IN THE HIGH COURT OF HIMACHAL PRADESH
AT SHIMLA

ITA No.28 of 2019 a/w
ITAs No.29, 30, 31, 32
of 2019 and ITA No.1
of 2020

Reserved on: 07.08.2023

Decided on: 22.08.2023

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1. ITA No.28 of 2019

The Commissioner of Income Tax (Exemptions),
Chandigarh ...Appellant

Versus

The Tibetan Children's Village Dal Lake,
Dharamshala Cantt. (H.P) (PAN-AAATT3933B)
through its President ....Respondent

2. ITA No.29 of 2019

The Commissioner of Income Tax (Exemptions),
Chandigarh ...Appellant

Versus

The Tibetan Children's Village Dal Lake,
Dharamshala Cantt. (H.P) (PAN-AAATT3933B)
through its President ....Respondent

3. ITA No.30 of 2019

The Commissioner of Income Tax (Exemptions),
Chandigarh ...Appellant

Versus

The Tibetan Children's Village Dal Lake,
Dharamshala Cantt. (H.P) (PAN-AAATT3933B)
through its President ....Respondent

4. ITA No.31 of 2019

The Commissioner of Income Tax (Exemptions),
Chandigarh ...Appellant

Versus

The Tibetan Children's Village Dal Lake,
Dharamshala Cantt. (H.P) (PAN-AAATT3933B)
through its President ....Respondent

5. ITA No.32 of 2019

The Commissioner of Income Tax (Exemptions),
Chandigarh ...Appellant

Versus

The Tibetan Children's Village Dal Lake,
Dharamshala Cantt. (H.P) (PAN-AAATT3933B)
through its President ....Respondent

6. ITA No.1 of 2020

The Commissioner of Income Tax (Exemptions),
Chandigarh ...Appellant

Versus

The Tibetan Children's Village Dal Lake,
Dharamshala Cantt. (H.P) (PAN-AAATT3933B)
through its President ....Respondent

Coram
The Hon'ble Mr. Justice M.S. Ramachandra Rao, Chief Justice
The Hon'ble Mr. Justice Ajay Mohan Goel, Judge

Whether approved for reporting?

For the appellant: Mr. Vinay Kuthiala, Senior Advocate with Ms.Vandana Kuthiala.

For the respondent: Mr. Vishal Mohan, Senior Advocate with M/s Rajeev Kumar, Sushant Kaprate and Praveen Sharma, Advocates.

M.S. Ramachandra Rao, Chief Justice

The Revenue has filed the instant appeals under Section 260A of the Income Tax Act,1961 (for short, "the Act") :

i. for the assessment year 2004-05 (ITA no.1 of 2020),

ii. for the assessment year 2005-06 (ITA no.28 of 2019),

iii. for the assessment year 2006-07 (ITA no.31 of 2019),

iv. for the assessment year 2007-08 (ITA no.29 of 2019),

v. for the assessment year 2008-09 (ITA no.30 of 2019) and

vi. for the assessment year 2009-10 (ITA no.32 of 2019).

2. In all these appeals, orders passed by the Income Tax Appellate Tribunal, Division Bench Chandigarh on different dates for the respective assessment years in respect of the respondent-assessee are under challenge.

3. Only ITA no.1 of 2020 for the assessment year 2004-05 has been admitted on 22.03.2021 to consider the following substantial questions of law:

> *"1. Whether on facts and in the circumstances of the case and in law, the Hon'ble ITAT is justified in treating the notice*

under Section 148 as invalid on the ground that the notice was based only on change of opinion and there was no escapement of income?

2. Whether on facts and in the circumstances of the case and in law, the Hon'ble ITAT has erred in holding that specific purpose donation are voluntary contributions in the hands of the assessee for charitable purpose u/s 12A of the Act even when the same were not reflected in the FCRA return of the assessee?

3. Whether the ITAT, on the basis of facts and in the circumstances of the case and in law, has erred in acknowledging a new concept "Fund Pending Utilization" introduced by the assessee in its balance sheet and thereafter corroborating assessee's contention that it need not be routed through the income and expenditure account?

4. Whether on facts and on the circumstances of the case and in law, the Hon'ble ITAT is justified in not recognizing the facts that "Fund Pending Utilization" of the assessee had opening balances at the beginning of the year and any fund received afterwards during the year was to be spent after the initial balance has already been exhausted?"

4. According to the Revenue, even in ITA no.28 of 2019 for the assessment year 2005-06, the same substantial questions of law arise; and as regards ITA no.29 of 2019, ITA no.30 of 2019 and ITA no.32 of 2019 for the assessment years 2006-07, 2007-08, 2008-09 and 2009-10, respectively questions 2, 3 and 4 raised in ITA no.1 of

2020 arise. In addition, according to the Revenue, the following question also arises in these 4 appeals:

> *"Whether on the facts and in the circumstances and in law, the order of the Appellate Tribunal is contrary to the evidence and material on record of the case and therefore perverse?"*

5. We may point out that these appeals had initially been filed before the High Court of Punjab and Haryana, but the said High Court had returned the same in 2016 directing the Revenue to file them before the Court of competent jurisdiction, and thereafter these appeals were filed in this Court and they were numbered, after condoning the delay, if any, in filing the same, and after making of suitable amendments in the grounds of appeals.

The back ground facts

2004-05 and 2005-06

6. The background facts are that a return was filed by the respondent-assessee for the assessment years 2004-05 and 2005-06 after claiming exemption under Section 11 of the Act.

7. The cases of the assessee were, however, re-opened under Section 147 of the Act for the said assessment years on the ground that the assessee had earmarked funds amounting to

Rs.20,66,74,263/- for the assessment year 2004-05 under the head 'Fund Pending Utilization' and had not included in receipts.

8. The Assessing Officer in his order dt. 28th December, 2011 observed that if the said amount was routed through the Income & Expenditure account, the application of income would have fallen short of the statutorily required 85%, and hence income had escaped assessment within the meaning of Section 147 of the Act. He held that the deficiency in application of fund for charitable purposes during the year under assessment comes to Rs.5,55,50,896/- and the same is added back to the taxable income of the assessee-trust.

9. The assessee filed an appeal before the Commissioner of Income Tax (Appeals), Shimla against the re-opening of the case as well as against the additions made by the Assessing Officer.

10. By order dt. 29th January, 2015, the 2 appeals for the assessment years 2004-05 and 2005-06 were decided by the CIT(Appeals) by a consolidated order. He dismissed the appeals filed by the assessee, and while doing so enhanced the taxable income of the assessee on the ground that the assessee was not entitled to the benefit of exemption of 15% under Section 11(1)(a) and (d) of the Act as they

were unable to spend 85% of its income during the year in question. He enhanced the income of the assessee to Rs.9,97,09,788/-.

11. The assessee then preferred appeals before the Income Tax Appellate Tribunal, which passed the order on 20.01.2016 allowing the appeals of the assessee. It accepted the plea of the assessee that the re-opening had been sought to be resorted to on an issue which had already been dealt with and discussed during regular assessment proceedings and copy of reasons recorded for reopening reveal that proceeding under Section 147 of the Act was resorted to since the Assessing Officer believed that funds amounting to Rs.20,66,74,263/- shown in the balance sheet of the assessee as earmarked funds under the head "Fund Pending Utilization" ought to have been included in the income of the assessee, and there was a shortfall in utilization of income to the extent of 85% resulting in taxability of income of the assessee which had allegedly escaped assessment.

It held that in regular assessment proceedings, the assessee had been specifically asked why earmarked funds had not been included in the income of the assessee for determining 85% utilization of the same; and the assessee had also been specifically asked to state the

amount of corpus donations received alongwith evidence through a questionnaire dt. 1st September, 2006; that the assessee had also duly explained the nature of earmarked funds as being given for a specific purpose and hence treated as corpus funds by the assessee; evidences in the form of letter of the donees had also been submitted vide a letter dt. 8th September, 2006; thereafter assessment order under Section 143(3) of the Act was passed without making any addition on account of corpus funds, meaning thereby that after examining the issue of corpus/funds, the Assessing Officer had formed an opinion that they were corpus funds, and hence were not to be included in the income of the assessee.

The Tribunal held that having thus formed an opinion on the treatment of earmarked funds shown as "Funds Pending Utilization", the Assessing Officer could not have resorted to re-opening the case of the assessee on the same issue, since it amounts to change of opinion which cannot be resorted to in re-assessment proceedings.

The Tribunal held that proceedings for re-opening of assessment on the ground of income escaping assessment are an exception to

the finality of proceedings arrived at under Section 143(3) of the Act during the regular assessment proceedings of the assessment years; the Assessing Officer, having applied his mind to the issue of corpus funds, after the assessee explained the same with evidences in the regular assessment, impugned notice under Section 148 of the Act (issued by the Assessing Officer stating that the earmarked funds shown in the Funds Pending Utilization are to be treated as income of the assessee on the same set of facts and material which were in the knowledge of the Assessing Officer), is invalid.

The Tribunal held that the Assessing Officer cannot issue notice u/s 148 of the Act merely because it felt that a decision which had been taken earlier needed to corrected. It relied on the decision of the Supreme Court in ***Commissioner of Income Tax, Delhi vs. Kelivinator of India Limited,***[1] to hold that reassessment proceedings cannot be initiated on the basis of a mere change of opinion.

The Tribunal therefore allowed the appeals of the assessee and deleted the additions made by the Assessing Officer on the above grounds for the assessment years 2004-05 and 2005-06.

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[1] **(2010) 2 SCC 723**

2006-07 to 2009-10

12. In respect of assessment years 2006-07 to 2009-10 in the case of the same assessee identical issues had arisen and the issues had also been decided in favour of the assessee by the CIT (Appeals) and the Income Tax Appellate Tribunal had upheld the same.

The Tribunal concluded that 'Funds Pending Utilization' exceeded 85% even if the said funds are treated as voluntarily contribution, and the utilization by the assessee exceeds 85% and the assessee is entitled to claim exemption under Section 11 of the Act.

Consideration by the Court

ITA no.1 of 2020 and ITA no.28 of 2019 for the assessment years 2004-05 and 2005-06.

13. In ***Kelivinator of India Limited*** (1supra), it was held that there can be re-opening of assessment under Section 148 of the Act only if the Assessing Officer has reason to believe that any income chargeable to tax had 'escaped assessment' for any assessment year; that the use of this power is conditional upon the fact that the Assessing Officer has some reason to believe that the income has 'escaped assessment'; that the words 'reason to believe' in Section

147 of the Act cannot be interpreted to have the consequence of conferring arbitrary powers on the Assessing Officer who may even initiate such reassessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings; and it would empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge and the said fact would have material bearing on the outcome of the relevant assessment order. Thus on account of a mere change of opinion, re-assessment proceedings cannot be initiated by assessing office. This has been reiterated in Assistant Commissioner of Income Tax, ***Mumbai and others*** vs. ***ICICI Securities Primary Dealership Limited***[2] and ***Income Tax Officer, Ward No.16(2)*** vs. ***Techspan India Private Limited and another.***[3] So we do not find any merit in ITA no.1 of 2020 and ITA no.28 of 2019 for the assessment years 2004-05 and 2005-06.

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[2]**(2012) 13 SCC 514**
[3]**(2018) 6 SCC 685**

ITA. no.31 of 2019 and ITA no.29 of 2019, ITA no.30 of 2019 and ITA no.32 of 2019

14. Coming to ITA. no.31 of 2019 and ITA no.29 of 2019, for the assessment year 2006-07, assessment order was passed on 25.06.2008, for the assessment year 2007-08, it was passed on 31.12.2009, but the said orders were revised under Section 263 of the Act subsequently by the Commissioner of Income Tax on the ground that they were prejudicial to the interest of Revenue and that the Assessing Officer had fail to apply the correct provisions of Section 12(1) of the Act. The said assessment orders were set aside with a direction to the Assessing Officer to pass fresh assessment orders.

15. Thereafter fresh assessment orders for the assessment years 2006-07 and 2008-09 were passed on 27.12.2010.

16. Assessment order for the assessment year 2009-10 was passed on 27.12.2011.

17. On 30.11.2012, CIT (Appeals) allowed the appeals for the assessment year 2009-10 and deleted the additions made by the Assessing Officer.

18. CIT (Appeals) also allowed the appeals on 21.03.2012 pertaining to the assessment years 2006-07 and 2007-08 and 2008-09, holding that the assessee had in fact spent much more than 85% of its receipts under the head 'Funds Pending Utilization' , and also of the total receipts, that the entire spending was towards the charitable purposes, and there was no income accumulated or set apart in excess of 15% of the income during the year under consideration. He therefore directed the deletion of additions made by the Assessing Officer on account of alleged deficiency in application of funds for charitable purposes. He also held that the assessee fully satisfies conditions under Section 11 and 13 read with Section 12(1) of the Act.

19. When this was challenged before the Income Tax Appellate Tribunal, it disposed of all the appeals as infructuous and while dismissing the appeals filed by the Department, upheld the reasoning given by the CIT(Appeals) and consequently deleted the additions.

20. Thus, the findings of fact recorded by the CIT(Appeals) had been confirmed by the Tribunal in all these appeals holding that these findings had not been assailed by the Revenue through any

evidence or material on record; and therefore it is established that the assessee utilized the fund for the purpose of achieving its objective, and that the utilization was more than the prescribed limit, consequent upon which there was no reason to make additions against the assessee.

21. After considering the facts and circumstances and the contentions of the Revenue, we are satisfied that no question of law much less substantial question of law arises for consideration in these appeals and we hold that the findings recorded by the Tribunal cannot, in the facts and circumstances, be said to be perverse.

22. We therefore do not find any merit in any of these appeals. Accordingly the same are dismissed alongwith pending application(s), if any. No costs.

(M.S. Ramachandra Rao)
Chief Justice

(Ajay Mohan Goel)
Judge

August 22, 2023
(vt)