, wherein among other things, it was stated that no order making an assessment shall be made by the Assessing Officer without giving effect to the provisions of Section 10, unless the Assessing Officer has intimated the Central Government or the prescribed authority, the contravention of the provisions of clause (23C) of

Section 10 and only after such approval granted has been withdrawn, he can proceed to pass an order, denying the benefit of exemption on the ground of contravention and without complying with these mandatory provision, the Assessing Authority gets no jurisdiction to re-open the assessment made. On 01.12.2014, the petitioner filed a petition under Section 154 of the Act before the fifth respondent, to rectify the order passed by the fifth respondent, dated 18.11.2014, holding that the petitioner will not be eligible for exemption under Section 10(23C)(vi), of the Act. In the mean time, a notice was issued to the petitioner under Section 226(3) of the Act treating the petitioner to be an assessee in default in respect of the tax payable for the assessment years 2010-11 and 2011-12.

6. The petitioner filed Writ Petitions in W.P.Nos.13376 & 13377 of 2014, challenging these notices on the ground that they have filed appeals before the Commissioner of Income Tax (Appeals)-II against the assessment orders, dated 28.03.2013 and 22.04.2013 respectively and also filed stay petition before the Assessing Officer on 24.04.2013 and the Assessing Officer by order dated 07.05.2013, directed the petitioner to pay a sum of Rs.1,11,39,991/- and Rs.2,44,51,454/- for both the assessment years to avail the benefit of stay of recovery.

7. During the course of hearing of the Writ Petitions, the learned Standing counsel appearing for the respondents submitted that the Department has lifted the order of attachment and the second respondent has directed the stay petition to be listed for hearing shortly and the petitioner will be heard in the matter and decision will be taken in accordance with law.

8. Taking note of such submission, this Court by order dated 19.12.2014, directed the second respondent to afford an opportunity of personal hearing to the petitioner and pass appropriate orders and till such orders are passed by the second respondent, the notices under Section 226(3) to remain stayed. The fifth respondent by order dated 06.02.2015, dismissed the rectification petition filed by the petitioner under Section 154 of the Act, dated 01.12.2014, holding that there is no mistake apparent on the record in the order cancelling the exemption granted. The fifth respondent has assigned reasons as to why he has come to such conclusion. While, the matters stood thus by corrigendum, dated 22.01.2015, the first respondent stated that while passing the assessment order for the assessment year 2010-11 in the preface column (10) "the section and sub-section under which the assessment is made", it was erroneously mentioned as Section

143(3) read with Section 153A of the Act instead of Section 144 of the Act, as the assessment was actually made under Section 144 of the Act, as brought out in para 4 of the assessment year. Therefore, the first respondent stated that the error, which is apparent from the record is corrected and the assessment order for the assessment year 2010-11, dated 28.03.2013, shall read as an order passed under Section 144 of the Act. Similar corrigendum was issued for the assessment year 2011-12. The petitioner has filed these Writ Petitions challenging the said corrigendums.

9. Mr.P.S.Raman, learned Senior counsel appearing for M/s.Subbaraya Aiyar Padmanabhan & Ramamani, learned counsel for the petitioner submitted that the first proviso to Section 143(3) of the Act makes it clear that no order making an assessment shall be made by the Assessing Officer, without giving effect to the provisions of Section 10(23C)(vi), unless the Assessing Officer has intimated the Central Government or the prescribed authority, the contravention of the provisions of the said Section and only after such approval granted has been withdrawn, he can proceed to pass an order denying the benefit of the exemption on the ground of contravention. However, in the cases on hand, the Assessing Officer without intimating the Central

Government/prescribed authority about the contravention of the provisions of Section 10(23C)(vi) has completed the assessments under Section 143(3) read with Section 153A on 28.03.2013. It is further submitted that this objection was raised by the petitioner in the Writ Petitions field by them challenging the notices under Section 226(3) of the Act, after which the first respondent/Assessing Officer has issued the impugned corrigendum, which is erroneous. It is submitted that the provisions of Section 144 of the Act, is applicable only if the petitioner fails to comply with the conditions mentioned in clauses (a)(b) & (c) of sub-section (1) of Section 144 and only then, the Assessing Officer shall make the assessment of the total income or loss to the best of his judgment based on the materials covered and determine the sum payable by the assessee on the basis of such assessment.

