* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **I.T.A. NO. 869/2011**

Reserved on: 21st July, 2011
% Date of Decision: 19th September, 2011

Director of Income Tax (Exemptions) ....Appellant
Through Mr. Abhishek Marath, Standing Counsel.

VERSUS

The Institute of Chartered Accountants of India ....Respondent
Through Mr. N.K. Poddar, Sr. Advocate with
Mr. Pramod Dayal, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in the Digest ? Yes

SANJIV KHANNA, J.

Director of Income Tax (Exemption) has filed the present appeal under Section 260A of the Income Tax Act, 1961 (1961 Act, for short). It is submitted that the following questions of law arise for consideration:-

A. Whether ITAT was justified in the eyes of law in the facts and circumstances of the present case in passing the impugned order ignoring that the DIT(E) has passed the order u/s 263 of the Act because the AO had not made

necessary inquiries during the assessment proceedings in reaching the conclusion?

B. Whether the ITAT was justified in the eyes of law in the facts and circumstance of the present case in passing the impugned order that running of the coaching classes is a business activity and therefore is in violation of the provisions of Income Tax as also supported by Judgment of the Patna High Court cited in 208 ITR 608?

C. Whether the impugned order passed by the ITAT is perverse both in law and facts of the present case?

2. The respondent is the Institute of Chartered Accountants of India (Institute, for short), a statutory body established under the Chartered Accountants Act, 1949 (1949 Act, for short), for regulating the profession of Chartered Accountants in India.

3. Central Board for Direct Taxes (CBDT, for short), since the assessment year 1996-97, has been approving the said Institute under sub-clause (iv) of Section 10(23C) of the 1961 Act. Vide order dated 18th October, 2004, approval under Section 10(23C)(iv) was granted for the assessment years 2003-04 to 2005-06.

4. For the assessment year 2005-06, the respondent filed its return declaring its income as NIL, which was accepted by the assessment order dated 21st August, 2007 under Section 143(3) of the 1961 Act. The assessment order records that a notice under Section 142(1) was issued calling for detailed information which was furnished by the institute. Books of accounts were also furnished and examined on test check basis.

5. The appellant, on the basis of a proposal received from the Assessing Officer, passed an order under Section 263 of the 1961 Act on two grounds, namely, coaching activity was undertaken by the institute and the said activity was "business" and not a charitable activity. In these circumstances, the institute was required to maintain separate books of accounts and thus there was violation of Section 11(4A) of the 1961 Act. Secondly, it was also held that the institute had incurred expenses of Rs.164.33 lacs on overseas activities including travelling, membership of foreign professional bodies etc. without permission from Central Board of Direct Taxes (CBDT) as required under Section

11(1)(c) of the 1961 Act. Thus, income of the institute was not entitled to exemption as a charitable institution.

6. On appeal by the institute, ITAT by order dated 18th October, 2010, held that the power under Section 263 of the 1961 Act was wrongly exercised and the appellant was not justified in giving the directions on the two grounds relied upon by him.

7. Before us, the appellant has raised and questioned the findings of the ITAT on the first ground i.e. in respect of coaching classes, whether the same amounts to business and whether separate books of accounts were required to be maintained by the institute.

8. As far as scope of Section 263 of the 1961 Act is concerned, there is merit in the contention of the appellant that the observations made by the Tribunal in the impugned order are somewhat ambiguous and contradictory. This does not, however, justify interference and framing of question of law. The scope and ambit of the said provision was examined by the Supreme Court in ***Malabar Industrial Co. Ltd. vs. CIT,*** [2000] 243 ITR 83 (SC)***, Commissioner of Income Tax versus Max India Ltd.*** [2007] 295 ITR 282 (SC) ***CIT vs. Ralson Industries Lt.*** [2007] 288 ITR

322 (SC) and the question thereto is well-settled. The jurisdiction under section 263 can be exercised when (i) when order of the Assessing Officer is erroneous and (ii) it should be prejudicial to the interest of the Revenue.

9. On the first question, learned counsel for the appellant has submitted that the Assessing Officer had failed to make enquiries and therefore, jurisdiction under Section 263 of the 1961 Act was rightly invoked by the appellant. He relies upon the decision of the Delhi High Court in ***Gee Vee Enterprises versus ACIT***, [1975] 99 ITR 375 (Del).

