

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.644/Coch/2019 : Asst.Year 2010-2011

ITA No.645/Coch/2019 : Asst.Year 2011-2012

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SA No.98/Coch/2019 : Asst. Year 2010-2011

SA No.99/Coch/2019 : Asst. Year 2011-2012

M/s.Shalom Charitable Ministries of India, Shalom Residential Public School, Shalom Nagar, Kosathara Chitur, Palakkad-678 101. PAN : AADTS6647Q.	Vs.	The Asst.Commissioner of Income-tax, Circle 1 Palakkad.
(Appellant)		(Respondent)

Appellant by : Sri.Shivadas Chettoor, FCA

Respondent by : Sri.Sudhanshu Shekhar Jha, CIT-DR

Date of Hearing : 05.03.2020	Date of Pronouncement : 05.03.2020
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ORDER

Per George George K, JM :

These appeals at the instance of the assessee are directed against two orders of the CIT(A), both dated 09.08.2019. The relevant assessment years are 2010-2011 and 2011-2012. The assessee has also filed stay applications seeking to stay the recovery of outstanding tax arrears.

2. Since common issue is raised in these appeals, they were heard together and are being disposed of this consolidated order.

3. The solitary issue that was argued, is whether the CIT(A) is justified in confirming the A.O.'s action in denying the benefit of claim of deduction u/s 11 of the I.T.Act.

4. The brief facts of the case are as follows :

The assessee is a trust claiming exemption u/s 11 of the I.T.Act. For the assessment years 2010-2011 and 2011-2012, the assessments were completed denying the claim of exemption u/s 11 of the I.T.Act. The reasoning of the Assessing Officer to deny the claim of exemption was that the assessee was engaged in micro finance activities, wherein it was charging exorbitant interest from its beneficiaries and there was no charitable activities involved in micro finance activities. Accordingly, the income claimed as exempt u/s 11 of the I.T.Act was assessed as business income.

5. Aggrieved by the order passed by the Assessing Officer for assessment years 2010-2011 and 2011-2012, the assessee preferred appeals to the first appellate authority. The CIT(A) dismissed the appeals of the assessee and affirmed the view taken by the Assessing Officer. The CIT(A) in doing so, noted the order of the Tribunal in assessee's own case for assessment years 2007-2008 and 2009-2010 in ITA o.79 & 80/Coch/2017 (order dated 25.04.2018).

6. Aggrieved by the orders of the CIT(A), the assessee has filed these appeals before the Tribunal. The learned Counsel for the assessee fairly conceded that the issue in question is covered against the assessee by the order of the Tribunal for assessment year 2007-2008 and 2009-2010 (supra). The learned Departmental Representative present was duly heard.

7. We have heard the rival submissions and perused the material on record. The claim of exemption u/s 11 of the I.T.Act was denied by the Tribunal in assessee's own case for assessment year 2007-2008 and 2009-2010 (supra). The Tribunal in the above case had held that the assessee's activities of micro finance was not charitable in nature and was not entitled to the claim of benefit u/s 11 of the I.T.Act. The relevant finding of the Tribunal in assessee's own case for assessment year 2007-2008 and 2009-2010 reads as follow:-

"8. We have heard the rival submissions and perused the material on record. Sec. 11 of the Act stipulates that the income from property held for charitable or religious purpose shall not be included in the total income of the previous year of the person in receipt of the income to be given effect in the manner as specified therein. The term 'charitable purpose' has not been defined under the statute; but for the inclusive nature of the term as specified under s. 2(15) of the Act, which as existed before the amendment is as follows :

'Sec. 2(15): "Charitable purpose" includes relief of the poor, education, medical relief and the advancement of any other object of general public utility.'

As per Finance Act, 2008, the said provision was amended adding a 'proviso' w.e.f. 1st April, 2009 as follows:

"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 application or retention of the income from such activity."

The AO has taken a stand that by virtue of the amendment as above, the assessee is not entitled to exemption u/s.11 of the Act.

8.1 The Id. AR submitted that, the idea and understanding of the AO with regard to the scope of amendment to sec.2(15) is thoroughly wrong and misconceived. There is no trade or business in the activities pursued by the assessee in running of micro

finance business and will not take it outside the purview of charity and hence, that the "proviso" added to sec.2(15) of the Act, is not attracted to the case in hand. He also submitted that the statute, as it stood earlier, had clarified the charitable purpose mentioned in sec.2(15) of the Act, had clarified the charitable purpose mentioned in s. 2(15) by the words "not involving the carrying on of any activity for profit". By virtue of the existence of these clarifying words, if there was any element of profit it was enough liable to be reckoned as charitable purpose right from the inception of the Act in 1961 till 1st April, 1984, when the words "not involving the carrying on of any activity for profit" were deleted. Thus the contention is that after 1st April, 1984, there is no allergy to profit and if the profit feeds charity, it stands cleared for exemption under s. 11 of the Act.

