

**IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH  
KOCHI**

**BEFORE S/SHRI GEORGE GEORGE K, JM & MANJUNATH. G, AM**

**ITA No 336/Coch/2015  
(Asst Year 2005-06 )**

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|---|----|--|
| The Dy Commr of Income Tax<br>Central Circle<br>Kozhikode | Vs | M/s Kunhitharuvai Memorial<br>Charitable Trust<br>No.1 MCC Cross Road<br>Kozhikode 673 001 |
| <b>( Appellant)</b>                                       |    | <b>(Respondent)</b>  |

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|-----------------------|---------------------------|
| <b>PAN No.</b>        | AAATK4733C                |
| Assessee By           | Sh Surendranath Rao       |
| Revenue By            | Sh A Dhanaraj, Sr DR      |
| Date of Hearing       | 29 <sup>th</sup> Aug 2017 |
| Date of pronouncement | 11 <sup>th</sup> Sep2017  |

**ORDER**

**PER MANJUNATHA.G, AM:**

This appeal filed by the revenue is directed against the order of the CIT(A), Kozhikode and its pertains to assessment year 2005-06.

2 The brief facts of the case are that the assessee is a Trust, registered u/s 12A of the I T Act 1961, filed its return of income for the assessment year 2005-06 on 30.3.2007 declaring 'nil' total income and claimed exemption u/s 11 of the I T Act. The case has been selected for scrutiny and accordingly, notices u/s 143(2) and 142(1) were issued. In response to the notices, the authorized representative for the assessee appeared from time to time and furnished the details as called for. During the course of assessment proceedings, the

Assessing Officer noticed that the assessee trust has diverted its funds to the persons as specified u/s 13(3) of the Act, whereby the Trust disqualified for exemption u/s 11 as per section 13(1)(c)(ii) of the Act. The Assessing Officer further observed that in the books of account of the Trust as on 31.3.2005 an amount of Rs. 8,17,434.55 was due from M/s Moidu's Medicare Pvt Ltd., a company in which the trustees are substantially interested. The Assessing Officer further observed that the Trust has also given an advance of Rs. 1,65,321.72 to M/s Moidu's Medical Pvt Ltd., from National Hospital College of Nursing's account.

2.1 Similarly, an amount of Rs. 19,95,817/- has been paid as an expenditure incurred on Nursing College Building by the Trust during the year, in the name of Dr K M Mehaboob and two others. The Assessing Officer further observed that the Trust has spent an amount of Rs. 1,61,333/- towards construction of building on the lease-hold land belonging to two Trustees and the amount has been debited to the advance account in the name of Dr K M Mahaboob, Dr K M Ashik and Dr K M Navas, who are all the trustees. The building is required to be surrendered to the lessors, free of cost in lieu of the license fee as per clause 6 of the license fee agreement dated 1.9.2002. The Assessing Officer further observed that though the license fee agreement stipulates adjustments of license fee annually, no adjustment has been made in the accounts for the license fee payable for the year. The assessee also asked to produce the rent agreement and lease deed. However, the assessee has not produced the

lease agreement nor has given any details of license fee payable. It was further observed by the Assessing Officer that by incurring an expenditure of Rs. 19,95,817/- towards construction of building in the lease-hold land belonging to the trustees and adjustment on account of license fee, the assessee has diverted its funds to the persons as specified u/s 13(3) of the Act, which attracts provisions of section 13(1)(c)(ii) of the Act and therefore, the assessee is not eligible for exemption u/s 11 of the I T Act. Accordingly, a show cause notice was issued calling for its explanation.

2.2 In response to the show cause notice, the assessee has submitted that the amount standing in the name of M/s Moidu's Medicare Pvt Ltd., is represents repayment of the amount already taken from Dr K Moidu, the Managing Trustee. However, inadvertent mistake repayment of advance has been wrongly debited to the account of M/s Moidu's Medicare Pvt Ltd., in which the Managing Trustee of the Trust is also a Director of the company. The assessee further submitted that in the subsequent year the mistake was rectified by the assessee trust by passing necessary journal entries in the books of account. It was further submitted that even assuming for a moment that there was a debit balance of Rs. 8,17,434.55 in the name of M/s Moidu's Medicare Pvt Ltd., still there is a credit balance of Rs. 41.14.000/- in the name of the Trustees which takes care debit balance in the name of the company; therefore, the question of diversion of its funds to the persons specified u/s 13(3) of the Act, does not arise.

2.3 As regards the debit balance of Rs. 1,65,361.72 in the books of account of National Hospital College of Nursing to M/s Moidu's Medicare Pvt Ltd, it was submitted that the Trust has entered into an agreement with the company on 1.6.2002 for providing nursing training to the students of its Nursing College from the Hospital owned by the company for which it has spent an advance amount. The assessee further submitted that as per the agreement between the company, the lessor has to train the nursing students in their hospital for which the assessee has to pay Rs. 650/- per month per student for which the amount has been paid in advance which cannot be considered as a diversion of funds to the person as specified u/s 13(3) of the Act.

