(1972) 10 KL CK 0004

In the High Court Of Kerala

Case No : Income Tax R. No. 75 of 1971

CIT, Kerala APPELLANT

Vs

Dharmodayam Co., Trichur RESPONDENT

Date of Decision : 05-10-1972

Acts Referred:

Income Tax Act, 1922 — Section 4(3)(i), 4(3)(i)
Income Tax Act, 1961 — Section 11, 11(1)(a), 2(15), 2(15)

Citation : (1974) 94 ITR 113

Hon'ble Judges : T.C. Raghavan, J;K. Bhaskaran, J

Bench : Division Bench

Advocate : P.A. Francis and P.K. Ravindranatha Menon, for the Appellant; C.T. Peter, T.C. Karunakaran, V.M. Kurian, A.I.M. Basheer and K.K. Gangadharan, for the Respondent

Final Decision : Allowed

Judgement

T.C. Raghavan, C.J.—The questions referred to us in the reference are:-

1 Whether on the facts and in the circumstances of the case, the Appellate Tribunal is correct in law in holding that the income derived by the assessee is exempt under S. 11 (1) (a) of the Income tax-Act, 1961?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that setting apart reserves under Art. 39 of the assessee''s memorandum did not vitiate the charitable purpose of the institution?

The assessee is a company, which was originally registered under the Cochin Companies Act and later on under the Indian Companies Act of 1956. It was allowed to be registered with limited liability without the addition of the word "limited" to its name by the Dewan of Cochin; and the registration was followed under the Indian Companies Act too. The sources of income of the Company are interest on securities, income from property and business of conducting kuries (chit funds). In a previous reference, viz., Dharmodayam Co. v. Commissioner of income tax, Kerala (45 ITR. 478), a Division Bench of this Court had occasion to consider the position relating to the kuries conducted by the Company under S. 4 (3) (i) of the Indian income tax Act of 1922; and the Court held that the business of conducting kuries was held by the Company under trust for religious or charitable purposes and proviso (b) to S. 4(3)(i) was not attracted. The Memorandum of Association of the Company had as its objects:-

(a) To raise funds by conducting kuries with the Company as the foreman; receiving donations and subscriptions; and by such other means as the Company deems fit.

(b) To do the needful for the promotion of Charity, Education and Industry.

It was in construing this portion of the Memorandum of Association that this Court held that the business of conducting Kuries was held by the Company under trust for religious or charitable purposes, namely "the promotion of Charity, Education and Industry". The matter was taken in appeal to the Supreme Court by the Revenue; but, the appeal was withdrawn, with the result that the decision of this court became final.

2. After the income tax Act of 1961 came into force, the present case arose. The assessment year, with which we are concerned in this case, is 1968-69; and the income tax Officer assessed the income derived by the Company by conducting kuries to tax for the said year. The Officer held that, since the sole test for exemption under S. 11 of the Act was that the objects on which the income was spent should be charitable, the test was not satisfied and therefore the liability to tax arose. In appeal, the Appellate Assistant Commissioner came to a different conclusion; he held that the earlier decision of this Court applied to the case and the alteration in the definition of "charitable purpose" in S. 2(15) of the new Act did not bring about any alteration in the position of the Company. This view was accepted by the Appellate Tribunal as well. Thereafter, at the instance of the Revenue, the questions mentioned at the commencement of the judgment have been referred to us.

3. The counsel of the Revenue has referred mainly to the decision of the Mysore High Court in The Commissioner of Income Tax, Mysore, Bangalore Vs. The Sole Trustee Lok Shikshan Trust, Hubli, . In that decision, the Mysore High Court was considering the scope of S. 2 (15) of the Act of 1961. This clause, as we have already indicated, defines "charitable purpose" to include "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 for profit". From the very language of this definition, what appears is that in so far as relief of the poor, education and medical relief are concerned, no question of any activity for profit can arise; in other words, the question whether there is involved any activity for profit is confined only to the last part of the definition, namely, the advancement of any other object of general public utility. This the Mysore decision has also noted; but the Mysore decision appears to have gone a little

further and said something regarding the last part of the definition, which might not arise in this case, in view of what we are going to bold presently. From the statement of the case and also from the Memorandum of Association of the Company, it is clear that the raising of funds is by conducting kuries, by receiving donations and subscriptions and by such other means as the Company deems fit. In other words, in the language of the earlier decision which is binding between the parties, the business of conducting kuries was held under trust by the Company: conducting kuries was not itself a purpose or object of the Company-it was a property of the Company. Therefore, we do not think that the Mysore decision has any application to the case; and on the strength of that decision, the Revenue cannot also contend that the answers to the questions referred should be is its favour.