10. After elaborately referring to the assessment orders, it is submitted that the orders do not indicate that the assessment was made under Section 144 of the Act, as stated in the impugned corrigendum. It is further submitted that the assessment was passed consequent to a search and based on material seized during the search and the original Assessing Officer did not deem it fit to make the

assessment to the best of his judgment in the absence of any material and therefore, the impugned corrigendum issued by the present Assessing officer after two years is an after thought.

11. Mr.T.Pramod Kumar Chopda, learned Standing counsel appearing for the respondent Department submitted that the petitioner without availing the alternate remedy provided under the statute, cannot approach this Court, challenging the corrigendums by way of these Writ Petitions and the petitioner is entitled to file a separate appeal or raise additional grounds in the pending appeals over the orders of assessment and the present attempt of the petitioner is only to drag on the proceedings and to prevent the Commissioner (Appeals) from completing the appeals, which are pending since 2013. It is further submitted that the assessment orders are admittedly, best judgment assessments under Section 144 of the Act and the findings recorded in both the orders more particularly in paragraph 4 therein clearly show that the assessments were made under Section 144 of the Act and therefore, the Assessing Officer was well within his jurisdiction to issue the impugned corrigendum.

12. To substantiate such contention, the learned counsel submitted that statutory notices and summons under Section 131 of

the Act were issued to the petitioner, but there was no effective response and in this regard for the assessment years 2010-11, notice dated 17.10.2011 was issued under Section 153A, notice dated 17.09.2012, under Section 143(2), notice dated 01.11.2012, under Section 142(1), notice dated 12.02.2013, under Section 143(2), summons issued under Section 131, dated 04.03.2013, along with notice under Section 142(1), dated 12.02.2013. For the assessment year, 2011-12, notice under Section 143(2), was issued on 17.09.2012, which returned as "unserved" with remark "left without intimation" and notice was again sent through ITI for enquiry and one set of notices was sent to the college address at Tiruvallur on 26.09.2012. The ITI served the notice on 27.09.2012, at the changed address at Guindy and the notice dated 17.09.2012, was received by one Mr.N.Srinivasan. That apart, notices were issued under Section 142(1) of the Act, dated 01.11.2012, and notice under Section 143(2) of the Act, dated 12.02.2013. It is further submitted that by way of affording a final opportunity, letter dated 22.03.2013, was sent to the petitioner, which was common for both the assessment years which was received by Mr.V.R.K.S.Prasuala on behalf of the petitioner Trust on 25.03.2013. It is further submitted that apart from the above, the authorised representative of the petitioner was called upon to furnish

the details in support of the return filed by them, however, on 13.03.2013, the authorised representative filed a letter withdrawing themselves from representing the petitioner. Subsequently, the General Manager/Finance appeared on 14.03.2013, and thereafter, the Chairman of the Trust appeared on 19.03.2013 and agreed to furnish the details called for by 21.03.2013. However, there was no further response. In spite of it, once again, a letter was sent on 22.03.2013, with a view to give a final opportunity. In spite of receipt of the said letter, the petitioner failed to avail the opportunity provided. Hence, in view of the non-cooperation by the petitioner in finalising the assessment proceedings, the assessment order was passed on best judgment basis. Since an error occurred in the preamble portion of the assessment orders and the error being apparent on the face of the record, corrigendum was issued within the period of limitation prescribed under Section 154(7) of the Act. The learned counsel referred to Section 292B of the Act and submitted that this defect will not invalidate the order of assessments which have been passed. Further, it is submitted that the petitioner has filed petition before the Commissioner of Income Tax (Appeals), in which they can canvass all grounds and it is also open to the petitioner to file a separate appeal.

13. In reply, the learned Senior counsel for the petitioner submitted that if it is the contention of the Department that the corrigendum was issued invoking power under Section 154 of the Act, then the petitioner ought to have been issued a notice under Section 154(3) of the Act and then opportunity of being heard ought to have been given.

