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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 2689 OF 2015

Shri Shanmukhananda Fine Arts
And Sangeetha Sabha

....Petitioner

V/s.

The Deputy Director of Income Tax
(Exemptions) 1(2) and Ors.

...Respondents

Mr. Madhur Agrawal i/b Mr. Balasaheb G. Yewale for Petitioner.
Mr. Suresh Kumar for Respondents.

**CORAM : K.R. SHRIRAM &
DR. NEELA GOKHALE, JJ.
DATED : 19th JANUARY 2024**

P.C. :

1. Petitioner is a society registered under the Societies Registration Act, 1960 and is also a charitable institution under Bombay Public Trust, 1950. Petitioner states, it is engaged in charitable activities comprising field of Education (Music, Fine Arts & Yoga), Medical relief (running of Eye Centre, Dialysis Center, Pathology Centre & holding Medical Camps) and promotion of dance and drama and fine arts in all forms without derogation to the generality of Secular Education.

2. Petitioner has been granted registration under Section 12A of the Income Tax Act, 1961 (the Act) by the Commissioner of Income-tax, vide order dated 28th January 1976 which is still in force.

3. Petitioner filed the original return of income on 29th September 2009 disclosing total deficit at Rs. 3,26,12,415/- after claiming exemption under section 11 of the Act. Petitioner also claimed depreciation on the capital assets of Petitioner. The said return was accompanied by a copy of the Annual Report and Statement of Account for the year ended 31st March 2009. In its accounts, Hall Charges income of Rs.2,88,87,001/- and compensation for use of premises of Rs.45,69,771/- aggregating to Rs.3,34,56,772/- are disclosed. Further, the computation of income filed by petitioner also discloses Hall and Premises Rental Income at Rs.3,34,56,772/-.

4. Petitioner was issued a notice dated 31st January 2011 under Section 142(1) of the Act asking for various information including on the object of the Trust. Petitioner filed detailed note on the object of the Trust as also on the issue of claim of depreciation.

5. In the mean time, the Director of Income Tax (Exemption) passed an order dated 2nd February 2011 withdrawing the registration granted under section 12A of the Act for amendment to objects. Petitioner had filed an appeal before Tribunal against the said order of Director of Income Tax (Exemption). The Tribunal, vide order in ITA No. 1849/Mum/2011, dated 9th September 2011, allowed Petitioner's appeal and the 12A registration was restored.

6. The department preferred an appeal before Hon'ble Bombay High Court against the said order dated 9th September 2011 of the Income Tax Appellate Tribunal (ITAT). The Hon'ble Bombay High Court, vide Order No. 214 of 2012 dated 30th April 2014, dismissed the department's Appeal.

7. The assessment order dated 23rd December 2011 was passed under Section 143(3) of the Act by the Assessing Officer (A.O.) denying the exemption under Section 11 of the Act and computing the taxable income of Rs.35,90,477/-. Petitioner filed an appeal before CIT(A) against the quantum order. Grounds taken were regarding denial of exemption under Section 11 of the Act, addition of expenses, non-grant of set off/carried forward of unabsorbed depreciation and excess of expenditure over income.

8. The CIT(A), vide order dated 9th July 2012, allowed Petitioner's appeal and granted exemption under Section 11 of the Act, deleted disallowed expenses and allowed claim of set off/carried forward of unabsorbed depreciation and excess of expenditure over income based on ***CIT vs Institute of Banking Personnel***¹.

9. The department filed an appeal before the ITAT on 27th November 2011. The ITAT, vide order dated 30th May 2014, dismissed departmental appeal for denial of exemption under Section 11 of the Act,

1 264 ITR 110 (Bom.)

disallowance of expenses, non- allowance of claim of set off/carried forward of unabsorbed depreciation and excess of expenditure over income.

10. The department further appealed in Bombay High Court which was dismissed on 31st July 2017 by the High Court on account of low tax effect.

11. Petitioner was issued the impugned notice dated 28th March 2014 under Section 148 of the Act which was received on 1st April 2014.

Reasons recorded for reopening are on two issues :

- a. Allegation of applicability of the proviso to Section 2(15) of the Act and for withdrawing claim of exemption under Section 11 of the Act on the ground that the main activity of giving Hall on rental basis is a commercial activity.
- b. disallowance of claim of depreciation.

12. Petitioner filed objection to challenge the reopening on 22nd January 2015. Respondent No.1 passed the impugned order rejecting the objection of Petitioner by holding that Petitioner's indulgence in the commercial activity was not disclosed by Petitioner.

13. Mr. Agrawal submitted that there can be no grievance to believe escapement of income because the observations of the A.O. that petitioner's object include commercial activity is incorrect, there are no allegations as to

which and how much income has escaped assessment and the issue of withdrawal of exemption under Section 11 of the Act was considered by the A.O. in the original assessment proceedings, the exemption was withdrawn which were restored in appeal by the Commissioner of Income Tax (Appeals) [CIT(A)]. Mr. Agrawal submitted that as per the third proviso to Section 147 of the Act the A.O. will have no jurisdiction to reopen the assessment on an issue which was the subject matter of appeal and the Appellate Authority has allowed the benefit of Section 11 of the Act. In effect the A.O. cannot sit in appeal over the decision of CIT(A).

14. In the second part of disallowance of claim of depreciation, Mr. Agrawal relied on *Commissioner of Income Tax III, Pune vs. Rajasthan and Gujarati Charitable Foundation, Poona*² and submitted that a charitable trust is also eligible for claiming depreciation.

15. Mr. Suresh Kumar opposed the petition and submitted that petitioner did not disclose to the A.O. during the assessment proceedings that it was indulging in commercial activities. In fact petitioner is also guilty of non-disclosure.

16. Mr. Suresh Kumar also submitted that there has to be only a reason to believe and it need not be conclusively demonstrated at the stage of issuance of notice that income had escaped assessment. He also

² (2018) 89 taxmann.com 127 (SC)

submitted that the assessment order was silent on the issue of commercial nature of receipts which falls under the amendment to first proviso of Section 2(15) of the Act.

17. The third proviso to Section 147 of the Act provides “..... provided also that the Assessing Officer may assess or re-assess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment”.

18. It is not disputed that the benefit of Section 11 of the Act was not granted in the original assessment order dated 23rd December 2011 which was carried in appeal before the CIT(A). The CIT(A) vide an order dated 9th July 2012 allowed the appeal and granted exemption under Section 11 of the Act, deleted disallowed expenses and allowed claim of set off/carry forward of unabsorbed depreciation and excess of expenditure over income. The CIT(A) had also relied upon a judgment of this court in the case of *CIT vs. Institute of Banking Personnel* (supra).

19. Therefore, as stated in the third proviso to Section 147 of the Act, the A.O. has no jurisdiction to assess or reassess any income which was the subject matter of an appeal. Since the grant of benefit of Section 11 of the Act was the subject matter of appeal and has been held in favour of

assessee, the matter cannot be reopened. As regards the issue of disallowance of depreciation claim, the Hon'ble Apex Court in *Rajasthan and Gujarati Charitable Foundation, Poona* (supra) has held that a Charitable Trust is eligible for claiming depreciation.

20. In fact, this was also a subject matter of the appeal that was preferred by petitioner against the assessment order.

21. In the circumstances, Rule issued on 27th March 2015 is made absolute.

22. Petition disposed.

(DR. NEELA GOKHALE, J.)

(K.R. SHRIRAM, J.)