4. In this connection, the counsel of the Revenue has brought a few other decisions also to our notice. The first decision is COMMISSIONER OF Income Tax Vs. KRISHNA WARRIAR., , wherein the same Division Bench of this Court which decided the earlier Dharmodayam Co. case bad occasion to consider a similar case, There also the Division Bench held that Arya Vaidyasala at Kottakkal was a charitable institution and thus came within the purview of S. .4(3)(i) of the Indian income tax Act of 1922. The matter was taken in appeal before the Supreme Court by the Revenue; and the Supreme Court confirmed the decision of this Court in Commissioner of Income Tax Kerala and Coimbatore Vs. Krishna Warriar, . Subba Rao J., in affirming the decision of this Court, has approvingly referred to our decision in Dharmodayam Co. case too. Recently, another case relating to the same institution (Arya Vaidyasala) came before another Division Bench of this Court in Commissioner of Income Tax Vs. P. Krishna Warrier, The Division Bench was considering in the second case Arya Vaidyasala and two other institutions. Arya Vaidya Hospital and Arya Vaidya Patasala, all created by the same will left by the same testator, the late Shri P.S. Warrier Under the will, a percentage of the income was bequeathed to some of the tavazhies of the tarwad of the testator; and the Division Bench bad to consider whether there was a mixing up of charitable and non-charitable purposes in the trust created by the testator. Arya Vaidyasala was manufacturing Ayurvedic medicines and selling them; and by such sales, Arya Vaidyasala made lakhs of rupees over eleven lakhs is one year and over 12 lakhs in another year. During these two years, the income derived from Arya Vaidya Hospital was just above Rs, 25,000/-, and above Rs. 17,000/- respectively. From these facts, the Division Bench came to the conclusion that treatment imparted to patients in Arya Vaidya Hospital was a negligible activity, on incidental object of the trust, the predominant and the substantial object of Arya Vaidyasala being the preparation and sale of ayurvedic medicines, which, though might have as its object "public utility", still involved ''the carrying on of an activity, for profit". And the Bench went on to hold that the intention of the testator was that the Vaidyasala must apply its financial resources for the maintenance of the three institutions, namely, the Vaidyasala, the Hospital and the Patasala, and should also pay the other bequests to the

tavazhies of the testator it was thus a trust with mixed objects of charitable and non-charitable purposes, and therefore, it fell outside the ambit of the definition in S. 2 (15) of the Act. We do not think that this decision can advance the case of the Revenue in the reference before us. As we have already indicated, the position here is that the purpose of the institution was to promote charity, education, medical relief and industry, the business of conducting kuries being only a property, held in trust by the Company.

5. We may also refer to the other two or three decisions cited by the counsel of the Revenue. One of them is the decision of the Supreme Court in East India Industries (Madras) Private Limited Vs. Commissioner of Income Tax, Madras, . This decision, in our opinion, cannot, give any assistance to the Revenue, because one of the clauses in the trust deed that was considered by the Supreme Court contained as a purpose of the trust:-

to manufacture, buy, sell and distribute pharmaceutical, medicinal, chemical and other preparations and articles such as medicines, drugs, medical and surgical articles-preparations and restorative of food.

