

A.F.R.**Judgment Reserved on 06.12.2017****Judgment Delivered on 09.02.2018****Court No. - 35****Case :- INCOME TAX APPEAL No. - 49 of 2014****Appellant :- Commissioner Of Income Tax****Respondent :- Shri Balaji Samaj Vikas Samiti****Counsel for Appellant :- Dhananjay Awasthi, S.S.C. I.T, Shubham Agrawal****Counsel for Respondent :- Suyash Agarwal****Hon'ble Bharati Sapru, J.****Hon'ble Saumitra Dayal Singh, J.****(Per S.D. Singh)**

This appeal has been filed by the revenue under Section 260-A of the Act, 1961 (hereinafter referred to as the Act) against the order of the Income Tax Appellate Tribunal, Delhi Bench dated 26.7.2013, in ITA No. 94/Del/2012, arising from the order passed by the Commissioner of Income Tax, Meerut dated 23.11.2011 under Section 12-AA (1) (b) (ii) of the Act. It had been admitted on the following questions of law:

"1. Whether the ITAT erred in law in giving relief to the assessee society by misinterpreting the provision and language of Section 2 (15) where the language used is "advancement" of any other object of "General Public Utility" shall not be a charitable purpose, if it involves carrying on of any activity in the nature of trade, commerce or business, which is the case here?

2. Whether the ITAT erred in law in directing the C.I.T. to register the assessee society U/s 12-AA when the assessee does not fall under the provisions of Section 2(15) which uses the language "any activity of rendering any service in relation to any trade, commerce or business for a cess or fee" which is the case here where the assessee is providing services with a profit motive?

3. Whether the ITAT erred in law in curbing the legislative powers provided to the C.I.T. U/s 12-AA regarding satisfaction that the activities are genuine before granting of registration?

4. Whether the ITAT has justified in directing the C.I.T. to register the society U/s 12-AA and not considering the facts that the assessee's sole activity was in the nature of trade, commerce or business which does not make its activities as advancement of any activities of general public utility and, therefore, it was ineligible for registration in terms of the first proviso of Section 2(15) of I.T. Act."

While, the Commissioner of Income Tax, Meerut had rejected the assessee's application for grant of registration under Section 12-AA (1) (b) (ii) of the Act, the Tribunal allowed the assessee's appeal and directed the CIT to register the assessee under Section 12-AA of the Act.

The assessee claims itself to be a registered society formed with the object to establish and run Health Club, Arogya Kendra, to organize emergency relief centers etc. It also claims to work to promote moral values, eradication of child labour and dowry etc. The assessee filed an application under Section 12-AA of the Act, on 17.5.2010 for grant of registration. At that time, admittedly the assessee was engaged mainly in preparing and supplying mid-day-meals to the students at primary schools in various villages, against a contract awarded by the Basik Shiksha Adhikari, Meerut.

It appears, under the contract thus awarded, the assessee was authorized to prepare and supply meals from the material/ingredients supplied by the Government

of U.P. The assessee society received food preparation and distribution charges, on per child, per month basis from the Government of U.P.

It is in the above factual background that the assessee claimed itself to have been engaged in an activity for “advancement of any other object of general public utility”, under Section 2(15) of the Act being a “charitable purpose”.

The Commissioner of Income Tax considered the aforesaid facts. Also, he referred to the audited accounts of the assessee for the period up to 31.3.2011 and held that the assessee had not engaged in a charitable activity. He held:

“As the society is getting preparation and distribution charges per child per month from the state govt., the activity in this field cannot be treated as charitable in nature. In fact, this is a contractual work and leans towards business activity. In such a case, even if the contention of the applicant that it is engaged in the object of the general public utility is accepted, the same is in the nature of trade, commerce or business as admittedly consideration is received for providing mid-day-meal.”

On such reasoning, the Commissioner concluded that the assessee was not engaged in any charitable work. He therefore, rejected the assessee's application under Section 12-AA of the Act.

