

IN THE SUPREME COURT OF BANGLADESH

APPELLATE DIVISION

PRESENT:

Mr. Justice Borhanuddin

Mr. Justice M. Enayetur Rahim

Mr. Justice Md. Ashfaquul Islam

Mr. Justice Md. Abu Zafor Siddique

CIVIL APPEAL NO.74 OF 2007.

(From the judgment and order dated 14.01.2007 passed by the High Court Division in Income Tax Reference Application No.274 of 2006 with Rule No.09(Ref) of 2006).

East West University, a Project of Progati : ...Appellant.
Foundation for Education and Development, a Society Registered under the Societies Registration Act, 1860 having its address at 45, Mohakhali, C.A. Dhaka.

-Versus-

The Commissioner of Taxes, Taxes Zone-3, Dhaka. : ...Respondent.

For the Appellant. : Mr. Khairul Alam Chowdhury, Advocate instructed by Mr. Md. Helal Amin, Advocate-on-Record.

For the Respondent. : Mr. A.M. Amin Uddin, Attorney General with Mr. Samarendra Nath Biswas, Deputy Attorney General, Ms. Mahfuza Begum, Deputy Attorney General, Mr. Mohammad Saiful Alam, Assistant Attorney General, Ms. Farzana Rahman Shampa, Assistant Attorney General, instructed by Mr. Haridas Paul, Advocate-on-Record.

Date of Hearing. : The 25th & 27th February, 2024.

Date of Judgment. : The 27th February, 2024.

J U D G M E N T

Borhanuddin, J: This civil appeal by leave is directed against the judgment and order dated 14.01.2007 passed by the High Court Division in Income Tax Reference

Application No.274 of 2006 with Rule No.09(Ref) of 2006 allowing the application in part.

Brief facts are that the appellant university is a Project of Progati Foundation for Education and Development and registered under the Societies Registration Act, 1860; Said Foundation adopted a resolution that the university would be run exclusively for educational purposes, not for the purpose of any profit, excess income from the university would be utilized only for educational purposes, no income which is in excess of the expenditure to be paid to any member of the foundation or to any of its sections; The appellant-university submitted income tax return for the year 2004-2005 showing an income of Tk.8,68,26,317/- and claimed the income as exempted from tax by the SRO No.178-Income Tax/2002 dated 03.07.2002 read with SRO No.454-L/80 dated 31.12.1980; The Deputy Commissioner of Taxes (hereinafter referred to as 'the DCT'), Companies Circle-9, Taxes Zone-3, Dhaka, ignoring the aforementioned SROs, i.e. provisions of exemption in respect of the income of the university assessed tax at

Tk.14,01,52,554/-; As against the order of the DCT, the appellant-university preferred appeal before the Commissioner of Taxes [hereinafter referred to as 'the CT (Appeal)'], Appeal Zone-3, Dhaka, but the CT (Appeal) with some modification dismissed the appeal vide order dated 23.08.2005; Against the order of the CT (Appeal), the appellant preferred second appeal being Income Tax Appeal No.1688 of 2005-2006 before the Taxes Appellate Tribunal, Division Bench-4, Dhaka, and the Tribunal by its judgment and order dated 20.02.2006 dismissed the appeal affirming the decision of the CT (Appeal) on the finding that since tuition fees are charged and teachers are paid remuneration therefore the appellant runs the private university on commercial basis and the income over expenditure being its income from business is taxable and the Tribunal also agreed with the DCT and the CT (Appeal) in disallowing an amount of Tk.1,04,22,925/- claimed as disbursement of scholarship to poor and meritorious students and a further amount of Tk.10,00,000/- spent on Medha Lalon Fund.

As against the judgment of the Tribunal, the appellant filed an application under Section 160 of the Income Tax Ordinance, 1984, before the High Court Division formulating 8(i-viii) questions of law in the form of following grounds:

"i. For that the assessee Applicant being totally exempt from tax the Tribunal erred in holding that since tuition fees are charged and the teachers are paid salaries the appellant's income over expenditure is its income from business.

ii. For that the appellant is a non-profitable institution established for the promotion of education and no part of its income are utilised for its promoters/founders but utilised solely for its own purpose especially for the purpose of education and infrastructure development and there is no scope to run the appellant-university on commercial basis and as such it is entitled to get benefit of exemption of income tax under SRO No.454-L/80 dated 31.12.1980 and SRO No.178 dated 03.07.2002 and in such situation the Tribunal acted illegally in dismissing the appeal.