This is evidently not a charitable trust; and we cannot apply this decision to the case before us, where conducting kuries was really not a purpose of the company but was only a property held in trust by the Company. The three other decisions brought to our notice are the decisions of our High Court in Commissioner of Income Tax Vs. Indian Chamber of Commerce, and Commissioner of Income Tax Vs. Cochin Chamber of Commerce and Industry, and the decision of the Calcutta High Court is Commissioner of Income Tax Vs. Indian Chamber of Commerce, . In the first of these decisions, a Division Bench of this Court held that the purpose of the Indian Chamber of Commerce was a charitable purpose and its activity of issuing certificates for weighment and survey involved no activity for profit. The Division Bench observed that, if the fee received for these services by the Chamber of Commerce was ultimately found to be in excess of the expenses and resulted in profit, the excess of the income over, the expenditure could not be brought in as income liable to tax under the Act of 1561 by virtue of S. 11(1)(a). Then came the decision of the Calcutta High Court; and the Calcutta High Court appears to have taken a different view on a similar question. That decision was brought to the notice of another Division Bench of this Court in the next decision in the Cochin Chamber of Commerce and Industry case. The Division Bench considered "the question afresh in the light of the Calcutta decision and disagreed with the view expressed by the Calcutta High Court. The Division Bench pointed out that, in issuing certificates, the Chamber of Commerce was not doing any activity for profit and the mere fact that a profit ultimately resulted would not make the purpose of the Chamber any the less charitable. We may also add that the decision of the Calcutta High Court was probably on slightly different facts too. There were two Chambers of Commerce, one, the Bengal Chamber of Commerce, and the other, the Indian Chamber of Commerce. The Indian Chamber of Commerce, the assessee before the Calcutta High Court, was doing arbitration among businessmen taking a fee therefor and was also issuing certificates and miscellaneous receipt, etc. taking fee. The same practice was being followed by the Bengal Chamber of Commerce. Subsequently, a partnership was established by name Calcutta Licensed Measurers by the two Chambers of Commerce; and this new concern was doing the business of weighing and issuing certificates. During the relevant year, the Indian Chamber of Commerce, the assessee before the Calcutta High Court, received a sum of Rs. 1,69,779/- as its share of the income from the Calcutta Licensed Measurers. It may therefore be possible to explain the decision of the Calcutta High Court that starting a partnership concern and taking a share therein was an activity for profit: to that extent, we need not even disagree with that decision. Therefore, that decision cannot also be applied to the case before us.

6. An attempt has been made by the counsel of the Revenue to contend that, in the case before us, one of the purposes is promoting industry; and that promoting industry is an activity for profit. There is no case that Dharmodayam Company ever started any industry: there is also no ground for saying that the object of the Company was to start an industry for the purpose of making profit. The mere promotion of industry cannot be said to be starting as industry for profit. Therefore, this contention cannot also avail to the Revenue.

7. Lastly, the counsel of the Revenue has argued on the second question that under Art. 39 of the Memorandum of Association of the Company, the entire profit for a year might beset apart as reserve under this Article and that provision would therefore vitiate the charitable nature of the Company. In the view we have taken that the income has been spent only on charitable purposes (this is not disputed either) and that conducting kuries is not a purpose of the Company as such, this contention cannot also have any force: the latter portion of S. 2(15) will not also apply.

8. In the result, the answers we give to both the questions are in the affirmative, namely, against the Revenue. A copy of this judgment will be sent to the Tribunal as required by law.

9. Now we come to the writ petitions. In O.P. No. 637 of 1972, the counsel of the Revenue has failed to convinces how, in the view we have taken in the reference, the Revenue can contend that the position in the writ petition is different. The assessment in this case is based on the decision of the income tax Officer, which is the subject matter of the reference: and therefore, this writ petition has only to be allowed. But we make it clear that the income tax Officer is free to continue the assessment treating the Company as a charitable institution under S. 11 of the income tax Act of 1961.

10. In the other writ petition, the counsel of the Revenue has argued that the case involves re-assessment and the requisite opinion of the income tax Officer was formed prior to the decision in the reference, so that the re-assessment proceeding has to go on. This contention cannot also be sustained, because it is

made abundantly clear in the counter affidavit that the opinion of the income tax Officer was on the basis of the opinion he formed in the case which ultimately resulted in the reference. If that is the position and if that opinion of the income tax Officer has no basis, it is clear that this writ petition has also to be allowed.

11. Both the writ petitions are allowed and the relevant notices sought to be quashed in the petitions are quashed, subject to the observation we have already made in O.P. No. 637 of 1972. However, we do not pass any order regarding costs in any of the cases.