10. With regard to the coaching activity, the appellant in the show cause notice dated 26th March, 2008, had made the following allegations:-

> "(a) Assessment has obtained coaching classes income of Rs.237.11 lakh as per schedule XI of the balance sheet. Expenditure of Rs.133.14 lakh as per schedule XII of the balance sheet has been incurred on running these coaching classes. I have examined the Chartered Accountants Act, 1949. Section 15 of the Act provides for the functions of the Council. None of the functions remotely relate to running of coaching classes. Further, running of coaching classes is a business and not a charitable activity. Under these circumstances, assessee ought to have maintained separate

> books of accounts in respect of the coaching classes. Assessee has not maintained separate books. A proviso below section 10(23C) provides that profits and gains of a business run by the approved institution could be exempt, if business is incidental to the attainment of objectives and separate books of accounts are maintained for such business. I find that the AO has failed to examine whether provision of coaching classes is an activity approved by the Chartered Accountant Act, 1949. If it is so, whether such activity amounts to a business, and accordingly, separate books of accounts were required to be maintained. In the event of provision of coaching classes being business, exemption granted u/s 10(23C) was liable to be cancelled. "

11. In response thereto, the institute had filed a reply and contested the show cause. The appellant rejected the said reply recording as under:-

> "Thus, none of the above clauses can be referred to giving powers to ICAI for conducting of coaching classes. The assessee has also not brought on record any material which would suggest that any of the objects allows powers to conduct coaching classes.
>
> Moreover, the receipts from such coaching classes are business income and the assessee was required to maintain separate books of accounts as per section 11(4A) of the Income Tax Act. The assessee has not maintained separate books for such income. Therefore, it has clearly violated the

> provisions of Income Tax Act and the order of the AO has become erroneous as it is prejudicial to the interest of revenue."

12. In the operative portion, the appellant had given the following directions to the Assessing Officer:-

> "Therefore, keeping in view the facts of the case, the order passed by the DDIT(E), Trust Circle-IV, Delhi has been found to be erroneous as it is prejudicial to the interest of revenue within the meaning of section 263 of the Income Tax Act. Accordingly, the order passed by the AO in this case on 21.08.2007 is hereby set aside. The AO is directed to re-assess the income of the assessee in view of the discussions made as above as per law."

13. What is clear from the above is that the appellant had given a categorical finding that the institute is conducting coaching classes. It was held by the appellant that the receipts from these coaching classes were business income and, therefore, the institute was required to maintain separate books of accounts as per Section 11(4A) of the 1961 Act. However, since separate books of accounts were not maintained, the institute was not entitled to exemption. The matter was not remanded to the Assessing Officer for adjudication on the issue

because necessary enquiries had not been made, but the appellant had examined the contentions and decided the question on merits. Specific direction was given to the Assessing Officer to reassess the receipts/ profit as income. The appellant has given a finding on merits and it is not the case of mere remittance for consideration on merits. The claim that this income was not chargeable was rejected. In these circumstances, we are required to examine the merits of the decision made by the appellant.

14. What is noticeable and clear from the order dated 29th March 2010 of the appellant is lack of discussion, and examination of the concept/term 'business', the object and role assigned to and performed by the institute. On the other hand, ITAT examined the provisions of 1949 Act and the role assigned to and undertaken by the institute. It was held that the institute has been created to regulate the profession of Chartered Accountancy and for this purpose the institute can and is required to provide education, training and monitor professional skills of the members. It is also required to provide education and training to students/article clerks who are appearing in the examinations and

aspire to be enrolled as member of the institute. In the impugned order, it has been elucidated by the Tribunal as under:-

> "We have gone through the various regulations of ICAI which provide for coaching etc. to the students of chartered accountancy course. These regulations inter-alia provide that no candidate shall be admitted to the professional examination unless he produces a certificate from the head of the coaching organization to the effect that he is registered with coaching organization and has complied with the requirements of the theoretical education scheme. The candidate is also required to pay such fee as may be fixed by the council for such professional education. Before a student is eligible for appearing in the examination, he has to produce a certificate from the head of the coaching organization to the effect that he has complied with the requirements of postal tuition scheme. An articled clerk who has completed the practical training as provided in these regulations, before complying for membership of the institute, shall be required to attend a course on general management and communication skill or any other course as maybe specified in council from time to time. For this purpose, the council is to arrange funds for this purpose, the institute is also conducting classes for chartered accountancy students registered with it. We found that these classes for chartered accountancy students registered with it. We found that these classes are conducted for which classes are provided to the students registered with the institute to train and is discharting its statutory function as required by the Parliament, which does not

> amount to any commercial activity. From the detailed brochure, we also found that institute provides a comprehensive study package including large question bank for which no separate cost is charged from the students. The board of studies also provides a CD for self-assessment and model test papers. Expenditure is being incurred for preparation of the study package, CD etc., salary of the faculty and other professionals, printing and stationery, research and development etc. The students registered for charged accountancy are also provided on-line guidance through institute's own website. At a very nominal cost, these services are provided to the students. The institute also provides computer training to the students registered with it, at a very low fee."

15. Thereafter, the Tribunal has quoted judgment of the Gujarat High Court in ***Saurashtra Education Foundation vs. CIT,*** (2005) 273 ITR 139 at page 146, in which it has been observed as under:-

> "As regards the illustration of the Institute of Chartered Accountants of India, although the institute was earlier not running formal classes and there was no geographical proximity when instructions were being imparted through postal tuitions, the Institute of Chartered Accountants of India has always been an institution set up, inter alia for imparting formal education in accountancy and connected subjects in an organized and systematic manner. The institute is accountable as per the provisions of the Act establishing it and

> the institute also has disciplinary control over the students who are required to be registered with its in the first place and who appear at the exams being held by the institute….."

16. The aforesaid findings as to the object, purpose and role of the institute cannot be disputed. The appellant has taken a very narrow and myopic view and has not examined the question of object and role of the institute in proper and correct perspective. As noticed above, the order passed by the appellant is devoid of reasoning. This has resulted in the error made by the appellant, which has been corrected by the tribunal.

17. The second question which arises for consideration is whether activities of the institute mentioned above including those of holding classes for students/article clerks/members and charging fee for classes and for providing literature/material can be regarded as a business activity. Again as noticed above, the order passed by the appellant dated 29th March, 2010 is devoid of any reasons and relevant consideration on the aspects like of what is meant and understood by the term of "business". The appellant proceeded on an erroneous basis that mere holding of classes amounts to business and the same

was outside the scope, ambit and object of the institute. The last aspect, as noticed above, is not correct. The order passed by the appellant is, therefore, bereft of reasons and does not meet the requirement of Section 263 of the Act. It may be noticed here that the term 'business' has been elucidated and explained by the Supreme Court in ***State of Andhra Pradesh vs. H. Abdul Bakhi & Bros.,*** AIR 1965 SC 531. The term 'business', is a word of large and infinite import but it represents an activity carried on continuously in an organized manner with a said purpose and with a view to earn profit.

18. The Supreme Court in ***Director of Supplies & Disposal versus Member, Board of Revenue*** AIR 1967 SC 1826 observed:

> "15. …To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive; there must be some real and systematic or organised course of activity or conduct with a set purpose of making profit. To infer from a course of transactions that it is intended thereby to carry on business, ordinarily there must exist the characteristics of volume, frequency, continuity and system indicating an intention to continue the activity of carrying on the transactions for a profit. But no single test or group of tests is decisive of the intention to carry on the business. It must be decided in the

> circumstances of each particular case whether an inference could be raised that the assessee is carrying on the business of purchasing or selling of goods within the meaning of the statute."

19. Further in ***CST v. Sai Publication Fund*** (2002) 4 SCC 57, the Supreme Court, in the context of statutory provision under consideration, has observed that if the main activity of a person is not business then any ancillary transaction would not amount to business unless an otherwise intention is established. It has also been held that irrespective of the profit motive, determination of the question whether a person's activity as "business" is to be decided on facts and circumstances of each case. It has held:-

> "**11.** No doubt, the definition of "business" given in Section 2(5-A) of the Act even without profit motive is wide enough to include any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture and any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern. If the main activity is not business, then any transaction incidental or ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established.

In such cases, the onus of proof of an independent intention to carry on "business" connected with or incidental or ancillary sales will rest on the Department. Thus, if the main activity of a person is not trade, commerce etc., ordinarily incidental or ancillary activity may not come within the meaning of "business". To put it differently, the inclusion of incidental or ancillary activity in the definition of "business" presupposes the existence of trade, commerce etc. The definition of "dealer" contained in Section 2(11) of the Act clearly indicates that in order to hold a person to be a "dealer", he must "carry on business" and then only he may also be deemed to be carrying on business in respect of transaction incidental or ancillary thereto. We have stated above that the main and dominant activity of the Trust in furtherance of its object is to spread message. Hence, such activity does not amount to "business". Publication for the purpose of spreading message is incidental to the main activity which the Trust does not carry on as business. In this view, the activity of the Trust in bringing out publications and selling them at cost price to spread message of Saibaba does not make it a dealer under Section 2(11) of the Act.

12. This Court in *State of T.N.* v. *Board of Trustees of the Port of Madras* (1999) 4 SCC 630 after referring to various decisions in regard to "business" and "carrying on business" in paras 15 and 16 has stated thus: (SCC p. 640)

"15. Now the definition of 'business' in Section 2(*d*) and in most of the sales tax statutes is an inclusive definition and includes 'trade or business or manufacture etc.' This itself shows

that the legislature has recognized that the word 'business' is wider than the words 'trade, commerce or manufacture etc.' The word business though extensively used is a word of indefinite import. In taxing statutes, it is normally used in the sense of an occupation, a profession — which occupies time, attention and labour of a person, normally with a profit motive and there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive and not for sport or pleasure (*State of A.P.* v. *H. Abdul Bakhi & Bros*. AIR 1965 SC 531). Even if such profit motive is statutorily excluded from the definition of 'business', yet the person could be doing 'business'.

16. The words 'carrying on business' require something more than merely selling or buying etc. Whether a person 'carries on business' in a particular commodity must depend upon the volume, frequency, continuity and regularity of transactions of purchase and sale in a class of goods and the transactions must ordinarily be entered into with a profit motive (*Board of Revenue* v. *A.M. Ansari* (1976) 3 SCC 512. Such profit motive may, however, be statutorily excluded from the definition of 'business' but still the person may be 'carrying on business'.

13. Further in para 30 of the same judgment, it is stated thus: (SCC pp. 647-48)

"*30*. In our view, *if the main activity was not 'business', then the connected, incidental or ancillary activities of sales would not normally amount to 'business'* unless an independent intention to conduct 'business' in these connected, incidental or ancillary activities is

established by the Revenue. It will then be necessary to find out whether the transactions which are connected, incidental or ancillary are only an infinitesimal or small part of the main activities. *In other words, the presumption will be that these connected, incidental or ancillary activities of sales are not 'business' and the onus of proof of an independent intention to do 'business' in these connected, incidental and ancillary sales will rest on the Department*. If, for example, these connected, incidental or ancillary transactions are so large as to render the main activity infinitesimal or very small, then of course the case would fall under the first category referred to earlier."

(emphasis supplied)

14. In the case on hand, the Revenue neither contended nor proved that in sale of publications the Trust had an independent intention to do business as incidental or as an ancillary activity.

15. This Court in the aforementioned judgment further examined the cases to find out if the main activity was not "business". In para 32, reference is made to the case of the Bombay High Court in *State of Bombay* v. *Ahmedabad Education Society* (1956) 7 STC 497 (Bom). In that case, the educational society was entrusted with the task of founding a college and for that purpose it was to construct buildings therefore. It was held that it could not be said to be "carrying on business" merely because for the above purposes, it established a brick kiln and sold surplus bricks and scrap at cost price without intending to make profit or gain. Having regard to main activities

and its objects, it was held that the educational society was not established "to carry on business" and the sale of bricks was held not excisable to sales tax. Chagla, C.J. pointed out that it was not merely the act of selling or buying etc. that constituted a person a "dealer" but the "object" of the person who carried on the activities was important. It was further stated that it was not every activity or any repeated activity resulting in sale or supply of goods that would attract sales tax. If the legislature intended to tax every sale or purchase irrespective of the object of the activities out of which the transaction arose, then it was unnecessary to state that the person must "carry on business" of selling, buying etc.

16. In para 33 of the same judgment, this Court has referred to various decisions to consider whether one is a "dealer" or carries on "business" and the nature and object of activity. The said para reads thus: (SCC pp. 648-50)

"*33*. In *Girdharilal Jiwanlal* v. *CST* (1957) 8 STC 732 (Bom), relied on for the respondent-Port Trust, the Bombay High Court held *that an agriculturist did not necessarily fall within the definition of a 'dealer' under Section 2(c) of the C.P. & Berar Sales Tax Act (21 of 1967), merely because he sold or supplied commodities. It must be shown that he was carrying on a business. It was held that it must be established that his primary intention in engaging himself in such activities must be to carry on the business of sale or supply of agricultural produce*. This High Court held that there was 'nothing to show that the petitioner acquired these lands *with a view* to

doing "the business of selling or supplying" agricultural produce. According to (the assessee), he (was) principally an agriculturist who also deals in cotton, coal, oilseeds and groundnuts'.
(emphasis supplied)

