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

+ ITA 14/2004

DIRECTOR OF INCOME TAX (EXEMPTIONS) Appellant

Through: Ms. Vibhooti Malhotra, Advocate.

versus

VISHWA HINDU PARISHAD Respondent

Through: Mr. S. Krishnan, Advocate.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE ANIL KUMAR CHAWLA

O R D E R

% 08.05.2017

Dr. S. Muralidhar, J.:

1. This appeal by the Revenue is directed against the order dated 30th June, 2003 passed by the Income Tax Appellant Tribunal ("ITAT") in ITA No.4650/Delhi/97 for the Assessment Year ("AY") 1993-94.

2. The background facts are that the Respondent/Assessee filed an application on 23rd June, 1973 seeking registration under Section 12A of the Income Tax Act, 1961 ("Act"). Nearly 26 years thereafter, by an order dated 24th February 1999, registration was granted by the order of the Director of Income Tax (Exemptions) ["DIT(E) "].

3.Meanwhile, on 10th December 1992, following the demolition of the Babri Masjid on 6th December 1992, the Ministry of Home Affairs ("MHA") issued a notification declaring the Respondent/Assessee as an unla

wful organisation under the Unlawful Activities (Prevention) Act, 1967 (¨UAPA¨). The Tribunal constituted under the UAPA confirmed the ban by its order dated 4th June, 1993.

4.

For the AY in question, i.e., AY 1993-94, the last date for filing of the return was 10th October, 1993. However, the return could not be filed as all the accounts of the Assessee were seized soon after the ban under the UAPA was imposed. On account of the failure of the Assessee to file a return, a notice dated 30th March, 1994 was issued to it under Section 142(1) of the Act. On 29th December 1994, a part of the accounts seized by the authorities pursuant to the ban order were released to it. These were the accounts of only the Delhi unit of the Assessee.

5. On 14th January 1995, the Assessee was once again banned under the UAPA.On 28th June 1995, the Tribunal constituted under the UAPA held that the Assessee was not engaged in any unlawful activity and lifted the ban. This was followed by a fresh notice issued under Section 142(1) of the Act on 1 8th September, 1995.

6. Before the Assessing Officer (¨AO¨) the Assessee pointed out at the hearing on 5th October, 1995 that its accounts that had been seized had only been released recently. Therefore more time was sought to file the return along with the accounts. The AO granted time till 25th October, 1995 for that purpose. However, the accounts could not be finalised. On 1st November 1995, the Assessee filed its return but this was not accompanied by the audit report. The AO gave the Assessee another opportunity on 7th February, 1996. On 1 9thand 22nd February 1996,

written submissions were filed by the Assessee before the AO. *Inter alia* it was pointed out that the audit report would be prepared and submitted in a short while.

7. Nevertheless, on 29th February 1996, the AO proceeded to pass the assessment order where *inter alia* the entire corpus of the Assessee was treated as income and brought to tax. On 1 2th March 1996, the Assessee filed its audited accounts, books of accounts and audit report. It may be noted herein that the last date for finalisation of assessment for the AY in question was 31 st March, 1996.

8. At this stage it requires to be noted that for AY 1990-91, the ITAT passed an order on 30th March, 1995 holding that the activities of the Assessee were charitable. The Revenue's appeal against the said order was dismissed by this Court on 8th April, 1997. Thereafter, as already noted, on 24th February1999, the DIT(E) granted registration to the Assessee on its application dated 23rd June 1973. For AY 1992-93, the ITAT again passed an order on 9th August, 2001 holding the Respondent¨s activities to be charitable.

9.On 31st March 1997, the appeal filed by the Respondent/Assessee against the assessment order was allowed by the Commissioner of Income Tax (Appeals) [CIT(A)] holding as under:

i. The books of accounts of the Assessee were audited late for certain valid reasons.

ii. The audit report was filed along with the revised return on 12th March, 1996, i.e., after the passing of the assessment order.

iii. The audit report as required under Section 12A(b) of the Act was filed by the Assessee. However, this was not before the AO. But "even as per the original return the Appellant was not having any excess of income over expenditure which could have been taxed."

iv. In the past the Assessee had been held to be a charitable organisation. Even if the Appellant were to be denied exemption under Section 11 of the Act for not filing audit report in time, the AO was not justified in taxing the whole receipts and the corpus fund of the Assessee. The corpus fund was a carry forward of the earlier years. In terms of Sections 11 (1)(a) and 12 of the Act this was a capital receipt.

10. The CIT(A) refused to confirm the order of the AO which allowed only 10% of the expenditure during the AY in question. This was a departure from the previous AYs where the expenditure incurred by the Assessee was allowed in full. Accordingly the addition made by the AO was deleted.

11. In its appeal before the ITAT against the above order of the CIT (A), the Revenue first raised only one ground which read as under:

> "In the facts and the circumstances of the case, the learned CIT(A) had erred in allowing exemption under Section 11 even though no order under Section 12A(a) was passed."

12. Subsequently by a written communication dated 18th July, 2002, the following additional ground was raised:

> "On the facts and the circumstances of the case, the learned CIT(A) erredin allowing exemption under Section 11 even though the assessee had been banned on 10.12.92 for a period oftwo years under Section 6 of the Unlawful Activities (Prevention)Act, 1967."

13.By the impugned order dated 30th June 2003, the ITAT dismissed the Revenue¨s appeal. In para 16 of the impugned order, it was noted by the ITAT as under:

> "16. During the course of the hearing of the present appeal some arguments were also advanced by the ld. DR about the non-filing of the audited accounts and the audit report by the respondent but in our opinion this issue cannot be raised by the Revenue since the initial ground raised before the Tribunal questions the action of the CIT (A) in allowing the benefit of section 11 although no order u/s 12A(a) had been passed by the Director of Income Tax (E). Moreover, the registration now has been granted and the order relates back to the date of the application."

14. As regards second question, the ITAT observed as under:

> "19. On a query from the Bench as to how the claim for exemption U/S 11 had been considered by the Revenue in the preceding and succeeding assessment years, the learned counsel for the respondent filed before us a chart covering AYs1974-75 to 2002-03 contending that in all the preceding assessment years up to AY 1992-93 benefit of Section 11 had been allowed either by the AD or by the CIT(A) and whether the Department had come up to the Tribunal, its appeals had been dismissed. As regards subsequent assessment years beginning 1994-95 the stand once again was that upto AY 1997-98 either the AO had allowed the benefit of section 11 or the CIT(A) had done so and the orders of the CIT(A) had become final, there being no second appeals to the Tribunal by the Revenue. For AYs 1998-99 to 2002-03, the assessments were stated to be pending. These factual aspects were not rebutted by the learned DR and we, therefore, have no hesitation in observing that in the preceding and succeeding assessment years, the claim for exemption U/S 11 stands allowed to the assessee and the only hurdle which seems to be coming in its way for the A.Y. 1993-94 is the notification issued by the Government declaring it to be an unlawful organization and the subsequent order passed by the Unlawful Activities (Prevention) Tribunal upholding the Notification."

15.The ITAT accordingly held that the Assessee was entitled to the benefit of Section 11 of the Act and "since during the course of the hearing, the learned DR on behalf of the Revenue has not raised any objection to the returned figure as also the relief given by the CIT(A), we uphold the action of the CIT(A)."

16. At the very first hearing of this appeal on 30th January, 2004, the following question was framed for consideration:

> "Whether exemption can be allowed under Section 11 of the Act to the Assessee despite the fact that the Assessee was not allowed registration under Section 12A(a) of the Income Tax Act, 1961 and also when there was failure on the part of the Assessee to comply with the provisions of Section 12A(b) of the Act?"

1 7.The question framed by this Court as above is actually a combination of two questions which ought to read as under:

(i) Whether exemption can be allowed to the Assessee under Section 11 of the Act although the Assessee was not registered under Section 12A(a) of the Income Tax Act, 1961?

(ii) Could the Assessee be granted exemption under Section 11 of the Act when there was a failure on its part to comply with the provisions of Section 12A (b) of the Act?

18. When the above question was framed the Assessee had not entered appearance. It was an *ex parte* order. For a number of dates thereafter the present appeal was directed to be heard along with ITA Nos.145/2001 and 188/2002. Later both the said appeals were decided by this Court. The decisions are reported as ***Commissioner of Income Tax-XI v. Indian National Congress (I)/All India Congress Committee (2016)***

383 ITR 99 (Del.) and ***Commissioner of Income Tax, Delhi-XI v. Janata Party (2016) 383 ITR 146 (Del.).***

19. As faras question No.(i) is concerned, it is seen that Section 12A of the Act, titled "Conditions as to registration of trusts, etc." read, at the relevant time i.e. AY 1993-94, as under:

> "Conditions as to registration of trusts, etc.
> 12A. The provisions of Section 11 and Section 12 shall not apply in relation to the income of any trust or institution unless the following conditions are fulfilled, namely:
>
> (a) the person in receipt of the income has made an application for registration of the trust or institution in the prescribed form and in the prescribed manner to the Commissioner before the 1st day of July 1973, or before the expiry of a period of one year from the date of the creation of the trust or the establishment of the institution."

20.By an amendment with effect from 1st April, 1997 the words "whichever is later and such trust or institution is registered under Section 12 AA" were inserted at the end of Section 12A (a) of the Act. Therefore the said amendment did not apply to the Assessee during the relevant AY. It will be recalled that the Appellant's application for registration under Section 12A of the Act was made on 23rd June, 1973 i.e. prior to 1st July 1973 and was pending as on the date of the above amendment. The first part of the condition in clause (a) as it read prior to the above amendment stood fulfilled. Section 12 AA was itself inserted by an amendment with effect from 1st April 1997. Therefore, the question of the Assessee having to get itself registered under Section 12 AA did not arise. By the time the ITAT answered the above question, the registration under Section 12 A (a) was granted. The registration related

back to the date of the application i.e. 23rd June 1973.

21.

Therefore, question (i) framed by the Court is answered in the affirmative i.e. in favour of the Assessee and against the Revenue.

22. Turning now to question (ii), one of the conditions required to be fulfilled under Section 12 A (b) of the Act, for a charitable organisation registered under Section 12 A (1) (a) of the Act to avail of the exemption under Sections 11 and 12 is that its return should be accompanied by an audit report prepared by a duly qualified Chartered Accountant as defined under Section 288 (2) read with the Explanation thereunder.

23. The facts show that the accounts that had been seized by the authorities pursuant to the ban order under UAPA were only partially released on 29th December, 1994. The ban ultimately was lifted only on 28th June, 1995. On 5th October 1995, the Assessee wrote a detailed letter to the Deputy Commissioner of Income Tax (Exemption) seeking time to file the audit report. The Assessee *inter alia* pointed out:

> "Now for the period 1st April, 1992 to 9.12.92 also, comprising of 8 full months and 9 days, the books of accounts maintained by VHP were also seized and were inthe custody of Police

> Department mentioned above and, therefore, physically VHF did not have any access to these records. Now on 7.9.93 and 8.10.93, there were requests from VHF to the Folice Department to release the books of accounts for preparation and finalisation of the same for filing the return under the Income-tax Act for the assessment year 1993-94."

24. It was submitted by Ms. Vibhooti Malhotra, learned counsel appearing on behalf of the Revenue, that there was no satisfactory explanation for the Assessee not filing the audit report even by the time of finalisation of the assessment order. She submitted that this was the maximum time permissible to any Assessee seeking exemption under Sections 11 and 12 of the Act. She emphasized the mandatory nature of the requirement under Section 11 of the Act read with Section 12A(b) thereof. She relied on the decision of this Court in ***Commissioner of Income Tax-XI v. Indian National Congress (I)/All India Congress Committee*** (*supra).*

25. In reply, it was pointed out by Mr. Krishnan, learned counsel for the Assessee, that in the first instance the question concerning the non-filing of the audit report along with the return was not urged by the Revenue before the ITAT in its memorandum of appeal. It was not even urged at the time of raising an additional ground on 1 8th July 2002. It was sought to be raised for the first time orally by the Department Representative (DR) during the course of submissions before the ITAT. This was not permitted by the ITAT.

26. Mr Krishnan further submitted that there were *bona fide* reasons for the inability of the Assessee to get the audit report readied in time. By

itsletter dated 6th October, 1995, the Assessee had explained its difficulty to the AO. However, since time was running out, the return was filed on 1st November, 1995 but without the audit report. Mr Krishnan referred to the two written submissions filed by the Assessee on 19thand 20th February 1996 before the AO which explained the delay in preparing the audit report and seeking some more time for that purpose. He submitted that before the CIT(A) the revised return together with the audit report was presented and therefore, in those circumstances the CIT(A) was justified in accepting the audit report and allowing the appeal of the Assessee.

27. The Court finds that indeed the Revenue did not raise any specific ground in its appeal before the ITAT on the issue of the non-filing of the audit report by the Assessee along with its return in terms of Section 12 A(b) of the Act. The Revenue raised only one ground in its appeal before the ITAT. Thereafter, while the appeal was pending, an additional ground was urged in writing on 18th July, 2002. Even this did not pertain to the failure by the Assessee to file the audit report with its return. The said issue was sought to be urged for the first time during oral arguments before the ITAT. However, in para 16 of the impugned order, the ITAT declined to permit the Revenue to do so "since the initial ground raised before the Tribunal questions the action of the CIT(A) in allowing the benefit of Section 11 although no order under Section 12A(a) has been passed by the Director of Income Tax (E). Moreover, the registration now has been granted and the other relates back to the date of the application."

28. There appears to be no justification for the Revenue to have not urged such a ground in its memorandum of appeal. The Court is also not able to agree with the contention of Ms. Malhotra that this is a pure question of law and could be raised at any time. It is a mixed question of law and fact. Consequently the Court is of the view that if the present appeal had not been admitted *ex parte*on the first date it is possible that the Court may not have framed a question on Section 12 A(b) of the Act.

29. Nevertheless the question having been framed, requires to be examined on its merits. The facts in ***Commissioner of Income Tax-XI v. Indian National Congress (I)/All India Congress Committee*** (*supra)* speak for themselves. There, the Assessee was a major political party.It had not filed the return and along with it the audited accounts for the AY in question i.e. 1994-95. When it ultimately did produce the audited accounts, after an inordinate delay at the appellate stage before the CIT (A),the accounts were found to be unsatisfactory and not presenting a true and fair picture of the financial affairs of the party. The audit report produced too was found to be far from satisfactory. The Court found: "The final audited accounts tendered at the appellate stage contained various discrepancies and shortcomings. The auditor¨s report submitted before the CIT (A) ....is woefully short of the requirement of the law." In the circumstances, this Court held that the INC was not entitled to claim exemption under Section 13 A of the Act from paying income tax for the AY in question.

30. Again in ***Commissioner of Income Tax, Delhi-XI v. Janata Party***

(*supra)*, which was a case involving another political party, this Court found that the audit report filed by the party did not "satisfy the requirement of the law." Further the accounts produced by the party "were not such as would enable the AO to properly deduce its income. The consolidated accounts produced after the filing of the returns disclosed a figure of voluntary contributions that differed from that disclosed in the original return."

31. In the present case, however, there is no finding that the audit report submitted by the Assessee does not satisfy the requirement of the law. The Assessee's audited accounts too were not doubted. The delay in submitting the audit report could not be said to be inordinate. The Assessee was able to show that the delay was due to bona fide reasons beyond its control. Apart from the letter dated 5th October, 1995 explaining its difficulties, the Assessee's letter dated 19th February, 1996 sought to explain the accounts to the extent available with it as follows:

> "4. The details of Life Member Corpus donations received are from 1,848 members of Rs.2,000/- each. Detailed list of Rs.36,96,000/- (not the figure you have given in the letter of Rs.39,66,000/- wrongly) is enclosed and Rs.36,96,000/- is the figure in the Balance Sheet.
>
> Regarding your query related to Audit Report in Form 10-B and furnishing of Audited Accounts, we have to submit as under:
>
> It is well known fact that VHP was banned for 2 years under Unlawful Activities Act on 10.12.92 and the ban lapsed on 10.12.1994. Again the ban was imposed on 14th January, 1995 and by a judgment of the Hon'ble Tribunal by Justice K. Ramamurthy, the ban order was quashed on 20.6.1995. Due to the above ban, the books of Account of VHP Central Office, Delhi,

for the Assessment Year 1993-94 were in the custody of Police Department. After lifting of the ban, these were collected and then the writing of books was completed and accounts finalised. There were various centres from where the accounts were to be collected before these could be audited.

The present accounts for the Assessment Year 1993-94 consist of the accounts of (i) VHP Delhi Office, (ii) VHP Mumbai Office, (iii) Sanskriti Raksha Yojana Office, Mumbai, (iv) Madyanchal Office, Lucknow, (v) Uttaranchal Office, Delhi. Sanskriti Raksha Yojana Office accounts are audited at Mumbai and Madyanchal accounts are audited at Lucknow. The remaining three accounts are audited at Delhi.

As regards Madyanchal, we are enclosing herewith the audited accounts which is already incorporated in the accounts furnished along with the return which is before your goodself and it tallies. Similarly, we are also contacting Sanskriti Raksha Yojana Office at Mumbai for expeditiously sending the audited accounts. We are expecting these at any time and as soon as these are received, it will be compared with the existing consolidated accounts and furnished to your goodself in the proper form. Therefore, we need time to do the above before giving it to you. We may kindly be given time till 5.3.1996."

32.The assessment order was passed on 29th February 1996 and the Assessee's audit report was ready on 12th March 1996. Hadthe AO granted the Assessee two weeks' time, the Assessee would have filed its audit report and the assessment order passed thereafter would still have been within the deadline of 31st March 1996. It would have caused no prejudice to the Revenue.

33.The CIT(A) noted that even if there was a non-compliance with Section 12 A (b) of the Act by the Assessee, thus disentitling it to

exemption under Sections 11 and 12 thereof, the AO was still not justified in adding the entire corpus of the Assessee to its taxable income. The corpus fund had been present in the earlier years and was a capital receipt. Even as per the original return, the Assessee did not have any excess over expenditure which could have been taxed. The ITAT committed no error in concurring with the CIT (A).

34. For all the aforementioned reasons, the Court finds that the question framed at (ii) above has to be answered in the negative, viz., in favour of the Assessee and against the Revenue. It is held that the Assessee could not have been denied exemption under Sections 11 and 12 of the Act as there was no failure to comply with Section 12A (b) of the Act.

35. The above conclusions are in the peculiar facts discussed hereinabove and also considering that this infraction is for only one AY, i.e., 1993-94. It is not even the Revenue¨s case that for any year thereafter or earlier there has been any failure by the Assessee to comply with the mandatory provisions of the Act.

36.The appeal is accordingly dismissed but in the circumstances with no orders as to costs.

S.MURALIDHAR, J

ANIL KUMAR CHAWLA, J

MAY 08, 2017

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