IN THE INCOME TAX APPELLATE TRIBUNAL

PUNE BENCH "A" , PUNE

BEFORE SHRI I.C. SUDHIR JUDICIAL MEMBER AND
SHRI D. KARUNAKARA RAO ACCOUNTANT MEMBER

ITA No. 672/PN/2009
(Asstt. Year : 2005-06)

Mercedes Benz Education Academy, ... Appellant
Plot No.P-26, Rajiv Gandhi
Infotech Park,
MIDC, Phase –I, Hinjewadi, Pune 411 057
PAN : AAATM1757A

Vs.

Income Tax Officer, ... Respondent
Ward 2(1), Nashik

Appellant by : Shri Kishor Phadke
Respondent by : Shri A.S. Singh

ORDER

Per I.C. Sudhir JM

The assessee has questioned first appellate order on the following Grounds :

"1. The learned ITO Ward 11(1), erred in law and on facts in making a total addition of Rs. 1,84,65,940/- to the total income of the appellant.

2. The learned AO further erred in law and on facts in denying benefit of exemption u/s. 10(23C)(vi) of the ITA, 1961.

3. The learned AO erred in law and on facts in deciding the status of the appellant as that of an AOP (Trust) instead of an institution engaged in providing education as covered u/s. 10(23)(vi) of the ITA, 1961.

4. Alternatively and without prejudice, the learned AO erred in law and on facts in adding the Capital Outlay Contribution of Rs.1,25,18,250 to the total income considering it to be a Revenue Receipt."

2. Besides above, the assessee has raised following additional Grounds with request to allow the same for adjudication of the Tribunal since issue involved therein is legal in nature which does not need consideration of material outside the record. :

<u>Additional Ground</u>

1. The learned CIT(A)-I, Pune and the learned ITO, Ward 11(1), Pune erred in law and on facts in not appreciating that, considering the long elapsed time from the date of application for approval u/s 10(23C)(vi) for A.Y.2005-06; and considering the time limitation factor implicit in the provisions of law; the appellant is eligible to claim exemption u/s 10(23C)(vi) of the ITA, 1961.

<u>Additional ground (Alternate and without prejudice)</u>

2. The learned ITO, Ward 11(1), Pune erred in law in not setting off the business loss (assessed as deficit) of the past years before deciding the tax liability of the appellant for A.Y. 2005-06. The learned CIT(A)-I, Pune erred in law in not directing the AO to permit the set-off of past business losses (assessed as deficit). Both the tax authorities ought to have considered the following position of business loss (assessed as deficit) in this regard.

a) A.Y. 1999-2000	-	Rs.38,96,994
b) A.Y. 2000-01	-	Rs.25,82,275
c) A.Y. 2001-02	-	Rs.14,49,602
d) A.Y. 2002-03	-	Rs.33,60,746
e) A.Y. 2003-04	-	Rs.49,46,947
f) A.Y. 2004-05	-	<u>Rs.94,84,942</u>

TOTAL Rs.2,57,21,506"

3. The Ld. D.R. opposed the above request for allowing adjudication of the additional Grounds raised for the first time before the Tribunal with this submission that the assessee has not explained as to why these additiional Grounds were not raised before the authority below.

4. Considering the above submissions, we find that so far the issue raised in additional Ground No. 1 is concerned, it is legal in nature which goes to the root of the matter and further that adjudication of the same does not require consideration of fresh material outside the record. We also find that the other additional Ground which is alternative in nature and the grounds of the appeal explaining the action of the first appellate authority are consequential to the issue raised in additional Ground No. 1. We thus allowed the request of the Ld. A.R. for adjudication of Additional Ground No. 1. We accordingly directed the parties to proceed with their arguments on additional Ground No. 1.

5. In support of the said additional Ground, the Ld. A.R submitted that assessee's school is solely engaged into the activity of education. The school is not aided by any Government authority. The school collect fees from the students and runs the educational activities, which fact has been accepted even by the Department as it is evident from the assessment orders framed for the A.Ys. 2000-

01, 2003-04 and 2004-05. He submitted that the application of the assessee for grant of approval u/s. 10(23C)(vi) of the Act is pending disposal before the Ld Chief Commissioner of Income Tax concerned. The A.O. has held that in the absence of specific approval from the Ld Chief Commissioner of Income Tax, the exemption u/s. 10(23C)(vi) cannot be granted to the assessee. The Ld CIT(A) has upheld the same without appreciating this material fact that there is no fault on the part of the assessee in the whole process for not having the approval. The Ld CIT(A) has failed to appreciate that assessee having a bonafide educational activity does not cease to be so due to delay in granting approval u/s. 10(23(vi) of the Act. The Ld. A.R. pointed out that the assessee had moved application seeking approval of exemption u/s. 10(23C) in Form No. 56D before the Ld Chief Commissioner of Income Tax for the A.Y. 2005-06 under consideration and for the next 2 years along with return of income for the A.Y. 2005-06 well in time on 13.3.2006 but, it has not been disposed off so far. The assessment order treating the assessee as A.O.P in absence of the required approval for the exemption has been framed u/s. 143(3) on 28.12.2007 and the Ld CIT(A) vide its order dated 1.4.2009, has affirmed the action of the A.O again in absence of the required approval by the Ld Chief Commissioner on 1.4.2009. He pointed out that till Taxation Laws (Amendment) Act 2006 with retrospective effect from 1.4.2006 in Section 10(23C) proviso, whereby granting or rejecting of application order is required to be passed within the period of 12 months from the end of month in which such application was received, no time limit was prescribed for the action of the Ld Chief Commissioner on such application for the approval. Thus in absence of such prescribed time limit for the period before the amendment came into effect, a reasonable time should be taken for disposal of the application for approval by the Ld Chief Commissioner of Income Tax for required deemed approval for framing the assessment accordingly.

6. The Ld. D.R., on the other hand, objected the above submissions of the Ld. A.R. with this contention that admittedly, when the assessment was framed and first appellate order was passed in the present case, the assessee was not having approval of exemption u/s. 10(23C) of the Act which is well within the jurisdiction of the Ld Chief Commissioner of Income Tax. Thus, in absence of such approval, the authorities below were justified in framing the assessment treating the assessee as an A.O.P. He submitted further that under the provisions of Section 253 of the Income Tax Act, appeal cannot be preferred against the orders which have not been mentioned in the provisions u/s. 253 of the Act. He pointed out that as per Section 253, order passed by Ld Chief Commissioner except u/s. 272A, is not appealable before the Tribunal, thus in the present appeal, action of the Ld Chief Commissioner in not granting approval of exemption on the application of the assessee, cannot be questioned before the Tribunal.

7. Considering the above submissions we are of the view that there is no dispute that the present appeal preferred against 1st appellate order passed by ld. CIT(A) is very much maintainable under Section 253(1)(a) of the I.T. Act, 1961. A natural question has arisen in our mind in the present case is as to whether A.O or Ld CIT(A) can pass an order against the action of the ld. Chief Commissioner of Income Tax on the application moved for exemption u/s.10(23C) by an institution. The answer as per the provisions of law and procedure laid down under Income Tax Act, 1961, would be in negative. But here is a peculiar situation before us. In the present case, the revenue has not denied before us the claim of the appellant institution that it had moved application seeking approval of exemption u/s. 10(23C) in form No. 56D before the Ld. Chief Commissioner for A.Y. 2005-06 and for the next two years alongwith return of income for A.Y. 2005-06 well in time on 13.3.2006, but it has not been disposed off so far. The assessment order treating the appellant as AOP in absence of the required approval for the exemption has been framed u/s. 143(3) on 28.12.2007 and the ld. CIT(A) has affirmed the action of the AO (again in absence of the required approval by the ld. Chief Commissioner) on 1.4.2009. Thus admitted position before us is that till 1.4.2009 no action was taken on the application for approval of the claimed exemption by the ld. Chief Commissioner. In our view two actions were possible by the ld. Chief Commissioner on the said pending application for approval i.e. firstly rejection of it and secondly approval of it. Neither of the two actions has been

taken by the ld. Chief Commissioner on the application. There would have been no question of challenging the granting of the claimed approval by the ld. Chief Commissioner as in that situation there was no grievance with the appellant/applicant. The appellant/applicant would have been aggrieved by the order of the ld. Chief Commissioner in the case of rejection of the application for approval of exemption by him. Remedy in that situation was of course was not available with the applicant to move the Tribunal in appeal in absence of any such provision u/s. 253 of the Act. But here in the present case is third situation i.e. in-action of the ld. Chief Commissioner on the application for the approval of exemption. <u>Now the question is as to whether such in-action can be treated as deemed approval of the claimed exemption in the application for the purpose of framing assessment or for other action by the A.O. The further consequential question would arise as to what would be the reasonable time on passing whereof after the date of filing of the application would acquire deemed approval.</u>Till Taxation Laws (Amendment) Act, 2006 with retrospective effect from 1.4.2006 in Section 10(23C) proviso (whereby granting or rejecting of application ordere is required to be passed within the period of twelve months from the end of month in which such application was received) no time limit was prescribed for the action of the ld. Chief Commissioner on such application for the approval. Thus the inference by implication would be that w.e.f. 1.4.2006 if the Chief Commissioner does not act upon the application for approval of exemption u/s. 10(23C) pending before him, after passing of the period of 12 months from the end of month in which such application was received, it will be deemed as the claimed approval has been accepted/granted. In other words in such a situation the A.O will frame the assessment treating the assessee applicant as having been granted the approval for the claimed exemption for the relevant period.

8. Now we have to deal with the situation which has arisen in the present case, since the applicant was not having the benefit of prescribed time limit of 12 months for the disposal of the application for the approval. Now it is a settled proposition of the law that in such a situation where the law is silent on such time limit reasonable time would be considered as time prescribed for the disposal of the application. The thought behind it is that there can not be an infinite period for the purpose detrimental to the interest of the applicant. Of course in our view guidance of such reasonable time i.e. 12 months can be taken for the years before the amendment as prescribed time limit. Here in the present case till 1.4.2009 when first appellate order was passed, admittedly application for approval moved on 13.3.2006 before the ld. Chief Commissioner was not disposed off. In our view the period of 3 years (i.e. till passing of 1st appellate order) was more than reasonable for deeming the authority below that the application for approval of the claimed exemption u/s.10(23C) of the Act has been allowed by the ld. Chief Commissioner to frame the assessment for the A.Y. in question accordingly. It is however pointed out by the

Ld. AR before us has pointed out at Bar that till date no action has been taken by the ld. Chief Commissioner on the said application dated 13.3.2006. Under these circumstances, the above stated two issues are decided in favour of the appellant accordingly. Consequently, while setting aside the orders of the authorities below, we direct the A.O to frame assessment for the year in question afresh treating the appellant as enjoying approval of exemption u/s. 10(23C) for the claimed period in its application dated 3.3.2006 (acquired deemed approval) after affording opportunity of being heard to the appellant.

9. In result, appeal is allowed for statistical purposes.

Order pronounced in open Court on 31st May 2011.

Sd/-	Sd/-
(D. KARUNAKARA RAO)	(I.C. SUDHIR)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Pune: Dated: 31st May, 2011

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Copy of the order is forwarded to :

1. The Appellant
2. The Respondent
3. The CIT-I, Pune
4. The CIT(A)-I, Pune

4. The D.R. ITAT, "A" Bench, Pune
5. Guard File

By order

Assistant Registrar
Income Tax Appellate Tribunal
Pune