8.2 To analyse the scope and object of the amendment, we have gone through the "Budget Speech" of the Minister for Finance in the Finance Bill 2008, reported in (298 ITR (St.) 33 at page 65 :

"180. 'Charitable purpose' includes relief of the poor, education, medical relief and any other object of general public utility. These activities are tax exempt, as they should be. However, some entities carrying on regular trade, commerce or business or providing services in relation to any trade, commerce or business and earning incomes have sought to claim that their purposes would also fall under 'charitable purpose'. Obviously, this was not the intention of Parliament and hence I propose to amend the law to exclude the aforesaid cases. Genuine charitable organizations will not in any way be affected" (Emphasis supplied)."

8.3 The learned counsel points out that, the amendment was brought about as a measure of rationalization and simplification, streamlining the definition of charitable purpose and not as a measure of taxation. It is also stated that the concept of charity in India is wider, simultaneously adding that, by virtue of the amendment, the position that existed prior to 1st Feb., 1984 has been brought back and that is all. This however will not tilt the balance in any manner in the case of the assessee so as to take the activities outside the charitable purpose, particularly in view of the fact that micro finance business will not constitute any trade or business. According to the Id. AR, to perform charity, income is inevitable and contended that the activities being pursued by the assessee may constitute a trade or business, if it is not applied for the purposes of charity. Contrary to this, the Id. DR submitted that though the object of the assessee is to carry on charitable activities, but it does not carry those charitable activities, and it was only carrying on micro finance business in a commercial manner, which cannot be construed as charitable activity. In other

words, it was contended by the Id. DR that the assessee carried on activities in a business oriented manner, it will definitely come within the fourth limb of the amended sec.2(15) of the Act, where the prohibition of activity in the nature of trade, commerce or business for any activity of rendering service or any other consideration, irrespective of the nature of the use or application or retention of the income of such activity is specified and hence, not entitled to any exemption.

8.4 To analyse the activities carried on by the assessee, we have to go through the nature of activities pursued by the assessee and perusal of that activities carried on by the assessee, cannot be oust the involvement of "trade, commerce or business" or "any service in connection with trade, commerce or business" as contemplated under the statute. Further, we note that there is substantial variation in the statutory position as it existed earlier to 1st April, 2009, where the assessee has been given exemption under section 11 of the Act and the position available after amendment to section 2(15) of the Act, brought into effect from 1st April, 2009. Yet another important aspect to be noted in this context is that, after the amendment by incorporating proviso to section 2(15), the 4th limb as to the advancement of "any other object of general public utility" will no longer remain as charitable purpose, if it involves carrying on of:

(a) any activity in the nature of trade, commerce or business,

(b) any activity of rendering any service in relation to any trade, commerce or business for a cess or a fee or any other consideration, irrespective of the nature of use or application or retention of the income from such activity.

8.5 The first limb of exclusion from charitable purpose under cl. (a) will be attracted, if the activity pursued by the institution involves any trade, commerce or business. But the situation contemplated under the second limb [cl. (b)] stands entirely on a different pedestal, with regard to the service in relation to the trade, commerce or business mentioned therein. To put it more clear, when the matter comes to the service in relation to the trade, commerce or business, it has to be examined whether the words "any trade, commerce or business" as they appear in the second limb of cl. (b) are in connection with the service referred to the trade, commerce or business pursued by the institutions to which the service is given by the assessee. If the said words are actually in respect of the trade, commerce or business of the assessee itself, the said clause [second limb of the stipulation under cl. (b)] is rather otiose. Since the activity of the assessee involving any trade, commerce or business, is already excluded from the charitable purpose by virtue of the first limb [cl. (a)]

itself, there is no necessity to stipulate further, by way of cl. (b), adding the words "or any activity of rendering any service in relation to any trade, commerce or business.". As it stands so, giving a purposive interpretation to the statute, it may have to be read and understood that the second limb of exclusion under cl. (b) in relation to the service rendered by the assessee, the terms "any trade, commerce or business" refers to the trade, commerce or business pursued by the recipient to whom the service is rendered and in such circumstances, the activities carried on by the assessee cannot be considered as charitable activities.

