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Neutral Citation No. - 2023:AHC:227959-DB

IN THE HIGH COURT OF JUDICATURE AT ALLHABAD

Present:

The Hon'ble Justice Siddhartha Varma

The Hon'ble Justice Shekhar B. Saraf

WRIT TAX NO. 476 OF 2022

M/S MAA BHAGWATI SHIKSHA SAMITI

VS

COMMISSIONER OF INCOME TAX AND TWO OTHERS

For the Petitioner	**Mr. Ashish Bansal, Advocate**
	Mr. Ashish Raj Shukla, Advocate
For the respondent	**Mr. Gaurav Mahajan, Advocate**
	Mr. Manu Ghildyal, Advocate
	Mr. Praveen Kumar, Advocate

Last heard on : November 29, 2023

Judgment on : December 06, 2023

1. Heard learned counsel for the petitioner and learned Standing Counsel for the Income Tax Department.

2. The writ petition has been filed seeking the following reliefs:

a. stay the effect and operation and implementation of the notice dated 31.03.2021 relating to assessment year 2013-14 issued by the respondent no. 2 under Section 148 of the Income Tax Act on the petitioner;

b. stay the effect and operation and implementation of the notice dted 13.01.2022 and 03.03.2022 issued under Section 142(1) of the Income Tax Act and disposal letter dated 03.03.2022 issued by respondent no. 3 on the petitioner for making compliance;

c. restrain the respondent nos. 2 and 3/revenue authorities from continuing the reassessment proceedings over the petitioner, else the petitioner will suffer grave and irreparable loss and injury;

d. grant such other ad-interim ex-parte relief in terms of prayer (a)(b) and (c) above.

3. Learned counsel for the petitioner submitted that the petitioner is a society created on 14.02.2006 and got itself registered with the Registrar of Society, Uttar Pradesh under Societies Registration Act, 1860 bearing registration no. 1398/2005-06 for carrying out charitable work by imparting education through its institutions run by it. It had also the registered under section 12A of the Act on 25.09.2008 by the CIT-1, Kanpur, vide certificate of registration no. 630/1335/निबंधक/तकनीकी/कानपुर/2474.

4. The petitioner society was maintaining regular books of account and other records which were subjected to audit under section 12-A(b) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). For the year under consideration, that is, A.Y. 2013-14 it had filed its return on 31.03.2014 disclosing nil income after claiming exemption under section 11 of the Act. As the overall utilization during the year fell short by 17.02% (Rs.1,58,56,689/-) from prescribed limit of 85% it had issued Form – 10 as per Rule 17 of Income Tax Rules, 1961 (hereinafter referred to as 'the Rules') which was filed before the Income Tax Department on 31.03.2014.

5. Return filed by the petitioner society was selected for scrutiny and notice under section 143(2) dated 22.09.2014 was issued, followed by notices, under section 142(1) of the Act, query letter and order sheet entries. In response to the notices/ queries raised by the Assessing Officer, books of account, audited balance sheet, Form – 10 and further information were placed on record. After verifying the same, assessment order dated 20.01.2016 was passed by Respondent No.2 under section 143(3) of the Act accepting the NIL income disclosed by the petitioner after taking due cognizance of Form- 10 filed by the petitioner by observing as under:

"……Shri Ashutosh Dixit, AR attended the assessment proceedings from time to time and filed written submission/explanation. Books of account, bills, vouchers, etc. produced were put to test check and the case was discussed with him."

2. The assessee is a society registered under societies Act with Registrar of Society U.P. vide certificate No. 1398/2005-06 dated 14.02.2006 which was renewed for a period of 5 years with effect from 14.02.2011. The assessee society was granted registration u/s 12A of the Act, by the Ld. Commissioner of Income Tax, Kanpur vide order dated 25.09.2008.

3. The assessee society is running educational institutions. The total receipt during the year has been shown by the assessee at Rs.8,80,22,040/- against which application for of fund towards charitable purposes is Rs.7,93,25,060/- after submitting Form No.10 which is 85%."

