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

INCOME TAX APPEAL NO.1498 OF 2012

Director of Income Tax (Exemption) ..Appellant

-*Versus*-

Bommanji Dinshaw Petit ..Respondent

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Mr. A. R. Malhotra for the Appellant.
Mr. P. J. Pardiwalla, Senior Advocate, a/w Mr. M.A.Saldanha i/b. Vigil Juris for the Respondent.

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CORAM: S.C. DHARMADHIKARI
AND
A.A. SAYED, JJ.

DATE :- 27th NOVEMBER, 2014

P.C.:

This Appeal challenges the order passed by the Income Tax Appellate Tribunal dated 20th March, 2012 in Income Tax Appeal No.3259/Mum/2011. The assessment year is 2007-08.

2] The Appeal before the Tribunal was filed by the Revenue against the order dated 15th November, 2010 of the Commissioner of Income Tax (Appeals).

3] The case of the Revenue is that the Assessee filed a return of income on 31st October, 2007 declaring losses of Rs.9,96,83,553/- after claiming exemption under section 11 of the Income Tax Act. The revised return was filed on 31st March, 2008 on declaring loss of Rs.9,73,45,636/-. The return was processed under section 143(1) of the Income Tax Act. The case was selected for scrutiny and notices were issued. In the Assessment Order, it has been noted that Assessee is a trust registered under the Bombay Public Trust Act, 1950 by the Charity Commissioner of Maharashtra State. It is also registered under section 12A of the Income Tax Act. The objects of the trust remained unchanged. The scrutiny revealed that the corpus donation and its application, application of capital nature and claim of depreciation thereon and deficit are the issues which have cropped up and they will have the impact on the income of the Trust. The assessment was finalized on 20th September, 2009 making a change or variation in the income returned on account of ;

(a) donation of Rs.5,66,68,898/- received from M/s. Shapoorji Pallonji Trust and in kind in the form of old age home, lift, furniture, EPBX System and kitchenware and cash of Rs.73,803/- towards corpus fund;

(b) disallowance of depreciation of Rs.1.16,26,771/. The deficit of Rs.9,96,83,553/- which was reduced to Rs.3,13,87,884/- was not allowed to be carried forward.

4] The Assessee did not claim exemption under section 10(23C)(via) in the return where it claimed exemption under section 11. Therefore, for want of this exemption in the return of income the Assessing Officer was not empowered to entertain that claim. The same was, therefore, rightly disallowed in the assessment order.

5] Against the order of the Assessing Officer, an Appeal was preferred before the Commissioner and the Commissioner by his order noted above held that Assessee Trust is qualified for exemption under section 10(23C)(via) as per approval dated 7th April, 2009 and which was received during the assessment proceedings. The Assessing Officer, therefore, was not justified in denying the exemption under this section. Since the first ground was decided in favour of the Assessee, the Commissioner did not deal with the other grounds. His order allowing the Appeal partly has been confirmed by the Tribunal. Hence the Revenue is in Appeal under section 260A of the Income Tax Act.

6] Mr. Malhotra appearing in support of this Appeal submits that this Appeal raises substantial questions of law. The questions have been formulated at page 9 to 11 of the paper book.

7] He submits that the Tribunal ignored the ratio in the Hon'ble Supreme Courts decision rendered in the case of ***M/s. Goetze (India) Ltd. V/s. Commissioner of Income Tax reported in (2006) 284 ITR 323***. He also submits that the depreciation should not have been allowed as it was resulting in double deduction. In so far as the reasons assigned by the Tribunal in para 7 of the order under challenge, Mr. Malhotra submits that the ingredients of section 10(23C)(via) having not been satisfied, the Tribunal sould not have gone ahead and granted the relief. Any order under this provision received during the course of the assessment will not alter the legal position. Mr. Malhotra invited our attention to section 10(23C) and submitted that the said provision clearly points towards the intention of the legislature inasmuch as the income received by any person on behalf of any hospital or other institution for the reception and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation, existing solely for philanthropic purposes and not for purposes of profit other than those mentioned in sub-clause (iiiac) or (iiiae) and which may be approved by the prescribed authority is alone exempt. Mr. Malhotra also relies upon the wording of section 12A and section 11 to urge that in this case the Assessee has not qualified itself and for the deduction that it claimed. Mr.

Malhotra strenuously submitted that it is income derived from property held for charitable or religious purposes and which is the subject matter of section 11 whereas in terms of section 12 and particularly under section 12A the requirement or condition for applicability of section 11 and section 10(23C) has been set out. Sub-section (1) of section 12A has been relied upon to urge that section 11 will not apply in relation to the income of any trust or institution unless the conditions stipulated therein have been satisfied. In the present case, the said conditions have not been fulfilled and that is why the Assessing Officer was right in his conclusion. Hence, the Appeal deserves admission.

8] Mr. Pardiwalla, on the other hand, brought to our notice the fact that the computation of income and as submitted before the Assessing Officer itself indicated that the hospital management had made applications from time to time for approval by the prescribed authority in the Form 56D to exempt the institution under section 10(23C) of the Income Tax Act. The applications were made from 1st April, 1998 upto 31st March, 2007. That is from assessment year 1999-2000 to assessment year 2007-2008. The Trust had received the Notification / order dated 23rd August, 2004 for first year, namely, 1999-2000 only. A copy was attached of this order and it was submitted though the office of Director

General of Income Tax (Exemptions) Calcutta vide their letter dated 29th October, 2000 sent the summary of hospital case for assessment year 2000-2001 and 2001-2002 for notification to Central Board of Direct Taxes, no notification was received for these assessing officers from the board till the date of submission of the computation of income. The Trust is also not aware of the status of the applications made in Form 56 for assessment years 2002-2003 to 2007-2008. It is without prejudice to this right and contention and in the alternative that the Assessee claimed exemption under section 11, 12 and 13. They pointed out as to how the objects being solely for the purpose of reception and treatment of persons suffering from illness or mental defectiveness or for the reception and treatment of persons covered by clause (via) of section 10 (23C) that the Tribunal rightly relied upon the order dated 31st March, 2009. If that is how it relied upon and granted the relief claimed, then, this is not a fit case for interference in our further appellate jurisdiction and the Appeal does not raise any substantial question of law. Consequently, it deserves to be dismissed.

9] On the ground of double deduction, Mr. Pardiwalla would submit that the point or issue is covered by several judgments including of this Court, therefore, the same also do not raise any substantial question of law. The Appeal deserves to be dismissed.

10] There being no dispute about the facts as taken from the paper book, what we find is that the Tribunal as also the Commissioner held that the objects of the Trust remained unchanged. The Trust is registered with the Charity Commissioner of Mumbai and also registered under section 12A of the Act. The certificate under section 80G of the Income Tax Act has also been granted by the Director of Income Tax (Exemptions) Mumbai. The Tribunal noted that the Commissioner has granted the relief and partially. In considering the rival contentions and arising from the order of the Commissioner, all that the Tribunal has relied upon is the order which has been passed under section 10(23C)(via) dated 31st March, 2009 that was exempting the hospital from assessment year 2000-2001 and onwards until withdrawn. A similar order was there in favour of the Trust dated 23rd August, 2004 for the assessment year 1999-2000. The Tribunal further found that this approval was duly intimated to the Assessing Officer by the Assessee's authorised representative by a letter dated 7th April, 2009. It is in these circumstances that the Tribunal proceeded to grant the relief. We do not think that any substantial question of law arises once the Tribunal took into account the peculiar facts. The facts peculiar to the Assessee would reveal that the Asessee had throughout maintained that it had obtained the approval from the competent authority exempting it under the relevant legal provision. The application was also made in that behalf. This led the Tribunal to hold that compliance with the legal provision was made by producing before the Assessing Officer the relevant order. During the pendency of the assessment proceedings by a communication the order which was dated 31st March, 2009 it came to be forwarded. In such circumstances, any larger question or wider controversy need not be addressed and decided. The Tribunal has rightly relied upon this order in upholding the conclusion of the Commissioner of Income Tax (Appeals).

11] In relation to the argument of double depreciation as well the issue is concluded in favour of the Assessee and against the Revenue by several judgments and there is nothing like a double benefit. Once the asset has been held and upon its acquisition used for the purpose and object of the Trust, then, in the subsequent or successive years, the claim for depreciation can be lodged and maintained is the conclusion reached in several decisions including of this Court. When the Tribunal applies them in the facts and circumstances of this case, then, on the other two questions as well, we do not think that the Appeal deserves to be entertained.

12] The argument of Mr. Malhotra is based on the grounds as set out in the memo of Appeal by the Revenue before the Tribunal. The argument of Mr. Malhotra is that ground No.2 at page 38 of the grounds of Appeal and ground No.3 were specifically raised before the Tribunal but the Tribunal has omitted them from consideration. This is also a submission proceeding on the footing that even if during the course of proceedings, an order under section 10(23C)(via) was received and forwarded, yet, in relation to a donation received from M/s. Shapoorji Pallonji Trust and that being for an old age home purpose, the same would not qualify or fall within the purview of the above legal provisions. Ground Nos.2 and 3 read as under:-

> "2. On the facts and in the circumstances of the case, and in law, the learned Commissioner of Income Tax (Appeals) erred in law and facts by not appreciating the fact that the Assessee was wrongly enjoying double deduction u/s 11(1)(d) for the receipts of donation (in kind) towards corpus fund of Rs.5,66,68,898/- comprising of old age home building, lift, furniture, kitchenware, etc. received from Shapoorji Pallonji Trust the cost of which was NIL to the assessee trust, and claiming the value of th same assets as expenditure for purchase and application of income, when no such income was taken into account and as such double deduction as claimed is contrary to the legal principles as laid down in the decision of Hon'ble Supreme Court in the case of Escorts Ltd. V/s. Union of India 199 ITR 43.
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> 3. On the facts and in the circumstances of the case, and in law, the Learned Commissioner of Income Tax (Appeals) erred in law and facts by allowing exemption under section 10(23C)(via), when the assessee is not satisfying the

> conditions laid down in section 10(23C)(via), as far as income received by gift of Rs.5,66,68,898/- is concerned which is for old age home purpose, which is not covered under the activity covered under section 10(23C)(via)."

14] What we have found from perusal of the order passed by the Commissioner and equally by the Tribunal is that the conclusion of both essentially rests on the receipt of the order by the Assessee during the course of the assessment proceedings and referable to section 10(23C)(via) of the Income Tax Act. We do not see as to how the Revenue can make a complaint only by reading out ground Nos.2 and 3 from the memo of Appeal, copy of which is annexed at page 38 of the paper book.

15] In a decision rendered by the Hon'ble Supreme Court reported in ***AIR 1985 SC 973 in the case of Daman Singh and others V/s. State of Punjab and others,*** the Hon'ble Supreme Court has commented and rather strongly on the tendency of parties to urge before the Higher Court that a particular ground in the Petition or memo of Appeal was pressed but not considered by the subordinate court or Tribunal. In relation to that the Hon'ble Supreme Court observed as under:-

> *The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and counsel to raise innumerable grounds in the petitions and memorandum*

of appeal etc., but, later, confine themselves, in the course of argument to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in enquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not?"

16] A perusal thereof reveals that the tendency of parties to complain to the higher Court on such issue is strongly deprecated. It has been pointed out by the Hon'ble Supreme Court and repeatedly that several grounds are set out in memos of Appeals and Petitions. It is eventually a counsel's discretion about which of that should be pressed and which ought not. If the counsel in his discretion chooses not to press certain grounds, then, the complaint of this nature cannot be made subsequently and in a higher Court. Even if such grounds are being pressed during the course of argument before the subordinate or lower Appellate Court, yet, it is not for the parties to complain to the higher Court straightway about such omission but to place material that the omission of such ground and which was raised in the memo was indeed pointed out to the subordinate or lower Appellate Court by making an application for clarification and rectification and that explanation was either decided or dealt with erroneously. In the absence of such material, complaints made to higher Court cannot be entertained.

17] Apart therefrom, what we find is that if such explanations have to be accepted that would be going behind the contents of the order made by the competent authority under section 10(23C)(via) of the Income Tax Act. We are surprised how the Revenue can doubt the correctness or dispute the contents of the order made by the Central Board of Direct Taxes or its delegate. If that authority is satisfied with regard to the essential requirements or ingredients of section 10(23C)(via), then, it is hardly open for the Revenue to complain. As a result of the above discussion, the Appeal does not raise any substantial question of law. The appeal fails and it is accordingly dismissed. No costs.

(A. A. SAYED, J.) **(S.C. DHARMADHIKARI, J.)**

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