

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO.2307 OF 2013**

Director of Income Tax (Exemptions) }
6th Floor, Piramal Chambers,
Lalbaug, Mumbai-400 012. } .. Appellant

VS

M/s Lala Lajpatrai Memorial Trust }
Lala Lajpatrai Marg,
Haji Ali, Mumbai-400 034. } .. Respondent
PAN :AABCA0832C }

Mr.A.R.Malhotra for Appellant
Mr.Phiroz Andhyarujina Sr.Counsel a/w
Mr.A.P. Singh, Mr.Asim Sarode for Respondents

...
**CORAM: S.C.DHARMADHIKARI &
G.S.KULKARNI, JJ**

JUDGMENT RESERVED ON: 4TH APRIL, 2016
JUDGMENT PRONOUNCED ON: 13TH APRIL 2016

JUDGMENT (Per G.S.Kulkarni, J)

1. This appeal of the revenue under section 260A of the Income Tax Act, 1961 (for short 'the Act') challenges the order dated 25th May 2013 passed by the Income Tax Appellate Tribunal (for short ' the tribunal') whereby the appeal filed by the respondent-

assessee against an order passed by the Director of Income Tax (Exemption) (for short 'the DIT (E)') withdrawing the registration of the assessee under section 12A of the Act stands allowed.

2. The assessment year in question is 2009-10. The revenue has proposed the following question of law for our consideration:

6.1 “Whether on the facts and in circumstances of the case, the Hon'ble ITAT was justified in allowing the appeal of the assessee brushing aside the provisions of Section 11 (4A) of the Income Tax Act, 1961 ?”

3. The facts lie in a narrow compass. The assessee is a trust founded under a Trust Deed dated 10th April, 1959. The assessee claimed that the object for the establishment of the assessee-trust was “advancement of education” which fell within charitable purpose as defined under section 2 (15) of the Act. On 29th June 1973, the assessee had made an application seeking registration under section 12A of the Act. The Commissioner of Income Tax, Mumbai-City IV approved the assessee-trust as a charitable trust and

granted registration under section 12A (a) of the Act. Thereafter, the trust deed was amended, however the main object of the trust deed did not change. The objects were to promote, support, establish and conduct college or colleges, schools, institutions etc for advancement of education and give scholarship or other assistance to students prosecuting studies. One of the objects was also to pay some part of income to any of the institutions which are carrying out the said objects. Thus, it was submitted that the main object of the trust was always promotion of education.

4. The assessee owns a plot of land at Haji Ali, Mumbai with an approximate area of 1,00,000 sq.ft, having a building consisting of an auditorium on the ground floor and class rooms from 2nd to 7th floors. This building was let out to one Lala Lajpatrai Institute which conducts Junior College, Senior college, Law College etc and the 6th and 7th floors are let out to run a Management Institute. The letting out was in consonance with the objects of the trust which intended to promote and/or establish colleges and

schools. The income which was received by the assessee from letting out the premises to Lala Lajpatrai Institute was claimed as exempted from taxation. This was the position right from 1976 till the Assessment year in question (A.Y.2009-10).

5. The Income Tax officer (Exemption) for A.Y.2009-10 forwarded a proposal to the DIT (E) that on verification of the record of the assessee, it was prima facie found that the first proviso to section 2 (15) of the Act as inserted by an amendment to the Act with effect from A.Y.2009-10 was attracted in view of the income earned by the assessee from letting out of the said premises.

6. At this stage, we may note the provision of section 2 (15) of the Act which reads thus:

“Section 2 (15):

“Charitable Purpose” includes relief of the poor, education, medical relief / preservation of environment (including water sheds, forests and wildlife and preservation of monuments or places or objects of artistic 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 out 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 any other consideration, irrespective of the nature of use or application or retention of the income from such activity.

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

By virtue of the first proviso “advancement of any other object of general public utility,” if it involved carrying out of any activity in the nature of trade, commerce or business or any activity of service in relation to trade, commerce or business for a cess or any other consideration was excluded to be a charitable purpose.