6. Notice dated 31.03.2021 under section 148, after 4 years from the end of the relevant assessment year, was issued upon the petitioner. Reasons recorded for initiation of 147 proceedings against the petitioner [which was provided to the petitioner alongwith the letter dated 15.02.2022 issued under section 143(2) of the Act by the Respondent No.3] reads as under:

Reasons for reopening of the assessment in case of M/s Maa Bhagwati Devi Shikchhna Sewa Samiti for A.Y. 2013-14 u/s 147 of the Act.

1. Brief details of the assessee

The assessee is a society involved in running a educational institute(s).

2. Brief details of information collected/received by the AO:

Return of income in this case was filed on 31.03.2014 at total income of Rs. Nil. Thereafter the case was selected under scrutiny and assessment was completed on 20.01.2016 at total income at Rs.Nil. From the records it is noticed that there was unapplied surplus income of Rs.1,58,86,689/- for which assessee has submitted form 10 on 31.03.2014 for accumulation of aforesaid amount of surplus income. Under the provision of section 11(2), assessee had to submit the form 10 for accumulation of income upto the date of filing its return provided u/s 139(1) i.e. 30.09.2013 but it was submitted after due date as provided u/s 139(1) of IT Act,1961.

3. Analysis of information received:

Since, there was unapplied surplus income of Rs.1,58,86,689/- for which assessee has submitted form 10 on 31.03.2014 belatedly for accumulation of aforesaid amount of surplus income. Under the provision of section 11(2), assessee had to submit the form 10 for accumulation of income upto the date of filing its return provided u/s 139(1) i.e. 30.09.2013 but it was submitted after due date i.e. belated and return was not submitted in due date i.e. 30.09.2013.

4. Enquiries made by the AO as sequel to information received:

From the records, it is clear that Form 10 for accumulation of income was filed belatedly and not within the due date of filing Return of Income u/s 139(1) of the Act.

Findings of the AO:

From the records it is noticed that there was unapplied surplus income of Rs.1,58,86,689/- for which assessee has submitted form 10 on 31.03.2014 for accumulation of aforesaid amount of surplus income. Under the provision of section 11(2), assessee had to submit the form 10 for accumulation of income upto the date of filing its return provided u/s 139(1) i.e. 30.09.2013 but it was submitted after due date as prescribed u/s 139(1) of the Act. Hence, deduction claimed by the assessee for unapplied surplus income of Rs.1,58,86,689/- was not allowable u/s 11(2) and the same was required to be disallowed and taxed as per the provisions of I.T. Act, 1961.

5.Basis of forming reason to believe and details of escapement of income:

From the above discussion, it is clear that there is an escapement of income to the tune of Rs. Rs.1,58,86,689/- for A.Y. 2013-14.

6. Applicability of the provisions of section 147/151 of the Income Tax Act,

1961 to the facts of the case:

Provisions of section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case

where income chargeable to tax escaped assessment. In view of the above, on the basis of information available on record I have reason to believe that the income of Rs. Rs.1,58,86,689/- chargeable to tax has escaped assessment within the meaning of section 147 of the IT Act, 1961 on account of interest income. Therefore, necessary approval to issue notice u/s 148 is being obtained separately from Commissioner of Income Tax (Exemption), Lucknow as per the provisions of section 151 of the IT Act."

7. The petitioner filed his objection to the initiation of reassessment proceedings proceedings on the following grounds:

a) No escapement of income of Rs.1,58,86,689/- (as alleged) on the basis of the belated filing of Form – 10, as several judicial pronouncements have held that if the same is filed during the course of assessment proceedings, then the same is to be accepted;

b) Nothing is contained in section 11(2)(a) of the Act regarding period for furnishing of Form – 10, the period provided under Rule 17. This period of filing on or before due date under section 139(1) which relates to the time period for furnishing of return, was provided only with effect from A.Y. 2016-17 by Finance Act, 2015.

c) As per various judicial pronouncements time limit provided under Rule 17 was directive in nature and not mandatory.

d) Reason to believe as recorded is wholly based on the review of Assessment Order made under section 143(3) of the Act which has taken cognizance of Form – 10 furnished by assessee belatedly but accepted by the Assessing Officer during the course of regular assessment proceedings, therefore, it amounts to review of assessment order;

e) Reason to believe as recorded is vitiated by the legal mischief of the change of opinion. Reliance in this regard was placed on decisions of ***CIT Vs. Kelvinator of India Ltd.,*** *reported in (2010) 320 ITR 561 (SC),* ***H. K. Buildcon Ltd. Vs. ITO,*** *reported in (2011) 339 ITR 535 (Guj.) and* ***Jagran Prakashan Ltd. Vs. CIT,*** *reported in (2014) 226 Taxman 36 (Alld.);*

f) First proviso to section 147 is applicable as there is no failure on the part of the Petitioner Society to disclose truly and correctly all material facts necessary for the assessment, therefore, the proceedings are barred by limitation.