Upon appeal to the Tribunal, the Tribunal has, relied upon the second proviso to Section 2(15) of the Act and held, the assessee was entitled to registration under Section 12-AA of the Act.

Sri Shubham Agarwal, learned counsel for the revenue submits that the Tribunal has in the first place misread the order of the CIT in so far as the Tribunal has assumed that the CIT had found that the activity of supply of mid-day-meals was an activity of general public utility. No finding was recorded by the CIT to that effect. Therefore, the Tribunal has erred in making an assumption as to the same. Also, the Tribunal having itself not recorded any finding that the activity of the assessee was charitable, it could not have directed the CIT to grant registration to the assessee.

Second, Sri Shubham Agarwal, learned counsel for the revenue submits that in fact the CIT had reasoned that the activity of the assessee was purely contractual. According to him, it was therefore for the assessee to lead such evidence and establish that it was actually engaged in an activity of 'general public utility" and not an activity covered under the first proviso to Section 2(15) of the Act. According to the learned counsel for the revenue, no such evidence was led by the assessee.

Third, he submits according to the Commissioner the assessee was discharging purely commercial obligations in pursuance of the contract awarded to it and it could not claim benefit of exemption that may have been available to a person/assessee/such as the State authorities engaged in providing free of cost mid-day-meals at village schools. While the State was not charging any money for

such an activity, the assessee was charging consideration to prepare and distribute such mid-day-meals.

He therefore submits, the Commissioner had rightly found such work to be a business activity that fell within the description of trade, commerce or business appearing in the first proviso of Section 2(15) of the Act.

Then, referring to the second proviso to Section 2(15) of the Act, learned counsel for the revenue submits it does not create a right in favour of the assessee to obtain registration under Section 12-AA of the Act. According to him, there is no presumption in favour of the assessee pursuing a charitable purpose because its receipts were below Rs. 10,00,000/-. According to him, despite that proviso, the burden continues to rest on the assessee to establish that he was engaged in an activity of “general public utility”.

Responding to the above Sri Suyash Agarwal, learned counsel for the assessee submits that the CIT had got misdirected in his approach in not looking beyond the first inference drawn by him as to the nature of the activity being contractual. The further inference drawn by the Commissioner that the assessee was engaged in a business activity is erroneous. Merely because a contract had been awarded to supply and distribute mid-day-meals, it could not be said that the assessee was engaged in a business activity or that it had profit motive.

In that regard, he submits that the assessee is a

Non-Government-Organization (NGO) and that a bare perusal of the income and expenditure account of the assessee as on 31.3.2011 extracted in the order of the CIT itself disclosed that it was not running for profit. Therefore, according to him the assessee was pursuing a “charitable purpose” in so far as it was working for the “advancement of an object of general public utility” being to address the minimum nutritional requirements of the students attending village schools without any profit motive.

In any case, he would submit, the activity of the assessee is inseparably linked to and purely consequential to the welfare measure adopted by the State Government to provide mid-day-meals to students at village schools who may otherwise be malnourished or who may otherwise dropout from school. The policy of the State Government being wholly for the advancement of an object of general public utility, the assessee who had been engaged to give effect to and to carry out such policy, was clearly working for a charitable purpose.

Then, in the alternative, learned counsel for the assessee submits that by virtue of the clear language of the second proviso to Section 2(15) of the Act, even if it is assumed that the assessee was engaged in an activity of trade, commerce or business for consideration, yet, in view of the fact that his total receipts were below Rs. 10,00,000/-, it was clearly entitled to registration under

Section 12-AA of the Act.

Having considered the argument so made by learned counsel for the parties, we first take note of the provision of Section 2(15) of the Act. It reads as below:-

“2(15) ‘Charitable purpose’ includes relief of the poor, education, medical relief, [preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest,] and the advancement of any other object of general public utility.

Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or applications, or retention, of the income from such activity.”

(emphasis supplied)

Later, by Finance Act, 2010 second proviso to Section 2(15) of the Act was inserted with retrospective effect from 1.4.2009. It reads as below:-

“Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lakh rupees or less in the previous year;”

(emphasis supplied)

Also, by Finance Act, 2012, sub-Section (8) was introduced to Section 13 of the Act with retrospective effect from 1.4.2009. It reads as below:-

“Section 11 not to apply in certain cases.

