IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA Nos.98,99,100 & 101/CTK/2016
Assessment Years : 2005-06, 2006-07, 2007-08 & 2009-10

Xavier Institute of Management, Xavier Square, Bhubaneswar.	Vs.	ITO, Ward 2(1), Bhubaneswar.
PAN/GIR No.AAAAX 0006 A		
(Appellant)	..	(**Respondent**)

ITA Nos.266,267 &320/CTK/2017
Assessment Years : 2010-11, 2011-12 & 2011-12

ITO, Ward 2(1), Bhubaneswar.	Vs.	Xavier Institute of Management, Xavier Square, Bhubaneswar.
PAN/GIR No. AAAAX 0006 A		
(Appellant)	..	(**Respondent**)

Assessee by : Shri P.S.Panda/Kamal Agarwal, ARs
Revenue by : Shri D.K.Pradhan, DR

Date of Hearing : 26/07/ 2018
Date of Pronouncement : 27/07/ 2018

O R D E R

Per N.S.Saini, AM

The assessee has filed these appeals against the common order dated 19.2.2013 of the CIT(A)-II, Bhubaneswar for the assessment years 2005-06, 2006-07, 2007-08 & 2009-2010. The department has filed appeals against the separate orders of the CIT(A)-3, Bhubaneswar dated 10.3.2016 for the assessment years 2010-11 & 2011-12.

2. The department has also filed appeal against the order dated 10.3.2017 of the CIT(A)-3, Bhubaneswar in deleting the penalty of Rs.24,10,169/- u/s.271(1)(c) of the Act for the assessment year 2011-12.

3. The appeals filed by the assessee are barred by limitation of 1050 days. The assessee has filed copy of judgment of Hon'ble Orissa High Court in Writ Petition No.10002 of 2013 order dated 1.2.2016 wherein, the writ petition filed by the assessee in Misc Case No.15710 of 2015 was allowed to be withdrawn by the assessee and a liberty was granted to the assessee to file the appeal before the Tribunal.

4. It was submitted by ld A.R. of the assessee that after the said order of Hon'ble Orissa High Court, the assessee filed appeals to the Tribunal on 22.3.2016, which are within the time limit prescribed and, therefore, the delay be condoned and appeals be added for hearing.

5. Ld D.R. had no objection to the above submission of ld A.R. of the assessee.

6. In view of above facts, we condone the delay and admit the appeals for hearing.

7. The sole issue involved in the appeals filed by the assessee is that the CIT(A) erred in confirming the order of the Assessing Officer disallowing exemption u/ss 11 & 12 of the Act to the assessee on profit out of training and consultancy of Rs.74,68,700/- for the assessment year 2005-06, Rs.37,29,240/- for the assessment year 2006-07, 42,19,010/-

for the assessment year 2007-08 and Rs.73,82,290/- for the assessment year 2009-2010, respectively.

8. In the revenue's appeal, the sole issue involved is that the CIT(A) erred in allowing exemption u/s.11 of the Act claimed by the assessee on the amount of business activity of providing training and consultancy thereby violating the provisions of section 11(4A) of the Act as separate books of account are not maintained.

9. As the facts and issue involved in assessee's appeals and revenue's appeals are interconnected, they ae being disposed of together by this consolidated order as under:

10. The brief facts of the case are that the Assessing Officer observed that the income derived from training and consultancy by the assessee was not incidental to the objects of the institution for which registration under the Income tax Act was given and the assessee has not maintained separate books of account as envisaged in section 11(4A) of the Act. Therefore, he treated the sum of Rs.74,68,700/- for the assessment year 2005-06, Rs.37,29,240/- for the assessment year 2006-07, 42,19,010/- for the assessment year 2007-08 and Rs.73,82,290/- for the assessment year 2009-2010, respectively as income from business and taxed the same at maximum marginal rate denying exemption u/ss 11 & 12 of the Act.