8. By an order dated March 3, 2022, the respondent no. 3 rejected the objections raised by the petitioner primarily on the ground that Form-10 was not submitted by the petitioner before the due date of filing of return under Section 139 (1) of the Act.

9. Subsequently, the respondent no.3, during the pendency of the writ petition, passed the assessment order dated March 19, 2022 under Section 147 read with Section 144(B) of the Act assessing the income of petitioner as Rs. 1,58,86,689/- and imposed demand of Rs. 1,03,00,246/- upon the petitioner with the following observations:

"In the present case, no explanation is discernable as to why assessee failed to comply with this requirement. The assessee ought to have applied under Form No. 10 for permission to accumulate as provided in section 11(2). The assessee has pleaded that as per the law, the delay is being generally condoned. But one has to provide the reasons for such a delay and apply for condonation of delay in a reasonable time period before due date specified u/s. 139(1) of the Act. It abundantly clear from the wordings of sub-section (2) of section 11 that it is mandatory for the person claiming the benefit of section 11 to intimate to the A.O particulars required under rule 17 in Form No. 10 of the Act."

Contentions of the petitioner

10. The contentions of the petitioner is that the Assessing Officer has acted in haste and passed a non-speaking order on March 2, 2022 disposing of the objections raised by the petitioner. The petitioner further submitted that not only the assessment order dated March 19, 2022 is completely silent upon the applicability of the first proviso to Section 147 of the Act, the entire exercise of reassessment is only a change of opinion on the issue of availability of exemption under Section 11 of the Act by the Assessing Officer, that had been granted by the Assessing Officer while passing the

regular assessment order after taking into consideration Form-10 filed by the petitioner.

11. The petitioner further contended that umpteen judgments of Supreme Court and various High Courts have held that delay in filing Form-10 is condonable and Rule 17 of the Act is directly and not mandatory.

Contentions of the respondents

12. Per contra, learned counsel for the respondents supported the initiation of reassessment proceedings, the order passed on March 3, 2022 and the assessment order passed on March 19, 2022. Learned counsel submitted that non filing of Form-10 within time is fatal in nature and the petitioner could not have claimed the exemption under Section 11 of the Act if such form was not filed within time. He further submitted that the factual aspect of late receiving of Form-10 came to the knowledge of the Assessing Officer on a later date and accordingly amounts to new material. He also submitted that this clearly shows that it is not a mere change of opinion that has led to the initiation of reassessment proceedings.

Analysis and Conclusion

13. Before entering into the controversy, we would like to put on record the relevant Section 11(2) of the Act and Rule 17 of the Rules. The same are provided below:

> *"Section 11(1)……..*
>
> *(2) Where [eighty-five] per cent of the income referred to in clause (a) or clause (b) of sub-section (1) read with the Explanation to that sub-section is not applied, or is not deemed to have been applied, to charitable or religious purposes in India during the previous year but is accumulated or set apart, either in whole or in part, for application to such purposes in India, such income so accumulated or set apart shall not be included in the total income of the previous year of the person in receipt of the income, provided the following conditions are complied with, namely:—*
>
> *[(a) such person furnishes a statement in the prescribed form and in the prescribed manner to the Assessing Officer, stating the purpose for which the income is being accumulated or set apart*

and the period for which the income is to be accumulated or set apart, which shall in no case exceed five years;

(b) the money so accumulated or set apart is invested or deposited in the forms or modes specified in sub-section (5);

(c) the statement referred to in clause (a) is furnished [at least two months prior to] the due date specified under sub-section (1) of Section 139 for furnishing the return of income for the previous year:

Provided that in computing the period of five years referred to in clause (a), the period during which the income could not be applied for the purpose for which it is so accumulated or set apart, due to an order or injunction of any court, shall be excluded.]

