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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.1383 of 2009

Breach Candy Hospital Trust

a Company incorporated under the

Companies Act,1913 having its registered

office at 60, Bhulabhai Desai Road,

Mumbai 400 026.

.. Petitioner

versus

1. The Chief Commissioner of Income
tax, Ayakar Bhavan,

M.K. Bhavan,Mumbai 400 020

2. The Income Tax Officer

(Exemptions)-I(1),Piramal

Chambers Lalbaug,

Mumbai 400 012.

3. Union of India

.. Respondents

...

Mr.T.D. Mistry with Mr.R. Murlidhar i/b Mahimtura & Co. for the petitioner.

Mr.Yogesh Patki for the respondents.

CORAM : FERDINO I. REBELLO &

D.G. KARNIK, JJ

DATED : 24th August 2009

ORAL JUDGMENT: (Per D.G.Karnik,J)

1. By this petition, the petitioner challenges the order dated 31st March 2009 passed by the Chief Commissioner of Income Tax, Mumbai (Respondent no.1) rejecting the petitioner's request for grant of approval under section 10(23C)(via) of the Income Tax Act, 1961 (for short "the Act") for the Assessment Year 2002-03 to A.Y. 2008-09 and onwards.

2. The petitioner is a company incorporated and registered under the Companies Act, 1913 whose main object is creating and maintaining an hospital for philanthropic purposes. The petitioner is also registered as a public trust under the Bombay Public Trust Act 1950. The petitioner was granted exemption u/s.10(22A) of the Act for the years 1970-71 to 1995-96. In the year 1996-97, an issue was raised by the tax authorities whether the petitioner could be considered as carrying on its activities solely for philanthropic purpose and by an order dated 26th March 1991, the petitioner was assessed to income tax holding that petitioner did not exist solely for philanthropic purpose. However, by an order dated 22nd January 2002, the Commissioner (Appeals) allowed the appeals of the petitioner for the years 1997-98 and 1998-99 holding that the petitioner existed solely for philanthropic purposes. Thereafter, Central Board of Direct Taxes by its order dated 10th April 2003 also granted approval to the petitioner under section 10(23C) of the Act for the years 1999-2000 to 2001-02. Thus, till

the year 2001-2002, the petitioner was continuously enjoying exemption from payment of Income tax as an institution existing solely for philanthropic purpose. On 12th February 2002, Director General of Income Tax (Exemptions) however issued a show cause notice to the petitioner why its application for renewal of the exemption be not rejected. By a reply dated 15th March 2002, the petitioner replied to the show cause notice. On 26th December 2002 and 4th October 2005, the petitioner made applications to the Chief Commissioner of Income Tax for the A.Y.2002-2003 to 2004-2005 and A.Y. 2005-06 to 2007-08 respectively seeking renewal of the approval u/s. 10(23C) (via) of the Income Tax Act. On 31st March 2008, the petitioner filed an application to the Chief Commissioner for renewal of the approval u/s.10(23C) VI a of the A.Y. 2008-09 to 2010-2011. By an order dated 31st March 2009, the respondent no.1 rejected all the aforesaid applications u/s.10(23C)(via)for the A.Y.2002-2003 to 2010-2011. That order is impugned in this petition.

3. Learned counsel for the petitioner submitted that the petitioner was previously granted approval by the Central Board of Direct Taxes for the years 1990-2000 to 2001-2002 and even earlier, the petitioner was granted exemption holding that it exists solely for the philanthropic purpose. He therefore submitted that the respondent no.1 could not have taken a contrary view and in the absence of any new material could not have taken a different view in the matter in rejecting the applications. We are unable to

agree. It is settled principle of law that the principle of res judicata does not apply in matters pertaining to tax for different Assessment Years as the cause of action for each Assessment Year is distinct. If any authority is needed for this proposition, it is found in C.K. Gangadharan Vs. Commissioner of Income Tax 2008 2008-TIOL-140-SC as also Devidayal Modi Vs. Sales Tax Officer AIR 1965 SC 1150. Grant of approval in the past would not, in our view come in the way of the respondent no.1 if he is otherwise satisfied that the application for renewal should be rejected on the facts before him.

4. With the help of the counsel for the parties, we have perused the impugned order which gives four grounds for rejection. Firstly, after comparing the total receipts of the hospital and the total expenses incurred for the years 2001 to 2008 the respondent no.1 found that only for the one year, the expenses exceeded the receipts. For very other year, the receipts exceeded the expenses and the excess of receipts over the expenditure was between 2.58% to 22.08% of the total receipts. The respondent no.1 also noticed that the assets of the petitioner had increased during this period and therefore, he deduced that the petitioner had used the excess of receipts over expenses for creating the assets and thereby strengthening its capacity to earn more. Therefore he inferred that the petitioner did not exist solely for philanthropic purpose but there existed some profit motive. Secondly, respondent no.1 examined and compared the money spent by the petitioner