11. The assessee filed appeals against the orders of the Assessing Officer. The CIT(A) confirmed the orders of the Assessing Officer by observing as under:

> " 7. I have carefully applied my mind to all the documents made available to me and have considered the arguments placed before me. I may start with the aforesaid certificate of M/s. Haribhakti & Co. which is understood to have been produced by the appellant before the Supreme Court in connection with special leave petition. There is no issue in respect of the books maintained for sponsored by foreign donors. This is required to be maintained for FCRA (Foreign Contribution Regulation Act). Similarly, there is no issue for maintaining separate accounts in respect of Indian donors the donors required such separate accounts. We are primarily concerned with the accounts pertaining to training and consulting services offered by the appellant society against training fee and consulting fee received from government and private organizations, Such fees received in CENDERET remain merged with the accounts of regular academic activities and the merged accounts pertain to "education' unit" as mentioned in the certificate of Haribhakti & Co. In other words, separate accounts are not maintained u/s.11(4A) for the activities of CENDERET pertaining to profit yielding training and consultancy activities.
>
> 7.1. Now coming to the nature of activity in CENDERET pertaining to training and consultancy, I have to respectfully follow the observation of the Hon'ble High Court where, considering the magnitude of activity and nature of services rendered and considering the non-involvement of students in such services, the Hon'ble Court has agreed with the view of CCIT, Odisha that this is a profit yielding activity. Therefore, in order to be qualified for the benefit u/s.11 it had to maintain separate accounts for such training and consultancy, which the appellant has failed to do.
>
> 7.2 There is no problem on the issue that the profit arising from the profit yielding activity is ploughed back and is ultimately used for attainment of charitable objective of the society. This has been the explainable/non-controverted position in all the four cases under appeal. However, unless and until separate accounts are maintained as stipulated u/s.11(4A) of the I.T. Act, benefit u/s.11 cannot be given for the profits. Therefore, in my view, the AO is absolutely correct in taxing the profits arising from the activities of training and consultancy. The appeal therefore, stands dismissed."

12. Before us, ld A.R. of the assessee argued and submitted that in the assessment year 2010-2011 and 2011-12, the CIT(A) has allowed deduction u/s.11 of the Act to the assessee on profits earned out of training and consultancy. While doing so, he has also taken into consideration the order of Hon'ble Orissa High Court in the case of the assessee itself in Writ Petition No.2467 of 2011 dated 24.11.2011, wherein, the Hon'ble High Court held that it was not entitled to approval u/s 10(23C)(vi) of the Act as it was not any institution is in existence solely for educational purposes. The CIT(A) has held as under:

> "Submission of the Ld. A.R. and grounds of appeal are carefully considered with reference to material available on record. The Ld. AR contended that the treatment of income from 'Training and Consultancy Services' provided by the appellant is not a violation of Section 2(15) read with Section 11(4A) & 13(8), that the AO in his order has misquoted the order of the Hon'ble Odisha High Court dated 24.11.2011 in the appellant's own case in W.P.(C) No. 2467 of 2011, that the AO had taxed the income under section 11(4A) which is legally incorrect, that the AO had misunderstood not only the relevant provisions but also he has failed to understand that a tax demand under section 11(4A) can be made only if the* income is not applied for charitable purposes and a difference is noticed in the book income disclosed and if a violation under proviso to section 2(15) is raised then section 11(4A) cannot be invoked to raise demand on entire income forfeiting exemption U/S.13(8).
>
> It was pointed out that the High Court Ruling dated 24.11.2011 was not in context of any assessment of the appellant. It was in context of refusal of approval under section 10(23C)(vi)-where in the Hon'ble High Court of Orissa did not revoke the charitable status and exemption of the appellant under section 12AA. Therefore, it was totally unwarranted on the part of the AO.to have passed a coercive order. It was further pointed out that even on perusal of the financial statement, it can be seen that the gross surplus from such activities is only Rs. 77.99 lakh which is not even 3% of the total revenue of Rs.28.34 crore, that the gross turnover from "Training and Consultancy" was Rs. 3.47 crores which is also around 12% of the total revenue. In such circumstances, the AO had not provided any substantial reason as to why 3% of surplus could be treated as a dominant profit motive particularly in the light of the Hon'ble Supreme Court Decisions in *T.M.A.Pai Foundation v. State of Karnaataka* (2002) 8 SCC 481 and in the case *P.A. Inamdar v. State of Maharashtra* AIR 2005

SC 3226 (2005] SCC 537 where even 6 to 15% surplus was held to be permissible.

The Training and Consultancy Activity was incidental to the primary activity and even the profit motive was not required to be seen in advancement of ancillary objects as held by the Hon'ble Apex Court in the case of CIT *v. Andhra Chamber of Commerce* [1965] 55 ITR 722 that only the predominant object for which the organization was created is alone to be considered for the purpose for determining whether the nature of activities fall within the scope and ambit of 'charity .