Rule 17 (1)- The option to be exercised in accordance with the provisions of the explanation to sub-section (1) of section 11 of the Act in respect of income of any previous year relevant to the assessment year beginning on or after the 1st day of April, 2016 shall be in Form No. 9A and shall be furnished before the expiry of the time allowed under sub-section (1) of section 139 of the Act for furnishing the return of income of the relevant assessment year."

14. One may rely upon the judgment of this Court in ***CIT Vs. Moti Ram Gopi Chand Charitable Trust,*** reported in (2014) 360 ITR 598 (Alld.), that specifically dealt with the issue at hand. The relevant paragraphs are provided below:

"8. In Nagpur Hotel Owners Association's case (supra) the Supreme Court held that the notice of accumulation must be given to the assessing authority under section 11 before the assessment is concluded. It was held that the assessing authority must have this information at the time he completes the assessment. In the absence of any such information it will not be possible for the assessing authority to give the assessee the benefit of such exclusion and once the assessment is so completed, it would be futile to find fault with the assessing authority for having included such income in the assessable income of the assessee. Therefore, even assuming that there is no valid limitation prescribed under the Act and the Rules even then. It is

reasonable to presume that the intimation required under section 11 has to be furnished before the assessing authority completes the concerned assessment. In the present case, the application under section 11(2) was not filed with the return. The information, however, was given during the process of the assessment, before the assessment was completed. The assessee had given notice under section 11(2)(a) of the Act read with rule 17 of the Rules of 1962 for accumulation of income to the Additional Commissioner of Income-tax. The Assessing Officer, however, did not consider the contention of the assessee.

9. We do not find substance in the contention of Shri Shambhu Chopra that unless the information, which was otherwise provided by the assessee is furnished in Form 10, the Assessing Officer could not have taken into consideration and was entitled to reject it. The benefit of the exemption is on setting apart of the 85 per cent. Amount to be spent in the next year before the assessment is complete and not on the furnishing of information on the prescribed form. There was sufficient material before the Assessing Officer both in the shape of the information furnished within the prescribed period and the proof of not only setting apart 85 per cent of the amount to be spent in the next year but also the expenditure of that amount in the next year. The insistence of furnishing of information on Form 10 as a condition precedent, is insistence on the form and not the substance of the provisions of the Act."

15. One may also refer to the judgment of Supreme Court in ***Commissioner of Income-tax Vs. Nagpur Hotel Owners' Association***, reported in (2001) 247 ITR 201 (SC), wherein the Supreme Court has stated that the particulars required with the Rules 17 of the Rules and the Form-10 of the Act is required to be present before Assessing Officer at the time of assessment proceedings. The relevant paragraph is provided below:

"6. It is abundantly clear from the wordings of sub-section (2) of Section 11 *that it is mandatory for the person claiming the benefit of* Section 11 *to intimate to the assessing authority the particulars required, under Rule 17 in Form No.10 of the Act. If during the*

assessment proceedings the Assessing Officer does not have the necessary information, question of excluding such income from assessment does not arise at all. ***As a matter of fact, this benefit of excluding this particular part of the income from the net of taxation arises from*** Section 11 ***and is subjected to the conditions specified therein. Therefore, it is necessary that the assessing authority must have this information at the time he completes the assessment.*** *In the absence of any such information, it will not be possible for the assessing authority to give the assessee the benefit of such exclusion and once the assessment is so completed, in our opinion, it would be futile to find fault with the assessing authority for having included such income in the assessable income of the assessee. Therefore, even assuming that there is no valid limitation prescribed under the Act and the Rules even then, in our opinion, it is reasonable to presume that the intimation required under* Section 11 *has to be furnished before the assessing authority completes the concerned assessment because such requirement is mandatory and without the particulars of this income the assessing authority cannot entertain the claim of the assessee under* Section 11 *of the Act, therefore, compliance of the requirement of the Act will have to be any time before the assessment proceedings."*

