A COMPREHENSIVE ROUND-UP ON RECENT JUDICIAL PRONOUNCEMENTS REGARDING TRUSTS

CMA Ajith Sivadas
Cost Accountant

Adv. Srikanth Thamban

It is an English common law concept to do with the crusades when the knights left their land in the hands of trusted people in case they never returned from battle." The trusted people (usually the church who turned out to be very untrustworthy and kept a lot of it for themselves) had an obligation to pass on the land to the rightful heir.

Roman law has the notion of trustees, and of trustee duties and obligations, with respect to property in the form of two trust-like devices, *fideicommissum,* and *fiducia.*

The *fideicommissum* developed as an extra-testamentary means of a person being able to dispose of property on his death to X who in turn was under an obligation on the happening of a certain event (e.g., his death or re-marriage) to pass on the property to Y. In fact, Y could also be under an obligation to pass on the property as a part of this chain.

By tradition, private philanthropy in our country has been playing a very special and prominent role in enriching our cultural heritage and in catering to the education, medical, socio-economic, and religious needs of our people. In so doing, it has supplemented the work of a Welfare State, and the State, in turn, has recognized its contribution by giving generous tax exemptions to the donations given to philanthropic institutions and also to the income thereof applied for public, religious or charitable purposes.

Due to their distinct organisation and objective entire income of such charitable or religious trusts are taxed as per the provisions of section 11-13 of the Income Tax Act, 1961, which provides for various tax benefits. In the name of charity, there has been misuse of tax concessions by some of the Charitable Organizations which go undetected. There are various amendments in law relating to these

institutions to curb this practice. Judiciary also have an eminent role in structuring the law and preventing such un ethical practises with their land mark judgements. This article envisages on couple of recent pronouncements by Hon. Apex court (New Noble Education Society v. CIT) and Hon High Court of Kerala (Cardinal Mar George Alencheryy v State of Kerala), though both are not having direct facts correlated but in both cases, the judiciary stamps its uniqueness for the curbing the façade practices by the trusts in whole.

Background To The Verdict

The first decision was propounded by the Honourable Supreme Court in New Noble Education Society v. CIT which deals with tax exemption to educational institutions, the relevant provisions being Sections 2(15) and 10(23-C) of the Income Tax Act, 1961. The occasion for this decision arose in view of the refusal of the income tax department to deny the exemption to a trust. The fact that an educational institution was indeed being run by the trust was not in dispute. However, the two reasons for denying the exemption were.

a. The objectives of the trust were not limited to imparting education and, therefore, it could not be considered as "solely" instituted for purpose of education; and

b. The trust was not registered under state charity law. The Andhra Pradesh High Court had upheld both objections to deny the exemption, the challenge to which was before the supreme court.

Section 2(15) was amended in 2015 to provide that advancement of any other object of a 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, etc unless

i. Such activity is undertaken in the course of actual carrying out of such advancement of any other object of the general public utility and

ii. The aggregate receipts from such activities during the previous year, do not exceed 20% of the total receipts, of the trust undertaking such activities, of the previous year.

The Honourable Supreme Court in the *Asst. CIT Vs. Thanthi Trust (2001) 247 ITR 785 (SC)* stated that the scope of sub-section (4A) of Section 11, as amended in 1992, is more beneficial to a trust or institution than the scope of the sub-section before the amendment. After its amendment in 1992, all that is required for the business income of a trust to be exempt from tax is that the business should be incidental to the attainment of the objectives of the trust. A business whose income is utilized by the trust for the purpose of achieving the objectives of the trust is a business that is incidental to the attainment of the objectives of the trust.

The second decision is in the *Cardinal Mar George Alencheryy v State of Kerala* wherein the High Court of Kerala had said that Religious and charitable institutions are accumulating wealth and property under the guise of charity and a strong central legislation applicable across the country is required to regulate the activities of such institutions.

Single-judge of High Court, therefore, urged the Central government to consider the possibility of enacting a central regulation to regulate religious and charitable institutions. The Judge on pronouncing the note had included these words:

Now the term 'charity' is largely used to accumulate wealth and property under that guise and to give away the same without accounting the same to any responsible authority. Article 19(1)(c) of the Constitution of India guarantees the right of all citizens to form associations or unions, but that does not mean that it should be without any legal status or legal recognition, when involves the acquisition and accumulation of large quantity of wealth and assets under the guise of charity

Decisions Related To The Educational Institutions

The bulk of the decision in New Noble is devoted to exemplifying a single expression used in the statutory provision; **"solely".** The Supreme Court stated the judgment by reiterating the words *"It has been said that education is the key that unlocks the golden door to freedom".* The Honourable Apex Court had also taken the views from the Avinash Mehrotra v Union of India: where the Supreme Court had underlined the object and value of education in the following words:

"29. Education today remains liberation - a tool for the

betterment of our civil institutions, the protection of our civil liberties, and the path to an informed and questioning citizenry. Then as now, we recognize education's "transcendental importance" in the lives of individuals and in the very survival of our Constitution and Republic."