13 (1).....

(2).....

(3).....

(4).....

(5).....

(6).....

(7).....

(8). *Nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the previous year of the person in receipt thereof if the provisions of the first proviso to clause 15 of section 2 become applicable in the case of such person in the said previous year.”*

The first proviso to Section 2(15) of the Act applies to an assessee who may claim to be engaged in 'advancement of any other object of general public utility'. In respect of such an assessee it has been provided, if the activity, in respect of which it claims exemption be in the nature of trade, commerce or business or any other activity rendering any service in relation of any trade, commerce or business for consideration, such activity shall not constitute an activity for charitable purpose. However, the second proviso to Section 2(15) of the Act (introduced by Finance Act, 2010 with effect from 1.4.2009), created an exception to the first proviso. Thus, the first proviso to Section 2(15) of the Act would not apply in the event the receipt from activities referred to above did not exceed Rs. 10,00,000/- in the previous year.

While agreeing with the view taken by the Bombay High Court in the case of ***D.I.T. (Exemption) Vs. North***

Indian Association (supra), we have, in ITA No. 134 of 2013 **ACIT Vs. Agra Development Authority**, decided on 7.12.2017 held as below:-

“Upon a co-joint reading of both the provisos to Section 2(15) of the Act, the legislative intent appears not to allow exemption to an assessee who may engage in an activity mentioned in the first proviso to Section 2(15) of the Act, if his receipts for a previous year exceed Rs. 10,00,000/-. At the same time the benefit is not to be denied to such an assessee if his receipts in the previous year do not exceed Rs. 10,00,000/-.

The activities of any assessee are conducted on a day-to-day basis and accounts are made up at the year end. Therefore, at the relevant time i.e. during the previous year relevant to an assessment year, it may not always be predicted or determined or known as to whether the receipts (from activities have been specified in the first proviso to Section 2(15) of the Act) exceed the statutory limit of Rs. 10,00,000/- set in the second proviso to Section 2(15) of the Act.

Then Section 13(8) of the Act had also been incorporated with retrospective effect from 1.4.2009 i.e. the date of introduction of the first proviso to Section 2(15) of the Act. Thus notwithstanding a pre-existing registration certificate under Section 12A of the Act, if as a fact, it were found during the assessment proceedings of an assessee (holding registration under Section 12A or Section 12AA of the Act), that its receipts arising from the activity (falling under the first proviso to Section 2(15) of the Act), exceeded the limit of Rs. 10 lacs in the relevant previous year, such receipts would not be eligible for exclusion from the total income of that assessee under Section 11 or 12 of the Act.

The scheme of the Act has to be understood that the benefit of exemption otherwise available under sections 11 and 12 of the Act has to be denied to the assessee in question if his receipts arising from activities falling under the first proviso to Section 2(15) exceed Rs. 10 lacs, but not otherwise.

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The Act therefore neither contemplates an inviolable

right to claim exemption solely on the strength of a registration certificate nor does the Act appear to contemplate that in case of an opinion being formed by the Commissioner that an assessee is engaged in an activity specified in the first proviso to section 2(15) of the Act, he must necessarily seek to cancel the registration granted by him earlier. In fact, the Act carves out a middle path by allowing the registration to stand but it's benefit to be deprived in assessment proceedings in certain specified circumstances.”

Coming to the activity of the assessee in this case it had been found by the Commissioner, because the assessee had been paid preparation and distribution charges per child, per month, by the State Government, under a contract, therefore the activity of the assessee could not be treated as charitable in nature.

That being the finding of the Commissioner, the Tribunal was not right in observing from the above, it is evident that the learned CIT himself has stated that supplying of mid-day meals can be accepted as an object of general public utility.