8.6 *The activities carried on by the assessee cannot be considered as activities of medical relief or education or relief of the poor. It is true that the activities carried on by the assessee take care of the poor people also. But those activities cannot be classified under any of the specific activities of relief of the poor; education or medical relief. The correct way to express the nature of the activities carried on by the assessee is to say that the assessee is carrying on 'advancement of any other object of general public utility'. When that is the case, the assessee is hit by the proviso given under section 2(15). The proviso reads that 'advancement of any other object of general public utility' shall not be a charitable purpose, if it involves carrying on 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 consideration, irrespective of the application of the money. Therefore, the case of the assessee is hit by proviso to section 2(15) and the assessee is not entitled for the benefit of section 11 for that part of income generated in the hands of the assessee from running its micro finance business. Alternatively, one has to look into section 11(4A). Sub-section (4A) provides that exemption shall not apply in relation to any income of a trust or an institution, being profits and gains of business, unless the business is incidental to the attainment of the objectives of the assessee and separate books of account are maintained by such trust or institution in respect of such business. In the present case, there is no dispute on the fact that the assessee is carrying on the business of micro finance. The assessee is maintaining separate accounts for the above business activities. But, the crucial question is whether running of micro finance is a business incidental to the attainment of the objectives of the trust or not. By any stretch of imagination, it is not possible to hold that the business of micro finance is incidental to the abovestated objectives of the assessee-trust. "Incidental" means offshoot of the main activities; inherent by-product of principal activities. Activities to compliment and support the main objectives are not in the nature of incidental to the business. They are supporting*

activities, at the maximum. The genesis of incidental activities must be from the principal activities themselves. There cannot be one source for the principal activities and another source for incidental activities. In the present case, even if activities of the assessee were stated to be relief of poor, it was not possible to conclude that running of business in the form of micro finance is incidental to carrying on of main objective of the assessee-trust and it is the main business of the assessee. Therefore, the assessee is not protected by the provision stated in section 11(4A), either.

8.7 In the present case, from the details given in the assessment order, it is seen that the assessee was charging interest @ 29% per annum from its clients. The assessee admitted that they were taking loan from commercial banks at an interest rate below 15% per annum for disbursing these loans. Therefore, the difference between these rates was 14% which is very substantial. As per the Trust Deed, the main object of the assessee is shown as providing finance to the poor. If that is the real object, they would have provided loans at interest rate below bank rates or by taking a nominal margin on the money they borrowed from banks. But it is seen that they charged interest rate of 29% per annum which is 14% above the rate at which they have borrowed from the banks. In Kerala there is a specific law which is called as "The Kerala Money Lenders Act, 1958 (Act 35 of 1958)" to provide for the regulation and control of the business of money lenders in the State of Kerala. In this Act the maximum amount of interest which can be charged on lending money is prescribed. The rate is prescribed in section 7 of the said act which is as under:

"7. Interest and charges allowed to money lenders – No money lender shall charge interest on any loan at a rate exceeding 2% above the maximum rate of interest charged by commercial banks on loans granted by them."

8.8 For the previous year relevant to the assessment year 2007-08 the rate of interest as per section 7 of the Kerala Money Lenders Act cannot exceed more than 18%. However, in the present case the assessee was charging 29% interest which is far above the rate prescribed by the law i.e. The Kerala Money Lenders Act. This shows that the assessee is in the business of lending at 29% per annum to the poor, which is not as envisaged in the assessee-Trusts's objects. By collecting interest at such a higher rate the assessee has deviated from its objective of doing charity, especially in view of the fact that the difference of interest over deposits and disbursement in cases of banks and non banking financial companies is less than 10%. As such the micro finance activity conducted by the assessee is strictly commercial in

nature and with profit motive. The assessee had even collected penal interest from their defaulter which clearly shows that the trust was not even considerate with the poor loanees and was purely acting just as any money lender. From the above the activity of the assessee is business in nature and there is no element of charity involved in the activities of the assessee and it is purely commercial. In view of this, the action of the lower authorities in denying exemption u/s. 11 of the Act is confirmed.