for concessional treatment to the patients with the amounts received from them for such concessional treatment. On such examination the respondent no.1 concluded that part of the money received from the patients was need for free or concessional treatment to the staff members of the hospital run by the petitioner. He held that concessional treatment provided to the staff members could not be regarded as philanthropic purpose. Thirdly, the respondent no.1 took exception to the write off of the amount of Rs. 76,80,723/-. The petitioner had made certain payments to a stock broker for purchasing Trust Securities for the employees provident fund trust. The broker delivered part of the securities but failed to deliver the securities worth Rs.76,80,723/- for which the amount was paid. The broker company came under a cloud as it was controlled by Ketan Parekh who is being prosecuted for alleged malpractices on the stock exchange. The amount paid to the broker became irrecoverable and was written off by the petitioner. This fact was also held against the petitioner. Lastly, the Commissioner noted that in addition to the medical treatment, the petitioner was also engaged in conducting medical check-ups of the people applying for visa to USA and they paid fees for such check-ups. The expenses incurred for medial check-ups between the year 1999-2000 to 207-2008 were less than the examination fees earned and there was a surplus ranging between 3.9 lakhs to 7.4 lakhs except for two years when there was a loss of Rs.4 lakhs and Rs.5 lakhs respectively. The respondent no.1 therefore concluded that the petitioner was earning income out of the

medical check ups of USA visa applicants and this earning an income which cannot be regarded as philanthropic purpose. For these reasons, the respondent no.1 held that the petitioner did not satisfy the condition that it existed solely for the philanthropic purpose and rejected the applications.

5. As regards the first ground held against the petitioner viz, there being some surplus, learned counsel for the petitioner invited our attention to the statement given in ground no. A(viii) at page 23 of the petition, which discloses that though there was some surplus for a few years cumulatively for the years 1990-91 to 2008-09 there was a cumulative loss (expenditure exceeding the income) of 22.30 lakhs. These averments are not denied by the respondent. Thus, cumulatively there was no surplus as observed by the respondent no.1. In the notice of hearing dated 12th March 2009 also there was no mention that there was surplus for a certain number of years and no explanation was sought from the petitioner on that count though explanation was sought regarding write off of Rs.76,80,723/- as also regarding the fees received for medical examination from USA visa applicants. Had the notice been given to the petitioner that their applications were sought to be rejected on the ground that there was surplus of income over expenditure for some years, the petitioner could have explained that there was a cumulative loss for nearly two decades. Petitioner therefore, had no opportunity of explaining the true position nor does it appear that the respondent no.1 was aware of this position.

6. As regards the second ground of the free or concessional treatment given by the petitioner to its own employees, it cannot be said that it is not the philanthropy at all. Philanthropy is not restricted to give the free treatment only to the extremely poor, but it would also be philanthropy to give treatment at a concessional rate to those who though not extremely poor cannot afford to pay the full and normal charges. There was nothing on record to show that the staff members to whom the concessional treatment was provided were the affording lot not deserving any concession. In any event, that aspect has not been considered by the respondent no.1 at all.

7. As regards the third ground mentioned in the order, it was the duty of the petitioner to pay not only the salary to the staff but to make contributions to the Provident Fund. It is a statutory obligation under the Employees Provident Funds Act. On account of unfortunate event of the broker to whom money was paid for investments for the employees provident fund, the employees could not suffer. The petitioner and its Directors/Trustees could have been prosecuted and sued for non payment of the Provident Fund contributions which was their statutory duty. In our view, this was wholly irrelevant for considering whether the petitioner was or was not established solely for philanthropic purpose.

8. As regards the last ground regarding the fees received for medical examination of applications for USA visa, undoubtedly there has been a surplus for seven out of nine years while there was a loss in the remaining two years. But it may be difficult to appropriate every receipt for every activity and medical treatment provided by the petitioner. There may be some surplus in some areas and deficit in other areas. Cross subsidization is not unknown. Even in state function, cross subsidies are provided for. The hospital under the petitioner is one unit run at one place and it is not the case of the respondent there there are multiple units and one unit is subsidizing the other. In the same unit, payment is collected for different services rendered which may result in some cross subsidy. Ultimately, the entire receipts are used for treatment of the patients and medical care. In the absence of any material to show that generally there was a profit, it cannot be said that the petitioner does not exist solely for the philanthropic purpose but exists for the purpose of profit

9. Our attention was also invited to the Memorandum of Association and Articles of Association of the petitioner which show objects of the petitioner to be to establish and maintain Hospital for Philanthropic purpose and prohibit declaration of any dividend to the members. This aspect has also not been considered by the respondent no.1.

10. In our view, the matter requires re-consideration in the light of what

is stated above and in particular, the respondent no.1 should have given an opportunity to the petitioner to show that there was no net surplus taking into consideration its activities over a period of time. It may also be noted that the respondent no.1 has rejected the application for renewal for the Assessment Year 2008-2009 onwards. Though this may imply that the application was rejected for the years 2008-09 to 2010-11, according to the petitioner, it amounts to a rejection forever and this could not have been done. In any event, the respondent no.1 needs to clarify that the rejection is not forever but only for the periods 2008-09 to 2010-11.

11. For these reasons, the impugned order is set aside and the matter is remanded back to the respondent no.1 by considering it afresh in the light of what is stated above.

(D.G. KARNIK,J)

(FERDINO I. REBELLO, J)