

| आयकर अपीलिय अधिकरण न्यायपीठ, कोलकाता |
IN THE INCOME TAX APPELLATE TRIBUNAL
"B" BENCH, KOLKATA

BEFORE SHRI SANJAY GARG, HON'BLE JUDICIAL MEMBER
&
DR. MANISH BORAD, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 498/Kol/2023
Assessment Year: 2018-19

Durgapur Society of Management Science Dr. Zakir Hussain Avenue Hudco More Bidhannager Durgapur - 713206 [PAN : AAATD7804P]	Vs	Income Tax Officer, Circle-2, Exempt, Kolkata
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Assessee by :	Shri Sunil Surana, A.R.
Revenue by :	Shri Abhijit Kundu, CIT, D/R

सुनवाई की तारीख/Date of Hearing : 06/09/2023
घोषणा की तारीख /Date of Pronouncement: 01/12/2023

आदेश/ORDER

PER DR. MANISH BORAD, ACCOUNTANT MEMBER :

The present appeal is directed at the instance of the assessee against the order of the Commissioner of Income Tax (Exemption) (hereinafter the "Id. CIT(E)") dt. 21/03/2023, passed u/s 263 of the Income Tax Act, 1961 ("the Act") for the Assessment Year 2018-19.

2. The assessee has raised the following grounds of appeal:-

"1. For that the Ld PCIT erred in setting aside the order in the light of the judgement of the Hon'ble Apex Court in the case of New Noble Educational Society pronounced on 19th Oct, 2022 when the judgement itself clearly stated that it should be applied prospectively and therefore the order of the PCIT should be quashed since the order passed by the AO was neither erroneous nor prejudicial to the interests of revenue.

2. For that the Ld PCIT erred in holding that the rent received from the building which was let out since lying idle for some period constituted income from business when the objects the predominant object of the Society was providing education and

therefore the question of maintaining separate books of accounts in respect of such receipts does not arise.

3. *For that the Ld PCIT erred in holding that the rent received from the building constituted income from business when the investment in the immovable property was in accordance with the provisions of section 11(5) read with proviso 3 of section 10(23C) and income from such investments cannot be income from business .*

4. *For that the Ld PCIT erred in holding that the AO made no enquiry with regard to the applicability of 7th proviso to section 10(23C)(vi) when the AO had treated the rental income as income from other sources which view was not unsustainable in law and hence merely because the same was not discussed in the order did not make the order erroneous.*

5. *For that the income of the society was to be computed in accordance with the provisions of the Income tax Act 1961 and as such the same has rightly to be computed as income from House Property.*

6. *For that even otherwise the income could be computed separately since the rental income was separately ascertainable.*

7. *For that on the facts and circumstances of the case, the order of the Ld PCIT is liable to be set aside."*

3. Thought the assessee has raised various grounds of appeal, the sole grievance of the assessee is that Id. CIT(E) has erred in assuming jurisdiction u/s 263 of the Act and has also erred in treating the assessment order dt. 03/02/2021 as erroneous insofar as prejudicial to the interest of the revenue and directing the Assessing Officer to pass a fresh order.

4. The facts in brief are that the assessee is a Society registered u/s 10(23C)(vi) of the Act vide letter dt. 28/12/2010 and is established for promoting education and runs under graduate program like, hotel management, business administration, computer application, hospital management etc. The society filed its e-return for Assessment Year

2018-19 electronically on 11/10/2018 declaring Nil income. Case selected for complete scrutiny to examine the issues of receipt of trust and refund claim. Notice u/s 142(1) and 143(2) of the Act were issued and duly served upon the assessee. The assessee submitted requisite documents and information online. The finding of the Assessing Officer is at para 3 & 4 of the assessment order. Subsequently, Id. CIT(E) called for the assessment records and observed that gross receipts of the assessee society are at Rs.3,97,86,090/- which included building rent of Rs.2,02,34,592/- which is more than 50% of the total receipt. The Id. Id. CIT(E) issued the following showcause notice u/s 263 of the Act dt. 13/02/2023 u/s 263 of the Act:-

" The assessee trust has filed its return of income for the AY-2018-19 on 11.10.2018 declaring total income of Rs.NIL and subsequently the assessment was completed by the NeFAC u/s 143(3) on 03.02.2021 by determining the total income of Rs.NIL accepting the return income.

