



IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7708 OF 2008

Maharashtra Academy of Engineering & Educational

Research, Pune

.. Petitioner

V/s

Director General of Income Tax (Investigation), Pune & Anr.

.. Respondents

Mr. S.G. Dastur, Senior Advocate with Mr. K.B. Bhujle for the Petitioner.

Mr. B.M. Chaterjee with Mr. Y. Patki and Mr. P.S. Sahadevan for the respondents.

CORAM : FERDINO I. REBELLO & D.G. KARNIK, JJ.

DATE : 28TH JULY 2009

**JUDGMENT** : (Per Ferdino I. Rebello, J.)

1. Rule. By consent of the parties, heard forthwith.
2. The petitioner is a Public Trust whose sole activity is of running educational institutions. Upto A.Y. 1988-89, the income of the petitioner was exempted under section 10(22) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). Section 10(22) was omitted by Finance (No.2) Act, 1998 with effect from 1<sup>st</sup> April 1999, i.e. from A.Y. 1999-2000 and the exemption for the income of an educational institution like the petitioner

Trust was provided in the amended section 10(23C)(vi). The said section 10(23C)(vi) of the Act, as applicable for A.Y. 1999-2000, reads as under:-

**“Incomes not included in total income.**

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

(i) .....

(vi) any university or other educational institution existing solely for educational purposes and not for purposes of profit, other than those mentioned in sub-clause (iiiab) or sub-clause (iiid) and which may be approved by the prescribed authority.”

3. The petitioner Trust made an application for approval on 30<sup>th</sup> March 1999. The Prescribed Authority for granting approval was the Central Board of Direct Taxes (CBDT). By its order dated 9<sup>th</sup> March 2004, the CBDT approved the petitioner Trust for the purposes of exemption under section 10(23C)(vi) of the Act for the A.Ys. 1999-2000 to 2001-02. The petitioner thereafter made applications for renewal dated 24<sup>th</sup> December 2002 for A.Ys. 2002-03 to 2004-05 and on 22<sup>nd</sup> February 2005 for A.Ys. 2005-06 to 2007-08.

4. Subsequent to the survey under section 133A of the Act carried out on the office premises of the petitioner Trust on 20<sup>th</sup> July 2005, a show cause notice dated 30<sup>th</sup> April 2007 by CIT (Central), Pune came to be issued on the petitioner under section 12AA(3) of the Act to show cause why the registration granted to the petitioner Trust under section 12A(a) of the Act on 25<sup>th</sup> March 1999 ought not to be cancelled. The petitioner showed cause against the same. By an order dated 31<sup>st</sup> October 2007 passed by the CIT (Central), Pune the registration was cancelled.

5. The petitioner by its letter dated 9<sup>th</sup> August 2007 had requested the 1<sup>st</sup> respondent to grant renewal of the exemption for the period A.Y. 2002-03 onwards. Instead of granting renewal, the 1<sup>st</sup> respondent issued a show cause notice dated 26<sup>th</sup> November 2007 proposing to rescind the approval granted by CBDT on 9<sup>th</sup> March 2004. The 1<sup>st</sup> respondent by his order dated 8<sup>th</sup> February 2008 rescinded the approval granted by CBDT on 9<sup>th</sup> March 2004 under section 10(23C)(vi) of the Act for the period A.Ys. 1999-2000 to 2001-02 and also refused to renew the approval for the subsequent period.

6. The show cause notice issued was also based on the report of the CIT (Central) dated 5<sup>th</sup> November 2007 opposing the renewal of approval of the petitioner Trust under section 10(23C)(vi) of the Act. There are various other facts which need not be set out including those which have been incorporated pursuant to the amendment allowed by this Court by an order

dated 26<sup>th</sup> March 2009.

7. Though various contentions have been raised on behalf of the petitioner, it is pointed out that the order passed by the 1<sup>st</sup> respondent is without jurisdiction and consequently on this point alone the petition has to be allowed and the order is liable to be set aside and the matter remanded for consideration by the Prescribed Authority, which, according to the petitioner, is CBDT and not respondent no.1, i.e. Director General of Income Tax (Investigation), Pune.

8. Replies have been filed on behalf of the respondents. The passing of the impugned order was justified. By our order dated 22<sup>nd</sup> June 2009 after hearing the parties, the Court had directed the respondents to clarify as to who is the Prescribed Authority. Pursuant to that, an affidavit has been filed by Mr. Dharamchand Nemichand Parikh, Deputy Director of Income Tax (Investigation)(H. Qrs.), Pune. Reliance is placed on Rule 2CA of the Income Tax Rules. Reliance is also placed on a notification dated 30<sup>th</sup> May 2007. Based on the Rules and the notification, it is set out that the respondent no.1 would be the Prescribed Authority.

9. Considering the narrow controversy, we will first consider Rule 2CA of the Income Tax Rules, which reads as under:-

**“Guidelines for approval under sub-clauses (vi) and (via) of clause (23C) of section 10**

**2CA** (1) The prescribed authority under sub-clauses (vi) and (via) of clause (23C) of section 10 shall be the Chief Commissioner or Director General to whom the application shall be made as provided in sub-rule (2).

(1A) The prescribed authority under sub-clauses (vi) and (via) of clause (23C) of section 10 shall be the Central Board of Direct Taxes constituted under the Central Board of Revenue Act, 1963 for applications received prior to 3<sup>rd</sup> day of April 2001.

Provided that in case of applications received prior to 3<sup>rd</sup> day of April 2001 where no order has been passed granting approval or rejecting the application as on 31<sup>st</sup> day of May 2007, the prescribed authority under sub-clauses (vi) and (via) of clause (23C) of section 10 shall be the Chief Commissioner or Director General.

(2) An application for approval shall be made in Form No.56D by any university or other educational institution or any hospital or other medical institution referred to in sub-clauses (vi) and (via) of clause (23C) of section 10.

(3) The approval of the Central Board of Direct Taxes or Chief Commissioner or Director General, as the case may be, granted before the 1<sup>st</sup> day of December 2006 shall at any one time have effect for a period not exceeding three assessment years.”

10. We may also reproduce below the part of notification:

“**Prescribed authority.**- In pursuance of the provisions contained in sub-clauses (vi) and (via) of clause (23C) of section 10 read with sub-rule (3) of rule 2CA, the Central Board of Direct Taxes hereby authorises the following chief Commissioners or Directors Generals to act as prescribed authority for the purposes of sub-clauses (vi) and (via) of clause (23C) of section 10 in relation to any university or other educational institution or any hospital or other medical institution with effect from the 1<sup>st</sup> day of June 2007, namely:-

(i) for cases falling in the jurisdiction of Director of Income-tax (Exemption), Ahmedabad, the prescribed authority shall be Chief Commissioner of Income-tax, Ahmedabad-IV, Ahmedabad;

(ii) for cases falling in the jurisdiction of Director of Income-tax (Exemption), Bangalore, the prescribed authority shall be

Chief Commissioner of Income-tax, Bangalore-I, Bangalore;

(iii) .....

11. From a reading of Rule 2CA of the Rules, it would be clear that in respect of application received prior to 3<sup>rd</sup> April 2001, the prescribed authority under sub-clauses (vi) and (via) of clause (23C) of section 10 of the Act shall be CBDT constituted under the Central Board of Revenue Act. In section 10(23C), the expression used is “prescribed authority”. Prescribed authority is not defined under the Act. Under the Rules framed the prescribed authority has been defined for the purpose of sub-clause (vi) and (via) as the Chief Commissioner or Director General, and in respect of applications received prior to 3<sup>rd</sup> April 2001 as CBDT. There is also a proviso to sub-rule 2CA which sets out that in respect of application received prior to 3<sup>rd</sup> April 2001 where no order has been passed granting approval or rejecting the application as on 31<sup>st</sup> May 2007, the prescribed authority under sub-clauses (vi) and (via) of clause (23C) of section 10 shall be the Chief Commissioner or Director General.

12. In that context, let us consider section 10(23C)(vi) and/or (via) of the Act as also the 13th proviso which reads as under:

**“Provided also** that where the fund or institution referred to in

sub-clause (iv) or trust or institution referred to in sub-clause (v) is notified by the Central Government [or is approved by the prescribed authority, as the case may be,] or any university or other educational institution referred to in sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (via), is approved by the prescribed authority and subsequently that Government or the prescribed authority is satisfied that

(i) such fund or institution or trust or any university or other educational institution or any hospital or other medical institution has not

(A) applied its income in accordance with the provisions contained in clause (a) of the third proviso; or

(B) invested or deposited its funds in accordance with the provisions contained in clause (b) of the third proviso; or

(ii) the activities of such fund or institution or trust or any university or other educational institution or any hospital or other medical institution

(A) are not genuine; or

(B) are not being carried out in accordance with all or any of the conditions subject to which it was notified or approved,

it may, at any time after giving a reasonable opportunity of showing cause against the proposed action to the concerned

fund or institution or trust or any university or other educational institution or any hospital or other medical institution, rescind the notification or, by order, withdraw the approval, as the case may be, and forward a copy of the order rescinding the notification or withdrawing the approval to such fund or institution or trust or any university or other educational institution or any hospital or other medical institution and to the Assessing Officer:]”

13. Thus, insofar as the petitioner is concerned, considering that the approval was granted on 9<sup>th</sup> March 2004 and the application was made on 24<sup>th</sup> December 2002, it would be CBDT which would be the prescribed authority to grant the application and also to consider, review or recall the order insofar as A.Ys. 1999-2000 to 2000-01 are concerned.

14. The only argument advanced on behalf of the respondents has been that if the notification of 30<sup>th</sup> May 2007 is considered, it would be clear that the CBDT has authorised the Chief Commissioner or the Director General. It is the submission on behalf of the respondents that there is delegation of powers by CBDT in favour of the Director General. Let us examine the said contention.

15. The Rules made are pursuant to the power conferred on the CBDT

under section 295 of the Act. The Rules so made, insofar as section 10(23C) (via) is concerned, have defined the “prescribed authority” in respect of applications made prior to 3<sup>rd</sup> April 2001 and which were not disposed of by 31<sup>st</sup> May 2007 as the CBDT.. The notification issued on 30<sup>th</sup> May 2007 would be referable to Rule 2CA(1) which has notified the Chief Commissioner or the Director General, generally, i.e. without any territorial jurisdiction. There are several Chief Commissioners or Director Generals for various commissionerates or areas throughout India. The notification only spells out which of the Director Generals or Chief Commissioners would have jurisdiction in that area. So read, insofar as Rule 1A is concerned, it is clear that it will be that Chief Commissioner or Director General for that area alone would have jurisdiction over that area. The rule cannot be read into 1A which has specifically defined the prescribed authority as CBDT. There is no delegation of power of the CBDT by the notification to the Director General or any Commissioner. The notification therefore is clearly inapplicable insofar as Rule 2CA(1A) is concerned.

16. Having held that the prescribed authority is CBDT – respondent no.1 for the years 1990-2000 to 2000-01, the prescribed authority to pass the order reviewing grant of permission would be CBDT. In our opinion, once a power is conferred by the Act and the Rules, it is only that authority, who has been conferred power under the Act and the Rules who alone can assume jurisdiction. Merely because in the reply to the show cause notice, an

objection was not raised would not confer power on an authority which otherwise had no jurisdiction. Clearly therefore the order recalling or reviewing the earlier order dated 8<sup>th</sup> February 2008 is beyond jurisdiction and is liable to be set aside.

17. In the light of the above and for the aforesaid reasons, this petition is disposed of in the following terms:

(a) The petition is partly allowed and the impugned order dated 8<sup>th</sup> February 2008, more particularly paragraphs 10 and 11 thereof, are set aside. The power to rescind or recall for the yeas 1999-2000 to 2000-01 is to be exercised by CBDT alone.

(b) The DGIT is directed to consider the pending applications of the petitioner for the assessment years 2002-03 to 2004-05 and for the assessment years 2005-06 to 2007-08.

(c) It is open to the competent authority, if so entitled in law, to take such steps as he is entitled to.

(d) Considering our order, all parties including the Commissioner of Appeals to act accordingly and hear the pending appeals and dispose of the same at the earliest.

(e) In the event there be an adverse order, the same shall not be acted upon for a period of 8 weeks from the date of its communication.

(f) It is made clear that in respect of applications for A.Y. 2002-03 onwards, it will be the respondent no.1 – Director General of Income Tax in terms of the Rules, who will be the competent authority.

18. We further make it clear that we have not gone into the issues on the merits and have left all questions open for consideration by the prescribed authority.

19. The learned counsel for the respondents prays for stay of this order. The request is rejected. In the meanwhile, during the pendency of the appeals, the respondents shall not make any recovery.

(D.G. KARNIK, J.)

(F.I. REBELLO, J.)