iii. For that information technology being imparted the appellant is exempted from tax under SRO No.178 dated 03.07.2002.

iv. For that the Tribunal acted illegally in not holding that the profit seeking purpose

being the basic element to be operated on commercial basis and the appellant being a non-profitable educational institution cannot be operated on commercial basis and its entire income is held by it for the purpose of education and thus it is entitled to be exempted from income tax under the SRO dated 03.07.2002.

v. For that the Tribunal acted illegally in treating the appellant to be a University run on commercial basis when the appellant is clearly a non-profitable institution and the amended Notification did not make any difference so far the appellant is concerned.

vi. For that the computer department of the appellant-university is not subject to tax inasmuch as the income from this Department is exempted from paying tax under SRO dated 03.07.2002.

vii. For that the Tribunal acted illegally in affirming the disallowance by the DCT and its confirmation by the CT (Appeal) of the entire disbursement of Tk.1,04,22,925/- on scholarship to the poor and meritorious students in fulfilment of the University Grants Commission's requirements inasmuch as such disallowance is not tenable in the eye of law.

viii. For that the Tribunal acted illegally in affirming the decisions of the DCT and CT (Appeal) as regards the rejection in its entirety the amount of Tk.10,00,000/- spent on Medha Lalon Fund inasmuch as such

rejection in disregard of the objectives of the Foundation is not supportive of law."

Upon hearing the respective parties, the High Court Division allowed the reference application in part answering the formulated Question Nos.(i)-(vi) in negative and Question Nos.(vii) and (viii) in affirmative vide impugned judgment and order dated 14.01.2007.

Having aggrieved, the appellant being petitioner preferred Civil Petition for Leave to Appeal No.152 of 2007 invoking Article 103 of the Constitution and obtained leave granting order on 28.03.2007.

Consequently, instant civil appeal arose.

Mr. Khairul Alam Choudhury, learned Advocate appearing for the appellant submits that the Government (Ministry of Finance) in exercise of its power as conferred by Section 60(1) of the Income Tax Act, 1922 published gazette notification being SRO No.454-L/80 dated 31.12.1980 exempting income tax on some classes of income including the income of the university or any other educational institutions existing solely for educational purpose and not for the purpose of profit.

Subsequently, the Government in exercise of its power as conferred by Section 44(4)(b) of the Income Tax Ordinance, 1984 amended the said SRO No.454-L/80 and substituted Sub-Clause (3) of Clause (a) making the income of university/any other educational institutions "*not operated commercially*" as tax exempted and as such the appellant-university registered under the Societies Registration Act, 1860 and not being operated commercially is entitled to have the benefit of SRO No.454-L/80 dated 31.12.1980 read with SRO No.178-Income Tax/2002 dated 03.07.2002. He also submits that income of the appellant-university is spent for promoting education by giving scholarships and other incentives to the students for development of education and the appellant-university not being operated commercially is entitled to have the benefit of SRO No.454-L/80 dated 31.12.1980 read with SRO No.178-Income Tax/2002 dated 03.07.2002. He further submits that the issue raised in this appeal has been settled and is covered vide order dated 06.02.2017 passed by this Division in Civil Petition for Leave to Appeal Nos.1896-1900 of 2015.

On the other hand Mr. A.M. Amin Uddin, learned Attorney General appearing for the respondent conceded that the issue raised in this appeal has been settled by this Division in Civil Petition for Leave to Appeal Nos.1896-1900 of 2015 affirming the judgment and order dated 14.05.2015 passed by a larger Bench of the High Court Division in Income Tax Reference Application Nos.159-162 of 2011 and 511 of 2004.

Heard the learned Advocate for the appellant and the learned Attorney General for the respondent and perused the impugned judgment and order passed by the High Court Division alongwith papers/documents contained in the paper book.

The issue involved in the appeal

The appellant filed Income Tax Reference Application No.274 of 2006 before the High Court Division under Section 160 of the Income Tax Ordinance, 1984 in respect of the income tax assessment year 2004-2005 challenging the order dated 28.02.2006 of the Taxes Appellate Tribunal, Division Bench-4, Dhaka, in Income Tax Appeal No.1688 of 2005-2006, wherein the Tribunal declined to

allow tax exemption under SRO No.454-L/80 dated 31.12.1980 read with SRO No.178-Income Tax/2002 dated 03.07.2002.