However, as to the nature of activity of the assessee, the Tribunal itself observed as under:-

“It is clarified by the learned counsel that the only activity carried on by the assessee during the year under consideration was for preparation of mid-day meals and is supply to the primary schools in the villages as per the direction of the government. Therefore, the kitchen expenses and salary expenses were for the preparation of mid-day meals and transportation expenses were for supply of such mid-day meals to the various primary schools. The only other expenditure was telephone charges at Rs. 12,833/- and office rent at Rs. 14,400/- which are around Rs. 1,000/- per month which is necessary to

supervise the activity of preparation and supply of mid-day meals.” In view of the above, we are of the opinion that the activity of the assessee falls within the ambit of object of general public utility which is also accepted by the learned CIT himself in paragraph 4 of his order reproduced above by us.”

The Tribunal has, upon examination of the assessee's income & expenditure account found: (i) the total receipts (from the activity conducted by the assessee) were less than Rs. 10,00,000/-. Then, more importantly the Tribunal found (ii) the activity of the assessee involved preparation of mid-day-meals and it's supply to primary schools in villages as directed by the State Government; the assessee incurred kitchen expenses; salary expenses and; transportation expenses. Other than that, the assessee incurred nominal office expenses & telephone charges. Total excess of income over expenditure have been mentioned by the Commissioner at Rs. 2,432/- only. The Tribunal then concluded that the activity of the assessee was one of general public utility.

Learned counsel for the revenue does not dispute the correctness of the aforesaid findings of the Tribunal. No material had been brought on record to doubt the correctness of this finding of the Tribunal.

Merely because the State had itself not been able to cook and supply cooked food by way of mid-day-meals at it's schools and further because it out-sourced that part of the work, against consideration, it cannot be said that it

transformed the activity into one in the nature of trade, commerce or business etc. Execution of a contract between two parties, in these facts cannot be decisive whether the activity itself was one purely in the nature of trade, commerce or business. What was more important is to examine whether assessee had engaged in an activity that was inseparably linked to and performed in continuation of the charitable scheme of the government.

The fact that some money had been paid by the State to the assessee was only a necessary expense at the hands of the State. Looking at the nature of expenses met by the assessee one cannot escape the conclusion that similar expenses would have been incurred by the State, had it performed that work itself or through its own agencies.

Thus, at the hands of the assessee, the payments received were utilized to defray the expenses met to perform the task of cooking and supplying the meals as directed by the State government. It is also not the case of the revenue that the assessee was in any manner free to utilize either the materials supplied to it or food cooked by it, as per its own wish/discretion. The assessee appears to have acted merely as an agent of the State.

Therefore, on the basis of findings recorded by the Tribunal and the material examined by the Commissioner it would be wrong to conclude that because there existed a contract between the assessee & the government

therefore the assessee was not pursuing a “charitable purpose”. On the other hand the activity performed by the assessee clearly appears to be inseparably linked to the 'charitable purpose' of providing mid-day meals at village schools. Also, admittedly, the total receipts of the assessee were below the limit of Rs. 10,00,000/- as stipulated under the second proviso to Section 2(15) of the Act.

In that view of the matter, the Tribunal has rightly concluded that the restriction created by the first proviso to Section 2(15) of the Act did not operate against the assessee and therefore the activity of the assessee, even though it may have involved an activity in the nature of trade, commerce or business, etc., it would fall within the ambit of general public utility and therefore be a charitable purpose under Section 2(15) of the Act.

Accordingly, we answer question nos. 1, 2 & 4 raised in this appeal thus: In view of the fact the assessee was engaged solely to implement the welfare scheme of the state government to provide mid-day-meals to students at its various village schools, it was rightly held to be engaged in an activity of general public utility. Alternatively, if it be assumed that in that process the assessee engaged in an activity in the nature of trade, commerce or business, etc, then, because the receipts from such activity were below Rs. 10,00,000/-, the assessee was still entitled to registration under Section

12AA(1)(b)(ii) of the Act.

Question no.3 as framed does not arise in this appeal.

The appeal is accordingly **dismissed**. No order as to costs.

Order Date :- 9.02.2018

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