* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: September 13, 2007

\+ **ITA No. 862 of 2007**

\# BIRLA VIDYA NIKETAN .....Appellant

! Through : Mr. Krishan Mahajan with Mr. K.Sampath, Advocates

versus

$ INCOME TAX OFFICER ..... Respondent

^ Through Ms. P.L. Bansal, Advocate

CORAM:
HON'BLE MR. JUSTICE MADAN B.LOKUR
HON'BLE DR. JUSTICE S. MURALIDHAR

ORDER

For orders, see ITA No. 868 of 2007.

S. MURALIDHAR, J.

MADAN B.LOKUR, J.

September 13, 2007
rk

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: September 13, 2007

\+ ITA No. 868 of 2007

\# BIRLA VIDYA NIKETAN .....Appellant

! Through : Mr. Krishan Mahajan with Mr. K.Sampath, Advocates

versus

$ INCOME TAX OFFICER ..... Respondent

^ Through Ms. P.L. Bansal, Advocate

CORAM:
HON'BLE MR. JUSTICE MADAN B.LOKUR
HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in Digest? YES

: Dr. S. Muralidhar, J. (oral)

1. This appeal under Section 260-A of the Income Tax Act, 1961 ('Act') is directed against a common order dated 23rd March, 2007 passed by the Income Tax Appellate Tribunal, Delhi Bench 'G' Delhi ('Tribunal') in I.T.A. Nos. 2272 to 2281(Del)/2006. Although 10 corresponding appeals have been filed by the Assessee, the present order is being passed in ITA No. 868 of 2007 relevant to financial year 2000-01, since common issues arise in all the appeals.

2. The Assessee is a public school run by a registered society and the provisions of Chapter XVII-B of the Act are applicable to it. In the course of an interactive education programme in the school premises on 24th March, 2005, the department officials examined the books of accounts of the Assessee school for the period 2000-01 onwards. It was found that the Assessee has been providing concessional educational facilities to the teachers and other staff members of the Assessee school. In other words, the Assessee had been charging concessional fees from the children of the employees studying in the school @ 50% in respect of the standard/normal tuition fees, ancillary fees and computer fees and @ 60% in respect of the standard/normal sports fees and annual fees. The normal fee charged for classes KG-I and KG-II was Rs.16,200/- per annum and the normal tuition fees, ancillary fees for classes 1 to XII was Rs.15,000/- per annum. The case of the Assessee was that the difference between fees charged from a general student and fees charged from children of the employees, varied between Rs.7,500/- and Rs.9,915/-. Thus, the value of the concession was below Rs.12,000/- per annum per child, that is below Rs.1,000/- per month per child. It was claimed that in terms with the proviso to Rule 3 (5) of the Income Tax Rules, 1962 ('IT Rules') a concession of a total value of less than Rs.1,000/- per month would not be treated as such.

3. The Assessing Officer did not accept this contention and computed

the short deduction of tax at source by the Assessee in terms of Section 201 (1) of the Act for the financial years 2000-01 to 2004-05 as amounting to Rs.3,66,825/-. The interest payable thereon under Section 201 (1A) of the Act was computed as Rs.1,35,997/-.

4. During the hearing of the appeal filed by the Assessee before the Commissioner of Income Tax (A) ['CIT(A)'], the Assessee submitted cost of calculations which were sent by the CIT (A) to the Assessing Officer for his comments. The Assessing Officer in his report dated 17th January, 2006 pointed out that even if partial recoveries were made from the teachers, the cost of calculation in the school remained Rs.16,200/- or Rs.15,000/- per annum depending on the class in which the student was studying. Therefore, the value of the benefit given to the teachers was more than Rs.1,000/- per month and therefore, the concession given would have to be included in the income of the teachers for the purposes of calculating the tax to be deducted at source.

5. However, the CIT (A) in its order dated 26th March, 2006 relied upon the judgment of the Supreme Court in ***CED v. Kanti Lal Trikam Lal AIR 1976 SC 1935*** to draw distinction between the word "cost" and "price" and that held that an exemption to the extent of Rs.1,000/- per month should be allowed while computing the taxable perquisite in respect of free educational facilities granted to the children of the employees in terms of

Rule 3(5) of the IT Rules. The Assessing Officer was directed to allow such deduction while computing the taxable perquisite for the purposes of tax deduction under Section 201 (1) and interest thereon under Section 201(1A) of the Act.

6. In the appeal filed by the Revenue, the Tribunal came to the conclusion that the proviso to Rule 3(5) would not apply at all because the employer (Assessee) in the present case does not provide free educational facilities to children of its employees. If the proviso did not apply then it mattered little that value of the concession was less than Rs.12,000/- per annum. Accordingly, the Tribunal reversed the order of the CIT(A).

7. Appearing for the Assessee, Mr. Krishan Mahajan and Mr. K.Sampath, Advocates submitted that the Tribunal had overlooked the substantive portion of Rule 3(5) of the IT Rules which required the value of the benefit to the employee to be determined as the sum equal to the amount of expenditure incurred by the employer towards concessional educational facilities. Where the educational institution is itself maintained and owned by the employer, the value of the perquisite had to be determined with reference to the cost of such education in a similar institution in or near the locality.

8. We find that the case advanced by the Assessing before the Assessing Officer and CIT(A) was based exclusively on the applicability of

the proviso to Rule 3(5) of the Act. It was the Assessee's case that the proviso to Rule 3(5) applies and that since the value of the benefit that did not exceed Rs.1,000/- per month, the substantive portion of Rule 3(5) of the IT Rules was not apply. This was negatived by the Tribunal, and in our view rightly.

For ready reference, Rule 3(5) reads as under:

> "(5) The value of benefit to the employee resulting from the provision of free or concessional educational facilities for any member of his household shall be determined as the sum equal to the amount of expenditure incurred by the employer in that behalf or where the educational institution is itself maintained and owned by the employer or where free educational facilities for such member of employees' household are allowed in any other educational institution by reason of his being in employment of that employer, the value of the perquisite of the employee shall be determined with reference to the cost of such education in a similar institution in or near the locality. Where any amount is paid or recovered from the employee on that account, the value of benefit shall be reduced by the amount so paid or recovered.
>
> Provided that where the educational institution itself or maintained and owned by the employer and free educational facilities are provided to the children of the employee or where such free educational facilities are provided in any institution by reason of his being in employment of that employer, nothing contained in this sub-rule shall apply if the cost of such education or the value of such benefit per child does not exceed Rs.1,000/- p.m."

9. It is plain that the proviso stands attracted "only where the educational institution is itself maintained and owned by the employer and free educational facilities are provided to the children of the employee." Thus, the second part of the above extract from the proviso is not fulfilled in the instant case. Although the educational facilities are in fact being provided in the institution owned and maintained by the appellant itself, the educational facilities are not provided free of cost. Admittedly, a fee is being charged even from the children of the employees although at a concessional rate. Therefore, there is no question of the proviso to Rule 3(5) of the IT Rules getting attracted in the present case. The Tribunal's order in that regard is unexceptionable. As a result, the question whether the value of the benefit granted to the employees by way of concessional fees is less than Rs.1,000/- per month per child does not arise at all. In the impugned order of the Tribunal it is recorded that "the Assessee withdrew a number of grounds taken before him [the CIT(A)] and he was left with only one ground to be decided, namely, whether deduction of Rs.1,000/- per month per child was allowable as deduction while computing taxable perquisites?" That question being answered in the negative this appeal should fail on this short ground.

10. Nevertheless, we proceed to examine the other contentions advanced. As regards the substantive portion of Rule 3(5) of the IT Rules, it was

sought to be contended that the Assessing Officer had failed to examine what the value of the benefit to the employee was by making a reference to the cost of such education in a similar institution in or near the locality. This submission is without force since the calculations were before the Assessing Officer in the first instance and thereafter a report was called for from the Assessing Officer by the CIT (A). The extent of perquisite in the form of concessional fees charged to the children of the employee of the Assessee was also determined. These are pure questions of fact and do not raise any substantial question of law.

11. For the aforementioned reasons, we do not find any error in the impugned order of the Tribunal which is hereby affirmed. No substantial question of law arises in this appeal.

12. This appeal is dismissed.

S. MURALIDHAR, J.

MADAN B.LOKUR, J.

September 13, 2007
rk