The said SRO No.454-L/80 dated 31.12.1980 read with SRO No.178-Income Tax/2002 dated 03.07.2002 (as on the date of assessment) provides as follows:

"In exercise of the powers conferred by Sub-Section (1) of Section 60 of the Income-Tax Act, 1922 (XI of 1922) and supersession of the Ministry of Finance Notification No. SRO 1041(K)/61, dated the 31st October, 1961 the Government is pleased to direct that:

(a) The following classes of income shall be exempt from the tax payable under the said Act and they shall not be taken into account in determining the total income of an assessee for the purposes of the said act.

-AND-

(3) the income of any university, or any other educational institution, which is not operated commercially and also medical college, dental college, engineering college and institution imparting education on information technology."

The High Court Division vide judgment and order dated 14.01.2007 passed in the Income Tax Reference Application No.274 of 2006 upheld the decision of the Tribunal

declining to extend entitlement of exemption to the appellant-university on the ground that the appellant failed to submit certificate or exemption letter of the income tax authority proving that the appellant-university is entitled to tax exemption under the said SRO dated 31.12.1980 as amended by SRO dated 03.07.2002. The relevant part of the said judgment and order dated 14.01.2007 is quoted below:

"----The SRO No.454-L/80(a) dated 31.12.1980 as amended by SRO No.178-Income Tax/2002 dated 03.07.2002 contains, amongst other, that the income of any University or any other educational institution 'not operated commercially' and/or 'institution imparting education on information technology' are exempted from payment of tax and the same is general provision as to entitlement to claim exemption. In order to get such exemption it is necessary to satisfy the Taxes authority as to the fulfilment of the conditions/criteria laid down in the SRO's by an university or educational institution and on being satisfied the Tax authority is to issue a certificate or exemption letter to be produced/referred as and when required by the assessing officer. The SRO's do not authorize the assessing officer to decide the claim of such tax exemption by an assessee inasmuch as such claim for tax-

exemption requires proper enquiry by competent authority."

Against the judgment and order dated 14.01.2007 passed by the High Court Division in Income Tax Reference Application No.274 of 2006, this Division granted leave on 28.03.2007, out of which the instant Civil Appeal No.74 of 2007 arose.

On perusal of the judgment and order dated 14.05.2015 passed by the larger Bench of the High Court Division and order dated 06.02.2017 passed by this Division it appears that the issue involved in the instant appeal has been settled by this Division affirming the judgment and order of the larger Bench of the High Court Division.

Relevant portion of the judgment and order passed by the larger Bench of the High Court Division is quoted below:

The main arguments entered around whether the assessee-university or the assessee-college may be treated as 'being operated commercially'. There is no dispute that the words 'operated commercially' or 'not operated commercially' have not been defined in the Ordinance or the Rules made thereunder. From the Notification, SRO

No.178, it appears that no definition or explanation has been given for treating a university or educational institution as 'not operated commercially'.

Thus, considering the meaning of 'commercially activity' as discussed hereinbefore, it is evident that the expression of the words 'not operated commercially' is vague and it may carry meaning in favour or against the assessee i.e. both ways. When there is doubt, an interpretation which is favourable to the subject should be preferred.-National Board of Revenue vs. Bata Shoe Co., 42 DLR (AD) 105. When a particular provision is susceptible of two or more interpretations, that one most favourable to the citizen must be accepted.-Commissioner of Customs vs. Customs, Excise & VAT Appellate Tribunal, 8 BLC 329. It is a settled principle of law that when the provision of a fiscal law carries different meanings, in such case, the benefit of it will go in favour of the citizen i.e. the assessee-university/the assessee-college.

Question (ii) is about the requirement of certificate or exemption letter issued by Tax Authority to get exemption from payment of income tax.

The learned Deputy Attorney General failed to show before us that there is any legal

requirement to issue a certificate by the Tax Authority or exemption letter to be produced in order to get the benefit of SRO No.454 read with SRO No.178.

In the result, our answer to questions (i) and (ii) as re-formulated by us are decided in the negative in favour of the assessee-applicants and against the department-respondent."

Thereafter, this Division vide order dated 06.02.2017 in Civil Petition for Leave to Appeal Nos.1896-1900 of 2015 upheld the said judgment and order dated 14.05.2015 passed by a larger Bench of the High Court Division in Income Tax Reference Application Nos.159 to 162 of 2011 and 511 of 2004.

It appears that the issue of the present appeal and the issue involved in Income Tax Reference Application No.159-162 of 2011 and 511 of 2004 are identical. Both relates to tax-exemption under SRO No.454-L/80 dated 31.12.1980 read with SRO No.178-Income Tax/2002 dated 03.07.2002 and also relates to the same assessment year i.e. 2004-2005.

It is mentioned earlier that, the Income Tax Reference Application Nos.159-162 of 2011 and 511 of 2004 [reported in 2017 11 ALR (HCD) 6], has been settled by a larger Bench of the High Court Division which is maintained by this Division in Civil Petition for Leave to Appeal Nos.1896-1900 of 2015 vide order dated 06.02.2017.

It is true that the words 'operated commercially' or 'not operated commercially' have not been defined in the Income Tax Ordinance, 1984 or the Rules made thereunder. It also appears from the Notification, SRO No.178-Income Tax/2002 dated 03.07.2002, that no definition or explanation has been given for treating a university or educational institutions as 'not operated commercially'. As such, we are in agreement with the order dated 06.02.2017 passed by this Division in Civil Petition for Leave to Appeal Nos.1896-1900 of 2015 affirming findings of the larger Bench of the High Court Division passed in Income Tax Reference Application Nos.159-162 of 2011 and 511 of 2004.

We do not find any reason to deviate from the findings of the larger Bench of the High Court Division passed in Income Tax Reference Application Nos.159-162 of 2011 and 511 of 2004 which concurred by this Division in Civil Petition for Leave to Appeal Nos.1896-1900 of 2015.

The judgment and order of the High Court Division so far it relates to answers the Question Nos.(i)-(vi) are set-aside i.e. we affirmed the answers of the Question Nos.(i)-(vi) in affirmative. And the answers of the High Court Division relating to answers of the formulated Question Nos.(vii) and (viii) are maintained i.e. we also affirmed answers of the Question Nos.(vii) and (viii).

Distinguishable facts of the instant Civil Appeal No.74 of 2007 from the facts of other Civil Appeal Nos.111-155 of 2021.

Instant Civil Appeal No.74 of 2007 was analogously heard with other Civil Appeal Nos.111-155 of 2021 by this Division. But the facts and point of law involved in the Civil Appeal Nos.111-155 of 2021 are different from instant Civil Appeal No.74 of 2007.

The appellant university of this Civil Appeal No.74 of 2007 challenged the decision of the High Court

Division relating to the Assessment Year 2004-2005, when Clause 1(a)(3) of the said SRO dated 31.12.1980 (as amended by the SRO dated 03.07.2002) was in full force of law. The appellant university of the Civil Appeal No.74 of 2007 asserts that the university is entitled to tax exemption for the Assessment Year 2004-2005 under the prevailing law which is Clause 1(a)(3) of the said SRO dated 31.12.1980 (as amended by the SRO dated 03.07.2002).

Whereas the rest of the Civil Appeal Nos.111-155 of 2021 do not essentially involved whether the respective universities are entitled to exemption under the said Clause 1(a)(3) of the said SRO dated 31.12.1980 (as amended by the SRO dated 03.07.2002). In the Civil Appeal Nos.111-155 of 2021, the respective universities challenged the authority of the Government to revoke the said exemption under Clause 1(a)(3) of the said SRO dated 31.12.1980 (as amended by the SRO dated 03.07.2002). The said exemption under Clause 1(a)(3) of the said SRO dated 31.12.1980 (as amended by the SRO dated 03.07.2002) was revoked or rescinded or abolished by dint of the SRO

No.156-Ain/Income Tax/2007 dated 28.06.2007 and the respective university also challenged the authority of the Government exempting the private universities from tax to the tune of 10% by way of reducing the liability to pay tax to the tune of 15% under the SRO No.158-Ain/Income Tax/2007 dated 28.06.2007. Moreover, the tax assessment years involved in the said Civil Appeal Nos.111-155 of 2021 are all related to tax assessment years when the said Clause 1(a)(3) of the said SRO dated 31.12.1980 (as amended by the SRO dated 03.07.2002) was not in force. Hence, the points of law as well as facts of instant Civil Appeal No.74 of 2007 are distinguishable and different from Civil Appeal Nos.111-155 of 2021.

Accordingly, the civil appeal is disposed of.

No order as to costs.

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