7. Invoking proviso to section 2 (15) a show cause notice was issued to the assessee as to why registration under section 12A shall not be withdrawn in exercise of the powers under section 12AA (3) of the Act, as according to the DIT (E), activities of letting out the building as carried out by the assessee were in the nature of trade, commerce, commercial business etc. The main thrust of the revenue's case in issuing the show cause notice was that the assessee has received service charge of Rs.12 lacs for renting out the premises

for running the institution of Management. Further, the assessee had earned an income of Rs.15,02,182/- for letting out of the auditorium. The assessee's objects were of "advancement of education" and thus receiving rent would fall in the category of "any other object of general public utility" attracting the first proviso to section 2 (15) of the Act as applicable from the year 2009-10.

8. The assessee responded to the show cause notice interalia explaining that the trust was being conducted as per the main object namely 'promotion of education' and such letting out of the property of the trust did not amount to any trade, business or commercial activity and thus there was no case for withdrawing of the exemption granted to the assessee. The assessee submitted that the building from 2nd to 5th floors was let out to the Lala Lajpatrai Institute at a very nominal rent wherein junior college, senior college, and a Law College was being conducted. It was pointed out that 6th and 7th floors were used for running the Management Institute and the said premises were let out for Rs.12 lacs and this

amount is received under the head “service charges”. The assessee submitted that the auditorium is also part of the building and used mainly by the colleges as and when is not required for use by the colleges, it is let out. The assessee stated that out of the 365 days the auditorium was used by the colleges for 209 days and it was vacant for 76 days whereas it was let out only for 80 days. It was pointed out that expenses of electricity and Air-conditioners were borne by the assessee and that letting out the building was not the main activity but, only incidental to the main activity i.e. promotion of education. It was thus, contended that the proviso to section 2 (15) of the Act is not attracted in the assessee's case. In support of its submissions, the assessee also relied on a CBDT Circular No.11/2008 dated 19th December 2008.

9. The DIT (E) however passed an order dated 15th December 2011, withdrawing/cancelling registration of the assessee under section 12A of the Act. The DIT (E) observed that the claim of the assessee that its activity of letting out the premises is educational

cannot be accepted as the assessee by itself was not running the educational institutes but, the educational institutes were being conducted by a different entity to whom the assessee had given its buildings for its use. It was observed that the assessee was exploiting its property commercially and received Rs.12.00 lacs on account of service charges and Rs.15,02,182/- being income from the auditorium which was required to be taken as 'business income.' It was observed that this income was required to be treated as 'business income' by application of proviso to section 2 (15) of the Act as introduced with effect from Assessment year 2009-10. Accordingly, it was held that the assessee though a charitable trust, the activities of the assessee ceased to be charitable thereby resulting in the assessee losing its charitable character no longer being entitled to the benefits of section 11. The Director of Income Tax (Exemption) accordingly held that section 12AA (3) was attracted and cancelled the registration of the assessee granted under section 12A of the Act with effect from Assessment year 2009-10.

10. The assessee preferred an appeal before the Tribunal assailing the above order and findings of the DIT (E). The assessee interalia contended that the activities of the assessee were “advancement of education only” and secondly the activities of the trust were a charitable purpose as defined under section 2 (15) of the Act and the proviso in the facts of the case was clearly inapplicable.

11. In the impugned order, the tribunal examining the facts has come to a conclusion that the main object of the assessee-trust was to promote educational activities. It is in the course of this activity the premises were let out to Lala Lajpatrai Institute. The tribunal has observed that letting out of the premises to the said Institute was for educational purposes. As regards the letting out of the auditorium it was observed that it was not the dominant object of the assessee-trust and that merely because, the auditorium was incidentally let out to outsiders for commercial purpose, the case of the assessee did not cease to be 'advancement

of education' and fall in the category of "any other object of general public utility" so as to attract the proviso to section 2 (15) of the Act. The order of the DIT (E) was accordingly set aside by the Tribunal.

12. Learned counsel for the revenue in assailing the impugned order passed by the Tribunal and in support of the appeal contends that this is a case wherein clearly the first proviso to section 2 (15) of the Act had become applicable in as much letting out the premises by the assessee amounted to an activity in the nature of trade, commerce or business and not the object of 'advancement of education' as contended by the assessee. It is submitted that the educational institutes are not being conducted by the assessee-trust but by a separate management. It is contended that the tribunal has failed to appreciate the provisions of section 11 (4A) of the Act that the assessee had not maintained separate books of account as required under the said provision in respect of the amounts received from letting out of the auditorium as also running of the Institution of Management on 6th and 7th floors. On behalf of the revenue it is

urged that if the case of the assessee was that these activities are incidental to the 'advancement of education' then as per requirement of section 11(4A) separate accounts ought to have been maintained. It is therefore, contended that the question of law as formulated would arise for consideration of this Court.

13. On the other hand, learned counsel for the assessee supported the order passed by the Tribunal. The assessee would contend that the question of law as framed is misconceived in as much as from the order passed by the DIT (E), this provision is not the subject matter of assertion on the part of the revenue. It is contended that the Tribunal has clearly held that the object of the trust was 'advancement of education' and merely because the auditorium being incidentally let out to outsiders for commercial purpose, would not change the dominant object of the trust which was 'advancement of education'. In support of the submissions, learned counsel for the assessee has relied on the Division bench decision of this Court in Director of Income Tax (Exemptions)

Mumbai vs. M/s Shri Vile Parle Kelavani Mandal as also a Circular no.11 of 2008 dated 19th December 2008 issued by the CBDT.

14. We have heard learned counsel for the parties and with their assistance we have perused the order passed by the DIT (E) and the impugned order of the tribunal and other documents as placed in the paper book. The admitted position is that the assessee-trust being founded on 10th April 1959 had applied for registration under section 12A of the Act on 29th June 1973 and was granted registration under section 12A of the Act, considering the object of the trust to be charitable. Even after amendment of the Trust Deed the main object of the trust was to promote education and conduct colleges or schools, institutions etc for advancement of education, giving scholarship or assistance to students prosecuting studies. Further one of the object was also to pay some part of income to any other institutions which are carrying out the said objects. In furtherance of these objects, the building of the assessee-trust which consist of ground floor and class rooms from 2nd to 7th floors were

let out to Lala Lajpatrai Institute which conducts junior college, senior college, Law college and a management Institution on the 6th and 7th floors. In the Assessment year in question it was observed that the assessee had received service charges of Rs.12.00 lacs and letting out of the premises for running the Institution of Management and also an amount of Rs.15,02,182/- was received for letting out of the auditorium. On this basis the DIT (E) by an order dated 22nd May 2013 concluded that case of the assessee would fall within the proviso to section 2 (15) of the Act as made applicable with effect from Assessment year 2009-10, in as much as case of the assessee could no more be categorized as '*advancement of education*' and would fall under the first proviso to section 2 (15) of the Act so as to be "*any other object of general public utility*", which stands excluded to be a charitable purpose as it involved an activity in the nature of trade, commerce or business in exchange for a consideration and the use or application or retention of the income from such activity. The Tribunal however, negated these findings of the DIT (E).

15. We may observe that the premises of the assessee were let out to Lala Lajpatrai Institute to conduct junior college, senior college, Law College and a management Institution which is indisputedly an educational purpose. This is also in consonance with the objects of the assessee-trust which is to conduct colleges and schools and achieve 'advancement of education.' It is further an admitted position that these premises were let out on a nominal rent. The objection of the DIT (E) that the 6th and 7th floors rendered an income of Rs.12.00 lacs from the Institution of Management by way of service charges which according to the DIT (E) indicated that the assessee was involved in carrying out activities in the nature of trade, commerce or business, amounting to the assessee deviating from its object of 'advancement of education'. In our opinion, considering the facts, this conclusion of the DIT (E) is not well founded. The DIT (E) has overlooked that the principal purpose for which the premises were let out was for conducting an educational activity namely the Management Institution. There is no material before the DIT (E) to show that the 6th and 7th floors were used for purposes other than the

Management Institution or for any other purpose which is not an educational purpose. First Proviso to section 2 (15) of the Act would also not be attracted in this situation. As regards the auditorium the same was also part of the building housing these colleges conducted by Lala Lajpatrai Institute which was used by the colleges for 209 days and it was vacant for 76 days and was let out only for 80 days only when it was not needed by the colleges. In the course of this letting out the assessee had incurred expenses for electricity and Air-Conditioners. Letting out of the auditorium was not the dominant object of the trust and admittedly the auditorium was incidentally let out to outsiders for commercial purpose. It thus cannot be said that such letting out would fall within the first proviso to section 2 (15) of the Act.

16. It is well-settled principle of law that the test to determine as to what would be a charitable purpose within the meaning of section 2 (15) of the Act, is to ascertain what is the dominant object of the activity; whether it is to carry out a charitable

purpose or to earn profit. If the pre-dominant object is to carryout a charitable purpose and not to earn profit the purpose would not lose its charitable character merely because the some profit arises from the activity. (See **CIT Andhra Pradesh vs APSRTC Hyderabad (1986) 2 Supreme Court Cases 391**).

17. The revenue's contention that the tribunal has overlooked the provisions of section 11(4A) is unfounded. We have noted above that the service charges received in respect of 6th and 7th floor were clearly on account of educational purpose. Letting out was incidental and not the principle activity of the assessee-trust. Thus, in our opinion, section 11(4A) which require separate account to be maintained would not be attracted in view of our conclusion that the said amounts as received by the assessee for the assessment year have been received from educational activity which is the dominant activity of the assessee-trust. In our opinion, if this be the case, separate books of accounts cannot be insisted upon as the said activity becomes part and parcel of the educational activities carried

out by the assessee-trust. In such a case, the benefit of exemption under section 11 (4A) cannot be denied. An interpretation as urged on behalf of the revenue would render nugatory the very spirit, rationale and the object of the exemption provisions making the same unworkable. In this context, we may usefully refer to the observations of the division bench of this Court in the case of **Director of Income Tax (Exemption) vs Vile Parle Kelawani Mandal** to which one of us (S.C.Dharmadhikari, J) is a member) in which a similar contention as urged on behalf of the revenue was repelled. The division bench observed as under :

“5. The Tribunal has held that the “Management and Development Program & Consultancy Charges’ is part and parcel of ‘Narsee Monjee Institute of Management Studies’ which has been set up by the respondent-assessee. The respondent-assessee is a trust and has set up 30 schools and colleges. The Commissioner as also the Tribunal has found that the element of business is missing in conducting management courses. There may be some surplus generated which itself is applied towards the attainment of the object of the educational institute. The separate books of account cannot be insisted upon because once this programme is part and parcel of the activities undertaken and carried out by the Narsee Moonjee Institute of Management Studies, then the condition precedent set out in sub-section (4A) of section 11 of the I.T. Act is completely satisfied. Such finding of fact cannot be termed as perverse and it is in consonance with the factual aspect regarding activities of the trust and the object that it is seeking to achieve. Similarly, in regard to income from the hiring of the premises and

advertisement rights, the said question is also not substantial question of law. Letting out of halls for marriages, sale and advertisement rights has not been found to be a regular activity undertaken as a part of business. The educational institutions require funds. The income is generated from giving various halls and properties of the institution on rentals only on Saturdays and Sundays and on public holidays when they are not required for educational activities, then, this cannot be said to be a business which is not incidental to attain the objects of the trust. This being merely an incidental activity and the income derived from it is used for the educational institute and not for any particular person, separate books of account are also maintained, then, this income cannot be brought to tax. This conclusion is also not perverse and given the facts and circumstances which are undisputed.”

(emphasis supplied)

18. The assessee has also appropriately relied on the Circular No.11 of 2008 of the CBDT and which was issued in view of the amendment to section 2 (15) of the Act and insertion of the first proviso in question. The circular further clarifies the position as held by us above. The CBDT in para 2 has clarified the following implications arising from the amendment :

“2. The following implications arise from this amendment:—

2.1 “ The newly inserted proviso to section 2 (15) will not apply in respect of the first three limbs of section 2 (15) i.e. relief of the poor, education or medical relief. Consequently, where the purpose of a trust or institution is relief of the poor, education or medical relief, it will constitute charitable purpose even if it incidentally

involves the carrying on of commercial activities.

3. The newly inserted proviso to section 2 (15) will apply only to entities whose purpose is 'advancement of any other object of general public utility i.e. the fourth limb of the definition of 'charitable purpose' contained in section 2 (15). Hence such entities will not be eligible for exemption under section 11 or under section 10 (23C) of the Act if they carry on commercial activities. Whether such an entity is carrying on an activity in the nature of trade, commerce or business is a question of fact which will be decided based on the nature, scope, extent and frequency of the activity.”

(emphasis supplied)

19. In the light of the above discussion, we find no fault in the order of the tribunal. We answer the question accordingly in affirming the view taken by the tribunal and dismiss the appeal with no order as to costs.

G.S.KULKARNI, J

S.C.DHARMADHIKARI, J