On such account, it acknowledges the parliamentary intent underlying the provisions of the income tax law which is to promote "scholastic instruction" in society by fiscally incentivizing institutions dedicated to its cause. The decision, however, stresses the fact that judicial wisdom dictates, in line with the settled law, that exemption provisions are to be construed strictly with the benefit of the doubt going to the tax department and against the taxpayer.

The Supreme Court has revisited its earlier decisions to highlight that in view of the usage of the expression "solely", which is closer to "only", the intent underlying the exemption appears to be limited to those institutions which are exclusively devoted to the cause of education. To such end, the decision reverses its earlier view which approved the "predominant object test" as the benchmark to examine the availability of the exemption.

The views of the Additional Solicitor General

The Additional Solicitor General had stressed upon the meaning of the Educational Institutions and the word meaning "Solely" through various averments;

The learned ASG submitted that the ratio in T.M.A Pai Foundation (supra) had established that education per se was regarded as a charitable activity. It could not be regarded as trade or business with a profit motive driving it. There could be some doubt about whether education was to be regarded as a profession; nevertheless, it was covered by the term 'occupation'. It was submitted that the court in this context ruled an 'occupation' would be an activity of a person undertaken as a means of livelihood or as a mission in life. Counsel also pointed to certain portions of the judgment in T.M.A Pai Foundation (supra) to highlight that the rights conferred under Articles 29 and 30 were to be regarded as guarantees to ensure equality to minority communities either based on religion or language.

It was submitted that given this enunciation of the principle that education was an occupation and was per se, charitable, it was antithetical to commerce or business. In other words, education could not, either under the Constitution or under the IT Act, be regarded as a business activity. Thus, any commercialization of education would result in the loss of the benefit of tax exemption which an institution would otherwise be entitled to claim legitimately as a charitable trust. The ASG also relied upon the subsequent seven-judge decision in PA Inamdar v State of Maharashtra11 which had followed the reasoning in T.M.A Pai Foundation (supra).

Turning next to the decision in Oxford University Press (supra) the learned ASG pointed out that the majority judgment had recognized that the term 'existing solely for educational purposes and not for the purposes of profit' qualified 'university or other educational institution'. It was submitted that the majority judgment stated clearly that being part of an educational institution was insufficient and the concerned entity had to engage in imparting education itself, and in the course of such activity could generate a surplus. However, the claim that a unit that was part of a university abroad and was thus entitled to be treated as a charity in India was held to be untenable because the assessee's sole activity was to print and publish books for profit.

Supreme Court's Reiteration and Deliberation

In order to be eligible for exemption, under section 10(23C) (vi) of the Act, it is necessary that there must exist an educational institution. Secondly, such an institution must exist solely for educational purposes and, thirdly, the institution should not exist for the purpose of profit. (CIT v. Sorabji Nusserwanji Parekh, [1993] 201 ITR 939 (Guj)). In deciding the character of the recipient of the income, it is necessary to consider the nature of the activities undertaken. If the activity has no co-relation to education, the exemption has to be denied. The recipient of the income must have the character of an educational institution to be ascertained from its objects. (Aditanar Educational Institution, [1997] 224 ITR 310 (SC)). The emphasis in section 10(23C)(vi) is on the word "solely". "Solely" means exclusively and not primarily. (CIT v. Gurukul Ghatkeswar Trust, (2011) 332 ITR 611 (AP); CIT v. Maharaja Sawai Mansinghji Museum Trust, [1988] 169 ITR 379 (Raj)). In using the said expression, the Legislature has made it clear that it intends to exempt the income of the institutions established solely for educational purposes and not for commercial activities. (Oxford University Press v. CIT, [2001] 247 ITR 658 (SC)). This requirement would

militate against an institution pursuing objects other than education. (Vanita Vishram Trust v. Chief CIT, [2010] 327 ITR 121 (Bom)). Even if one of the objects enables the institution to undertake commercial activities, it would not be entitled to approval under section 10(23C)(vi) of the Act. (American Hotel and Lodging Association Educational Institute, [2008] 301 ITR 86 (SC)). It is only if the objects reveal that the very being of the assessee society, as an educational institution, is exclusively for educational purposes and not for profit, the assessee would be entitled to exemption under section 10(23C)(vi) of the Act. (Gurukul Ghatkeswar Trust, [2011] 332 HR 611 (AP))".

The decision of the Supreme Court in *New Noble* is to the effect that the tax officers are permitted to closely monitor the activities of the institution claiming the exemption, by calling for annual financial records, etc. to ascertain the exclusive devotion to education-linked activities. This de facto appraisal is beside the point that even de jure, the trust deed, which marks the birth of the institution, must not contain any objective other than to carry out the educational activities. In addition, confirming their additional monitoring, the Supreme Court has confirmed the view of the High Court that registration of such institutions under the local charity law is mandatory.

In order to avoid disruption and to give time to institutions likely to be affected to make appropriate changes and adjustments, the Supreme Court has given this decision prospective effect.

Decisions Related To The Religious Institutions

The High Court of Kerala had expounded on the veracity of the ongoing issue of land grabs and encroachment by organized institutions. The High Court had pondered that; *now the term 'charity' is largely used to accumulate wealth and property under that guise and to give away the same without accounting the same to any responsible authority. Article 19(1)(c) of the Constitution of India guarantees the right of all citizens to form associations or unions, but that does not mean that it should be without any legal status or legal recognition when involves the acquisition and accumulation of large quantity of wealth and assets under the guise of charity.*

In the guise of Charitable Institutions, the Bona Vacantia had been violated by the culprits with the creation of unviable Power of Attorneys and thus trying to extinct the options of the Government in a mala fide manner. The High Court had reined in with the keen observation on the said matter and had invoked the judicial review powers inherent within the sou moto laws.

The High Court had vehemently stated in its order that *Article 19(1)(c) of the Constitution of India guarantees the right of all citizens to form association or union, but that does not mean that it should be without any legal status or legal recognition, when involves acquisition and accumulation of large quantity of wealth and assets under the guise of charity.*

Pertinently, the Court emphasized the need for uniform central legislation as the study further revealed that the number of unregistered organizations is much more than the number of registered or formally registered.

Further, the High Court had pressed upon the (Radhasoami Satsung v. VIT [(1992) 193 ITR 321 (SC)] stating the 7th Schedule of the Constitution of India, of India which means that both the Central and State legislatures are competent to legislate and regulate charitable organizations. The legal framework governing charitable organizations in India is quite complex due to the multiplicity of legislation. The formation of a trust is designed to be on a different footing as it is not necessary to create a trust with a formal document.

Thus, the judicial scrutiny and review had tightly packed the matter of the land encroachments. The judicial review enhanced the views of the Government for proper legislation to clear the clutter that is prevalent in the area where no proper guidelines or regulations are being exercised.

Common Findings

At a larger level, the decisions converge the judicial ethos with the parliamentary intent that pursuits of charitable objectives are to be promoted, and accordingly granting exemptions to such causes is a core foundational tenet of the fiscal law. At the same time, the decision stresses upon the statutorily carved exceptions to the exemption provision to highlight that their abuse or misuse would not be permitted and to that extent, the tax officers are empowered to examine the affairs of the charitable institution closely to satisfy themselves that the conditions

for grant of exemption are scrupulously complied with.

The High Court of Kerala referred the matter of Radhasoami Satsung v. VIT [(1992) 193 ITR 321 (SC) and had stated that

It is relevant to take note of the study conducted by the Ministry of Statistics & Programme in 2012 and the final report published on non-profit institutions in India. The study took into consideration only those entities which were registered under the Societies Registration Act, of 1816, the Bombay Trust Act, of 1950, and companies registered under the Companies Registration Act, of 1956. The result indicated the existence of 31,74,420 non-profit institutions across India. The study further reveals that the number of unregistered organizations is much more than the number of registered or formally registered. There is no single central legislation that lays down the law governing charity or charitable organizations in India. Now the term 'charity' is largely used to accumulate wealth and property under that guise and to give away the same without accounting the same to any responsible authority. Article 19(1)(c) of the Constitution of India guarantees the right of all citizens to form associations or unions, but that does not mean that it should be without any legal status or legal recognition when involves the acquisition and accumulation of large quantity of wealth and assets under the guise of charity. The Constitution in Part IV lays down Directive Principles of State Policy.

From another perspective, both these decisions revisit the legal provisions which have been frequently amended, as also the judicial delineation of these provisions to highlight that the initial judicial standards, which required higher compliance, appear to have slipped over time and consequently diluted. Accordingly, these decisions are an exercise in streamlining the legal position by reconciling the deviations through categorical propositions, akin to a needle sewing loose threads together. Further to the observation, The High Court of Kerala emphasized that separate dedicated legislation from the side of the sovereign and the sub-sovereign which are necessary for the scrutiny and safeguarding of Bona Vacantia matters. On that account, the Supreme Court itself has admitted that a revisit to virtually all cases before it, is required to reconfirm the availability of tax exemptions by reviewing the facts of each case on its own merits.

Pertinently, Under the current extent of the income tax law, the scope of "charitable purpose" does not factor in religious orientation; instead, it currently subsumes "relief of the poor, education, yoga, medical relief, preservation of the 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". However, the focus of the decisions is largely on the exclusions to these purposes that is *"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".*

Decisions Governing The Availability Of The Tax Exemptions To Other Charitable Institutions

The decision of the Supreme Court in *Ahmedabad Urban Development Authority* is significantly wider than the decision in the New Noble decision. In the former decision, the Supreme Court has set out the rules required to be observed by all non-educational charitable institutions claiming tax exemption. Even in this case, the Supreme Court has streamlined the legal position to set at naught various decisions of the Tax Tribunals and the High Courts in favor of the taxpayers, by enunciating what according to it is the correct interpretation of the exemption provision. However, in doing so, the Supreme Court has not been as magnanimous as in the case of the latter decision, insofar as the decision in Ahmedabad Urban Development Authority does not accord any prospective application and requires all past claims to tax exemptions to be revisited in the light of the legal position now declared by the Supreme Court.

The Supreme Court has concluded that the institutions claiming the charitable exemption cannot be engaged in trade, commerce, or business activities used for general public utility purposes. However, highlighting that pre-2016 amendment of the law, a monetary threshold was applicable and post-2016 amendment the law permits up to 20% of the total receipts towards ineligible activities, the Supreme Court has made an across-the-board declaration that non-charitable activities would now be governed by these disqualifying criteria. In doing so, the court has declared the non-application of its earlier "predominant test" and given way to the statutory limitations to the ineligible activities. The institutions claiming the charitable exemption must now, therefore, ensure that "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" is carried out within these thresholds, the compliance to which end needs to be demonstrated on a year-to-year basis.

Conclusion

The two decisions of the Honourable Courts have revisited the legal position in vogue for decades to reverse the tide in favour of the tax department by imposing strenuous conditions upon the institutions claiming charitable exemption. Revisiting earlier decisions and discontinuing the "predominant object test" which supported the cause of the institutions, the Supreme Court has applied its followed 2018 trend that the tax authorities have an upper hand in the interpretation of conditions under exemption provisions and the burden is upon the taxpayer to demonstrate strict compliance of these conditions towards claiming preferential status. By doing so, the Supreme Court and High Court of Kerala have tectonically changed the ground rules governing tax exemption and deeds for charitable causes. These decisions will result in a revisit of all claims to exemption (except in the case of educational institutions) of the past assessment periods and also result in the large-scale restructuring of the institutions to align their activities in line with these decisions on a going-forward basis. More critically, given that the clear mandate of the Supreme Court to the tax authorities is to examine the claim on a yearly basis, it is now crucial for such institutions to get their act together and ensure diligence in bookkeeping, and even micromanagement, if need be, to ensure compliance with the rigorous standard for exemption. The need for educational institutions to follow their objectives strictly rather than changing the course towards any commercial activities is tied-up by the verdict.

Further, the Judicial Review by the High Court of Kerala had put to light the need for the regulation of Religious Charitable Institutions by the chance of legislation from the Central and State Governments, in the guise of religious Charitable Institutions the mismanagement of funds let loose by the society at large.

On the contrary circular 11 of 2008 dated 19/12/2008, S. 11(4) A of the act and amendment in 2(15) in 2015, which restricts the business receipts utilised for the advancement of general public utility, clearly and evidently allows such business income which are incidental to its objects, to be utilised for any other purposes mentioned u/s 2(15) such as relief of poor, Medical relief, education etc. Thereby these decisions analysed earlier shall not be applicable to such genuine and legally abided cases. If Profit making is neither the aim nor object nor the principal activity of the Trust, merely because the assessee carries out the activities for the purpose of achieving the objects relief of the poor or other non restricted purposes, should not be denied the benefit. Various land mark judgements also reinforces this settled position.

Thus, it is concluded by stating that, the law is not against the working of the economy or is not against the gains being created through the shades of trust for the purpose of the objectives, but more critically it is beseechingly against the unjust enrichment being made by the private persons with the facade of the trusteeship, which flares a bad precedent in the society to take the same footprint of washing methodology being done earlier. TB