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

Date of decision: 11th April, 2013

\+ **WRIT PETITION (C) 3598/2012**

HAMDARD LABORATORIES INDIA AND ANR ..... Petitioners
Through: Mr.Parag P. Tripathi, Sr. Adv. with Mr.Simran Mehta, Mr.R.M.Mehta & Ms.Yogita, Advs.

versus

DIRECTOR GENERAL OF INCOME TAX (EXEMPTION) ..... Respondent
Through: Mr.Sanjeev Rajpal, Sr. Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

SANJIV KHANNA, J.

The petitioner No.1 Hamdard Laboratories (India), stated to be a trust, has filed the present writ petition for issue of writ, order or direction in the nature of certiorari for quashing order dated 22.02.2012 passed by respondent No.1/Director General of Income Tax (Exemptions) under Section 10(23C)(iv) of the Income Tax Act, 1961 ('Act' for short).

2. The petitioner Nos.1 claims that it is governed by a Constitution dated 28.8.1948 and were/are dedicated to business of manufacture of sale of unani medicines for the purpose of charity. They rely upon clauses 44 to 47 of the

deed dated 28.8.1948, which read as under:-

> "44. The "Qaumi Income' of the Wakf, shall be spent only within the territories of the Union of India and only on objects of public charity, which satisfy the following two cumulative tests:
>
> (a) They must be objects of public charity for the benefit of all persons irrespective of caste, colour or creed, such as relief of the poor, education, medical relief and the advancement of any other object of general public utility not involving the carrying on of any activity of profit, and
> (b) They must be consistent with the principles of the true teachings of Islam. Provided, however, that in spending the income on objects of public charity, priority shall be given to the collective needs of the country or to such needs as may benefit the largest number of persons or their generations.
> 45. Priority may be given to the following:
> (1) To establish and run an Institute for the promotion of medical education and research with emphasis on indigenous systems of medicine.
> (2) To establish and successfully conduct a Tibbia College in conformity with the recognized standards.
> (3) To establish and run charitable hospitals and clinics where poor patients are given free treatment.
> 46. Qaumi Income may also be spent on the following:
> (1) To establish and run educational institutions, and/or to aid those which are already in existence.
> (2) To build schools, laboratories, wells, or such other buildings of a public nature as may benefit the largest number of people in the country.
> (3) To publish books, pictures, maps or literature or to aid in publication of the same by the publication of which the object of Wakf are fulfilled or achieved.
> 47. Help may also be given to needy orphans, needy widows or helpless persons, needy authors and research scholars and victims of unforeseen calamities without restriction of caste, colour or creed."

3. The petitioner No.1 has stated that vide declaration of the founder Wakif Mutawalli dated 10.10.1985, the original deed in respect of "khandani" or family "income" was irrevocably abolished and no "khandani" income has ever been distributed or paid.

4. It is an undisputed position that the petitioner No.1 was granted registration under Section 10(23C)(iv) of the Act w.e.f. assessment year 1984-1985. Even prior thereto, they have been treated and regarded as a charitable institution under Section 2(15) of the Act and the applicable provisions. The earlier dispute between the Income Tax Department and the petitioner No.1 on the said aspect is referred to and examined below.

5. The petitioner No.1 filed an application for renewal of approval under Section 10(23C)(iv) for the assessment year 2004-05 onwards vide application in Form No.56 dated 31.03.2003. Queries were raised and several letters were exchanged and written between the respondent and petitioner No.1. By order dated 28.12.2007, the petitioner No.1 was granted renewal w.e.f. 2004-05. The respondents, however, rely upon certain conditions stipulated in the said order and submit that there was/is violation of the same.

6. By the impugned order dated 22.02.2012, the earlier order granting renewal i.e. order dated 28.12.2007 has been rescinded. Accordingly, the petitioner No.1 is not to be treated as an approved assessee under Section

10(23C)(iv) of the Act w.e.f. assessment year 2004-05.

7. The impugned order dated 22.02.2012 has set out and given the following reasons for recall/rescinding the earlier order dated 28.12.2007:-

(1) Petitioner No.1 was/is engaged in business and its primary and main activities were/are manufacture and sale of unani and ayurvedic medicines on commercial lines and not charity or charitable purposes.

(2) The petitioner No.1 is not engaged in any charitable activities set out in Section 2(15) but donates a part of its surplus to Hamdard National Foundation ('HNA' for short). This does not meet the requirements of Section 2(15).

(3) The petitioner No.1 does not maintain proper books of accounts for charitable activities and business activities and therefore, there is violation of Clause (c) of the notification under Section 10(23C)(iv) dated 28.12.2007 and Section 11(4A) of the Act.

8. The petitioner No.1 has impugned the said order/the aforesaid reasons on the following grounds:-

(i) Section 2(15) does not prohibit a charitable institution from undertaking business or commercial activities but the income generated or the surplus earned should be used for charitable purpose. Business held under trust can fund and provide finance for conducting and doing charity. [see ***Additional CIT Vs. Surat Art Silk Cloth Manufacturers Association*** (1980) 121 ITR 1 (SC)]

(ii) Amendment made to Section 2(15) of the Act w.e.f. assessment year 2009-10 is applicable only to the last limb i.e. when an assessee carries on activities under the clause 'advancement of any other object of public utility'.

The last limb is not applicable to petitioner No.1. The objects and purpose of charity undertaken by the petitioner No.1 are relief to poor, education and medical relief. It is accordingly submitted that the said amendment is not applicable to petitioner No.1.

(iii) The impugned order dated 22.2.2012 does not specifically state or quote that the petitioner No.1 was/is carrying on charitable activities under the residuary head. The impugned order does not disturb the findings recorded in the earlier appellate proceedings/orders that the charitable activities in the case of petitioner No.1 relate to the first three heads i.e. relief to poor, education and medical relief.

(iv) The impugned erroneously records that the Income Tax Department does not accept the decisions of the Delhi High Court in **Additional Commissioner of Income Tax vs. Hamdard Dawakhana,** (1986) 157 ITR 639 and **Commissioner of Income Tax vs. Hamdard Dawakhana,** (2001) 249 ITR 601 to cancel/recall the earlier order.

(v) The assertion that the petitioner No.1 did not maintain separate books of accounts of business and charitable activities should not be accepted as the entire income or surplus or business was/is being used for charitable purpose and in such cases Section 11(4) is applicable and Section 11(4A) is not applicable. Reliance is placed on **CIT vs. Mehta Charitable Prajnalay Trust**, (2013) 214 Taxman 88 (Delhi) wherein it has been held that Section 11(4A) is

applicable where the business is not held under trust.

9. Section 2(15) of the Act defines 'charitable purpose' and at present reads as under:-

> **"**[15] "charitable purpose" includes relief of the poor, education, medical relief, [preservation of environment (including watersheds, forests and wildlife) and preservation of monuments or places or objects of artistic or historic interest,]and the advancement of any other object of general public utility;
>
> Provided that the advancement of any other object of general public utility shall not be a charitable purpose, if it involves the carrying on of any activity in the nature of trade, commerce or business, or any activity of rendering any service in relation to any trade, commerce or business, for a cess or fee or any other consideration, irrespective of the nature of use or application, or retention, of the income from such activity:]
>
> [Provided further that the first proviso shall not apply if the aggregate value of the receipts from the activities referred to therein is ten lakh rupees or less in the previous year;]"

10. We may note here that the first proviso to sub Section was amended by Finance (No.2) Act, 2009 with retrospective effect from 01.04.2009. The said proviso is applicable in cases where an assessee claims that it is carrying on charitable purpose covered by the residuary clause i.e. "advancement of any other object of public utility". The proviso is not applicable in case an assessee or institution claims that it is carrying on charitable purpose like relief to poor, education, medical relief etc., i.e. purposes which have been specifically enumerated and stated in the earlier part of Section 2(15).

11. We have gone through the impugned order dated 22.02.2012, but do not

find any specific finding or statement in the said order that the charitable activities or purposes in the case of the petitioner No.1 fall under the residuary head and not under the enumerated heads mentioned in Section 2(15) of the Act. The impugned order in this regard is completely silent On the said aspect, we may record that the petitioner No.1 has filed before us number of orders passed by CIT(Appeals) relating to assessment years 1965-66 onwards upto assessment year 1994-95 and orders of the Income Tax Appellate Tribunal from 1966-67 upto 1976-77 in which findings have been recorded that the petitioner No.1 was undertaking charitable activities covered under the clauses; relief to poor, education and medical relief. It is, therefore, clear that the impugned order has applied the first proviso to Section 2(15) of the Act without elucidating the scope and ambit of the said proviso and whether it would be applicable. The respondents have proceeded on assumption that charitable purpose undertaken by the petitioner is covered by the residuary clause, without recording any such specific finding.

12. Our attention has also been drawn to the observations made in the impugned order with regard to earlier decisions of the High Court in the case the assessee. The two decisions went in favour of the petitioner No.1. It is not understandable on what basis the author of the impugned order can ignore or disregard the said decisions by observing that; "with due respect I differ

with the decision". The two decisions are binding precedents but can certainly be distinguished on facts and in case there is any change in law in view of the amendments or altered statutory provision. The decisions can also be distinguished or observed as not applicable or good law, in case there is a decision of the Supreme Court which takes a contrary view.

13. On a question whether or not the assessee must himself undertake charitable activities, petitioner No.1 has pointed out observations in the impugned order that the petitioner No.1 was running two state of the art dispensaries in Delhi where free medical prescription was provided to the patients; it has also been stated in the impugned order that petitioner No.1 was maintaining two state of the art laboratories for R & D in Ghaziabad and Manesar factories and was providing financial help to Hakims and Vaids by paying monthly allowance to them.(Quantum of expenditure incurred or application made is not stated in the writ petition). It is stated in the impugned order that this financial help was being given to selected Hakims and Vaids of repute. However, no details of Hakims and Vaids and their incomes have stated or mentioned in the impugned order. On what basis did the author of the order reach the conclusion that financial aid was being given to already well of Hakims and Vaids is not indicated or averred to.

14. The petitioner No.1 has referred to decisions of this Court and other High Courts in **CIT vs. Sarladevi Sarabhai Trust,** (1988) 172 ITR 698 (Guj.), **CIT**

vs. Nirmala Bakubhai Foundation, (1997) 226 ITR 394 (Guj.), **CIT vs. Hindustan Charity Trust,** (1983) 139 ITR 913 (Cal.), **CIT vs. M. Ct. Muthian Chettiar Family Trust & Ors.,** (2000) 245 ITR 400 (Mad.), **CIT vs. Trustees of the Jadi Trust**, (1982) 133 ITR 393 (Bom.), **CIT vs. Shri Ram Memorial Foundation,** (2004) 269 ITR 35 (Del.). It is submitted that these decisions have accepted the view that application of income for charitable purposes includes transfer of funds to a third person for the said purposes. Decision in **Inland Revenue Commissioner vs. Helen Slater Charitable Trust Ltd., (1980)** 83 WLR 157 has been referred to. It is accordingly submitted that application of money for charitable purposes takes place when the petitioner No.1 transfers his surplus or the entire income or substantial portion thereof, i.e. 85% or more, to a third person who is also using the funds for charitable purpose. This is also application of the money for charitable purpose. It is good and valid application of money unless the transferor i.e. the assessee know or ought to have know that the money will be mis-applied by the transferor. At this stage, we record that this contention of the petitioner No.1 has not been dealt with or examined in the impugned order. We record that the petitioner No.1 has relied upon a decision of the Delhi High Court in **Shri Ram Memorial Foundation,** which is the jurisdictional of High Court. The petitioner has in addition also referred to instruction No. 1132 dated 05.01.1978 issued by the CBDT which states that charitable trust will not lose

exemption under the Act, if it passes a sum of money to another charitable trust for utilization for charitable purpose . It is submitted that as per the Board this constitutes shall be proper utilization of money by the donor for the charitable purposes. It is pointed out to us that the petitioner No.1 has set up no less than 25 medical, educational, literary, scientific and cultural organizations, the All India Unani Tibbi Conference, Institute of History of Medicine and Medical Research, Indian Institute of Islamic Studies, Ghalib Academy, Rabea Girls Public School, Hamdard Education Society, Majeedia Hospital, Jamia Hamdard (University), Rufaida Nursing School, Hamdard Study Circle, Hamdard Coaching Centre, Hamdard Primary School, Hamdard College of Pharmacy etc.

15. HNF, it is claimed, was set up by late founder Wakif Mutawalli on 12.5.1964 as a special purpose vehicle to implement charitable purposes which are identical to the charitable purposes of the petitioner No.1. Our attention was specifically drawn to the objects of HNF, a philanthropic society registered under the Societies Registration Act, 1860 and the objects and functions referered to in the Constitution of HNF. It is stated that HNF is registered under Section 12A read with Section 12AA of the Act and throughout they have been granted exemption. For assessment year 2007-08, the Assessing Officer had denied exemption to HNF under Section 11 of the Act but the said decision was reversed by the appellate authority vide decision dated 31.1.2012 i.e. before the date of the present order dated 22.2.2012. The impugned order however, does

refer to the order of the Assessment Officer but does not notice the appellate order passed on 31.01.2012 reversing the findings of the Assessing Officer.

16. On the question of surplus, application of income and accumulation, our attention was drawn to the chart mentioned in Paragraph 8.3 of the impugned order. It is pointed out that the gross surplus is mentioned in the first column. The second column refers to 15% of the general reserve and the last column mentions the accumulative reserve. Petitioner No.1 submits that the amount mentioned in last column accumulation is less than 15% of the general reserve and therefore, the petitioner meets the prescribed parameters. This aspect has been ignored in the impugned order by recording that the surplus has been given to HNF or surplus/income has been passed on and given to HNF. The effect thereof and whether objects/use of funds by HNF can be determinative and relevant for deciding the applicable head u/s 2(15) in the case of the petitioner No.1 is an aspect which requires examination/consideration.

17. On the question of books of accounts, we have already noticed the contention of petitioner No.1 relying upon the decision of Delhi High Court in **Mehta Charitable Prajnalay Trust (**supra).

18. Looking at the aforesaid situation, we allow the present writ petition and issue the writ of certiorari quashing the impugned order dated 22.2.2012 passed by the Director General of Income Tax (Exemptions). The Director General of Income Tax (Exemptions) will pass a fresh order dealing with all the

contentions and issues raised by the petitioner No.1 keeping in mind the case law on the subject. The reason why we are remitting the matter is that we find that there are several issues and questions, which have been partially adverted to in the impugned order and we cannot in this writ petition form a firm view. We have discussed the legal contentions raised and also referred to the legal position on certain aspects but application of legal ratio is dependent upon the facts. Difference in facts can materially affect the final outcome and the legal position applicable; whether it be books of accounts, question of application of income, quantum of surplus available or the activity undertaken by HNF. For example whether activities of HNF can be treated as charitable activity of the petitioner for the purpose head under Section 2(15) as claimed by the petitioner No.1. We find ourselves handicapped and unable to give any firm/final opinion on issues/contentions, which may have been touched but not elaborated in the impugned order and/or examined without appreciating the correct legal position. The petitioner No.1 has also disputed some factual assertions stated in the impugned order. Fairness and justice demands that the matter should be examined threadbare, first factually and then by applying the applicable legal ratio. We refrain from elucidating and going into the greater details on these aspects, least it causes prejudice to any side, in view of the remand order.

19. In order to curtail delay, it is directed that the petitioner No.1 through his authorized representative will appear before the Director General (Exemptions)

on 2nd May, 2013, when a date of hearing will be fixed.

20. By order dated 01.06.2012, it was directed that the assessment proceedings can continue and even assessment orders can be passed but demands will not be enforced by the Revenue without leave of the Court. The said interim order was applicable to all assessment years except assessment year 2005-06.

21. In another writ petition W.P.(C) No.3599/2012 relating to AY 2005-06, an interim order was passed on the same day that the assessment proceedings can continue but no final assessment order can be passed.

22. The interim order in W.P.(C) 3598/2012 will continue for a period of three months. We hope and expect that the respondent-Director General of Income Tax (Exemptions) will be able to decide and dispose of the remand expeditiously and within the said period. Similarly, it will be open to the Commissioner of Income Tax (Appeals) to dispose of the appeals within the said time. The assessee is expected to cooperate and in case there is any laxity and failure, it will be open to the authority to take action and decide the matter in accordance with law.

23. We clarify that this decision does not deals with the interim order for the assessment year 2005-06 passed/operating in W.P.(C) No.3599/2012.

The writ petition No.3598/2012 is accordingly disposed of with no order as to costs.

SANJIV KHANNA, J.

SIDDHARTH MRIDUL, J.

APRIL 11, 2013
Gm/NA