In the case of *Addl. CIT v. Surat Art Silk Cloth Manufacturers Association* [1978] 121 ITR 1 [1972] 2 Taxman 501, the Hon'ble Apex Court has held that in the case of entity or organization whose objects are several, the test of predominant object for which the organization was set up is alone to be applied.

In the case Institute for *Development and Research In Banking Technology (IDRBT), Hyderabad v. Assistant Director of Income-tax (E)~I,*[2015] 63 taxmann.com 297 (Hyderabad-Trib.) where assessee society was established by RBI to provide Banking Technology services and to carry out research which was charitable in nature; it was held that merely because it had generated surplus during course of carrying on ancillary objects, it could not be denied exemption under section 11. The same order was confirmed by the High Court of Judicature at Hyderabad in the case Institute for Development and Research In Banking Technology (IDRBT), Hyderabad v. Assistant Director of Income-tax (E)-I, Hyderabad, ITTA No. 168 dated 04.11.2015. It may be noted that the ratio of this case is about carrying out incidental objectives on commercial principles and generating surplus which basically is the contention of the AO.

The Ld. AR also placed the principles laid by Supreme Court for Solely Educational Institutions in *Queen's Educational Society v. Commissioner of Income-tax* [2015] 55 taxmann.com 255 (SC), [2015] 8 SCC 47 wherein it has been held that the law common to educational institutions under section 10(23C)(iiiad) and (vi) may be summed up as follows :

(i)`Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

(ii) The predominant object test must be applied - the purpose of education should not be submerged by a profit-making motive.

`(iii) A distinction must be drawn between the making of a surplus and an institution being carried on "for profit". No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.

(iv) If after meeting expenditure, a surplus arises incidentally from the activity carried on by the educational institution, it will not cease to be one existing solely for educational purposes.

(v) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons."

In the case Visvesvaraya Technological University vs. Assistant commissioner of Income tax, [2016] 68 taxmann.com 287 (SC) the Hon'ble Apex court confirmed and reiterated the same principles. The second proviso to section 2(15) of the Act clarifies that first proviso to sec.2(15) shall not apply if the aggregate value of the receipts from the activities referred to therein is [twenty-five lakh rupees] or less in the previous year.

The Hon'ble Delhi High Court in the case of *GSI India v. Director General of Income-tax (Exemption) & Anr.* [2014] 360 ITR 138 held that the proviso does not seek to disqualify charitable organization covered by the last limb, when a token fee is collected from the -beneficiaries in the course of activity which is not a business but clearly charity for which they are established and they undertake."

Again, the Hon'ble Delhi High Court in the case of *India Trade Promotion Organization v. Director General of Income-tax (Exemptions) & Ors.* [2015] 371ITR 333, held that if the literal interpretation is given to the proviso to Section 2(15) of the said Act, then the proviso would be at risk of running fowl of the principle of equality enshrined in Article 14 of the Constitution of India.

The Ld. AR also cited the Delhi High Court decision in *Institute of Chartered Accountants of India v. DGIT (Exemptions)* [2012] 347 ITR 99/[2011] 202 Taxman 1/13 taxmann.com 175 (Delhi) where it was held that a broad interpretation of the term business was not intended under section 2(15). A definite profit motive was required to be established; existence of surplus itself was not enough to treat an organization as commercial entity.

The Ld. AR reiterated the dominant purpose theory through the decision of Hon'ble SC in the case of *CST v. Sai Publication Fund* [2002] 258 ITR 70 wherein it has been laid out that if the main activity is not business, then any transaction incidental *or* ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established. In such cases, the onus of proof of an independent intention to carry on "business" connected with or incidental *or* ancillary sales will rest on the Department.

The Hon'ble Delhi High Court in the case of *ICAI Accounting Research Foundation & Anr. v. Director General of Income-tax (Exemptions) & Ors.* (2010) 321 ITR 73 has held that charging of amount from the Government bodies for undertaking these research projects would not make the activity "commercial".

Again, the Hon'ble' Delhi High Court in the case of *Bureau of Indian Standards v. Director General of Income-tax (Exemptions)* (2013) 358 ITR 78 held that "rendering any service in relation to trade, commerce or business" cannot, in the opinion of the Court, receive such a wide construction as to enfold regulatory and sovereign authorities, set up under statutory enactments, and tasked to act as agencies of the State in public duties which cannot be discharged by private bodies.