8.9 The Ld. AR submitted that the Income Tax Officer does not have the power to sit in judgment over the decision of his superior that is the Commissioner of Income-tax who found the objects of the Trust as charitable in nature. It was submitted that the Income Tax Officer did not give notice to deny the exemption u/s. 11 of the Act. According to the Ld. AR the status of the assessee was fixed as 'Trust' whereas there is no such status under the Income Tax Act. Further the Ld. AR made an argument that the assessee was already granted approval under section 12AA of the Act after considering the object clause of the assessee-Trust. As such granting of exemption u/s. 11 is automatic and it cannot be disturbed. However, we find that the assessee was availing loans from commercial banks below the prime lending rate and charging interest at the rate of 29% per annum to its members. In addition, the assessee was also charging penal interest from the defaulters which shows that the assessee-Trust was not even considerate with the poor borrowers and the assessee-Trust is nothing but doing lending business and there is no element of charity in its activities. As such we do not find any infirmity in the order of the lower authorities and the same is confirmed on this issue.

8.9.1 In the present case, contrary to the findings in the assessment order, the Ld. AR submitted that the assessee has borrowed funds for advancing loans to the public at interest of 12% per annum from the Banks. Later, the assessee lent that amount to the public at average rate of 29%. It means that even there is a gap of 17% between borrowing and lending the amount to the public. The assessee claimed it as a charitable activity by placing reliance on the report of the sub-committee of the Central Board of Directors of Reserve Bank of India to study issues and concerns in the MFI sector(Malegam Committee Report). For the purpose of determining appropriate margin cap, the Committee examined the financials for the year ended 31st march 2010 of large MFIs and small MFIs as under:

a) for the larger MFIs the effective interest rate calculated on the mean of the outstanding loan portfolio as at 31st March, 2009 and

31st march, 2010 ranged between 31.02% and 50.53% with an average of 36.79% for the smaller MFIs the average was 28.73%.

8.9.2 According to the Ld. AR, it was recommended by the sub-committee to charge interest from the public at 24% per annum since there was administrative expenditure incurred by the micro finance institutions. Even going by the Malegam Committee Report of the RBI, the interest charged by the assessee is 29% which is very high. Hence, the activity carried on by the assessee cannot be considered as charitable so as to grant exemption u/s. 11 of the Act.

8.9.3 The Ld. AR relied on various judgments of Tribunals and Supreme Court. The Ld AR relied on the decision of the ITAT, Visakhapatnam in the case of Spandana (Rural & Urban Development Organisation) vs. ACIT in ITA No. 364/Vizag/2009 dated 17/02/2019 which is related to grant of approval u/s. 12AA of the Act. The Tribunal considered the micro finance activities as charitable activities as the assessee was charging interest at 15% per annum. In the judgment of the ITAT, Delhi Benches in the case of Disha India Micro Credit vs. CIT in ITA No. 1374/Del/2010 dated 28/01/2011, the issue was related to approval u/s. 12AA of the Act and not with regard to granting of exemption u/s. 11 of the Act while passing assessment order u/s. 143(3) of the Act. The Ld. AR also relied on the decision of the ITAT, Bangalore Bench in the case of Janalakshmi Social Services vs. DIT(Exemptions), 33 SOT 197 which is decided against the assessee. In the judgments of the Supreme court in the cases of Thiagarajar Charities vs. ACIT (225 ITR 1010) and ACIT vs. Thanthi Trust (239 ITR 502), the cases are not relating to micro finance activities. Similar is the position with the decision of the ITAT, Chennai Bench in the case of ACIT vs. Jeppiar Educational Trust in ITA Nos. 1333, 1334, 1591 to 1595/Mds/2010 dated 15/06/2011 and decision of the ITAT, Kolkata Bench in the case of Sreema Mahila Samity vs. DCIT dated 13/10/2017. In view of this, we do not find any infirmity in the order of the CIT(A) and confirm the same. Thus the above ground of appeals taken by the assessee is rejected for both the assessment years."

8. Since the co-ordinate Bench of the Tribunal in assessee's own case held that the micro finance conducted by the assessee is not a charitable activity, for identical facts, these appeals filed by the assessee are rejected.

9. Since we have disposed of the appeals filed by the assessee, the Stay Applications filed by the assessee become infructuous and the same are dismissed as such.

10. In the result, the appeals as well as stay applications filed by the assessee are dismissed.

Order pronounced on this 05th day of March, 2020.

Sd / -
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd / -
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 05th March, 2020.
Devadas G*

Copy of the Order forwarded to :

1. The Appellant.
2. The Respondent.
3. The CIT(A)-Thrissur.
4. The Pr.CIT, Thrissur.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin