

*IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH "A" KOLKATA*

Before **Shri Waseem Ahmed, Accountant Member** and
Shri S.S.Viswanethra Ravi, Judicial Member

**ITA No.1031/Kol/2013
& C.O.No.69/Kol/2013**
(a/o ITA No.1031/Kol/2013)
Assessment Year:2009-10

ITO(E)-II, 5 th Floor, 10B, Middleton Row, Kolkata-700 071	<u>बनाम</u> / V/s.	Future Education and Research Trust "Nimphool", 17C, Mandeville Gardens, Ballygunge, Kolka-19
Future Education & Research Trust, 17C, Mandeville Gardens, Kolkata-19 [PAN No.AAATF 0951 B]	<u>बनाम</u> / V/s.	ITO(E)-II, Kolkata, 10B, Middleton Row, 5 th Floor, Kolkata-71
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent

आवेदक की ओर से/By Assessee	Shri Miraj D Shah, AR
राजस्व की ओर से/By Revenue	Shri M.K. Biswas, JCIT-DR
सुनवाई की तारीख/Date of Hearing	23-12-2016
घोषणा की तारीख/Date of Pronouncement	08-02-2017

आदेश /O R D E R

PER Waseem Ahmed, Accountant Member:-

This appeal as well as Cross Objection (CO) filed by the Revenue and assessee is directed against the order of Commissioner of Income Tax (Appeals)-Jalpaiguri dated 08.03.2013. Assessment was framed by ITO (Exemp.)-II, Kolkata u/s 143(3)/II

of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide her order dated 26.12.2011 for assessment year 2009-10.

Shri M.K. Biswas, Ld. Departmental Representative represented on behalf of Revenue and Shri Miraj D Shah, Ld. Advocate appeared on behalf of assessee.

First we take up Revenue's appeal in ITA No.1031/Kol/2013.

2. Revenue has raised following grounds, which reproduced below:-

"1. That the Ld. CIT(A), Jalpaiguri has erred in facts and in law in holding that funds provided by the assessee trust for settling the proposed bank loan of the trustee and his wife did not attract the provisions of section 13(1)(c). Ld. CIT(A)/Jalpaiguri had overlooked the fact that funds provided by the assessee trust for settling the personal bank loan of the trustee and his wife did not carry any interest and the foregoing of interest by the trust certainly amounted to benefit to the trustee and his spouse u/s. 13(1)(c).

2. Ld. CIT(A), Jalpaiguri has erred in law in admitting additional evidence under clause (c) and (d) of the Rule 46(1) of the IT Rules without granting adequate opportunity to the AO for rebuttal. Ld. CIT(A), Jalpaiguri had been misled by the assessee vide their fresh submissions which was totally in contrary to the materials on record. During the course of proceedings u/s. 143(3), the assessee vide its letter dated 20.12.2011 stated that the loan paid to the trustee's wife from the general fund of the trust was for the specific purpose of higher studies, enrichment of various study programmes, continued full time involvement etc. however, the facts represented before the Ld. CIT(A) was totally to the contrary where the assessee changed its earlier statement and claimed that the fund was utilized for settling the personal bank loan of the trustee and his wife.

3. That on the facts and in the circumstances of the case, the Ld. CIT(A)/Jalpaiguri had erred in placing his reliance on the assessee's contention that the issue raised by the AO in the assessment order had been examined by the higher authorities i.e. JDIT(E), DIT(E), and CCIT-III, Kolkata before granting exemption u/s. 10(23C)(vi). The fact of the matter is that the issue of private benefit being derived by the Trustee's wife was not the matter of consideration while proceeding the application u/s. 10(23C)(vi). The only two issues considered during the proceedings u/s. 10(23C) were whether the assessee exists (i) solely for education and (ii) not for profit.

4. That on the facts and in circumstances of the case, the Ld. CIT(A)/Jalpaiguri had erred in accepting the assessee's contention that the DIT(Exemptions), Kolkata has not cancelled the registration of the assessee u/s. 12AA(3) in spite of receiving a proposal to that effect from the AO; the correct status in this matter is that the proceedings u/s. 12AA(3) are still in progress."

3. The common issue raised by Revenue in this appeal is that Ld. CIT(A) erred in granting exemption to the assessee under section 11 of the Act in spite of the fact the conditions for exemptions were not complied by the assessee.

4. The facts in brief are that assessee in the present case is a trust and engaged in educational activities. In the year under consideration, assessee has shown advance given to Dr. M. Ghosh being wife of the trustee for ₹ 3.19 crores in its balance sheet as on 31st March 2009 as detailed under:-

Date of loan	Loan amount (Rs)	Cheque No. Axis Bank	Utilization amount (Rs)	Purpose utilized for
1.1.08	60,00,000	(Op Bal)	55,86,000	Advance for flat in Alipore
30.6.08	50,00,000	143326	45,12,000	-do-
06.07.08	1,10,000	14332	1,07,18,352	Loan repayment for Mandeville Gardens flat
21.08.08	92,00,000	164126	91,77,689	-do-
21.01.09	7,00,000		7,00,000	Purchase of land at Shanti Niketan
Total	3,19,000	164134	3,06,94,041	

Out of Rs.3.19 crores a sum of ₹60 lacs was given in the immediate preceding assessment year i.e. 2008-09. According to the AO there was violation of the provisions of section 13(1)(c) of the Act which prohibits the exemption in the case where the income of the trust ensures or applies for benefit of the persons as specified under section 13(3)(d) of the Act. As M. Ghosh being the wife of the trustee is the specified person and accordingly an explanation was called for from the assessee. The assessee in compliance thereto submitted that the said loan was given temporarily for the specific purpose of higher study. However, AO disregarded the claim of assessee and held that the exemption u/s. 11 of the Act is not available to the assessee as it has contravened the provision of Sec. 13(1)(c) of the Act.

5. Aggrieved, assessee preferred an appeal before Ld. CIT(A) whereas assessee challenged the assessment proceedings on technical grounds as detailed under :-

- i) The AO has concluded the entire income tax proceedings in two hearings only. As such no opportunity was given to assessee to explain the utilization of fund which was shown as loan given to Dr. M. Ghosh in its balance sheet.
- ii) A sum of ₹60 lacs was advanced in the immediate preceding assessment year 2008-09 which was held for the purpose of society by the AO in her order u/s. 143(3) of the Act.
- iii) The assessee also submitted that exemption u/s 11 of the Act was given to assessee in the earlier and succeeding assessment years in similar facts & circumstances. Therefore, assessee was entitled for exemption/deduction of the advance provided by assessee on the principle of consistency.
- iv) The AO has disallowed the exemption under section 11 of the Act just on the basis of loan provided to the wife of the trustee without checking the utilization of the loan given by the assessee.

The assessee before the Id. CIT(A) on merits submitted as under :

- a) The advance was given to Dr. M Ghosh to buy property at Alipore, Kolkata on behalf of trust in the immediate preceding AY 2008-09 for Rs. 60 lacs and similarly, another advance payment was made in the year under consideration for ₹ 50 lacs to buy the same property at Alipore, Kolkata. However, the property deal got cancelled and advance money was returned back to assessee in AY 2011-12. The deal of the property was scrapped as the Alipore property was not meeting the norms of AICTE.
- b) Similarly, an amount of ₹2.20 crores was given to Dr. M Ghosh for the repayment of housing loan from Axis Bank. In fact assessee had to clear the housing loan availed by M. Ghosh for the purpose of mortgaging the property with the bank in order to avail the term loan of ₹13 crores for the purpose of educational activities of trust as it was one of the

condition in the sanction letter issued by the Axis bank. The property on which housing loan was availed by assessee has been given on rent free basis to assessee for the use of its registered office.

- c) Similarly, ₹7 lacs was also advanced to Dr. M. Ghosh for the purchase of plot of land on behalf of trustee at Shanti Niketan. However M. Ghosh utilized such advance of ₹ 7 lakh for arranging long term lease to assessee on rent free basis for the purpose of educational activities. The copy of the lease deed was also filed by the assessee.

As such, assessee submitted that all the advance of ₹3.19 crores was utilized solely for the purpose of trust's activities and no benefit directly or indirectly was derived by trustee.

The assessee also submitted that on similar set of facts the Ld. DIT(E) has given exemption u/s. 10(23C) of the Act. The AO proposed for the cancellation of exemption certificate u/s. 12A of the Act but same was not cancelled by Ld. DIT(E) after considering the facts and circumstances of assessee. Ld. CIT(A) accordingly deleted the addition made by AO by observing as under:-

“5.1 It is seen that the order u/s. 143(3) assessing the income at Rs.7,77,91,639 against the returned income of NIL thereby creating a demand of Rs.351,54,330 has been passed in hurry in a summary manner in just one hearing. Whatever was asked to be submitted by the assessee has been submitted and the AO has not mentioned whether there was any non-compliance of the notices us. 142(1)/143(2) or whether the assessee failed in furnishing any information/details as called for by her. The AO has not mentioned any direct or indirect benefit that has accrued to Dr M Ghosh, wife of main trustee, by the cumulative advance of Rs.3.19 crores spread over two year. The AO has never asked for the utilization of this advance by Dr M Ghosh. The submissions of the assessee were forwarded to AO for comments. The AO vide letter dated 11-2-2013 received on 25-2-2013 has stated that some of the submissions before the undersigned are at variance with the initial submissions made before her during the assessment proceedings. Therefore, she indicated to obtain some further clarifications in those matters before submitting her comment. And as she is extremely busy in completion of time-barring cases, a time till 15-4-2013 was requested for submission of report/comment. In view of the fact that the assessment was completed in a single hearing and the assessee was not asked to submit details for explaining the deposited of Rs.3.19 crore with one Director of the trust who also happens to be the wife of the main trustee, I hold that the assessee was prevented by sufficient cause from production of evidence before the AO and further hold

that the assessee was not given the sufficient opportunity to adduce evidence relevant to the ground of appeal. The case of the assessee falls in the conditions mentioned in Rule 46(A)(1)(C & d). After giving a reasonable opportunity to the AO as per the requirements of Rule 46A(3), the submissions of the assessee before the undersigned during the appellate proceedings are admitted.

5.2 The assessee has submitted the details of end-use of the funds placed at the disposal of Dr M Ghosh. The details of end-use of these funds were there before the completion of assessment i.e. 26th December 2011. But as the AO did not ask for the details of the utilization of the funds with Dr M Ghosh, the assessee could not furnish the same. It is seen that all the funds placed at the disposal of Dr M Ghosh were used for the charitable purposes of the trust. The payments were routed through Dr M Ghosh because of practical reasons; the reasons being the sellers of property were either reluctant to sell property to trust or used to inflate prices if purchased in the name of trust. In one case, as the deal could not materialize, the entire amount was deposited back to the trust. In other case of purchase of a plot of land at Shanti Niketan, the land has been handed over to trust vide a long term lease rent-free to the trust. In the case of property at Mandeville Garden which is used as the registered office of the trust, the payment of Rs.1.98 crores for retiring the existing housing loan for availing the term loan of Rs.13 crores routed through Dr M Ghosh because she is one of the co-borrowers of the housing loan. For starting a new college at Garia, the loan was required. The bank will require collateral security which should be unencumbered. The property at Mandeville Garden which is used as the registered office of the trust was encumbered by an outstanding housing loan of Rs.1.98 crores. There were following options for retiring this housing loan for availing the term loan of Rs.13 crores from Axis Bank.

- i. Mr. Silajit Ghosh and Dr M Ghosh borrowed Rs.1.98 crores from some other person, pay to Axis Bank for retiring this loan and start charging rent from the trust for use of this building as registered office. This rent would be more than the EMI for repayment of loan of R.1.98 crores taken to retire the housing loan.*
- ii. The trust advances as loan of Rs.1.98 crores Dr M Ghosh for retiring the housing loan from Axis Bank and continues using the property without payment of any rent.*

The assessee trust and the trustees have chosen the better of these two options in the interest of the objectives of the trust. The trust continuous using the property without paying any rent by paying only a part of the cost of the property; that too as loan to Dr M Ghosh. Thus, it is seen that Dr M Ghosh, who is a Director in the trust and also the wife of the main trustee, has not derived benefits by routing the transactions through her. The only difference by trust repaying the housing loan of Rs.1.98 crores on Dr M Gosh to Axis Bank

for taking a term loan of Rs.13 crores is that now Dr M Ghosh has to repay this loan to the trust instead of to the Axis Bank. Therefore, there is no violation of section 13(1)(c) although Dr M Ghosh is a person covered under section 13(3)(d).

5.3 These facts have been examined by CCIT-Kol-III while according approval to the assessee under section 10(23C)(vi). This approval was granted after the report of DDIT(E), JDIT(E) and DIT(E). This approval was granted before the AO completed the assessment u/s. 143(3).

5.4 After the completion of assessment, the AO made a proposal to DIT(E) for cancellation of registration u/s. 12A. the DIT(E) after considering the submissions of the assessee did not cancel the registration.

5.5 It is further seen that on same set of circumstances, the assessee was allowed exemption u/s. 11 in immediately preceding as well as succeeding AYs.

5.6 In view of the above, the order of AO is annulled u/s. 251(1)(a) and the appeal of the assessee is allowed.”

Aggrieved by this, Revenue has come up in appeal before us.

8. Before us Ld. DR submitted that assessee had purchased a property in Alipore area for ₹ 2,25,60,000/- vide indenture of conveyance dated 23.09.2009. The relevant details of the purchase of Alipore property is placed on pages 3 to 44 of the paper book. Further the said property was sold for a consideration of ₹2.50 crores as evident from the indenture of conveyance dated 18.02.2011. Dr. M Ghosh on such sale-purchase of such property earned profit of ₹24.40 lacs which was not offered to tax by the assessee. Therefore assessee is not entitled for exemption u/s 11 of the Act.

8.1 With regard to the advance given to the wife of trustee for Rs. 2.02 crores, the ld. DR submitted that there was no such pre-condition mentioned in sanction letter of loan of Axis bank for ₹ 13 crores to mortgage the trustee flat that the assessee has to repay the housing loan which was taken by trustee. Finally the Ld. DR vehemently relied on the order of AO.

On the other hand, Ld. AR accepted the arguments of assessee that Dr. M Ghosh earned an income of ₹24.40 lakh wherein the fund of assessee was involved. Ld. AR further submitted that the addition of exemption can be denied to assessee u/s. 11 of the Act to the extent of the amount of profit/benefit derived by Dr. M Ghosh. Ld. AR

further submitted that all other advance given to Dr. M. Ghosh was utilized for the purpose of the society. The Ld. AR supported the order of Ld. CIT(A).

9. We have heard rival contentions of both parties and perused the materials available. The issue in the instant case relates to the advance given by assessee to the wife of trustee, thereby violating the provision of Sec. 13(1)© of the Act. The AO observed that the assessee has given various amounts in the shape of loan to the wife of trustee. Therefore, assessee is not entitled for claiming exemption u/s 11 of the Act. Accordingly, the exemption claimed by assessee was declined and demand of tax was raised. However, Ld. CIT(A) opined that the trustee derived no benefit from the trust either directly or indirectly and therefore, assessee is entitled for exemption u/s. 11 of the Act.

9.1 Admittedly, the loan was provided by the assessee to Dr. M Ghosh in the immediate preceding AY 2008-09 and in the year under consideration for Rs. 60 lacs and Rs.50lacs respectively for some property located at Alipore, Kolkata. First, we deal with the loan amount provided to Dr. M Ghosh in the immediate preceding AY 2008-09 for ₹60 lacs and 50 lacs in the year under consideration for the purchase of the property at Alipore. On examination of the order of Authorities Below and other relevant records, we find that flat was purchased at Alipore in the financial year 2009-10 on 23.09.2009 which was registered in the name of trustee and his wife. The total cost of flat purchased was for ₹2,25,60,000/- as evident from the indenture of conveyance which is placed on **page 7** of the paper book. Further, the same was sold in the financial year 2010-11 dated 08.02.2011 for ₹2.50 crores as evident from the indenture of conveyance which is placed on record. Thus the benefit of ₹ 24.40 lacs was derived by the trustee and his wife on the sale-purchase of Alipore property. Admittedly, assessee made investment of ₹ 1.10 crores in the purchase of the said property located at Alipore. Therefore, in our considered view, the assessee is entitled for the share of profit to the extent of its investment i.e. ₹ 24.40 lacs x 1.10 crores divide by ₹ 2.25 crores = 11.93 lacs. So this amount of profit has to be taxed under the IT Act as the provision of Sec.13(1)© of the Act as the provisions has been contravened to this extent on the basis of available facts & circumstances. We also

find that there is no dispute with regard to amount of ₹ 1.10 crores which was financed by the trust has come back to the trust. Therefore, the amount of profit to the extent of ₹11.93 lacs has to be subject to tax in the relevant year in which the profit was derived. As such, the assessee will not be eligible for claiming exemption u/s 11 of the Act for the amount of profit of ₹ 11.93 lacs but the entire exemption claimed by assessee cannot be denied. In this connection, we rely in CBDT Circular No.387 dated 06.07.1984, the relevant extract is reproduced below:-

*“In the present context, paragraph 28 of Circular No. 387, dt. 6.7.1984, issued by the CBDT, under the heading **“Levy of income-tax at maximum marginal rate in the case of charitable and religious trusts which forfeit tax exemption”** is very relevant. For our purpose, paragraph 28.6 of the aforesaid Circular is relevant, which is reproduced as follows:*

“where such a trust contravenes the provisions of section 13(1)(c) or (d) of the Act, the maximum marginal rate of income-tax will apply only to that part of the income which has forfeited exemption under the said provisions.”

We also find the guidance and support from the judgment of Hon’ble High Court of Karnataka in the case of CIT Vs. Fr. Mullers Charitable Institutions reported in 363 ITR 230. The relevant extract of the order is reproduced below :

“11. With regard to second and third substantial questions of law are concerned, reading of Section 13(1)(d) of the Act makes it clear that it is only the income from such investment or deposit which has been made in violation of Section 11 (5) of the Act that is liable to be taxed and that violation under Section 13(1)(d) does not tantamount to denial of exemption under Section 11 on the total income of the assessee. An identical question came before the Bombay High Court in the case reported in (2001) 249 ITR 533 (Bom) (supra). The question before the Bombay High Court is “ Whether violation of Section 11(5) r/w Section 13(1)(d) by the assessee-Trust attracts maximum marginal rate of tax on the entire income of the Trust? The Bombay High Court held that in case of contravention of Section 13(1)(d), maximum marginal rate of tax under Section 164(2), proviso is applicable only to that part of income of the Trust which has forfeited exemption and not the entire income. Relevant paragraph reads as under:

Sec. 164(2) refers to the relevant income which is derived from property held under trust wholly for charitable or religious purposes. If such income consists of severable portions, exempt as well as taxable, the portion which is exempt is to be left out and the portion which is not exempt is charged to tax as if it is the income of an AOP. Therefore, a proviso was inserted by the Finance Act, 1984

w.ef 1st April 1985, under which in cases where the whole or any part of the relevant income is not exempt under s. 11 or s. 12 because of the contravention of s.13(l)(d), the tax shall be charged on such income or part thereof, as the case may be, at the maximum marginal rate. In other words, only the non-exempt income portion would fail in the net of tax as if it was the income of an AOP. The phrase 'relevant income or part of the relevant income' in the proviso is required to be read in contradistinction to the phrase 'whole income' under s.161(1A). This is only by way of comparison. Under s. 161(1 A), which begins with a non obstante clause, it is provided that where any income in respect of which a person is liable as a representative assessee consists of profits of business, the tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate. Therefore, reading the above two phrases shows that the legislature has clearly indicated its mind in the proviso to s. 164(2) when it categorically refers to forfeiture of exemption for breach of s.13(l)(d), resulting in levy of maximum marginal rate of tax only to that part of the income which has for forfeited exemption. It does not refer to the entire income being subjected to maximum marginal rate of tax. This interpretation is also supported by Circular No.387, dt. 6th July, 1984. Vide the said Circular, it has been laid down in para 28,6 that where a trust contravenes s.13(l)(d), the maximum marginal rate of income-tax will apply only to that part of the income which has forfeited exemption under the said provision and not to the entire income. There is a vital difference between eligibility for exemption and withdrawal of exemption/forfeiture of exemption for contravention of the provisions of law. These two concepts are different. They have different consequences. In the circumstances, there is merit in the contention of the assessee that in the present case the maximum marginal rate of tax will apply only to the divided income from shares held in contravention of s. 13(1)(a) and not to the entire income. Therefore, income other than dividend income shall be taxed at normal rate of taxation under the Act.

A similar view has been taken by the Delhi High Court in a judgment reported in (2002) 253 ITR 593 (Supra).Reading of the proviso to Section 142 is very clear that the legislature has clearly contemplated that in a case, where the whole or part of the relevant income is not exempted under Section 11 by virtue of violation of Section 13(1)(d) of the Act, tax shall be levied on the relevant income or a part of the relevant income at the maximum marginal rate. The said analogy is applicable to the facts of the present case.

12. We are in respectful agreement with the views expressed by the Bombay High Court as well as Delhi High Court for violating Section 11 (5) of the Act and the entire income of the respondent-Trust cannot be assessed for the tax."

On the identical facts & circumstances the Hon'ble High Court of Bombay has decided the issue in favour of assessee in the case of DIT(E) Vs. Sheth Mafatlal

Gagalbhai Foundation Trust reported in 249 ITR 533. The relevant extract of the order is reproduced below :

*“6. Sec. 164 does not create a charge on the income of a discretionary trust. The word ‘charge’ in s. 164 means ‘levy’. Sec. 164(2) refers to the relevant income which is derived from property held under trust wholly for charitable or religious purposes. If such income consists of severable portions, exempt as well as taxable, the portion which is exempt is to be left out and the portion which is not exempt is charged to tax as if it is the income of an AOP. Therefore, a proviso was inserted by the Finance Act, 1984 w.e.f. 1st April, 1985, under which in cases where the whole or any part of the relevant income is not exempt under s. 11 or s. 12 because of the contravention of s. 13(1)(d), then the tax shall be charged on such income or part thereof, as the case may be, at the maximum marginal rate. In other words, only the non-exempt income portion would fall in the net of tax as if it was the income of an AOP. Sec. 11(5) lays down various modes or forms in which a trust is required to deploy its funds. Sec. 13(1) lays down cases in which s. 11 shall not apply. Under s. 13(1)(d)(iii), it has been laid down that any share in a company, not being a Government company, held by the trust after 30th Nov., 1983, shall result in forfeiture of exemption. By virtue of the proviso (iia) it has been laid down that any asset which does not form part of permissible investment under s. 11(5) shall be disposed of within one year from the end of the previous year in which such asset is acquired or by 31st March, 1993, whichever is later. In the present case, the assessee was required to dispose of the shares under the said proviso by 31st March, 1993, see the judgment of this Court in IT Appeal No. 81 of 1999, dt, 14th Sept., 2000 [reported as Director of IT (Exemptions) vs. Shardaben Bhagubhai Mafatlal Public Charitable Trust (2000) 164 CTR (Bom) 97]. The shares have not been disposed of even during the assessment year in question. Now, under s. 164(2), it is, inter alia, laid down that in the case of relevant income which is derived from property held under trust for charitable purposes, which is of the nature referred to in s. 11(4A), tax shall be charged on so much of the relevant income as is not exempt under s. 11. Sec. 164(2) was reintroduced by the Direct Tax Laws (Amendment) Act, 1989, w.e.f. 1st April, 1989. Earlier it was omitted by the Direct Tax Laws (Amendment) Act, 1987. However, the legislature inserted a proviso by the Finance Act, 1984, w.e.f. 1st April, 1985. By the said proviso, it is, inter alia, laid down that where whole or part of the relevant income is not exempt by virtue of s. 13(1)(d), tax shall be charged on the relevant income or part of the relevant income at the maximum marginal rate. The phrase ‘**relevant income or part of the relevant income**’ is required to be read in contradistinction to the phrase ‘**whole income**’ under s. 161(1A). This is only by way of comparison. Under s. 161(1A), which begins with a non obstante clause, it is provided that where any income in respect of which a person is liable as a representative assessee consists of profits of business, the tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate. Therefore, reading the above is so liable at the maximum marginal rate.*”

Therefore, reading the above two phrases shows that the legislature has clearly indicated its mind in the proviso to s. 164(2) when it categorically refers to forfeiture of exemption for breach of s. 13(1)(d), resulting in levy of maximum marginal rate of tax only to that part of the income which has forfeited exemption. It does not refer to the entire income being subjected to maximum marginal rate of tax. This interpretation of ours is also supported by Circular No. 387, dt. 6th July, 1984. Vide the said circular, it has been laid down in para 28.6 that where a trust contravenes s. 13(1)(d) of the Act, the maximum marginal rate of income-tax will apply only to that part of the income which has forfeited exemption under the said provision and not to the entire income. We may also add that in law there is a vital difference between eligibility for exemption and withdrawal of exemption/forfeiture of exemption for contravention of the provisions of law. These two concepts are different. They have different consequences. It is interesting to note that although the legislature withdrew s. 164(2) by the Direct Tax Laws (Amendment) Act, 1987, which provision was reintroduced by the Direct Tax Laws (Amendment) Act, 1989, the legislature did not touch the proviso to s. 164(2) which has been on the statute book right from 1st April 1985. The said proviso was inserted by the Finance Act, 1984. The proviso specifically refers to violation of s. 13(1)(d) and its consequences. In the circumstances, we find merit in the contention of the assessee that in the present case the maximum marginal rate of tax will apply only to the dividend income from shares in Mafatlal Industries Ltd. and not to the entire income. Therefore, income other than dividend income shall be taxed at normal rate of taxation under the Act.”

9.2 In view of above we find that in the event of the violation of the provisions of Sec. 13(1)(c) of the Act, the amount of benefit applied to the specified persons will not be eligible for the exemption under section 11 of the Act. Therefore, the benefit u/s 11 of the Act to the extent of ₹11.93 lacs will not be available to the assessee in AY 2011-12.

9.3 Now coming to the amount advanced by assessee to the trustee for ₹2.02 crores for repayment of loan of Axis Bank, we find that such repayment of housing loan was one of the pre-condition for the loan of Rs. 13 crores for the activities of the trust in the sanctioned letter issued by the Axis bank. The copy of the sanctioned letter is placed on pages 49 to 58 of the paper book. As per the sanctioned letter we also find that the trustees and M. Ghosh has also given personal guarantees to the bank for loan of Rs. 13 crores for the trust activities as well. The status of the trust is different than of the trustees but in the instant case the trustees has stood as personal guarantors

which shows that the trustees are also exposed to the risks for their own properties. Therefore it cannot be inferred that the trustees are getting any benefit directly or indirectly from the trust rather they (trustee and his wife M. Ghosh) stand as guarantors in their individual capacity. Moreover the property mortgaged has been used as registered office of the trust. Indeed the amount has been shown in the balance sheet of the trust which will be refunded by the trustee and his wife. Such loan has not been written off by the trust in its books of accounts. As such we find that the trustee has not derived any benefit either directly or indirectly. It is also not in dispute that amount of housing loan was repaid by the trust on behalf of the trustee and M. Ghosh as it was necessary for availing the loan for the educational activities of the assessee. In somewhat similar circumstances the Hon'ble Jurisdictional Calcutta High Court where the question of deemed dividend as specified under section 2(22)(e) of the Act was there before it for adjudication and it was decided in favour of assessee in the case of Pradip Kumar Malhotra Vs. CIT in **ITA No. 219 of 2003**. The relevant issue and the facts before the Hon'ble High Court were as under:

*“After hearing the learned Counsel for the parties and after going through the aforesaid provisions of the Act, we are of the opinion that the phrase **“by way of advance or loan”** appearing in sub-section (e) must be construed to mean <http://www.itatonline.org> 13 those advances or loans which a share holder enjoys for simply on account of being a person who is the beneficial owner of shares (not being shares entitled to a fixed rate of dividend whether with or without a right to participate in profits) holding not less than ten per cent of the voting power; but if such loan or advance is given to such share holder as a consequence of any further consideration which is beneficial to the company received from such a share holder, in such case, such advance or loan cannot be said to a deemed dividend within the meaning of the Act. Thus, for gratuitous loan or advance given by a company to those classes of share holders would come within the purview of Section 2(22) but not to the cases where the loan or advance is given in return to an advantage conferred upon the company by such share holder. In the case before us, the assessee permitted his property to be mortgaged to the bank for enabling the company to take the benefit of loan and in spite of request of the assessee, the company is unable to release the property from the mortgage. In such a situation, for retaining the benefit of loan availed from Vijaya Bank if decision is taken to give advance to the assessee such decision is not to give gratuitous advance to its share holder but to protect the business interest of the company. The view we propose to take finds support from the two decisions, one of the Bombay High Court and the other of the Delhi High Court relied upon by Mr. Khaitan as indicated earlier. <http://www.itatonline.org> 14 We, therefore, find that the authorities*

below erred in law in treating the advance given by the Company to the assessee by way of compensation to the assessee for keeping his property as mortgage on behalf of the company to reap the benefit of loan as deemed dividend within the meaning of Section 2(22) (e) of the Act. We, consequently, set aside the order of the Tribunal below by directing the Assessing Officer not to treat the advance of Rs.20,75,000/- as a deemed dividend. The appeal is, thus, allowed by answering the point No. ii in the affirmative and against the Revenue.”

In fact the facts of the above case are not matching directly with the instant case before us but the underlying principles can be drawn which prohibit to treat the advance given by the assessee to the directors as deemed dividend in the aforesaid facts & circumstances. In our view similar principles can also be applied in the given facts & circumstances of the case and therefore there will be no denial of exemption under section 11 of the Act on account of temporary loan given to the trustee and his wife as per the provisions of section 13(1)(c) of the Act. In view of above we hold there is no contravention of section 13(1)(c) of the Act in aforesaid facts & circumstances.

9.4 Similarly for the advance given by the assessee for Rs. 7 lacs we find that the Id. DR has not brought anything on record against the finding of Id. CIT(A). Hence we find no infirmity in the order of Id. CIT(A) on this issue.

9.5 We also further find that in the similar facts & circumstances the Id. CCIT has granted the registration under section 10(23C) of the Act and the Id. DIT(E) also granted the registration under section 12AA of the Act. It is also important to note that the Id. DIT(E) under section 264 of the Act allowed the exemption under section 11 of the Act for the AY 2011-12 in the similar facts & circumstances in the own case of the assessee vide No. DIT(E)/Kol/264/2014-15/1472 order dated 20.8.2014. In this view of the above, we uphold the order of CCIT-III and the ground raised by Revenue is dismissed. AO is directed accordingly.

Coming to assessee's CO.No.69/Kol/2013.

10. Grounds raised by assessee in its CO are supportive to the order of Id. CIT(A). Ld. AR for the assessee stated that if the Revenue's appeal was rejected then the CO

of assessee would become infructuous because it was filed to support the order of Ld. CIT(A). Hence, we have already dismissed the Revenue's appeal, therefore CO of assessee becomes infructuous.

11. In the result, assessee's CO is dismissed as infructuous.

12. **In the result, Revenue's appeal stands dismissed as well as assessee's CO is dismissed as infructuous.**

Order pronounced in open court on 08/02/2017

Sd/-
(S.S.Viswanethra Ravi)
Judicial Member

Sd/-
(Waseem Ahmed)
Accountant Member

*Dkp, Sr.P.S

दिनांक:- 08/02/2017 कोलकाता / Kolkata

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. आवेदक/Assessee-Future Education & Research Trust, "Nimphool", 10C, Mandeville Gardens, Ballygunge, Kolkata-19
2. राजस्व/Revenue-ITO(E)-II, 5th Floor, 10B, Middleton Row, Kolkata-71
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता