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

% Judgment delivered on: 12.10.2011

\+ ITA Nos. 226/2005, 228/2005, 229/2005 & 230/2005, 1175/2008, 1288/2008 & 1177/2008

DIRECTOR OF INCOME TAX ..... APPELLANT

Vs

INDIA HABITAT CENTRE ..... RESPONDENT

Advocates who appeared in this case:

For the Appellant : Mr. Sanjeev Rajpal
For the Respondent : Mr. Joseph Vellapally, Sr. Advocate with Mr. M.P. Rastogi & Mr K.N. Ahuja

CORAM :-
HON'BLE MR JUSTICE SANJAY KISHAN KAUL
HON'BLE MR JUSTICE RAJIV SHAKDHER

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

RAJIV SHAKDHER, J

1. The captioned appeals pertain to assessment year 1990-1991, 1991-92, 1994-1995, 1995-1996, 1996-1997, 1997-1998, 1998-1999. The revenue being aggrieved by two sets of common judgments passed by the Income Tax Appellate Tribunal (hereinafter referred to in short as the Tribunal) dated 16.09.2003 and 29.02.2008 has preferred these appeals in this court under

section 260 A of the Income Tax Act, 1961 (in short, the IT Act). The judgment dated 16.09.2003 pertains to assessment years 1990-1991, 1991-1992, 1995-1996 and 1996-1997 which are subject matter of ITA Nos.226/2005, 230/2005, 228/2005 and 229/2005; while judgment dated 29.02.2008 relates to assessment years 1994-1995, 1997-1998, 1998-1999 pertaining to ITA Nos.1175/2008, 1288/2008 and 1177/2008.

2. Therefore, in all by virtue of the said impugned judgments, the Tribunal has disposed of seven (7) appeals. The parties before the Tribunal in so far as the judgment dated 16.09.2003 was concerned were ad idem that it would suffice if the facts and circumstances which obtained in assessment year 1990-1991 were discussed for the purposes of adjudication of assessment years 1991-1992, 1995-1996 and 1996-1997. While deciding appeals for assessment years 1994-1995, 1997-1998 and 1998-1999 by way of its second judgment dated 29.02.2008, the Tribunal simply followed its earlier view.

2.1. Before us, both the revenue and the assessee have taken a similar stand. The learned counsels have in fact submitted that the discussion of facts as set out in ITA No.226/2008 pertaining to assessment year 1990-1991 would largely apply to the remaining assessment years.

3. The only question which arose for consideration before the Tribunal was whether the Commissioner of Income Tax (in short, CIT) had erred in revising

the order of the Assessing Officer whereby, it had proceeded to hold that the income of the assessee was exempt under section 11 of the IT Act.

4. In our view, in order to adjudicate upon the legal tenability of the order passed by the Tribunal, following facts are required to be noticed :-

4.1. The assessee was set up in 1989 under the sponsership of Government of India, Ministry of Urban Development for the sole purpose of providing physical environment to various institutions for the purposes of carrying out their activities. The assessee was consequently granted lease of land situate in the institutional in Lodhi Road, New Delhi. It may, however, be noted that during the relevant period a formal lease was yet to be executed, though a letter of allotment was issued. A governing council was constituted comprising of senior officers of the Government of India and other senior officers of certain Public Sector Undertakings, etc.

5.2. The object with which the assessee was set up was to ensure that there was an inter-linkage between institutional members so as to ensure furtherance of its object of providing a '***habitat***' in the demised premises.

5.3 Towards this end, the assessee received contributions from institutional members. These contributions were given by the institutional members with a view to acquire the rights of a sub-lessee proportionate to their contribution in the demised land.

5.4. The amounts which were received from institutional members were used in the construction of the super-structure whereby, the contributors obtained a proportionate area of the super-structure; which was determined based on a system of allotment devised by the assessee.

5.5. The assessee was thus, in sum and substance playing a supervisory role qua the construction of the super-structure and for this purpose, acted as a custodian of funds received from various institutional members.

5.6. The amounts received from the institutional members were neither received towards creation of a 'corpus' or in the form of donation. The sums received from the institutional members were utilized fully for constructing the super-structure on the demised land.

6. Given the fact that the aforementioned model was in place, on 05.10.1991, the assessee filed a return of income declaring its income as nil. The income in the first instance was processed under section 143(1)(a) of the IT Act. It appears, however, that subsequently, a notice was issued under section 148 of the IT Act, whereby the assessee was called upon to give explanation with regard to the charitable activities undertaken by it. The assessee was also called upon to explain the nature of the contributions made by the institutional members qua the construction of the super-structure on the demised land, and whether these institutional members were covered under section 13(1) read with section 13(3) of the IT Act.

7. After a detailed examination of the material produced by the assessee, an assessment order dated 20.03.1998 was passed sustaining the contention of the assessee that it ought to be given the benefit of the provisions of section 11 of the IT Act.

8. The CIT, however, took a contrary view and, in exercise of his powers under section 263 of the IT Act, set aside the assessment order dated 20.03.1998, on the ground that it was both erroneous and prejudicial to the interest of the revenue. A direction was issued for framing a fresh assessment in accordance with the provisions of law.

9. Aggrieved by the order of the CIT, the assessee preferred an appeal to the Tribunal. The Tribunal after a detailed discussion reversed the view taken by the CIT and restored the order of the Assessing Officer.

10. Before us, arguments were advanced on behalf of the revenue by Mr. Sanjeev Rajpal and on behalf of the assessee, Mr. Joseph Vellapally, Sr. Advocate assisted with Mr.M.P. Rastogi & Mr K.N. Ahuja, Advocates.

11. Mr. Rajpal based his submissions largely on the order passed by the CIT. A particular emphasis was laid by learned counsel on the observations made in paragraph 11 and 12 of the order passed by the CIT, whereby he had noted that during the period 1998-1999, the assessee had started functioning as a club, and that, its activities did not fall within the object for which it was formed, i.e., '***habitat related activities***'. Mr. Rajpal though conceded before us

that there were several assessment years in which, like in the assessment years in issue, orders had been passed in favour of the assessee and the revenue for reasons best known to it, had not preferred an appeal to this court. He thus fairly conceded that if the principle of consistency is followed then the decision would perhaps go against the revenue.

12. Mr. Rajpal, however, submitted that the bench should decide the matter on merits.

13. Mr. Vellapally on the other hand, taking a clue from the last submission made before us by the learned counsel for the revenue, produced before us a chart which broadly demonstrated the following :-

Assessment Year	**Remarks**
1988-1989	Intimation under section 143(1)(a) dated 02.03.1989. Tribunal order dated 30.09.1997 passed in favour of the assessee. No appeal preferred by the revenue.
1989-1990	Intimation under section 143(1)(a) dated 18.01.1992.
1990-1991	Intimation under section 143(1)(a). Tribunal ‘s order dated 16.09.2003 passed in favour of the assessee. Revenue in appeal before this court.
1991-1992	Intimation under section 143(1)(a) dated 28.01.1994. Tribunal ‘s order dated 16.09.2003 passed in favour of the assessee. Revenue in appeal before this court.
1992-1993	Intimation under section 143(1)(a) dated 30.03.1995. Tribunal’s order dated 19.11.2001 passed in favour of the assessee. No appeal preferred by the revenue.
1993-1994	Intimation under section 143(1)(a) dated 27.03.1996.

	Tribunal's order dated 11.02.2002 passed in favour of the assessee. No appeal preferred by the revenue.
1994-1995	Intimation under section 143(1)(a) dated 26.03.1997. Tribunal's order dated 29.02.2008 passed in favour of the assessee. Revenue in appeal before this court.
1995-1996	Intimation under section 143(1)(a) dated 30.03.1998. Tribunal's order dated 16.09.2003 passed in favour of the assessee. Revenue in appeal before this court.
1996-1997	Intimation under section 143(1)(a) dated 27.03.1998. Tribunal's order dated 16.09.2003 passed in favour of the assessee. Revenue in appeal before this court.
1997-1998	Intimation under section 143(1)(a) dated 27.03.2000. Tribunal's order dated 29.02.2008 passed in favour of the assessee. Revenue in appeal before this court.
1998-1999	Intimation under section 143(1)(a) dated 27.03.2001. Tribunal's order dated 29.02.2008 passed in favour of the assessee. Revenue in appeal before this court.
1999-2000	Assessment order passed in favour of the assessee. No appeal preferred by the revenue.
2000-2001	Intimation under section 143(1)(a) dated 26.02.2001. Assessment order passed in favour of the assessee. No appeal preferred by the revenue.
2001-2002	Intimation under section 143(1)(a) dated 26.03.2004. Assessment order passed in favour of the assessee. No appeal preferred by the revenue.
2002-2003	Intimation under section 143(1)(a) dated 28.04.2004. Assessment order passed in favour of the assessee. No appeal preferred by the revenue.
2003-2004	Intimation under section 143(1)(a) dated 20.01.2004. Assessment order passed in favour of the assessee. No appeal preferred by the revenue.

2004-2005	Intimation under section 143(1)(a) dated 21.03.2005. Assessment order passed in favour of the assessee. No appeal preferred by the revenue.
2005-2006	Intimation under section 143(1)(a) dated 15.06.2007. Assessment order passed in favour of the assessee. No appeal preferred by the revenue.
2006-2007	Assessment order passed in favour of the assessee. No appeal preferred by the revenue.

14. Mr. Vellapally submitted that in view of the above, two aspects emerged, which are, that the Tribunal by the impugned judgment dated 16.09.2003, was dealing with periods commencing from 1997/ 1998 and thereon when, according to the revenue, the assessee had turned itself into a club and had undertaken activities which were not in tune with 'habitat related activities'. In regard to this period, the learned counsel submitted that the Tribunal has noted quite categorically that they were not concerned with the activities of the assessee in the years '1997' or '1998' onwards, since these were aspects which arose in the said period were not covered in the appeals before it. The second aspect, according to the learned senior counsel pertained to the period prior to 1997/1998. It was submitted that the circumstances which obtained in the period post 1997 would not impact the impugned decision of the Tribunal dated 16.09.2003. In so far as the period post 1997/1998 was concerned, the aforementioned details (which have been tabulated by us above) would show that except for assessment year 1998-1999, in the period commencing from assessment year 1999-2000 to 2006-2007 even

though favourable orders have been passed by the Assessing Officer granting the benefit of exemption under section 11 of the IT Act to the assessee, the revenue has not raised a cavil vis-à-vis the said orders. Therefore, based on the principle of consistency even for periods other than those which are covered by the impugned judgment of the Tribunal dated 16.09.2003, the assessee ought to be allowed the benefit of exemption under section 11 of the IT Act.

15. We have heard the learned counsels for the parties.

16. On a perusal of the judgment of the Tribunal and the authorities below, it is quite evident that the following undisputed facts emerged in this case :-

16.1. As noticed by us above, during the period in issue the demised land had been allotted to the assessee vide an allotment letter dated 22.05.1988, by the Government of India, Ministry of Urban Development. At the relevant point in time, lease deed had not been executed;

16.2. The assessee was required to construct a super-structure to provide space and allot the same to various institutions engaged in furthering the concept of habitat. The institutions housed in the super-structure would share the common areas as well as facilities in accordance with clause VII of the aforementioned allotment letter. The assessee was empowered to recover the proportionate cost of the demised land, super-structure and the individual share in the common areas and facilities extended to the allottees.

16.3. The assessee was required to execute a sub-lease in the form of a triparte agreement; which at the relevant time as noticed above, had not been executed.

16.4 A reading of the order of the CIT would show that he did not dispute the following :-

16.4.1 That the aims and objects as provided in the Memorandum of Association of the assessee fell within the definition of charitable purpose as provided in section 2(15) of the IT Act i.e., for advancement of general public utility.

16.4.2. The assessee had obtained a registration under section 12A(a) of the IT Act; and

16.4.3. Lastly, that 'habitat related activities' qualified for exemption under section 11 of the IT Act.

17. The CIT, in our view, came to the conclusion that the assessment order was erroneous and prejudicial to the interest of the revenue for the following reasons :-

(i). the institutional members fell within the category of substantial contributors in terms of section 13(3) of the IT Act and since space in the super-structure had been allotted to the organizations below market price, provisions of section 13(1)(c) read with section 13(3)(b) were attracted and therefore, was not entitled to exemption under section 11;

(ii). the assessee had earned interest on the funds furnished by such institutional members and that the income earned by way of interest by the assessee had been passed on to the institutional members in the form of sub-sidised costs in respect of space allotted to them resulting in undue benefit to such institutional members. This according to CIT was violative of section 13(1)(c) of the IT Act;

(iii). the activities of the assessee did not fall within the provisions of section 2(15) of the IT Act, which was functioning as a club;

18. The Tribunal examined each of these aspects in detail and returned the following findings of fact :-

(i). allotment of space to the institutional members was subject to the approval of the Government of India;

(ii). the assessee was authorised to recover the proportionate cost of land, building and the undivided share in the common areas and facilities to be given to the institutional members.

(iii). since the allotment of space was subject to the approval of the Government of India, Ministry of Urban Development, the price at which such space would be allotted would also axiomatically require its approval. In any event, on an appreciation of the evidence placed on record, which included the communication exchanged between the assessee and the allottees/ institutional members, it was evident that the construction and the development of the super

structure was based on a "***self financing model***", whereby they would have to pay a proportionate amount of the actual total cost which would include the cost of the land and common facilities. The assessee was at best "a custodian" of funds of the allottees / institutional members. The assessee was in one sense a supervisor of the construction activities carried out on the demised land;

(iv). there was no material put on record by the CIT which would justify the observation that the space was allotted to the institutional members for sum below the market price;

(v). even assuming, that the price at which space was to be allotted was below the market price, since the allotment was to be made under the directions and supervision of Government of India, it could be treated as a violation of the provisions of section 13 of the IT Act, as the assessee was bound to comply with the directives contained in the letter of allotment.

(vi). During the relevant assessment years, the assessee had not carried out the activities with regard to which umbrage had been taken by the CIT. The CIT should have confined himself to the facts which pertained to the assessment years in issue and not be guided by those which obtained in the years 1997/1998 and thereafter.

19. On the aspect of the cost of the space allotted to the institutional members being subsidised from the interest earned by the assessee, the Tribunal observed that since the institutional members could not be treated as

substantial contributors in terms of section 13(3) of the IT Act, and because the erection of the superstructure was based on a self financing model, there could not be said to be any violation of the provisions of section 13(1)(c) of the IT Act only by virtue of fact that the cost to the institutional members had been subsidised from the interest earned on the funds furnished by the institutional members in the first instance.

20. Having regard to the aforesaid findings of fact, it cannot be said that the assessment order passed was either erroneous in law and / or on facts or was in any manner prejudicial to the interest of the revenue. It is trite law that powers under section 263 of the IT Act can only be exercised if the order of the Assessing Officer is both erroneous and prejudicial to the interest of the assessee. The Tribunal based on the material before it, quite categorically concluded that the funds received from the institutional members were shown in the balance sheet of the assessee as liabilities and not contributions towards the '***corpus***'. As a matter of fact, some of the institutions to whom space had been allotted against amounts paid by them had reflected the office space in their balance sheet as fixed assets. Given these circumstances, in our view, the CIT, as rightly held by the Tribunal, had wrongly categorised the institutional members who had been allotted space in the super structure as substantial contributors in terms of section 13(3) of the IT Act. The allotment of space was, as noticed by the Tribunal, subject to the approval of Government of India and was based on a self financing model, therefore, there could be no question

of the assessee allotting space to the institutional members for a sum which was less than cost price both, with respect to the demised land as well as the common facilities. The total cost in terms of the model evolved by the assessee had to be shared amongst various institutional members on a pro-rata basis. Therefore, as rightly held by the Tribunal, there was no violation of the provisions of section 13(1)(c) of the IT Act as the interest earned on the funds received from institutional members would only reduce the cost which in turn would get proportionately divided amongst the institutional members.

20.1. The Tribunal has, according to us, correctly appreciated the position prior to 1997/1998, in as much as, the activities of the assessee which swayed the CIT in coming to the conclusion that the assessee had deviated from the object for which it was set up i.e., 'habitat related activities', were not circumstances obtaining in the period which was subject matter of the appeal before the Tribunal or the CIT. These were factors extraneous to those which the CIT ought to have considered in respect of the period in issue and, as rightly held by the Tribunal, the CIT ought to have ignored the same in determining whether in the periods in issue the assessee was entitled to the benefit of exemption under section 11 of the IT Act. The Tribunal in our view correctly set aside the CIT's order dated 28.03.1998.

20. As regards the period commencing from 1997/1998 and thereon is concerned, one would have to necessarily take into account the fact that in none of the assessment years beginning with assessment year 1999-2000 till

assessment year 2006-2007 has the revenue taken any overt action in laying a challenge to the assessment orders passed in favour of the assessee. Though, the principle of res-judicata does not apply to the proceedings under the IT Act, it is now well settled that the Income Tax authorities are governed by the principle of consistency. Reference can be made to the judgment of the Supreme Court in ***Chandra Prakash and Ors. Vs. State of U.P. and Anr. (2003) SCC (L&S) 827*** and judgment of the Division Bench of this court in ***Deputy Director of Income Tax Vs. Shanti Devi Progressive Education Society (2011) 197 Taxman 491***. Having regard to this principle, we are of the view that only outstanding aspect in the assessment year 1998-1999 would be with regard to the assessee functioning as a club. In our view, having regard to the stand of the revenue between assessment years 1999-2000 to 2006-2007, the impugned judgment of the Tribunal would have to be upheld, though for different reasons. From a reading of the judgment of the Tribunal dated 29.02.2008 it is clear it did not query the revenue on its stand post 1997/1998. Having noticed, we do not think it would serve any purpose in remanding the matter to the Tribunal if the principle of consistency were to be applied.

21. For the foregoing reasons, we are of the view that the impugned order of the Tribunal ought to be sustained. It is ordered accordingly. The appeal of the revenue is dismissed as the Tribunal by way of the impugned judgment has returned pure findings of fact. In our opinion, no question of law much less a

substantial question of law arises for our consideration. In the circumstances, there shall be no orders as to costs.

22. Before we conclude, we may only record that at the very beginning of the hearing, we had put to the learned counsels for the parties that both of us were members of India Habitat Centre and that in this circumstance, the appeals may be heard by another bench of which neither of us are members. The learned counsels, however, requested the bench to hear the matter given that hearing in the matter had been delayed on account of such recusals in the past. In view of the request made by the counsels, we had proceeded to hear the appeals.

SANJAY KISHAN KAUL,J

RAJIV SHAKDHER, J

OCTOBER 12, 2011
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