14. In reply to this submission, the learned Standing counsel for the Department that sub-section (3) of Section 154 of the Act would stand attracted only if an amendment, which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the assessee and in the instant case, the mistake which has been rectified is in the preamble portion of the order and there is no other change in the assessment orders.

15. The learned Standing counsel has circulated the original files duly flagged to substantiate the contention that the petitioner did not co-operate in the assessment proceedings and the assessment orders are indeed best of judgment assessments.

16. I have elaborately heard the learned counsels appearing for the parties and carefully perused the materials placed on record as well as have gone through the original files circulated by the learned Standing counsel for the respondents.

17. The issue involved in these Writ Petitions lie in a very narrow compass. The orders impugned are corrigendums issued by the first respondent effecting corrections in the assessment orders dated 28.03.2013 for both the years only with regard to the provisions of law under which the assessments were completed.

18. It is not in dispute that as against the orders of assessment dated 28.03.2013, for both the years i.e., 2010-11 and 2011-12, the petitioner has filed appeals before the Commissioner of Income Tax (Appeals)-II/fourth respondent on 22.04.2013 and the appeals are pending. While the appeals were pending, the petitioner moved for stay before the first respondent/Assessing Officer by application, dated 26.04.2013, who passed a conditional order directing the petitioner to pay a portion of the tax, which admittedly, was not complied with by the petitioner, but the petitioner chose to file a separate stay application before the second respondent/JCIT on 15.05.2013. While

the matter stood thus, the notices were issued to the petitioner under Section 226(3), which the petitioner had challenged before this Court by filing Writ Petitions in W.P.Nos.13376 & 13377 of 2014, which were disposed of by common order dated 19.12.2014, directing the stay petitions to be heard and staying the operation of notices issued under Section 226(3), till orders are passed on the stay petition. It cannot be disputed that the impugned corrigendums have been issued after about two years, after the assessments were completed and orders passed.

19. In this factual scenario, it has to be seen as to whether this Court should exercise its extra ordinary jurisdiction under Article 226 of the Constitution of India and examine as to whether the first respondent was justified in issuing the impugned corrigendums thereby examining as to whether the assessment orders were passed under Section 144 of the Act or Section 143(3) read with Section 153 of the Act, as to whether such a corrigendum could have been issued without notice to the petitioner under sub-section (3) of Section 154 of the Act; whether the Assessing Officer while completing the assessment by orders dated 28.03.2013, failed to follow the procedure stated in the first proviso to section 143(3) of the Act.

20. Yet another contention, which was raised by the learned Senior counsel is as to whether the Assessing Officer without giving effect to the provisions of Section 10(23)(vi), unless he has intimated the Central Government or the prescribed authority, the contravention of the provision of Section 10(23)(vi) and only after such approval granted, has been withdrawn, he could have proceeded to deny the benefit of exemption. This point is canvassed by the petitioner in the appeals, which are pending before the Commissioner of Income Tax (Appeals)-II, which were filed on 22.04.2013. That apart, this issue was canvassed by the petitioner while submitting their reply, dated 19.11.2014, to the notice issued under Section 221(1), dated 28.10.2014. Thus, while testing the correctness of the assessment orders dated 28.03.2013, the Commissioner of Income Tax (Appeals), would have to necessarily render a finding on this issue. Therefore, this Court refrains from considering the same, as it may prejudice the rights of parties in the pending appeals. In such circumstances, it would be necessary to examine as to whether the petitioner should be permitted to canvass the effect of the impugned corrigendums on the assessment orders. For doing so, it has to be seen as to whether the assessment orders are best judgment assessment or otherwise.

21. To decide this issue, the Court would be required to examine the manner in which the Assessing Officer proceeded with the assessments. The respondents have pitched their case on the manner in which the assessee had acted pursuant to the various notices and summons issued to them and would state that they did not co-operate in finalising the assessment proceedings and therefore, Assessing Officer passed the assessment orders on best judgment basis. This exercise need not be done by this Court in these Writ Petitions for the simple reason that the assessment orders are put to challenge before the Appellate Authority, where all grounds could be canvassed by the petitioner/appellant.

22. It was argued by the learned Senior counsel for the petitioner that the corrigendum was issued only after the petitioner had pointed out in the earlier Writ Petitions that the Assessing Officer was not justified in withdrawing the benefit of exemption without having intimated the Central Government or the prescribed authority of the alleged contravention.

23. The learned Standing counsel for the respondents had referred to Section 154 of the Act which deals with rectification of

mistake and it is submitted that the rectification has been done within the limitation prescribed under sub-section 7 of Section 154.

24. Therefore it has to be seen whether it was a mere wrong quoting of the provision of law in the assessment order or otherwise. While on this point, it would be beneficial to take note of the decision in ***Adaikappa Chettiar (VRCRM) vs. CIT***, reported in **(1970) 78 ITR 285 (Mad)**, and wherein it was held that the exercise of a power of rectification would be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it would be nugatory. It cannot be disputed that the power conferred under Section 154 is a power to correct mistakes and not a power of review. Therefore, invoking the said power, the Assessing Officer cannot revise or review his earlier order. It is important to note that the power of rectification of mistakes under Section 154 is with a view to rectifying any mistake apparent from the record and it is not error apparent on the face of the record and it has been held that the expression "any mistake apparent from the record" has a wider content than the expression "error apparent on the face of record" occurring in Order 47 Rule 1 CPC. In ***ITO vs. Bombay Dyeing & Mfg., Co., Ltd.***, reported in **1968 (68) ITR 760 (SC)**, the Supreme Court observed that the

former covers all mistakes discoverable from a perusal of the whole evidence in the case, or from an omission to apply certain provisions of the Act to the facts of the case, or a mistake due to an overlooking of certain aspects of the case, or a mistake arising on account of a wrong construction of any provisions of the Act.

25. The Hon'ble Supreme Court in the case of ***Sankappa (S) vs. ITO*** reported in ***(1968) 68 ITR 706 (SC)*** observed that what the Assessing Officer does, is to correct errors in or rectify the orders of assessment made by him and orders making such corrections or rectification or, therefore, clearly part of the proceedings for assessment.

26. The first respondent has issued the impugned corrigendum in exercise of powers under Section 154 of the Act and it has to be seen whether notice is required to be issued to the petitioner in terms of sub-section (3) of Section 154 of the Act. The stand taken by the first respondent is that such notice is required to be issued only if the rectification has the effect of enhancing an assessment or reducing the refund. Further, in terms of Section 246(1)(c), and 246(2)(d), opportunity has been provided and ordered under Section 154 of the Act.

27. In the light of the above, this Court is of the view that it would be in fitness of things and appropriate for the petitioner to pursue the matter before the Appellate Authority. Apart from the discussion in the preceding paragraphs, the issue as to whether the assessment orders are made on best of judgment basis or otherwise is a factual issue to be gone into by examining the assessment orders and the background facts and this has to be done by the petitioner before the appellate authority in the pending appeals. The effect of the rectification by way of the impugned corrigendum is equally an issue relatable and touching upon whether the assessment orders were passed on best judgment basis. Therefore, the petitioner should pursue their challenge to the impugned corrigendums before the Commissioner of Income Tax (Appeals)-II, before whom the appeals filed against the assessment orders are pending, since April 2013.

28. In the light of the above, the Writ Petitions are dismissed and the petitioner is permitted to challenge the correctness of the impugned corrigendums by raising additional grounds before the Commissioner of Income Tax (Appeals) in the appeal petitions which were filed on 22.04.2013, against the assessment orders dated 28.03.2013, for the years 2010-11 and 2011-12 and the

Commissioner of Income Tax (Appeals) is directed to consider the additional grounds raised along with the other grounds already raised in the appeals and after hearing the parties, dispose of the appeals as expeditiously as possible preferably, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petitions are closed.

05.07.2016

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Index :Yes/No

Internet :Yes/No

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T.S.SIVAGNANAM, J.
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Pre-Delivery O r d e r in
W.P.Nos.23341 & 23342 of 2015

05.07.2016