

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

DECIDED ON: 27.09.2012

+ **W.P. (C) 1755/2012**

BUREAU OF INDIAN STANDARDS Petitioner

Through: Sh. Vivek Singh, Advocate.

versus

DIRECTOR GENERAL OF INCOME TAX (EXEMPTIONS)

..... Respondent

Through: Sh. Abhishek Maratha, Sr. Standing
Counsel.

CORAM:
MR. JUSTICE S. RAVINDRA BHAT
MR. JUSTICE R.V. EASWAR

MR. JUSTICE S.RAVINDRA BHAT (OPEN COURT)

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1. This judgment will dispose of a proceeding under Article 226 of the Constitution, whereby the writ petitioner, Bureau of Indian Standards (hereafter "BIS") challenges the order dated 24.2.2012 passed by the

respondent by which the exemption granted to it under section 10(23C)(iv) of the Income Tax Act, 1961 (“the Act”, in short) was withdrawn. BIS is a statutory body established under the Bureau of Indian Standards Act, 1986 (“the BIS Act”, in short). The question that this Court has to decide is whether the withdrawal of exemption under section 10 was justified.

2. The BIS had been granted exemption under Section 10 (23C). By the impugned order, the Director of Income Tax Exemption withdrew the same. The reasoning employed by the respondent in withdrawing the exemption available under section 10(23C)(iv) can be gathered from the following extracts:

“12. It is undisputed that the activities of BIS fall into the last limb of definition of charitable activity as envisaged u/s 2(15) of I.T. Act i.e. ‘advancement of object of general public utility.

13... While deciding whether any assessee is engaged in trade or commerce or is rendering any service in relation to any trade and commerce, status and importance of the assessee are irrelevant considerations. That BIS is a body corporate incorporated by an Act of the Parliament and is managed by the very senior officers of Govt. of India are not valid grounds for taking a decision with regard to commercial activities carried on by the organization. There are a large number of government and semi-government organizations including Public Sector Undertakings where the shares are held by the government and the management and administration also vest with government officers. The profits of such organizations are treated as taxable like any other private entities engaged in trade and commerce.

15. The activities carried out by BIS fulfill all the attributes of business as BIS awarded the licenses under the various product certification schemes for which a fee or consideration is

charged. These licenses are not transferable and awarded for specific period. While it is not mandatory for a person to have such a license, the facts of having a license and publishing it through advertising, hence increases the marketability of the product. This shows that the activities of the assessee are in the nature of business and hence covered by the proviso to section 2(15) of the Income Tax Act.

16... It is not disputed that the BIS is engaged in these socially, economically desirable activities relating to promotion of Indian trade. In fact it is for this reason that the activities of the organizations are treated as advancement of objects of general public utility. This however, will not make any difference so far as application of the new proviso to Section 2(15) is concerned. So far as applicability of this proviso is concerned in respect of commercial activities, there is nothing in the Income tax Act to warrant differential treatment to a private entity and an organization claiming to be a public charitable institution.

18. As seen from the above, it is evident that the assessee has earned substantial amount of its income by way of Product Certification, Gold Hallmarking Certification, Systems certification, from outside companies, business firms, etc. towards granting licenses to them. Under the circumstances, the assessee is directly hit by the newly introduced proviso below section 2(15) of the Income Tax Act. Accordingly, there is no doubt that the activity of the assessee are in the nature of business and hence covered by the proviso below section 2(15) of the Income Tax Act, 1961.”

3. Learned counsel for BIS contended that it is an instrumentality of the state falling within the description, under Article 12 of the Constitution. It relied on provisions of the BIS Act, to say that BIS was established for the purpose of fixing standards to ensure that the public at large is assured of quality, in the larger good, and is not cheated; these functions are sovereign and regulatory provided for under Section 10 of the BIS Act. It was argued

that the license fee received by BIS is not by reason of any service rendered to business industry, but due to the statutory conditions imposed to use the ISI mark conforming to the standards prescribed by the Central Government. This license fee is mandatory for business or industry if it wants to claim that its products conform to the standards prescribed by the Central Government. The BIS's argument was that merely because there is a charge, its activities cannot be said to be commercial; an intention to make profits is essential, which is lacking in this case. This Court's attention was drawn to Sections 22 and 23 of the BIS Act to convey the sovereign nature of the BIS. Section 26, BIS Act was highlighted to indicate the power of search and seizure, akin to those of investigative agencies of the government. To support his contentions, counsel relied on the decisions cited as *Commissioner of Income Tax v. APSRTC*, 151 (ITR) 1 and *The Institute of Chartered Accountants of India and Anr v. The Director General of Income Tax (Exemptions) and Ors.*, Writ Petition (Civil) No. 1927 of 2010, decided on 19.09.201 ("ICAI case", in short).

4. The revenue defended the impugned order contending that since the BIS collected license fee from those who were using the certification given by it, its activities were not charitable, and were instead commercial. Reliance was placed on the amended proviso to section 2(15) of the Act to contend that the BIS was engaged in "business activity" disentitling it from the exemption under section 10(23C)(iv) of the Act. It was also contended that even otherwise, the activities performed by the BIS were not leading to the advancement of any object of general public utility, and therefore, in

any case, it did not fall within the scope of definition of charitable purpose as provided under section 2(15).

5. This Court has considered the submissions of the parties, and has perused through the impugned judgment. The relevant provisions of the Income Tax Act, 1961 are extracted hereunder:

“Section 10(23C)(iv):

“10. In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included

.....

23C. Any income received by any person on behalf of –

(iv) Any other fund or institution established for charitable purposes which may be notified by the Central Government in the Official Gazette, having regard to the objects of the fund or institution and its importance throughout India or throughout any State or States; or..”

Section 2(15) after the amendment made by the Finance Act 2010, w.e.f. 1.4.2009 is as follows:

“charitable purpose” includes relief of the poor, education, medical relief, preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic 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 on 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 fee 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 lakh rupees or less in the previous year;”

6. Section 2(15), as modified by the 2010 amendment w.e.f. 1.4.2009, employs the common method of defining an expression using specific categories which are followed by a general category. The categories “relief of the poor,” “education,” “medical relief” etc, are specific categories, and these are followed, in the end, by the general category of “advancement of any other object of general public utility”. The purpose is to not restrict the application of the definition to just the enumerated categories, but instead, extend it to all these activities which advance objects of general public utility. The first proviso carves out an exception which excludes advancement of any other object of general public utility from charitable purpose to the extent that it involves the carrying on 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 fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity.

7. The impugned order dated 24.2.2012 passed by the respondent indicates that it was undisputed that the BIS’s activities advance objects of general public utility. However, in these proceedings before this Court, the contrary was argued by the revenue. This Court is unconvinced by the

contention. The basis for rejection of the contention is the objective of the Bureau, and the functions assigned to it, under the BIS Act. The relevant provisions are reproduced hereunder:

“Preamble

An Act to provide for the establishment of a Bureau for the harmonious development of the activities of standardisation, marking and quality certification of goods and for matters connected therewith or incidental thereto.....

POWERS AND FUNCTIONS OF THE BUREAU

10. (1) The Bureau may exercise such powers and perform such duties as may be assigned to it by or under this Act and, in particular, such powers include the power to -

establish, publish and promote in such manner as may be prescribed the Indian Standard, in relation to any article or process;

recognise as an Indian Standard, in such manner as may be prescribed, any standard established by any other Institution in India or elsewhere, in relation to any article or process;

specify a Standard Mark to be called the Bureau of Indian Standards Certification Mark which shall be of such design and contain such particulars as may be prescribed to represent a particular Indian Standard;

grant, renew, suspend or cancel a licence for the use of the Standard Mark;

levy fees for the grant or renewal of any licence;

make such inspection and take such samples of any material or substance as may be necessary to see whether any article or process in relation to which the Standard Mark has been used

conforms to the Indian Standard or whether the Standard Mark has been improperly used in relation to any article or process with or without a licence;

seek recognition of the Bureau and of the Indian Standards outside India on such terms and conditions as may be mutually agreed upon by the Bureau with any corresponding institution or organisation in any country;

establish, maintain and recognise laboratories for the purposes of standardisation and quality control and for such other purposes as may be prescribed;

undertake research for the formulation of Indian Standards in the interests of consumers and manufacturers;

recognise any institution in India or outside which is engaged in the standardisation of any article or process or the improvement of the quality of any article or process;

provide services to manufacturers and consumers of articles or processes on such terms and conditions as may be mutually agreed upon;

appoint agents in India or outside India for the inspection, testing and such other purposes as may be prescribed;

establish branches, offices or agencies in India or outside;

inspect any article or process, at such times and at such places as may be prescribed in relation to which the Standard Mark is used or which is required to conform to the Indian Standard by this Act or under any other law irrespective of whether such article or process is in India or is brought or intended to be brought into India from a place outside India;

coordinate activities of any manufacturer or association of manufacturers or consumers engaged in standardisation and in the improvement of the quality of any article or process or in the implementation of any quality control activities;

perform such other functions as may be prescribed.”

8. A plain reading of the above clarifies that the designated functions of the BIS fall under the category of “*advancement of object of general public utility*”. The narrow question that, therefore, remains to be answered is whether it is involved in either carrying on 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. It is necessary that these activities are carried for a cess or fee or some other consideration. However, the nature of use or application, or retention of the income from such activity is immaterial.

9. It would be useful to refer to the decision of a Division Bench of this Court in the *ICAI* case (supra). There, the Court dealt with a similar question regarding interpretation of the amended section 2(15) in respect of the Institute of Chartered Accountants of India (established under the Chartered Accountants Act, 1949) which was charging fee for coaching students, and was earning profits therefrom. The Court examined in detail the meaning of the terms used (trade, commerce and business), and while noting that certain relevant factors had not been considered by the department and the issue was a question of fact, remanded the issue back for reconsideration. It made certain observations which are relevant to the present case, and are reproduced as under:

“12... In view of the first proviso, the decisions that the application of money/profit is relevant for determining whether or not a person is carrying on charitable activity, are no longer relevant and apposite. Even if the profits earned are used for charitable purposes, but fee, cess or consideration is charged

by a person for carrying on any activity in the nature of trade, commerce or business or any activity of rendering of any service in addition to any trade, commerce or business, it would be covered under the proviso and the bar/prohibition will apply.

13. Reliance place by the Petitioners on Additional CIT v. Surat Art Silk Cloth Manufacturers Association MANU/SC/0296/1979 : (1980) 121 ITR 1 (SC) may not be fully appropriate after introduction of the first proviso as the statutory requirements were then different. Utilization of the funds or income earned whether for charitable purpose or otherwise is not relevant now in view of the first proviso and cannot be a determining factor for deciding whether the Petitioner institute is covered by Section 2(15) of the Act. In the said decision, it was held that the primary or dominant purpose of the trust or institution has to be examined to determine whether the said trust/institution was involved in carrying out any activity for profit. If the "object" of the trust or institution was to carry out object of general public utility and this was the primary or dominant purpose and not carrying on any activity for profit, the same would satisfy the requirements of Section 2(15) as it existed. It was immaterial whether members had benefitted from some of the activities. The aforesaid observations of the Supreme Court in the said case and other cases will be relevant only for determining and deciding the question whether the trust or institution is carrying on any business.”

10. This view is based on settled law; [Ref. *Addl CIT v. Surat Art Silk Cloth Mfrs. Association* [1980] 121 ITR 1; *CIT v. Ahmedabad Rana Caste Association*, (1983) 140 ITR 1 (SC); *Commissioner of Sales Tax v. Sai Publication Fund*, (2002) 4 SCC 57]. Here, the expressions in the proviso are "trade, business or commerce". The activities that are undertaken by the assessee/ entity should be in the nature of trade, commerce or business or an activity of rendering any service in relation to any trade, commerce or

business. The three terms "trade", "commerce" or "business" have been interpreted by the Supreme Court and other courts in various decisions. The expression "trade" was discussed in *Khoday Distilleries Ltd. v. State of Karnataka* (1995) 1 SCC 574 where the Supreme Court held that:

“68. There is no doubt that the word business is more comprehensive than the word trade since it will include manufacture which the word trade may not ordinarily include. The primary meaning of the word trade is the exchange of goods for goods or goods for money.”

11. In *State of Andhra Pradesh v. H. Abdul Bakhi and Bros.* (1964) 15 STC 664, the Supreme Court dealt with the expression "business" and stated that it is an expression of indefinite import. In the taxing statutes it is used in the sense of an occupation or profession which occupies time, attention or labour of a person and normally associated with the object of making profit. It was held as under:

“4. 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, and not for sport or pleasure. But to be a dealer a person need not follow the activity of buying selling and supplying the same commodity. Mere buying for personal consumption i.e. without a profit motive will not make a person, dealer within the meaning of the Act, but a person who consumes a commodity bought by him in the course of his trade, or use in manufacturing another commodity for sale, would be regarded as a dealer.”

12. *CIT v. Lahore Electric Supply Company Limited* (1966) 60 ITR 1 (SC) held that “business”, under the Act contemplates activities capable of producing profit which can be brought to tax. In the judgment reported as

Institute of Chartered Accountants in England and Wales v. Customs and Excise Commissioners (1999) 1 W.L.R. 701, the House of Lords examined the question whether the institute was liable to pay value added tax for supply of goods and services as it was issuing licenses and certificates under three enactments for a fee. The issue which arose was whether the Institute was carrying on "economic activity" for the purposes of Value Added Tax Act, 1994. The definition of "economic activity" was wide. The expression "business" was examined with reference to the statutory mandate imposed on the institute and whether the statutory activities can be classified as a business, and the judgment observed as under:

"Although differences between them may arise, it seems to me that the Appellants were right in their case to accept that "The expression business, it is accepted, represents economic activity". It is not necessarily sufficient (though it may often be sufficient in different contexts) that money is paid and a benefit obtained, performing on behalf of the state this licensing function is not the carrying on of a business.

In relation to the Directive, the tribunal said: "Any regulatory activity carried out under a statutory power for the purpose of protecting the public by supervising and maintaining the standard of practitioners in, for example, the Financial Services field fall on the other side of the line from economic activities.

In the present case, I agree that that is entirely right and the same goes for "business" in the context of these three Statutes."

13. In view of the above discussion, it cannot be said that the BIS is involved in any carrying on trade, commerce or business. BIS is a statutory body established under the BIS Act and was brought into existence "for the

harmonious development of the activities of standardisation, marking and quality certification of goods". This was, and has been, its primary and predominant object. Even though it does take license fee for granting marks/certification, the same cannot be said to be done for the purpose of profit. If any profit/revenue is earned, it is purely incidental. The BIS performs sovereign and regulatory function, in its capacity of an instrumentality of the state. Therefore, this Court has no doubt in holding that it is not involved in carrying any activity in the nature of trade, commerce or business.

14. In this context, the Supreme Court held, in *Commr. of Income Tax v. Gujarat Maritime Board* [2007] 295 ITR 561(SC) speaking about what constitutes "any other object of general public utility" that:

"13... The said expression would prima facie include all objects which promote the welfare of the general public. It cannot be said that a purpose would cease to be charitable even if public welfare is intended to be served. If the primary purpose and the predominant object are to promote the welfare of the general public the purpose would be charitable purpose. When an object is to promote or protect the interest of a particular trade or industry that object becomes an object of public utility, but not so, if it seeks to promote the interest of those who conduct the said trade or industry (Commissioner of Income-Tax, Madras v. Andhra Chamber of Commerce [1965]55ITR722(SC)). If the primary or predominant object of an institution is charitable, any other object which might not be charitable but which is ancillary or incidental to the dominant purpose, would not prevent the institution from being a valid charity Addl. commissioner of Income-Tax, Gujarat v. Surat Art Silk cloth Manufacturers Association [1980]121ITR1(SC)).

14. *The present case in our view is equarely covered by the judgment of this Court in the case of Commissioner of Income-tax, A.P. v. Andhra Pradesh State Road Transport Corporation [1986]159ITR1(SC) in which it has been held that since the Corporation was established for the purpose of providing efficient transport system having no profit motive, though it earns income in the process, it is not liable to income-tax.*”

15. In a similar vein, the Allahabad High, in *Bar Council of Uttar Pradesh v. CIT* [1983] 143 ITR 584 held that the object of the Bar Council, to safeguard the interests of its advocates, to assist disabled advocates, to see that advocates who misbehave are taken to task, to promote law reform etc. shows that the body is constituted under Section 6 of the Advocates Act, 1961 to benefit the public at large by having on its rolls, advocates who are not only competent in law but who are respectable and proper persons to belong to the noble profession of lawyers; the said activities have been held for the advancement of general public utility within the meaning of Section 2(15) of the Act. In *CIT v. Ahmedabad Rana Caste Association* [1983] 140 ITR 1 (SC), the Supreme Court held that the expression “*any other object of general public utility*” *prima facie* include all objects which promote the welfare of the general public. It cannot be said that a purpose would cease to be charitable even if public welfare is intended to be served. If the primary purpose and the predominant object are to promote the welfare of the general public the purpose would be charitable purpose.

16. What survives to be determined is whether any of BIS’s activities fall within the latter and larger category of “*involved in the carrying on of any activity of rendering any service in relation to any trade, commerce or business*”. The expressions “*any activity,*” “*rendering any service*” and “*in*

relation to any trade, commerce or business” imply that the intention of the legislature was to make the latter part of the exception broad and inclusive. It seems that the exception (the first proviso) is intended to catch with its ambit any and all commercial activity, except what falls within the second proviso (which bars application of the exception in cases where the aggregate value of the receipts from the activities mentioned therein is less than ten lakh rupees in the relevant previous year). The Bureau, it would appear at the first blush, renders service in relation to trade, commerce or business by granting certification/quality marks in return of license fee. Apparently, Parliament intended to clarify that not all activities of State agencies (some of which might be set up to carry on trading and commercial activities) can be considered charitable. This can be gathered from the Notes on clauses attached to the Finance Bill, 2008:

“Government feels that claim of status of 'charitable organisation' by the organisations carrying out activities on commercial lines is contrary to legislative intention.

Finance Bill, 2008 seeks to amend section 2(15) w.e.f. April 1, 2009, by substituting existing definition with following definition:

'charitable purpose includes relief of the poor, education, medical relief 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 on 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 fee or any other

consideration, irrespective of the nature of use or application, or retention, of the income from such activity.”

In these circumstances, “*rendering any service in relation to trade, commerce or business*” cannot, in the opinion of the Court, receive such a wide construction as to enfold regulatory and sovereign authorities, set up under statutory enactments, and tasked to act as agencies of the State in public duties which cannot be discharged by private bodies. Often, apart from the controlling or parent statutes, like the BIS Act, these statutory bodies (including BIS) are empowered to frame rules or regulations, exercise co-ercive powers, including inspection, raids; they possess search and seizure powers and are invariably subjected to Parliamentary or legislative oversight. The primary object for setting up such regulatory bodies would be to ensure general public utility. The prescribing of standards, and enforcing those standards, through accreditation and continuing supervision through inspection etc, cannot be considered as trade, business or commercial activity, merely because the testing procedures, or accreditation involves charging of such fees. It cannot be said that the public utility activity of evolving, prescribing and enforcing standards, “*involves*” the carrying on of trade or commercial activity.

17. In view of the above discussion, the Court is of opinion that the impugned order of the Director of Income Tax dated 24.2.2012 is contrary to law. It is hereby quashed. The respondents are directed to process the case of BIS and issue the exemption hitherto enjoyed by it, under Section 10 (23) of the Act,

within 10 weeks from today. The Petition is allowed in the above terms; no costs.

**S. RAVINDRA BHAT
(JUDGE)**

**R.V. EASWAR
(JUDGE)**

SEPTEMBER 27, 2012