Emphasis Added

16. One may also refer to judgment of ***CIT Vs. Sakal Relief Fund,*** reported in (2017) 81 taxmann.com 396 (Bombay)/[2017] 248 Taxman 31 (Bombay) wherein their lordships have observed and held as under:

"12. Today when the matter was called out, Mr. Tejveer Singh, learned Counsel for the Revenue does not dispute the fact that the decision of the Delhi High Court in Association of Corporation and Apex Societies of Handlooms (supra) and of this Court in Trustees of Tulsidas Gopalji Charitable and Chaleshwar Temple Trust (supra) would apply to the present facts. Therefore, Revenue accepts that even if the Form 10 is filed during the re-assessment proceedings, the benefit of accumulation under Section 11(2) of the Act is available. So

also, the time allowed in Rule 17 of the Rules for furnishing the form before the expiry of time to file the return of income under Section 139(1) of the Act get extended to include the time within which a return of income could be filed under Section 139(4) of the Act. Therefore, filing of Form 10 during re- assessment proceedings is filing of the same within the time allowed for furnishing the return of income under Section 139(4) of the Act. Therefore, the Counsel for the Revenue has not been able to point out any reasons why the aforesaid two decisions should not be applied in the facts of the present case to reject the appeal.

13. It is only with regard to the decision of the Apex Court in Nagpur Hotel Owners' Association (supra) that Mr. Tejveer Singh expressed reservation. According to him, the observations of the Apex Court that Form 10 has to be filed before completion of Assessment Proceedings were rendered in the context of fact that it was not filed during the Assessment Proceedings. Therefore, the fact situation being different, the observations therein cannot be applied to the present facts. In fact, we note that the Apex Court in the above case has observed that for the purposes of excluding an income of the trust from the net of taxation, the intimation in Form 10 has to be filed with the Assessing Officer before he completes the Assessment. In fact, it is the context of the above finding of the Apex Court, that it observed that Form 10 has to be filed before completion of Assessment Proceedings. In fact, the Delhi High Court in the case of Association of Corporation and Apex Societies of Handlooms (supra) has also relied upon and so understood the decisions of the Apex Court in Nagpur Hotel Owners' Association (supra). Therefore, we do not find any merit in the reservations expressed by Mr. Singh, learned Counsel for the Revenue on the applicability of the Supreme Court order in case of Nagpur Hotel Owners' Association (supra) to the present facts.

14. In the above view, the question as proposed stands concluded against the Revenue by the decision of the Apex Court in Nagpur Hotel Owners' Association (supra) and the decision of this Court in

Tulsidas Gopalji Charitable and Chaleshwar Temple Trust (supra) and the Delhi High Court in case of Association of Corporation and Apex Societies of Handlooms (supra). The Revenue has not been able to point out as to why the ratio of the three above decisions should not be made applicable to the facts of the present case and the appeal filed by the Revenue not be entertained.

15. Therefore, the proposed question as framed, for the above reasons, do not give rise to any substantial question of law. Hence, not entertained.

16. Accordingly, Appeal dismissed. No order as to costs."

17. In the light of above judgments, it is crystal clear that Form-10 under Rule 17 of the Rules is required to be filed before the Assessing Officer before he completes the assessment. In a case, where Form-10 is filed late but is filed before the Assessing Officer completes the assessment, benefit of Section 11(2) of the Act shall be available to the assessee. From a reading of impugned notice, the order dated March 3, 2022 and assessment order dated March 19, 2022, it appears that the Assessing Officer has paid no heed to the ratio laid down in the judgment of the Supreme Court and various High Courts including the Coordinate Bench of this Court.

18. We, accordingly, have no hesitation in holding that the entire process of reassessment that has been initiated by the Department holds no water and is without any legal basis whatsoever.

19. In light of the above, we quash the notice dated 31.03.2021 issued under Section 148 of the Act, order passed rejecting the objection of the petitioner dated March 3, 2022 and the reassessment order passed by the Assessing Officer on March 19, 2022.

20. The writ petition is accordingly allowed.

21. Let a urgent certified copy of this order, if applied, be provided to the parties.

Order Date :- December 06, 2023
Ashish

(Shekhar B. Saraf, J.) (Siddhartha Varma, J.)