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HIGH COURT OF JUDICATURE AT ALLAHABAD, LUCKNOW BENCH

Court No. - 4

[CASE :- INCOME TAX APPEAL NO. - 66 OF 2018]

Appellant :- Commissioner Of Income Tax (Exemption) Gomti Nagar Lucknow

Respondent :- M/S Army Wives Welfare Association Lucknow

Counsel for Appellant :- Manish Misra

Counsel for Respondent :- Jai Narayan Mishra,Raj Kumar Singh

Hon'ble Munishwar Nath Bhandari,J.

Hon'ble Vikas Kunvar Srivastav,J.

Heard Sri Manish Misra, learned counsel for the appellant and Sri Raj Kumar Singh, learned counsel for the respondents. By this appeal under Section 260A of the Income Tax Act of 1961 (in short 'Act of 1961'), a challenge is made to the order passed by the Income Tax Appellate Tribunal so as Commissioner of Income Tax (Appeals), Lucknow. The appeal was admitted on following substantial questions of law which are quoted as under:

"1. Whether on facts and circumstances of the case and in law the learned ITAT is justified in allowing the claim of exemption u/s 10(23AA) of the Income Tax Act 1961 when for its eligibility under this Section the income should have been generated by a fund established by the armed forces of the Union ?

2. Whether on the facts and circumstances of the case and in law, the learned ITAT is justified in deleting the addition of Rs. 20,15,500/- made u/s 40(a)(ai) of the Act whereas the exemption u/s 11 of the Income Tax Act 1961 has been denied in this case in the assessment order dated 12.02.2016 ?

3. Whether on the facts and circumstances of the case and in law, the learned ITAT is right in restricting the Maximum Marginal Rate on the addition of Rs. 1,54,745 and Rs. 2,95,185 made u/s 13 of the Income Tax Act 1961 whereas the exemption u/s 11 of the Income Tax Act 1961 has been denied in this case in the assessment order dated 12.2.2016 ?"

Learned counsel appearing for the revenue submits that while passing the assessment order initially, the exemption claimed by the assessee under Section 10(23AA) of the Act of 1961 was denied as it was not claimed at the time of submission of return. The assessee preferred an appeal before the CIT (Appeals) which was partly allowed on the issues other than in reference to Section 10(23AA) of the Act of 1961.

Aggrieved by the order by CIT (Appeals), the assessee approached the tribunal. The appeal therein was allowed with remand of the case to determine the issue in reference to Section 10(23AA) of the Act of 1961. During the intervening period, assessment order was passed after a notice under Section 148 of the Act of 1961. In the reassessment, after opening the case, an addition of Rs. 20,15,500/- was made on account of non-deduction of TDS, despite the fact that exemption under Section 11 of the Act of 1961 was not available on violation of Section 13 of the Act. Therein the minimum marginal rate was taken on whole, thus exemption under Section 11 was not found admissible and was denied by the assessment order dated 12.02.2016.

Aggrieved by the assessment order, the assessee preferred an appeal before the CIT (Appeals). It was heard alongwith remanded appeal. The CIT (Appeals) allowed the appeal of the assessee after holding him to be entitled to the benefit under Section 10(23AA) of the Act, 1961. The other issues were in reference to non-deduction of TDS as per Section 40(a)(ia) of the Act so as of the issue of maximum marginal rate. The CIT (Appeals) allowed the appeal. The revenue challenged the order of CIT (Appeals). It has been dismissed by the tribunal by maintaining the order passed by the CIT (Appeals). Thus, the present appeal has been preferred to challenge the order of CIT (Appeals) as well as the tribunal. Learned counsel for the revenue submits that exemption under Section 10 (23AA) of the Act of 1961 is admissible only on receipt of fund from an establishment of the armed forces of the Union for the welfare of the past and present members of the such forces or their dependents. The assessee was not an establishment by the armed forces of the union but wives of the army personnels. They were not receiving income from any regimental fund or non-public fund from the establishment of armed forces of the Union. In view of the above, the exemption under Section 10(23AA) of the Act was not available to the assessee. Ignoring the aforesaid, the tribunal allowed the benefit of exemption to the assessee without even considering aforesaid aspect. The order was passed only by referring to the orders of other ITAT 's and the judgment of Bombay High Court. It is despite the fact that issue aforesaid has not been decided there on the ground urged in this case. No finding has been recorded either by the CIT (Appeals) or by the tribunal that the assessee has received income from regimental fund or from non-public fund of an establishment by the armed forces of the Union. The establishment herein is by the wives of the army personnels and not established under the Union. It may be for the welfare of past and present members and their dependents. In view of the above, the prayer is to cause interference in the order of CIT (Appeals) as well as the tribunal for grant of exemption to the assessee under Section 10(23AA) of the Act of 1961.

It is further urged that CIT(Appeals) has also committed an illegality in deleting the addition of Rs. 20,15,500/- ignoring the fact that the exemption under Section 11 of the Income Tax Act of 1961 was denied in the assessment order dated 12.02.2016. It is in view of the violation of Section 13 of the Act of 1961. The deletion of the addition of Rs. 20,15,500/- is

in ignorance of Section 11 and Section 13 of the Act, 1961 and for that the order passed on 12.02.2016. The CIT(Appeals) so as the tribunal simply referred the provision of Section 40(a)(ia) of the Act of 1961 to delete the addition. It is ignoring the proviso appended to the said provision. Thus, even deletion of the addition of Rs. 20,15,500/- by the CIT(Appeals) and upheld by the tribunal needs interference.

It is even in regard to the maximum marginal rate in view of the denial of exemption under Section 11 of the Act of 1961. Once the exemption was denied to the assessee, the maximum marginal rate could not have been restricted on addition of Rs. 1,54,745/- and Rs. 2,95,185/- but should have been on the entire amount, as given under Section 164(2) of the Act of 1961. The prayer is to allow the appeal by answering the substantial questions of law in favour of the appellant. A contest to the appeal has been made by assessee. It is submitted that the assessee was registered under Section 12AA of the Act as is involved in the charitable work thus rightly given exemption under Section 10(23AA) of the Act of 1961. The revenue has not disputed about its charitable work. Thus, the substantial question of law should be decided in favour of the assessee.

It is submitted that the Association herein was formed by the wives of the army personnels and as they are doing charitable work the exemption has been rightly given under Section 10(23AA) of the Act of 1961.

In the similar manner, deletion of the addition of Rs. 20,15,500/- by the CIT(Appeals) and the order maintained by the tribunal is just and proper. The discussion of the issue has been made in reference to Section 40(a)(ia) of the Act of 1961. Since the assessee was registered under Section 12(A) of the Act of 1961 and was doing charitable work, it was entitled to the exemption. In view of exemption, it has not rightly deducted TDS on Rs. 20,15,500/-. The CIT(Appeals) and the tribunal have considered the issue properly while deciding the appeal.

In the same manner, the CIT(Appeals) had rightly restricted the maximum marginal rate on the addition of Rs. 1,54,745/- and Rs. 2,95,185/-. It is after considering Section 164 (2) of the Act of 1961. Since the assessee was having registration under Section 12A of the Act of 1961 and was doing charitable work, the CIT(Appeals) allowed the appeal preferred by the assessee and thereupon tribunal had dismissed the appeal preferred by the revenue. The prayer is to maintain the order passed by the CIT(Appeals) as well as by the tribunal.

We have considered the rival submissions of learned counsel for the parties and perused the record.

It is a case where in the assessment order, benefit of exemption under Section 10(23AA) of the Act of 1961 was denied to the assessee as it was not claimed at the time of submission of return. It was claimed at the time of assessment. Aggrieved by the order of Assessing Authority, the assessee preferred an appeal before the CIT(Appeals). It was dismissed while partly allowing the appeal on other issues. The assessee approached the tribunal thereupon where order of the CIT(Appeals) was set aside with remand of the case. During the intervening period, a notice under Section 148 of the Act of 1961 was given. In pursuance to the notice under Section 148, assessment order was passed while the matter was pending before the CIT(Appeals) on the issue of exemption under Section 10(23AA) of the Act on remand of the case. The assessee challenged the order of assessment by maintaining appeal which was heard alongwith the appeal on issue of Section 10(23AA) of Act on its remand. The CIT(Appeals) allowed the appeal and granted exemption under Section 10(23AA).

A challenge to the order was made before the tribunal but appeal preferred by the revenue was dismissed. Perusal of the order of the tribunal does not reflect a detailed discussion in reference to exemption under Section 10(23AA). The issue aforesaid has been decided by referring certain orders passed by other ITAT's and Bombay High Court. It is without considering Section 10(23AA) and the facts of the case. Section 10(23AA) of the Act of 1961 is thus quoted hereunder for ready reference:

"[23AA) any income received by any person on behalf of any Regimental Fund or Non-Public Fund established by the armed forces of the Union for the welfare of the past and present members of such forces or their dependents;]"

The provision quoted above shows that under what circumstances exemption can be claimed. It can be for the income received by any person on behalf of any regimental fund or non-public fund established by the armed forces of the Union for the welfare of the past and present members. In the instant case, the assessee has failed to prove income on behalf of regimental fund or non-public fund established by the armed forces of the Union. The establishment should be of armed forces of the Union with receipt of the fund of the nature given under the said provision. The issue aforesaid has been ignored by the tribunal so as by the CIT(Appeals). It seems to have been persuaded only by one issue which was initial denial of the exemption under Section 10(23AA) as it was not claimed at the time of submission of return but during the course of assessment. It may be that assessee can claim the exemption under Section 10(23AA) at the time of assessment but entitlement for it was required to be decided by CIT(Appeals) and the tribunal.

On the facts of the case, we do not find that the assessee was entitled for exemption under Section 10(23AA) of the Act of 1961 when it failed to prove its case. Thus, the order of the CIT(Appeals) and the tribunal to allow the exemption under the aforesaid provision cannot be sustained.

The other substantial question of law is in reference to Section 40(a)(ia) of the Act of 1961. The CIT(Appeals) deleted the addition of Rs. 20,15,500/- in reference to the provision aforesaid. It is after ignoring the fact that the assessee was not found entitled to the exemption under Section 11 in view of the violation of Section 13. An order for denial of exemption under Section 11 was passed on 12.02.2016. Ignoring the aforesaid and treating the assessee to be entitled for the exemption on its registration under Section 12A of the Act of 1961, deletion of the addition was made. The tribunal upheld the order passed by the CIT(Appeals) ignoring the fact of denial of exemption under Section 11 of the Act of 1961. Once the exemption under Section 11 was denied, the assessee was required to deduct the TDS and thereby the addition was rightly made by the Assessing Authority. Accordingly, CIT(Appeals) so as to the tribunal was not justified to delete addition by referring to Section 40(a)(ia) while ignoring proviso appended to it and the order dated 12.02.2016 where the exemption under Section 11 of the Income Tax Act of 1961 was denied to the assessee. Thus, order of the CIT(Appeals) so as to the tribunal needs interference even on that count.

The last substantial question of law is regarding maximum marginal rate. The maximum marginal rate was not applied on the total income despite the fact that the assessee was not found entitled to the exemption under Section 11 of the Act of 1961. A reference of Section 164(2) of the Act of 1961 would be relevant for the aforesaid. If the assessee was not

entitled to the exemption under Section 11, the maximum marginal rate should have been applied on the total income and not on the addition of Rs. 1,54,745/- and Rs. 2,95,185/-. Since the assessee conducted itself in violation of Section 13 of the Income Tax Act, exemption under Section 11 was denied in the assessment order dated 12.02.2016. The CIT(Appeals) and the tribunal was required to consider aforesaid aspect while restricting the maximum marginal money on the addition of Rs. 1,54,745/- and Rs. 2,95,185/-.

In view of the above all the three substantial questions of law are answered in favour of the revenue and against the assessee. The order of the CIT(Appeals) and the tribunal in reference to the aforesaid questions are set aside. The appeal preferred by the revenue is allowed with the aforesaid.

Order Date :- 15.11.2019

kkv/

[Vikas Kunvar Srivastav,J.] [Munishwar Nath Bhandari,J.]

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