

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI A BENCH, NEW DELHI**

[Coram: Pramod Kumar AM and C. M. Garg JM]

I.T.A. No.: 2996/Del/11

Army Welfare Placement Organization

.....Appellant

*ADG Ceremonial & Welfare Directorate Integrated HQ
Ministry of Defence, Room No. 53, Wing 7, West Block III
R K Puram, New Delhi 110066 [PAN: AABAA5180B]*

Vs.

DIT (Exemptions)

New Delhi`

.....Respondent

Appearances by:

None. for the appellant

A Mishra, for the respondent

Date of concluding the hearing: 20th January, 2015

Date of pronouncing the order: 22nd January, 2015

O R D E R

Per Pramod Kumar, AM:

1. By way of this appeal, the assessee appellant has challenged correctness of the order dated 10th January 2011 passed by the Director of Income Tax (Exemptions), declining registration under section 12 A of the Income Tax Act, 1961.

2. Grievances raised by the assessee appellant are as follows:

1. That, on the facts and in the circumstances of the case, the learned DIT has erred in holding that the appellant is not a commercial organization, and, therefore, is not engaged in charitable activity within the meanings of that expression under section 2 (15) of the Income Tax Act, 1961.

2. That, on the facts and in the circumstances of the case, the learned DIT has erred in rejecting the application filed by the appellant for registration of the appellant under section 12AA read with section 12 A of the Act

3. The appeal is delayed by 73 days but the assessee appellant has moved a petition seeking condonation of this delay, and this petition is supported by an affidavit from Brigadier R K Sharma, managing director of the assessee institution. As stated in the condonation petition, the impugned order was served at the reception desk at ADG- Ceremonial and Welfare's office in the Ministry of Defence, just a day before the republic day 2011, but it was misplaced by the outside agency which was outsourced the work. When documents were retrieved by one Col Bajawa on 18th May 2011, the assessee immediately had consultation with a firm of chartered accountants and then an eminent tax advisor. In accordance with the advice received from these professionals, the appeal was finally filed on 26th May, 2011. We have carefully perused this petition and we have also taken into account the stand of the learned Commissioner- DR on the said petition. In our considered view, the explanation of the assessee, particularly as assessee is a defence establishment which has very little to do with the outside world and as the assessee is not expected to be well conversant with nuances of tax laws, deserves to be accepted. We, accordingly, condone the delay and proceed to take up the matter on merits.

4. The assessee is, as stated in its rule book – which is placed before us at pages 1 to 58 of the compilation filed before us, is a welfare and non-profitable organization set up by the Indian Army. Its aims and objectives, in the backdrop of the fact that army personnel, particularly in the lower ranks, retire at a young age and many of them make the ultimate sacrifice to protect the nation thus leaving their widows and wards to be taken care of by the Indian army, are as follows:

- (a) To arrange placement for the retiring/ retired army personnel in public and private sectors in India;**
- (b) To arrange placement of their widows and their wards in civil;**
- (c) To assist all the registrants in developing soft skill, personality developments and also help them in their career counselling and guidance;**
- (d) To deal with all such things as are incidental or conducive by the society to the attainment of the objects, or any of them, or welfare of the retired army personnel, their widows and the wards of the widows;**

(e) To arrange registration and placement for the dependents of serving/ retired army personnel; and

(f) To conduct all the above welfare activities on NO PROFIT NO LOSS BASIS to the extent possible. All the income, earning, movable and immovable properties of the society shall be solely utilized and applied towards promotion of aims and objectives set forth in the memorandum of association. Being a welfare/ not for profit organization, no payments shall be made, or transferred directly or indirectly, by way of dividends, bonus, profits, or, in any manner whatsoever, to the present or past beneficiaries of the society or to any person claiming, through any one or more of the present or past beneficiaries. No beneficiary of the society shall have any personal claim on any movable or immovable properties of the society or make any profits whatsoever.

5. The assessee appellant filed an application under section 12 A seeking registration under section 12 A of the Act, which is a *sine qua non* for being treated as a charitable institution eligible for tax exemption under section 11. However, this application was rejected by the learned Director by observing as follows:

On a perusal of the documents submitted, it was found that the main objective of the organization is to give placement to the members of the organization who register with them by paying the placement fee charges to the organization (particularly it is only for the ex-army personnel and their dependent and widows). It is purely a commercial activity and violation of Section 2(15) of the Income Tax Act, and there is no charitable activity conducted by the assessee. In view of the above, it is simply a placement agency which charges fee for their services, it does not qualify any merit for grant of a certificate which is the basic and one of conditions to be satisfied for granting registration under section 12 A of the Income Tax Act. Accordingly, the application filed by the applicant for grant of registration under section 12 A is rejected.

6. The assessee is aggrieved and is in appeal before us. None appeared for the assessee, but we have heard the learned Departmental Representative, perused the material on record and duly considered facts of the case in the light of the legal position. Having regard to all these factors, having regard to the fact that the issue in appeal lies in a narrow compass of material facts, and also having regard to the reasons we will set out in a short while in this order, we deem it appropriate to proceed with the matter *ex parte qua* the assessee.

7. We have noted that, in essence, the basic reason for rejecting the registration under section 12A is alleged violation of section 2(15) in the working of the assessee institution. Section 2 (15) defines charitable purposes, in an inclusive definition, as “relief of the poor, education, medical relief, and the advancement of any other object of general public utility”. There is , however, an explanation to this sub section to the effect that “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” though only in a situation in which aggregate receipts on account of such a cess or fees exceed Rs 25 lakhs in a financial year. In plain words, thus, even if an assessee is pursuing an object of general public utility, such an activity will cease to be an activity for charitable purposes, if

- (a) the activity is in the nature of trade, commerce or business; or
- (b) the activity of rendering any service in relation to any trade, commerce or business, for a cess or fees or for any other consideration (irrespective of the nature of use or application, or retention, of the income from such activity) when aggregate of such fees or cess exceed Rs 25 lakhs in a previous year.

8. It is thus clear that so far as charging of fees or any other consideration for rendition of a service is concerned, the fact of rendition of the service vitiates charitable nature of the activity only when the service is rendered to a trade, commerce or business, and, in addition to that factor, the aggregate of such fees etc is concerned exceeds Rs 25 lakhs. In a situation, however, in which the service is rendered to an entity other than trade, commerce or business, such a rendition of service does not affect charitable nature of the activity. In the present case, the service is rendered to ex-army personnel, their widows and dependents, rather than to any trade, commerce or business, and, therefore, second limb of Explanation to Section 2(15) has no application. As regards the question, whether the activity is in the nature of trade, commerce or business or not, on the ground that the assessee is charging a registration fee from some of the registrants, we may refer to rule 23(d) of the assessee appellant- a copy of which was placed before us at pages 1-58 of the compilation of papers, which provides as follows:

23(d) Fees

Nominal fees as mentioned below will be charged from the registrants for meeting the operational expenditure of the establishment:-

i. Offices	Rs 750
ii. Junior Commissioned Officers	Rs 500
iii. Other ranks	Rs 300
iv. Veernaris (widows)	Free
v. Widow's wards/ dependents	Free
vi. Dependents of serving/retired army personnel	Rs 500

9. We find that the nominal fees for the registration, which is a onetime fees, is barely enough to meet even partial costs of running this establishment, and the fact that such a nominal fees is charged from the registrants, in our humble understanding, cannot change the fundamental character of this charitable activity. Not only that the scale of fees is too modest and the facility of registration is restricted only to serving or former army personnel, and their dependents, the unambiguous objective of the assessee institution is to promote welfare of the army personnel and their dependents. There are no reasons to doubts *bonafides* of this well intended initiative of the Indian Army, by way of Army Welfare Placement Organization which is working under direct control of the Ministry of Defence in the Government of India. There is nothing on record whatsoever to suggest that this organization is set up on any commercial basis. It is only elementary that the mere fact that a fees is received from the registrants, by itself, cannot convert a charitable activity into a commercial activity. This position is recognized by the statue itself in second limb of Explanation to Section 2(15), a specific reference made is to the receipt of such fees from trade, commerce and business, and a further monetary limit is set out even on aggregate of fees even from trade, commerce or business. If receiving a fees *simplicitor* could be reason enough to hold that an activity can only be charitable activity, there could not have been any justification for such riders in the statute itself. That apart, time and again, the fundamental essence of a business activity is to earn profits but then a plain look at the objective (f), as reproduced in paragraph 4 earlier in this order, would show that clearly and unambiguously profit making cannot be an objective in this case. The assessee institution is set up by the Indian Army and it seeks to promote the wellbeing of their personnel after their retirement from the service, as also of the widows and dependents of the brave army men who sacrifice their lives, and help them integrate in the civil society by taking up suitable employment. This is surely an activity of general public utility, and, therefore, covered by the definition of

'charitable purposes' under section 2(15). The true test for deciding whether an activity is business activity is (i) whether the said activity undertaken with a profit motive, or (ii) whether the said activity has continued on sound and recognized business principles, and pursued with reasonable continuity. Clearly, therefore, in a situation in which an activity is not undertaken with a profit motive or on sound and recognized business principles, such an activity cannot be considered to be a business activity. We may, in this regard, usefully refer to the following observations made by Hon'ble Delhi High Court in the case of the **Institute of Chartered Accountants of India Vs DGIT (Exemption) [(2011) 347 ITR 99 (Del)]**:

Therefore, while construing the term 'business' for the said section, the object and purpose of the section has to be kept in mind. We do not think that a very broad and extended definition of the term 'business' is intended for the purpose of interpreting and applying the first proviso to s. 2(15) of the Act to include any transaction for a fee or money. An activity would be considered "business" if it is undertaken with a profit motive, but in some cases this may not be determinative. Normally the profit motive test should be satisfied but in a given case activity may be regarded as business even when profit motive cannot be established/proved. In such cases, there should be evidence and material to show that the activity has continued on sound and recognized business principles, and pursued with reasonable continuity. There should be facts and other circumstances which justify and show that the activity undertaken is in fact in the nature of business.

10. There has to be, therefore, something more than mere charging a fees by an institution which can demonstrate that activity undertaken is in the nature of business, and the onus of demonstrating that fact is on the revenue authorities. The reason for this onus is simple; nobody can be expected to prove a negative, as was held by Hon'ble Supreme Court in the case of **K P Varghese Vs ITO [(1981) 131 ITR 597]**, and the assessee cannot, therefore, be asked to prove that the assessee is not carrying on an activity with business motive. A perusal of the impugned order, however, indicates that the only reason for which the assessee is held to be pursuing business activity is charging of fees and there is no other legally sustainable finding to support that conclusion. In view of these facts, as also bearing in mind, we are of the considered view that the learned Director of Income Tax (Exemptions) was indeed in error in rejecting the registration under section 12 A, as sought by the assessee. We, therefore, direct

the learned Director to grant the registration under section 12A of the Income Tax Act, 1961. Order, accordingly.

11. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on 22nd day of January, 2015.

Sd/-
C M Garg
(Judicial Member)

Sd/-
Pramod Kumar
(Accountant Member)

New Delhi, the 22nd day of January, 2015.

Copies to: (1) The appellant
(3) Commissioner
(5) Departmental Representative
(6) Guard File

(2) The respondent
(4) CIT(A)

By order etc

*Assistant Registrar
Income Tax Appellate Tribunal
Delhi benches, New Delhi*