He was having agriculture for the purpose of earning income from the fields but there was nothing to show that he acquired the lands with the *primary intention* of doing business of selling or buying agricultural produce. This decision was approved by this Court in *Dy. Commr. of Agricultural Income Tax & Sales Tax* v. *Travancore Rubber & Tea Co.* (1967) 20 STC 520 (Bom) and it was held that where the only facts established were that the assessee converted latex tapped from rubber trees into sheets and effected a sale of those sheets to its customers, the conversion of latex into sheets being a process essential for transport and marketing of the produce, the Department had failed to prove that '*the assessee was formed*' with a commercial purpose. The Allahabad High Court in *Swadeshi Cotton Mills Co. Ltd.* v. *STO* (1964) 15 STC 505 (All) was dealing with a batch of cases where different bodies were running canteens. One of the cases concerned Aligarh Muslim University which was maintaining dining halls where it was serving food and refreshments to its resident-students. *It was held, referring to observations of this Court in University of Delhi* v. *Ram Nath,* AIR 1963 SC 1873 *that it was incongruous to call educational activities of the University as amounting to 'carrying on business'. The activity of serving food in the dining hall was a minor part of the overall activity of the University*. Education was more a mission and avocation rather than a

profession or trade or business. The aim of education was the creation of a well-educated, healthy, young generation imbued with a rational and progressive outlook of life. On this reasoning, it was held that Aligarh University was not 'carrying on business' and the sale of food at the dining halls was not liable to tax. Likewise after the amendment of the definition of 'business' question arose in *Indian Institute of Technology* v. *State of U.P.* (1976) 38 STC 428 (All) with respect to the visitors' hostel maintained by the Indian Institute of Technology where lodging and boarding facilities were provided to persons who would come to the Institute in connection with education and the academic activities of the Institute. It was observed that the statutory obligation of maintenance of the hostel which involved supply and sale of food was an integral part of the *objects* of the Institute. Nor could the running of the hostel be treated as the principal activity of the Institute. The Institute could not be held to be doing business. Similarly, in the case of a research organization, in *Dy. Commr. (C.T.)* v. *South India Textile Research Assn*. (1978) 41 STC 197 (Mad) *which was purchasing cotton and selling the cotton yarn/cotton waste resulting from the research activities, it was held that the Institute was solely and exclusively constituted for the purposes of research and was not carrying on 'business' and these sales and purchases abovementioned could not be subjected to sales tax*. Likewise, in *State of T.N.* v. *Cement Research Institute of India* (1992) 86 STC 124 (Mad) it was held that the Institute was an organisation, the *objects* of which were to promote research and other scientific work, that the laboratories and

workshops were maintained by the organization for conducting experiments, and that though the cement manufactured as a result of research was sold, it could not be considered to be a trading activity within Section 2(*d*) of the Tamil Nadu General Sales Tax Act, 1959. Again in *Tirumala Tirupati Devasthanam* v. *State of Madras* (1972) 29 STC 266 (Mad) the dispute arose with regard to the sales of silverware etc. which are customarily deposited in the hundis by devotees. It was held by the Madras High Court that the Devasthanam's main activities were religious in nature and these sales were not liable to tax. (*No doubt, the case related to a period where the profit motive was not excluded by statute.) We are of the view that all these decisions involve the general principle that the main activity must be 'business' and these rulings do support the case of the respondent-Port Trust.*"

(emphasis supplied)

17. This decision is directly on the point supporting the case of the respondent after noticing number of decisions on the point including the decisions cited by the learned counsel before us. It may be stated that the question of profit motive or no-profit motive would be relevant only where a person carries on trade, commerce, manufacture or adventure in the nature of trade, commerce etc. On the facts and in the circumstances of the present case irrespective of the profit motive, it could not be said that the Trust either was "dealer" or was carrying on trade, commerce etc. The Trust is not carrying on trade, commerce etc., in the sense of occupation to be a "dealer" as its main object is

> to spread message of Saibaba of Shirdi as already noticed above. Having regard to all aspects of the matter, the High Court was right in answering the question referred by the Tribunal in the affirmative and in favour of the respondent-assessee. We must however add here that whether a particular person is a "dealer" and whether he carries on "business", are the matters to be decided on facts and in the circumstances of each case."

20. The purpose and object to do business is normally to earn and is carried out with a profit motive; in some cases the absence of profit motive may not be determinative. The appellant has given no such finding as far as the activities of the institute are concerned. The appellant without examining the concept of business has held that the institute was carrying on business as coaching and programmes were held by them and a fee is being charged for the same. On the basis of the findings recorded in the order dated 29th March 2010, under section 263 of the Act, it is not sufficient to hold that the institute is carrying on business. In these circumstances, we do not think that the order passed by the appellant under Section 263 of the 1961 Act can be sustained and was, therefore, rightly upset and set aside by the Tribunal.

21. In view of the facts and circumstances stated above, we do not think any question of law arises in the present appeal and the same is accordingly dismissed. No costs.

(SANJIV KHANNA)
JUDGE

(DIPAK MISRA)
CHIEF JUSTICE

September 19th, 2011
kkb