IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "SMC", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA Nos. 3550 & 3551/Del/2018

Assessment Year: 2014-15

NEW AMAZING SHIKSHA SOCIETY, G-49, PRATAP VIHAR, GHAZIABAD (PAN: AAAAN9356R)	VS.	ITO(EXEMPTION (WARD) GHAZIABAD R.NO. 105, CGO-II KAMLA NEHRU NAGAR, GHAZIABAD – UP
(APPELLANT)		**(RESPONDENT)**

Assessee by : Ms. Sonia Rani, CA
Department by : Sh. SL Anuragi, Sr. DR

ORDER

PER H.S. SIDHU, JM

The Assessee has filed these appeals in respect of assessment year 2014-15 against the orders dated 29.9.2017 and 28.3.2018 passed by the Ld. CIT(A), Ghaziabad in quantum as well as in penalty appeals. Since the issues involved in these appeals are inter–connected, hence, these appeals were heard together and are being disposed of by this common order for the sake of convenience. We first deal with Assessee's Appeal No. 3550/Del/2018 (AY 2014-15).

2. The grounds raised in Assessee's Appeal No. 3550/Del/2018 (AY 2014-15) read as under:-

"1. That the Ld. CIT(A) has erred in law and on facts, while establishing that the appellant did not work solely for educational purpose merely because the incidental activities were taken by the appellant during the year. As such the order passed by the CIT(A) is bad in law and thus determining the income at Rs. 12,01,906/- may please be deleted.

2. That the Ld. CIT(A) has erred in law and on facts, while confirming the addition made by the AO of Rs. 4,08,190/- and enhancing the addition to Rs. 12,01,906/-, as the belief entertained by the CIT(A) that the entire surplus shown in the income and expenditure should be the profit earned by the appellant during the year, is not justifiable and illegal. As such addition of Rs. 12,01,906/- may please be deleted.

3. That the Ld. CIT(A) has erred in law and on facts, while denying the exemption u/s. 10(23C)(iiiad) of the Income Tax Act, 1961 without appreciating the facts and submission of the assessee. As such addition of Rs. 12,01,906/- may please be deleted.

4. That the Ld. CIT(A) has erred in law and on facts, while denying the exemption u/s. 10(23C)(iiiad) of the Act merely because buying and selling of uniform and books for educational purpose is not specifically mentioned in the memorandum of association of the appellant. Thus, the order passed by the CIT(A) for not providing the benefits of the section 10(23C)(iiiad) of the Act may please be quashed.

5. That the appellant craves leave to add, alter, delete and modify any of the ground of appeal at the time of hearing.

3. The grounds raised in Assessee's Appeal No. 3551/Del/2018 (AY 2014-15) read as under:-

1. That the Ld. CIT(A) has erred in law and on facts, while levying the penalty under section 271(1)(c) of the Income Tax Act, 1961 without appreciating the submission of assessee and as such penalty of Rs. 2,45,258/- may please be deleted.

2. That the Ld. CIT(A) has not specified in the notice u/s. 271(1)(c) r.w.s. 274 of the Act whether the penalty was leviable for concealment of income or for furnishing inaccurate particulars thereof. Therefore, the penalty order u/s. 271(1)(c) of the Act may please be quashed.

3. That the Ld. CIT(A) has erred in law, while passing the order u/s. 271(1)(c) of the Act without justifying in the order whether the penalty was levied for concealment of income or for furnishing inaccurate particulars thereof. Therefore, the penalty order u/s. 271(1)(c) of the Act may please be quashed.

4. That the appellant craves leave to add, alter, delete and modify any of the ground of appeal at the time of hearing.

Assessee's Appeal No. 3550/Del/2018 (AY 2014-15)

4. The brief facts of the case are that return of income declaring NIL income was filed on 31.10.2007. The case of the assessee was selected

for scrutiny under CASS and statutory notice u/s. 143(2) of the Income Tax Act, 1961 (in short "Act") on 18.9.2015. Notice u/s. 142(1) of the Act dated 11.7.2016. In response to the same, the AR of the assessee attended the proceedings from time to time and furnished the required details and information. The assessee is a society and is registered with the Registrar of Society, Uttar Pradesh under Society Registration Act. The assessee society has been claiming exemption u/s. 10(23C)(iiiad) of the Act. Assessee society is running a school named New Amazing Children Academy at Pratap Vihar, Ghaziabad. The assessee has filed the copy of audit report and balance sheet, income and expenditure a/c. During the year, assessee has disclosed total receipts of Rs. 99,14,564/- against which expenditure of Rs. 87,13,000/- was claimed and surplus of Rs. 12,01,906/- was shown and claimed as exempt u/s 10(23C)(iiiad) of the Act. The total receipts includes sale of books at Rs. 14,19,339/- and sale of dress at Rs. 2,13,300/- total to Rs. 16,32,639/-, against which purchases of books, copies and uniform is shown at Rs. 12,24,454/-. Thus, there is a profit of Rs. 4,08,185/-, which the assessee has claimed exempt u/s. 10(23C)(iiiad) of the Income Tax Act, 1961. Accordingly, the assessee was asked to explain as to why the profit of Rs. 4,08,185/- on sale of books and uniform should not be taxed vide, questionnaire dated 19.7.2016 and in response to the same, the assessee filed the reply, which was duly considered by the AO, who held that assessee has claimed exemption u/s. 10(23C)(iiiad) of the Act. He held that the purchase and sale of books and uniform is not educational activity.

Therefore, the assessee is not entitled for exemption u/s. 10(23C)(iiiad) of the Act on profit of Rs. 4,08,185/- on sale and purchase of books and uniform and the gross sale and purchase shall be deducted from the gross receipts and from the gross expenses and the surplus of Rs. 4,08,185/- is liable for tax at MMR as business income. Thus, the profit arisen on sale of books and uniform worked out at Rs. 4,08,185/-, vide order dated 21.11.2016 passed u/s. 143(3) of the I.T. Act, 1961 and assessed the income of the assessee at Rs. 4,08,190/-.

5. Against the assessment order dated 21.11.2016 the assessee appealed before the Ld. CIT(A), New Delhi, who vide his impugned order dated 29.9.2017 has dismissed the appeal of the assessee by enhancing the income from Rs. 4,08,190/- to Rs. 12,01,906/-. Aggrieved with the impugned order, the Assessee is in appeal before the Tribunal.

6. Ld. Counsel of the assessee has submitted that Ld. CIT(A) has erred in law and on facts, while establishing that the assessee did not work solely for educational purpose merely because the incidental activities were taken by the assessee during the year. She further submitted that Ld. CIT(A) has wrongly confirmed the addition made by the AO of Rs. 4,08,190/- and enhanced the addition to Rs. 12,01,906/-, as the belief entertained by the Ld. CIT(A) that the entire surplus shown in the income and expenditure should be the profit earned by the assessee during the year, is not justifiable and illegal. It was further submitted that Ld.CIT(A) has wrongly denied the exemption u/s. 10(23C)(iiiad) of the Income Tax Act, 1961 without appreciating the facts and submission of

the assessee. It was further submitted that exemption u/s. 10(23C)(iiiad) of the Act was denied merely because buying and selling of uniform and books for educational purpose is not specifically mentioned in the memorandum of association of the assessee. In view of above, she requested that the order passed by the Ld. CIT(A) for not providing the benefits of the section 10(23C)(iiiad) of the Act may please be quashed. In support of her contention, she filed a Paper Book containing pages 1-36 in which she has attached the Audit Report and Balance Sheet of the FY 2013-14; computation and ITR of the AY 2014-15; relevant copy of written submissions filed before AO dated 21.11.2016; copy of written submissions filed before CIT(A) dated 7.9.2017; copy of Memorandum; English Translation of the objectives at page no. 1 of Memorandum; copy of written submissions filed before CIT(A) dated 11.9.2017; copy of written submissions filed before CIT(A) dated 27.9.2017 and registration u/s. 12AA of the Act dated 26.5.2017. She also filed a letter dated 23.1.2019 stating therein that the assessee is an educational institution and had claimed exemption u/s. 10(23C)(iiiad) of the Act, for the AY 2014-15 as total receipts for the year under consideration was less than 1 Crore and thus, entire surplus of Rs. 12,01,906/- is not taxable as per provision of law and in this regard, she attached the utilization of surplus generated during AY 2014-15, over the years alognwith supporting documents. She also filed the copy of the Income Tax Department Circular No. 11/2008 dated 19.12.2008 stipulating therein the Definition of 'Charitable purpose' under section 2(15) of the Income

Tax Act. In support of her contention she also filed another Paper Book containing pages 1-310 in which she has attached the copy of judicial pronouncements covering the case of the assessee viz. St. Lawrence Educational Society (Regd.) vs. CIT (2013) 353 ITR 320 (Delhi); CIT vs. Surat Art Silk Clothes Manufacturers Association (1980) 121 ITR 1 (SC); IILM Foundation vs. ADIT, ITA No. 1142/Del/2011, dated of pronouncement on 8.11.2017 (ITAT, Delhi). Pinegrove International Charitable Trust vs. UOI 188 taxmann 402 (2010) (P&H); Queen's Educational Society vs. CIT (2015) 372 ITR 699 (SC); Hosiarpur Improvement Trust vs. ITO, ITA Nos. 497/Asr/2013 for AY 2009-10 Date of pronouncement 10.9.2015 ITAT Amritsar; Association of school Vendors and Ors. vs. Central Board of Secondary Education and Ors. WP(C) No. 7414/2017 Date of Pronouncement 21.2.2018, Hon'ble Delhi High Court and CIT vs. Delhi Kannada Education Society (2000) 246 ITR 731 (Hon'ble Delhi High Court.) In view of above, she requested to allow the appeal of the assessee.

7. On the contrary, Ld. DR relied upon the orders of the Ld. CIT(A) and also relied upon the case laws relied upon by the Ld. CIT(A). He submitted that assessee stated to be engaged in establishment and management of primary and higher education institutions. However, it was observed during the year that assessee is engaged in sale and purchase of books and uniform constituting around 16% of total receipts and involving gross profit of 4% on such sales. He further submitted that such a state of affairs establishes that educational institution did not work

solely for educational purposes but for profit only. It was further submitted by him that buying and selling of uniform and earning of profit thereon, by no means can be held to be educational activity. He further submitted that it is not one of the stated objectives of the society and placed the reliance on the decision of Hon'ble Supreme Court of India in the case of Aditanar Educational Institution vs Addl. CIT 224 ITR 310 (SC) wherein the Hon'ble Court has held that the availability of the exemption should be evaluated each year to find out whether institution existed during the relevant year solely for educational purposes and not for the purpose of profit. Thus, in this case, during the year under consideration, the assessee failed to establish that it existed solely for education and not for profit thus is not eligible for benefit for provision of section u/s 10(23C)(iiiad). He further submitted that the assessee was given and enhancement notice u/s 251(2) of the Act on 15.09.2017 as to why the income of the assessee should not be enhanced, withdrawing exemption granted by AO u/s 10(23C)(iiiad) as the activities undertaken by the assessee were beyond aim and objectives and were purely commercial in nature and in response to the same the assessee replied that the word solely for educational purposes includes activities such as sale of books and uniform. Therefore, he submitted that assessee has gone beyond the mandate given by the memorandum of association and activities of the assessee during the year have not been solely for the purpose of education, makes it ineligible for the benefits of section 10(23C)(iiiad) of the Act. Therefore, he stated that the entire profit earned during the year

i.e. Rs. 12,01,906/- was chargeable to tax and therefore, Ld. CIT(A) has held that the income of the assessee as assessed by the AO Rs. 4,08,190 was rightly enhanced to Rs. 12,01,906/- which does not need any interference. Hence, he requested to uphold the order of the Ld. CIT(A) and dismiss the appeal of the assessee.

8. I have heard both the parties and perused the records, especially the impugned order. I note that the assessee is a society, registered under Society Registration Act and has been claiming exemption u/s 10(23C)(iiiad) of the Income Tax Act, 1961. The Assessee is running a school namely New Amazing Children Academy recognized under U.P. state Board and income tax return for A.Y. 2014-15 was filed on 26-12-2014 declaring Nil income. Notice u/s 143(2) of the Act was issued on 18-09-2015 and further Notice u/s 142(1) dated 11-07-2016 was issued. During the concerned year, the assessee has disclosed total receipts of Rs.99,14,564/- which is less than Rs.1 crore against which expenditure of Rs. 87,13,000/- is claimed and surplus of Rs. 12,01,906/- is shown and claimed exemption u/s 10(23C)(iiiad) of the Income Tax Act, 1961. The total receipts include sale of books of Rs.14,19,339/- and sale of dress of Rs.2,13,300/- totaling Rs.16,32,639/- against which expenses on books, copies & uniforms amounts to Rs.12,24,454/-. I further note that the AO alleged that the purchase and sale of books and uniforms are not educational activity and made alleged addition of Rs.4,08,185/- by considering the surplus generated as business income. Aggrieved with the order of AO, Assessee preferred appeal before the Ld.

CIT(A) and Ld. CIT(A) in his impugned order has held that the assessee did not work solely for educational purposes but for profit, merely on the basis that the assessee generated surplus during the year under consideration and enhanced the addition from Rs.4,08,185/- to Rs.12,01,906/- (i.e. alleged that the entire surplus made during the year is chargeable to tax). I further note that surplus arises does not amounts to profit earned, hence, exemption u/s 10(23)(iiiad) of the Income Tax Act, 1961 should not be denied merely on the basis of the same. It is also noted that the assessee has generated the surplus of Rs.12,01,906/- (i.e. only 12.12% of total receipts) during the year under consideration. Merely because there is a surplus, i.e., excess of receipts over expenditure, it cannot be said that it is the profit earned by the assessee during the year. It does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit. The surplus in books of accounts of assessee for year under consideration is merely 12.12%. (i.e. Surplus - Rs.12,01,906.17 and Total Income - Rs.99,14,564.00) which is less than 15% and considered legitimate for charitable purpose. Therefore, it can be concluded that the institution is existing for the educational purpose and not for the purpose of profit. It is noted that the assessee is engaged in providing education to children, to open schools/ colleges. The assessee also sells the uniforms and books only to the students of the school of the appellant, not to outsiders, at lower rates compared to market rates. No implication arises that merely because imparting education and selling

uniforms and books results in making a surplus, it becomes an activity for profit. It would not lose its character of an educational purpose merely because some surplus arises from the activity. Further, it does not require that the activity must be carried on in such a manner that it does not result in any profit. Moreover, the assessee used the surplus generated for educational purpose. Therefore, it cannot be said that the educational institution ceases to exist solely for the educational purposes and becomes an institution only for the purpose of making profit. I further note that section 10(22) explains any income of a university or other educational institution, existing solely for educational purposes and not for purposes of profit and whereas new section 10(23C)(iiiad) provides Any income of a university or other educational institution, existing solely for educational purposes and not for purposes of profit if the aggregate annual receipts of such university or educational institution do not exceed Rs. 1 crore. Therefore, the intent of the law while introducing section 10(23C)(iiiad) and section 10(23C)(vi) is same as behind section 10(22), therefore all the judgement passed u/s 10(22) shall be applicable to section 10(23C) subject to similar facts. To support my aforesaid view, I draw support from the judgement in the case of Queen's Educational Society Vs Commissioner of Income-tax 120151 372 ITR 699 of the Hon'ble Supreme Court wherein, it has been held as under:-

> *".....11.Thus, the law common to Section 10(23C) (iiiad) and (vi) may he summed up as follows:*

(1) Where an educational institution carries on the activity of education primarily for educating persons, the fact that it makes a surplus does not lead to the conclusion that it ceases to exist solely for educational purposes and becomes an institution for the purpose of making profit.

(2) The predominant object test must be applied - the purpose of education should not be submerged by a profit making motive.

(3) A distinction must be drawn between the making of a surplus and an institution being carried on 'for profit". No inference arises that merely because imparting education results in making a profit, it becomes an activity for profit.

(4) If after meeting expenditure, a surplus arises incidentally from the activity carried on by educational institution, it will not be ceases to be one existing solely for educational purposes.

(5) The ultimate test is whether on an overall view of the matter in the concerned assessment year the object is to make profit as opposed to educating persons……..

19. It is clear, therefore, that the Uttarakhand High Court has erred by quoting a non-existent passage from an applicable judgment, namely, Aditanar and quoting a portion of a property tax judgment which expressly stated that rulings arising out of the Income Tax Act would not be applicable. Quite apart from this, it also went on to further quote from a portion of the said property tax judgment which was rendered in the context of whether an educational society is supported wholly or in part by voluntary contributions, something which is completely foreign to Section 10(23C) (iiiad). The final conclusion that if a surplus is made by an educational society and ploughed back to construct its own premises would fall foul of Section 10(23C) is to ignore the language of the Section and to ignore the tests laid down in the Surat Art Silk Cloth Mfrs. Association (supra) case, Aditanar Educational Institution (supra) case and

> *the American Hotel and Lodging case. It is clear that when a surplus is ploughed back for educational purposes, the educational institution exists solely for educational purposes and not for purposes of profit"…….*

8.1 Further, the dispute in the case of the assessee relates to the applicability of the provisions of section 10(23C)(iiiad) of the Act. This section reads as under: -

> "Any income received by any person on behalf of any university or other educational institution existing solely for educational purposes and not for purposes of profit if the aggregate annual receipts of such university or educational institution do not exceed the amount of annual receipts as may be prescribed."

8.2 Thus, from the plain reading of section 10(23C)(iiiad) of the Act, it is apparent that any income of any university or other educational institutional existing solely for educational purposes and not for the purpose of profit is totally exempt if the aggregate annual receipts of such university or educational institution do not exceed the amount of annual receipt as may be prescribed. This means that there is no restriction on the generation of surplus u/s 10(23C)(iiiad). It can be said that any university or other educational institution can generate surplus. Therefore, so long as the purpose of the institution does not involve carrying on of educational activity for profit, the requirement of condition given under section 10(23C)(iiiad) could be met if the activity of the educational institution is carried out not for the purpose of profit.

8.3 It is also noted that buying and selling of uniform and books to students of assessee, for educational purpose is not commercial activity. Because the assessee is engaged in providing primary and higher education to the poor students and working under the aims and objects of the society. It also engaged in sale and purchase of books and uniform to the students of the assessee school only, at cheaper rate than market prices, which is also a part of educational activity. Also, the assessee buys and sells only those books and uniforms which are related to the students only. It is entirely for the education of the students which is not beyond the aim and objective of the society. There is no need to specifically mentioned about the sale of uniforms and books in the memorandum of association as it is incidental to the educational activities which is object of the assessee. It is noted that the purchase and sale of text books, stationery items and uniforms exclusively to the students studying in the school are not in the nature of commercialization since all these activities are essential requirements of the students. The sale and purchase of books and uniform to the students are not commercialized activities. It actually benefits the entire student community as it not only provides convenience but also promotes equality by ensuring that there is uniformity in the products being sold and used by the children. Therefore, it can be said that these activities are undertaken for the educational purposes only. My aforesaid view is fortified by the following decision of the Hon'ble Delhi High Court in case of Association of School Vendors & Ors vs. Central Board of Secondary Education & Ors, WP(C)

No.7414/2017, Date of Pronouncement: 21/02/2018, wherein the Hon'ble High Court has observed as under:-

> *"39. In my considered opinion, the use of the school buildings for purposes of education, would put a corresponding duty on the school management to ensure that the students are provided with all necessary facilities so as to help them pursue education in the school. The availability of books, both NCERT and non NCERT, stationery items and uniform in the School premises would only add to the convenience of the parents and the students. The admitted case of the parties is that the aforesaid items in the school shops would be available only to the students of the school and not to outsiders and, therefore, I see no element of commercialization in sale of these essential items in the school shops. If the sale of books and uniform in the school shops without any coercion on the students/parents to buy the same from these shops, is treated as "commercialization", there is no reason as to why even the sale of food items in canteen facilities would also not be treated as*

"commercialization". Such an interpretation would lead to a wholly absurd situation where on the analogy sought to be propounded by the Respondents, a request for prohibition of sale of food items may also be raised. This, in my opinion, cannot be the intent of the provisions in the bye-laws or the Rules, relied on by Respondents, while prohibiting commercialization in schools. The term "commercialization" in schools, would thus mean only carrying out of activities wholly unconnected with education. The availability of uniform, non-NCERT reference books or even food items for sale only to the students o f the school, in my opinion, does not fall in the category of and cannot at all be considered as "commercialization.

8.4 Keeping in view of the facts and circumstances of the case and respectfully following the precedents, as aforesaid, I am of the considered view that the exemption u/s 10(23)(iiiad) of the Income Tax Act, 1961 should not be denied to the assessee as selling of books and uniform to the students of assessee is part of educational activity only. Moreover, the impugned addition was made merely on the basis that surplus arises to the assessee during the year under consideration without

appreciating that the surplus is merely 12% which is considered as legitimate for charitable purposes. Thus, the addition of Rs.12,01,906/- is not tenable, hence, the same is deleted as such and accordingly the grounds raised by the assessee stand allowed. In the result, the ITA No. 3550/Del/2018 stands allowed.

9. As regards ITA No. 3551/Del/201 is concerned, since we have deleted the quantum addition in dispute, in the preceding paras of this order, hence, the penalty in dispute does not survive in the eyes of law u/s. 271(1)© of the Act. Therefore, the same is deleted and grounds raised by the assessee stand allowed. In the result, this appeal of the assessee is also allowed.

10. In the result, both the appeals of the assessee stand allowed.

Order pronounced on 26/02/2019.

Sd/-
(H.S. SIDHU]
JUDICIAL MEMBER

Date: 26/02/2019

"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY
By Order,

Assistant Registrar,
ITAT, Delhi Benches