The appellant continues to be an exempt charitable organization u/s. 12AA of the Act in the year under consideration. In other words, the registration was not cancelled. However, approval for claiming exemption u/s.10(23C) was not accorded and the Hon'ble High Court of Odisha in the Order dt.24.11.2011 held that the appellant society is not working solely for educational purposes. In such circumstances of the case, the admissibility of exemption u/s.11 is required to be verified with reference to quantum of profits from project works and its application for charitable purposes in view of the decision of the Hon'ble Apex the case of *T.M.A.Pal Foundation v. State of Karnataka* (2002) 8 SCC 481 and in the *case of P.A.Inamdar v. State of Maharashtra* AIR 2005 SC 3226 (2005) SCC 537 etc. The appellant has generated a surplus of Rs. 77.99 lakhs, which is not even 3% of the total revenue of Rs.28.34 crores. This indicates at if the appellant is not working dominantly with profit motive. There is no evidence brought to the record of dominant profit motive or non-application of the profit from the alleged source for non-charitable purposes. Moreover, the CBDT has issued Circular No.21/2016 on 27.05.2016 regarding clarification on cancellation of registration u/s,12AA of the IT. Act, 1961 wherein the Board has clarified that the field authorities should not cancel registration of a charitable institution granted U/S.12AA of the Act just because proviso to section 2(15) comes into play and that process for cancellation of registration to be initiated strictly in accordance with sec. 12AA(3) and 12AA(4) after carefully examining the applicability of this provision. In view of the above and placing reliance in the case laws cited by the Ld. A.R., the first ground of appeal is allowed. The decision on the first ground renders the other grounds of appeal academic in nature and consequently infructuous. The other grounds are, therefore, adjudicated upon and are treated as allowed for statistical purposes."

13. He further argued that in the subsequent assessment years i.e. 2012-13, 2013-14, 2014-15 & 2015-16 in an order passed u/s.143(3) of the I.T.Act, 1961, the Assessing Officer himself has allowed exemption u/s.11 of the Act to the assessee on income earned from training and consultancy charges, copies of which have been placed at paper book at pages 61 to 66. Therefore, it was his submission that in view of the above facts of the case, the orders of the CIT(A) for the assessment years

2005-06, 2006-07, 2007-08 & 2009-2010 should be set aside and the appeals of the assessee should be allowed allowing exemption of income earned out of training and consultancy charges under sections 11 & 12 of the Act.

14. On the other hand, ld D.R. relied on the orders of lower authorities for the assessment years 2005-06, 2006-07, 2007-08 & 2009-10 and orders of the Assessing Officer for the assessment years 2010-11 & 2011-12.

15. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the undisputed facts of the case are that the assessee society is duly registered u/s.12AA of the Act by the Income tax Department. The assessee is thus a charitable institution. The assessee is mainly engaged in running educational institution in the name and style of "Xavier Institute of Management". It is also not in disputed that the assessee is entitled for exemptions u/ss 11 & 12 of the Act.

16. The only dispute in these appeals is that the assessee, inter alia, also derives income by way of training and consultancy fee from certain corporates. According to the Assessing Officer, the assessee ought to have maintained separate books of account in respect of its activity of providing training and consultancy services in view of section 11(4A) of the Act. As the assessee has not maintained separate books of account in respect of the activities, the income derived from the said activities was charged to tax in the hands of the assessee by the Assessing Officer and

exemption u/ss 11 & 12 of the Act was denied to the assessee society in respect of that part of the income.

17. The CIT(A) in earlier assessment years i.e. assessment years 2005-06, 2006-07, 2007-08 and 2009-2010 has confirmed the action of the Assessing Officer whereas in subsequent assessment years i.e. 2010-11 and 2011-2012 has decided the issue in favour of the assessee.

18. Ld D.R. supported the orders which are in favour of the revenue.

19. Ld A.R. submitted that the activity of rendering training and consultancy services cannot be held as business activity in the case of the assessee. Further, this activity is incidental to the main object of assessee society, which was education and, therefore, provisions of section 11(4A) are not applicable.

20. We find that the assessee is running Management Institute and imparts education on management of business to the students. Because of the above activity, the Faculty of the Institute acquires expertise knowledge of the subject. The Corporates with the intent to educate their officers and staff send them to the Institute and the assessee Institute to attain their objects of education imparts training to those persons also. The assessee Institute charges fee from such Corporates which is termed as training and consultancy.

21. We find that Section 11(4A) of the Act reads as under:

> "Sub-section(1) or sub-section (2) or sub-section(3) or sub-section 3A) 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 trust or, as the case may be, institution, and separate books of account are maintained by such trust or institution in respect of such business.'

22. A perusal of the above provisions shows that for an activity to get hit by the above provisions must satisfy two conditions, namely; it must constitute business and secondly that business must not be incidental to the attainment of objects of the institution. In our considered view, both these conditions are not satisfied in the instant case.

23. We find that Hon'ble Delhi High Court in the case of *Institute of Chartered Accountants of India v. DGIT (Exemptions)* [2012] 347 ITR 99/[2011] 202 Taxman 1/13 taxmann.com 175 (Delhi) has held that a broad interpretation of the term business was not intended under section 2(15). A definite profit motive was required to be established; existence of surplus itself was not enough to treat an organization as commercial entity.

24. The Hon'ble Supreme Court in the case of *CST v. Sai Publication Fund* [2002] 258 ITR 70 (SC) has laid out that if the main activity is not business, then any transaction incidental *or* ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established. In such

cases, the onus of proof of an independent intention to carry on "business" connected with or incidental *or* ancillary sales will rest on the Department.

25. The Hon'ble Delhi High Court in the case of *ICAI Accounting Research Foundation & Anr. v. Director General of Income-tax (Exemptions) & Ors.* (2010) 321 ITR 73 (Del) has held that charging of amount from the Government bodies for undertaking these research projects would not make the activity "commercial".

26. In the facts of the instant case, education is the main object of the assessee society. The training and consultancy fee was charged in the course of attainment of the main object as an incidental activity. The income realized from the training and consultancy fee by the assessee society was not significant keeping in view the total revenue of the assessee society. Thus, we do not find any material to show that the training and consultancy activity was undertaken by the assessee society as an independent business activity. We are inclined to agree with the contention of the assessee that the same was incidental to the attainment of the objects of the assessee society, which are charitable in nature. Thus, in our considered view, provisions of section 11(4A) are not attracted in the instant case.

27. Moreover, we find that in an assessment made in the subsequent assessment years u/s.143(3) of the Act in the case of the assessee, the

income derived from similar activity in the similar facts in assessment years 2012-13, 2013-14, 2014-15 & 2015-16 has been allowed as exemption u/ss 11 & 12 of the Act by the Income Tax Officer himself. Thus, there is no reason to take a different view in the years under appeal. We, therefore, allow the appeals of the assessee for the assessment years 2005-06, 2006-07, 2007-08 and 2009-2010 and dismiss the appeals of the revenue for the assessment years 2010-11 and 2011-12.

28. Further, the revenue is in appeal against the order of the CIT(A) deleting the levy of penalty u/s.271(1)(c) of the Act of Rs.24,10,169/- being 100% of tax sought to be evaded on account of furnishing inaccurate particulars of income by the assessee.

29. The Assessing Officer levied penalty u/s.271(1)(c) of Rs.24,10,169/-.

30. On appeal, the CIT(A) deleted the penalty on the ground that the quantum appeal has been decided in favour of the assessee.

31. We find that the Hon'ble Supreme Court in the case of K.C.Builders and Another vs ACIT, 265 ITR 562 (SC) has held that "Where the additions made in the assessment order on the basis of which penalty for concealment is levied, are deleted, there remains no basis at all for levying penalty for concealment and, therefore, in such a case no penalty can survive and the penalty is liable to be cancelled. Ordinarily, penalty cannot stand if the assessment itself is set aside. In the instant case, the quantum appeal has been decided in favour of the assessee. Hence, we

confirm the order of the CIT(A) in deleting the levy of penalty of Rs.24,10,169/- u/s.271(1)(c) of the Act and dismiss the ground of appeal of the revenue.

32. In the result, appeals filed by the assessee are allowed and the appeal filed by the revenue are dismissed.

Order pronounced on 27 /07/2018.

Sd/-	sd/-
(**Pavan Kumar Gadale)**	**(N.S Saini)**
JUDICIALMEMBER	**ACCOUNTANT MEMBER**

Cuttack; Dated 27/07/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack