

Court No. - 32

Case :- INCOME TAX APPEAL No. - 433 of 2008

Petitioner :- Commissioner Of Income Tax -I, Kanpur

Respondent :- Association For The Prevention Of Blindness, U.P.

Petitioner Counsel :- A.N.Mahajan,D Awasthi

Respondent Counsel :- A. Bansal,S.K. Garg

Hon'ble Sunil Ambwani,J.

Hon'ble Aditya Nath Mittal,J.

We have heard Shri Dhananjay Awasthi for the income tax department. Shri Ashish Bansal appears for the respondent assessee.

This income tax appeal under Section 260A of the Income Tax Act is directed against the order of the Income Tax Appellate Tribunal dated 31.12.2007 by which it has set aside the order of the Commissioner of Income Tax, rejecting the application for renewal of the respondent assessee for exemption under Section 80G of the Income Tax Act, 1961 (the Act).

In the year 2004 the respondent assessee was in the process of establishing an eye hospital, and was enjoying the exemption under Section 80G. It applied for renewal of the exemption, which was rejected by the Commissioner of Income Tax-1, Kanpur on 19.9.2007 on the ground that the grant given by the State Government of Rs.75.12 lacs, for specific purpose namely for purchase of equipments was not utilised within the time stipulated by the State Government i.e. upto 31.12.2004. The grant was kept in a fixed deposit in the Union Bank of India. The respondent assessee was utilising the interest of the grant and thus since the condition under Section 80G (5) (i) of the Act were not fulfilled, the application for renewal was liable to be rejected. The CIT-1, Kanpur rejected the application for renewal.

In the appeal filed by the assessee the Tribunal has found that the assessee received a sum of Rs.75,12,043/- from the Government of U.P. during the year 1997-98 for purchase of specific equipments with the condition that the equivalent amount will have to be spent by the hospital from out of its own funds. The assessee could not utilise the fund during the year and requested for extension of time. The extension was granted by the State Government for the period upto 31.12.2004. The Tribunal found that the application of assessee for further extension of time is pending with the State Government. A dispute between assessee, regarding the borrowings from the banks was pending in the civil court in which an order was passed by the Addl. District Judge directing the

petitioner to enter into an agreement for loan and for equitable mortgage of the property with a nationalised bank or government owned financial institution. The petitioner was required to furnish details of such agreement and the statement of loan received and expenditure made by the petitioner and also repayment of loan was required to be furnished to the Court.

The Tribunal found that the objections of the Kanpur Development Authority to the mortgage of the land with the financial institution were pending. The issue of purchase of plant and machinery for which grant was given by the State Government was also pending for the reasons beyond the control of the assessee. As per conditions laid down by the State Government, if the grant was not utilised, it had to be refunded. Even a part of the grant, which was not utilised had to be refunded to the government. The Tribunal observed that the department has allowed the approval to the assessee upto 31.3.2007, and that there was no change of facts to record finding that the conditions under Section 85G (5) (i) were not complied with.

The Tribunal, thereafter, observed as follows:-

"Clearly in the present case, plant and machinery for which grant is given by the Govt. would fall in the category of capital account, as assessee has to purchase plant and machinery as directed by the State Govt., for Eye Hospital. Clearly it cannot be for revenue account. This cannot be treated as income of the assessee. If in the normal course a contribution cannot be treated as income of the assessee, then on failure to utilize the same cannot become income of the assessee. Therefore, provisions of section 80G (5) (i) cannot be invoked to deny the assessee extension of approval. In our considered view, C.I.T. has proceeded on wrong foundation by presuming that grant given by the State Govt. would become income of the assessee without considering this aspect that this was not for the revenue account, but was for the corpus of the trust with specific condition to purchase specific plant and machinery. Once such grant cannot become income of the trust, then provisions of section 80G(5) (i) cannot be invoked. Accordingly order of C.I.T. is set aside. He is directed to consider the application afresh and allow approval to the assessee as per law.

In the result, appeal is allowed.

The above decision was announced in the court on 31.12.2007."

Section 80G (5) of the Act provides as follows:-

"80G. (5) This section applies to donations to any institution or fund referred to in sub-clause (iv) of clause (a) of sub-section (2), only if it is established in India for a charitable purpose and if it fulfils the following conditions, namely :—

(i) where the institution or fund derives any income, such income would not be liable to inclusion in its total income under the provisions of sections 11 and 12 [* * *][***] [or clause (23AA)] [or clause (23C)] of section 10 :

[Provided that where an institution or fund derives any income, being profits and gains of business, the condition that such income would not be liable to inclusion in its total income under the provisions of section 11 shall not apply in relation to such income, if—

- (a) the institution or fund maintains separate books of account in respect of such business;
- (b) the donations made to the institution or fund are not used by it, directly or indirectly, for the purposes of such business; and
- (c) the institution or fund issues to a person making the donation a certificate to the effect that it maintains separate books of account in respect of such business and that the donations received by it will not be used, directly or indirectly, for the purposes of such business;]
- (ii) the instrument under which the institution or fund is constituted does not, or the rules governing the institution or fund do not, contain any provision for the transfer or application at any time of the whole or any part of the income or assets of the institution or fund for any purpose other than a charitable purpose;
- (iii) the institution or fund is not expressed to be for the benefit of any particular religious community or caste;
- (iv) the institution or fund maintains regular accounts of its receipts and expenditure; [* * *]
- (v) the institution or fund is either constituted as a public charitable trust or is registered under the Societies Registration Act, 1860 (21 of 1860), or under any law corresponding to that Act in force in any part of India or under section 25 of the Companies Act, 1956 (1 of 1956), or is a University established by law, or is any other educational institution recognised by the Government or by a University established by law, or affiliated to any University established by law, [***] or is an institution financed wholly or in part by the Government or a local authority; [and]
- [(vi) in relation to donations made after the 31st day of March, 1992, the institution or fund is for the time being approved by the Commissioner in accordance with the rules⁶⁷ made in this behalf [;and]
- [(vii) Where any institution or fund had been approved under clause (vi) for the previous year beginning on the 1st day of April, 2007 and ending on the 31st day of March, 2008, such institution or fund shall, for the purpose of this section and notwithstanding anything contained in the proviso to clause (15) of section 2, be deemed to have been-
 - (a) established for charitable purposes for the previous year beginning on the 1st day of April, 2008 and ending on the 31st day of March, 2009; and
 - (b) approved under the said clause (vi) for the previous year beginning on the 1st day of April, 2008 and ending on the 31st day of March, 2009.]"

Shri Dhananjay Awasthi, learned counsel for the department argues that where the grant was not utilised, and that interest was utilised for the purposes of business, the conditions provided in Section 80G (5) (i) were not complied, and thus the CIT (A) was justified in rejecting the application for renewal for exemption under Section 80G. He submits that even if the grant has been kept in separate account, if it has not been spent, and the interest has been utilised for the purposes of business, the CIT (A) was justified in rejecting the application for renewal under Section 80G.

Shri Ashish Bansal on the other hand submits that under Section 11 (1) (d), income in the form of contribution made with specific

direction that they shall form part of the corpus of the trust or institution, is exempt. He submits that requirement for approval of an institution or fund under Section 80G is provided under Rule 11AA of the Income Tax Rules, 1962. Where the Commissioner is satisfied that all the conditions laid down in Clauses (i) to (v), sub-section (5) of Section 80G are fulfilled, by the institution or fund, they shall record such satisfaction in writing in grant of approval as required under sub-rule (4). In the present case he submits that none of the conditions under Section 80G (5) (i to v) were breached. The amount was kept in separate deposit. The amount of the grant coupled with certain conditions, which was not by way of deduction, which the petitioner could enjoy without complying with the condition. The purchase of plant and machinery would fall in the capital account. The amount could not be utilised as there was certain disputes with regard to mortgage of land to the bank for borrowing and for which the Kanpur Development Authority has not given no objection certificate.

From the facts, stated in the orders of the Commissioner of Income Tax and the Tribunal we find that the petitioner neither misutilised the grant nor utilised it for any business. The observations of CIT that the interest was utilised for business is not based on any material and the discussion of the manner in which the interest was utilised. He also did not record any finding that the respondent assessee did not comply with the terms and conditions of the utilisation of the grant.

Section 80G (5) (i) (b) provides the condition for exemption or rejection of the application for renewal, if the donation made to the institution or funds are not used by it directly or indirectly for the purpose of such business. In the present case the Commissioner did not record any such finding that the funds, which was earmarked and was kept in separate account in fixed deposit was not used by the respondent assessee directly or indirectly. Infact there was no occasion to misuse the funds as the hospital had not yet started and thus the plant and machinery could not be purchased from the grant, which was kept in fixed deposit.

We do not find that the findings recorded by the ITAT suffer from any error of law.

The income tax appeal is **dismissed**.

Order Date :- 13.7.2012

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