During the assessment proceedings it was found that the total receipt of the assessee for the F. Year-2017-18 relevant to A. Year 2018-19 was Rs.3,97,86,089/- including receipt from building rent amounting to Rs. 2,02,34,592/- which is more than 50% of the total receipt of the assessee. The assessee had not maintained separate books of accounts for this rental income as per records available. The assessee had explained during the course of assessment that it had rented out its properties for revenue generation to meet its expenditure. So, the rental income was not incidental to attainment of the objectives of the trust Hence, this rental income amounting to Rs.2,02,34,592/- was not incidental to the attainment of the objectives of the trust as per section 11(4A) of the act and the same is not be exempted as per 7th proviso to section 10(23C)(vi) and resulting erroneous assessment of the same. The tax calculation should be as follows:

<i>Particulars</i>	<i>Amount</i>
<i>Taxable Income</i>	<i>2,02,34,592</i>
<i>Income Tax</i>	<i>58,82,678</i>
<i>Surcharge</i>	<i>8,82,432</i>

E.Cess	2,02,959
Interest u/s 234B	24,35,870
Total tax effect	94,07,139

In view of the above the assessment order passed by the AO is found to be erroneous in so far as it is prejudicial to the interest of the revenue. As such, the assessment order is proposed to be reviewed in exercise of power conferred under section 263 of the Income Tax Act, 1961 enhancing/modifying the assessed income on the above issues and any other issue revealed during the proceedings."

5. In reply, the assessee submitted that it runs various courses and has a huge infrastructure to hold 1500 students but during the year under consideration, students were less in number and most of the infrastructure was vacant. For this reason, the vacant parts were given on rent and the revenue generated therefrom has been applied for the object of the institution. It also submitted that what is paramount is the application of source of income and simply letting out of the property of the Trust cannot be construed as carrying of business in the nature of trade and commerce and provisions of Section 11(4A) of the Act, cannot be enforced. Further, it was stated that since the receipt of rental income was applied solely for the purpose of attaining of the object of the Trust, rental income cannot be considered as a taxable income. However, the Id. CIT(E) was not satisfied with the submissions and he held the order of the Assessing Officer as erroneous insofar as prejudicial to the interest of the revenue observing as follows:-

"Decision:

The facts of the case, materials on record are carefully perused. The assessee filed its Return of Income for A.Y. 2018-19 on 11.10.2018, declaring Nil income. The assessee has claimed exemption u/s 10 (23C) (vi) of the IT. Act. The assessment was completed u/s 143(3) of the Act on 03.02.2021, wherein, the Nil return was accepted.

The total receipts of the assessee for the F.Y. 2017-18, was Rs.3,97,86,089/- which was inclusive of rent from Building rent Rs.2,02,34,592/-. From the assessment records it is not clear as to whether the assessee was maintaining separate books of accounts.

As per 7th proviso of the Sec.10(23C) of the Act, it is stated that nothing contained in sub clause (iv) or sub clause (v) or sub clause (vi) or sub clause (via) shall apply in relation to any income of the fund or trust or institution or any university or other Educational Institution or any hospital or other medical institution being profits and gains of business, unless the business is incidental to the attendant of its objects and separate books of accounts are maintained by it in respect of such business.

The assessee has placed reliance on case laws which are primarily related to Section 11 of the income Tax act whereas in the instant case, the assessee is claiming exemption u/s 10 (23C) of the Act.

The Hon'ble Supreme court, in the case of M/s New Noble Educational society, has categorically observed that income of educational institution from letting out of properties and utilization of infrastructure for conducting training programmes and seminars are not incidental to education.

In the instant case, the assessee claimed exemption u/s 10(23C)(vi) of the Act, which was allowed by the A.O in the assessment u/s 143(3) of the Act . The assessee has shown income of Rs. 2,02,34,592/- from the source letting out of building' out of the total receipt of Rs. 3,97,86,089/-. It is apparent that substantial portion of the receipt of the society is from the rental income. As discussed in forgoing Para that seventh proviso of the section 10(23C) (vi) of the Act provides that:

"Provided also nothing contained in sub clause (iv) or sub-clause (v) [or sub-clause (vi) or sub clause (via) shall apply in relation to any income of the fund or trust or institution [or any university or other educational institution or any hospital or other medical institution] being profit and gains of business, unless the business is incidental to the attainment of its objectives and separate books of accounts are maintained for such business.."

It is evident that if there is an income in the nature of profit & gains from Business, the following conditions have to be satisfied for being eligible to claim exemption u/s 10(23C)(vi) on such business income :

- 1, *The business should be incidental to the attainment of its objectives.*
2. *Separate books of accounts must be maintained for such business.*

In the instant case, on perusal of assessment order, it transpires that the A.O has not verified or conducted any enquiry with regard to i) whether income from letting of building falls under the head 'Business income'. All the evidence, such as letting out agreements, market rent etc. along with relevant incidental factors, have to be examined in this regard, ii) whether such letting out of building is incidental to the attainment of its object and ill) whether separate books of accounts are maintained for such activities, which prima facie appears to be business activities.

The A.O has not conducted any enquiry for verification of above issues before allowing exemption u/s 10(23C)(vi) of the Act on such substantial income from letting out of building.

In this connection, it is pertinent to refer to Explanation -2 of section 263 of the Act which is as under:

"Section -263 – ~-

Explanation-2- For the purpose of this section it is hereby declared that an order passed by the Assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal or Commissioner-

a) The order is passed without making inquiries or verification which should have been made,

(b) the order is passed allowing any relief without inquiring into the claim;

c) ... "

Therefore, as discussed above, the order, u/s 143(3) of the Income Tax Act, dated 03.02.2021, has been passed allowing the exemption u/s 10(23C)(vi) of the Act, without making any inquiry/verification with regard to applicability of 7th proviso of section 10(23C)(vi). Hence, the order passed by the A.O is erroneous in so far as it is prejudicial to the interests of the revenue, within the meaning of Explanations of section 263 of the Act.

In view of the above facts, the said assessment order u/s 143(3) of the Income Tax Act."

6. Aggrieved the assessee is now in appeal before this Tribunal.

7. The Id. Counsel for the assessee, stated that the assessee society has given the unutilised portion of building on rent for earning income and applying that income for charitable purposes of the society. It was

also submitted that the issue about the institution being solely existing for educational purposes and not for purposes of profit has been the subject matter of litigation before various Hon'ble Courts and most of the decisions are in favour of the assesseees. Reference was made to the decision of the Hon'ble Jurisdictional High Court in the case of *DIT(Exemption) vs. Sahu Jain Trust [(2011) 243 CTR 131(Cal.)*. Reference was further made to the judgement of the Hon'ble Apex Court in the case of *New Noble Educational Society V. Chief CIT 448 ITR 594 (SC)*, wherein the Hon'ble Court has held that *since the present judgement has departed from the previous rulings regarding the meaning of the term 'solely', in order to avoid disruption, and to give time to institutions likely to be affected to make appropriate changes and adjustments, it would be in the larger interests of society that the present judgment operates hereafter*. It was thus contended that even if it is presumed that the assessee society was not existing solely for educational purposes even though the profits earned have been applied for charitable purposes, then also the judgement of the Hon'ble Jurisdictional High Court will apply with full force in favour of the assessee as the judgement of the Hon'ble Supreme Court comes into operation from 19/10/2022 onwards.

8. On the other hand, the Id. D/R vehemently argued supporting the order Id. CIT(E) that to claim exemption u/s 10(23C)(vi) of the Act, strict compliance has to be made and only the profits earned from solely carrying out educational activity and not for the purpose of profit other than those earned from carrying out educational activity

as referred in sub-clause (iiiab) of Section 10(23C) of the Act are to be considered and not the building rent.

9. We have heard rival contentions and perused the records placed before us. The finding of the Id. CIT(E), in the revisionary order passed u/s 263 of the Act, is in challenge before us. The assessee society runs educational institutions under the name, Durgapur Society of Management Science. Gross receipts during the year are at Rs.3,97,86,089/-, which includes the receipt from building rent amounting to Rs.2,02,34,592/-, which is more than 50% of the total receipt. Separate books of accounts have also not been maintained for the rental income and expenditure incurred to earn such income. Assessee society is registered u/s 10(23C)(vi) of the Act. The Id. CIT(E), noticed that the rental income earned during the year is not from carrying out educational activity and only the income which is earned from carrying out educational activity is eligible for exemption u/s 10(23C)(vi) of the Act. Since the Id. AO has not examined this aspect, the order of the AO is erroneous and prejudicial to the interest of the revenue.

10. We notice that buildings constructed by the assessee are from the funds generated by carrying out educational activities and other capital receipts received from time to time given towards the corpus for construction of buildings for imparting education. There are nearly 1500 students and 400 staffs on the payroll of the assessee society. During the year under consideration there was decrease in the flow of students and some part of the buildings remained vacant, however,

the fixed expenditure were being incurred regularly. It is claimed by the assessee that to cover up such expenditure, the need was felt to give the building on rent and to earn some revenue and with this intention, the buildings were given on rent. This exercise by the assessee society was for the object of the society and to carry out the activity of education at the institutions. It has been submitted that all these details have been submitted before the AO and also reliance was placed on various judgements including that of Hon'ble Jurisdictional High Court in the case of *DIT(Exemption) vs. Sahu Jain Trust (supra)* as well as the judgment of the Hon'ble Madras High Court in the case of *CIT v. Madras Stock Exchange Ltd. [1976] 105 ITR 546* and since two views were possible on the issue in challenge of which one was in favour of the assessee, the Id. Assessing Officer adopted the same considering the judgement of the Hon'ble Jurisdictional High Court and allowed the benefit of Section 10(23C)(vi) of the Act to the assessee.

11. So far as the judgement of the Hon'ble Supreme Court in the case of *New Noble Educational Society V. Chief CIT (supra)* is concerned, which the Id. CIT(E) has referred in his finding we notice that so far as this finding of the Hon'ble Apex court is concerned, there is no dispute that the Hon'ble Apex Court has held that if an educational institution has earned income from letting out of properties and utilisation of infrastructure for conducting training programs and seminars such income cannot be considered as income earned incidental to education and, therefore, would be out of the ambit of Section 10(23C)(vi) of the

Act. However, from perusal of the order of the Hon'ble Apex Court more particularly para 78 of the order, we notice that the Hon'ble Apex Court has held that the judgement will operate from 19/10/2022 and onwards. Para 78 of the order of the Hon'ble Apex Court is reproduced as under:-

"78. In the light of the foregoing discussion, the assessee's appeals fail. It is however clarified that their claim for approval or registration would have to be considered in the light of subsequent events, if any, disclosed in fresh applications made in that regard. This court is further of the opinion that since the present judgment has departed from the previous rulings regarding the meaning of the term 'solely', in order to avoid disruption, and to give time to institutions likely to be affected to make appropriate changes and adjustments, it would be in the larger interests of society that the present judgment operates hereafter. As a result, it is hereby directed that the law declared in the present judgment shall operate prospectively. The appeals are hereby dismissed, without order on costs."

11. From perusal of the judgement of the Hon'ble Apex Court, now it is well settled that since there were various rulings by the Hon'ble High Courts, prior to the judgement of the Hon'ble Apex Court, regarding the meaning of the term "solely", the Hon'ble Apex Court in order to avoid disruptions and institutions to be likely affected, in larger interest of the society, held that their judgement shall operate prospectively. It thus brings us to the conclusion that prior to the judgement of the Hon'ble Apex Court in the case of *New Noble Educational Society (supra)*, the ratio laid down by the Hon'ble Jurisdictional High Court in the case of *DIT(Exemption) vs. Sahu Jain Trust (supra)*, will apply with full force in favour of the assessee and, therefore, even if some rental income was earned with the intention of

applying it for charitable purpose and educational activity, the Id. Assessing Officer was justified in accepting the claim of the assessee treating the gross receipts having been earned from carrying out educational activity. Thus, we are of the considered view that the order of the Id. Assessing Officer is neither erroneous nor prejudicial to the interest of the revenue. Accordingly, the impugned order u/s 263 of the Act passed by the Id. CIT(E) is quashed and that of the Id. Assessing Officer u/s 143(3) of the Act dt. 03/02/2021, is restored.

12. In the result, appeal of the assessee is allowed.

Order pronounced in the Court on 1st December, 2023 at Kolkata.

Sd/-

**(SANJAY GARG)
JUDICIAL MEMBER**

Sd/-

**(DR. MANISH BORAD)
ACCOUNTANT MEMBER**

Kolkata, Dated 01/12/2023

Sd/-

आदेश की प्रतिलिपि अग्रेषित / Copy of the Order forwarded to :

1. अपीलार्थी / The Assessee
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील) / The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, कोलकाता/DR,ITAT, Kolkata,
6. गार्ड फाई/ Guard file.

आदेशानुसार/ BY ORDER,
TRUE COPY

Assistant Registrar
आयकर अपीलीय अधिकरण
ITAT, Kolkata