2.4 Similarly, with regards to the advance in the name of Dr K M Mahaboob and two others, the Trust entered into a license fee agreement with the Trust for construction of building to be used for running its Nursing College. As per the agreement, the assessee trust has to incur the cost of construction of building and the building should be used over a period of 20 years without any payment of rent. It was submitted that although as per the license fee agreement, the entire cost of construction was to be met by the assessee trust; but only a part has been incurred by the Trust and the balance has been incurred by the Trustees. The amount incurred by the Trust has been adjusted towards license fee payable over a period of 20 years which workout to Rs. 1,24,154/- for a total plinth area of 1111.65 sq, mtrs., which is far below the prevailing market rent.

Therefore, the question of allowing or using the building by the person as specified u/s 13(3) of the Act does not arise.

2.5 The Assessing Officer, after considering the explanation offered by the assessee and relying on the judicial pronouncements observed that the assessee trust has diverted its funds to the persons/company owned by the persons as specified u/s 13(3) of the Act, which violates the provisions of section 13(1)(c)(ii) thereby not eligible for exemption u/s 11 of the I T Act 1961. The Assessing Officer further observed that though the assessee furnished certain agreements to prove the nexus between the payment of money to the interested persons, failed to substantiate its claim in the background of the specified observations made by the Auditors in their audit report that the assessee trust has given advance to the company in which the trustees are substantially interested. Therefore, the Assessing Officer held that the assessee is not entitled to exemption u/s 11 of the I T Act and accordingly levied the tax on the total income of the assessee trust at the maximum marginal rate.

3 Aggrieved by the assessment order, the assessee preferred appeal before the CIT(A). Before the CIT(A), the assessee has reiterated its submission made before the Assessing Officer. The assessee further submitted that as regards the debit balance appearing in the name of M/s Moidu's Mecicare Pvt Ltd., a company in which the trustees are substantially interested, the trust has received funds from the trustees on regular basis as and when required and

also repaid the amounts taken from the trustees in the normal course of its activities, which cannot be considered as a diversion of its funds. The assessee further submitted that during the year, the trust has repaid an amount of Rs 10 lacs by cheque drawn in the name of M/s Moidu's Madicare Pvt Ltd., as per the instructions of Dr K Moidu. The intention of Dr K Moidu was to give the proceeds to the company for its use and account for the receipt by crediting his account in the company. In order to save time and avoid multiple transactions, the Trust had paid the amount of Rs. 10 lacs in the name of the company, as per the instruction of Dr K Moidu. However, by inadvertent mistake, the same has been debited to the account of the company instead of Dr K Moidu's account, which has been later on ratified by passing necessary journal entries in the books of account. Even assuming for a moment that there is debit balance appeared in the company account and if the debit balance is adjusted against the credit balance appeared in the name of the trustee, still there is a credit balance in the name of the trustee. Therefore, the said transaction cannot be considered as an isolated transaction for the purpose of section 13(1)(c ) of the Act to hold that the assessee has diverted its funds to the persons as specified u/s 13(3) of the Act.

3.1 As regards the amount of outstanding in the name of the company in the books of account of National Hospital College of Nursing, it was submitted that the trust has entered into an agreement with the company for providing nursing training to its students of the hospital owned by the assessee trust for which an

advance payment of Rs. 2,50,000/- has been made on 25.10.2004 by way of cheque drawn on ICICI Bank Ltd. The trust has availed the service of the company for training to its students for which it had paid an advance payment and the same has been adjusted over a period of years. The transaction between the trustees of the company cannot be considered as a diversion of funds to the persons as specified u/s 13(3) of the Act.

3.2 Similarly, with regard to the amount of outstanding in the name of Dr K M Mahaboob and two others, the trust has constructed a building on the leasehold land belonging to the trustees and adjusted the amount towards license fee over a period of 20 years. The Trust immensely benefited out of the arrangements with the trustees and the lease rent workout far below the prevailing market rent; therefore, the same cannot be considered as a diversion of its funds.

3.3 The CIT(A), after considering the relevant submissions of the assessee observed that though the Assessing Officer has observed that the Trust has diverted its funds to the persons as specified u/s 13(3) of the Act, did not cancel the registration given to the assessee trust ; but denied exemption u/s 11 of the Act, on the ground that the assessee had violated the provisions of section 13(1(c) &(d) of the Act, whereby not entitled for exemption u/s 11 of the Act. The CIT(A) further observed that even if the assessee diverted certain income for the benefit of the Trustees, charging tax on the total receipt at

maximum marginal rate, is not correct in view of the specific provisions provided u/s 164(2) which states that where the whole or any part of relevant income is not exempt u/s 11 or sec.12, by virtue of provisions contained in clause (c) or (d) of sub section 1 of section 13, tax shall be charged on the relevant income or part of the relevant income, at maximum marginal rate.

3.4 As regards specific observation of the Assessing Officer with regard to diversion of funds to M/s Moidu's Medicare Pvt Ltd, the CIT(A) observed that the assessee trust has repaid the amount availed from Dr K Moidu, the Managing Trustee, which has been inadvertently debited to the account of M/s Moidu's Medicare Pvt Ltd instead of debiting to the account of Dr K Moidu. In the subsequent year, the mistake was rectified by passing necessary journal entries; therefore, there is reasonableness in the argument of the assessee trust that this amount represents repayment of loan availed from the Managing Trustee and the amount was paid to the company upon the instruction of the Managing Trustee.

3.5 As regards the debit balance of Rs. 1,65,361.72 in the books of National Hospital College of Nursing, the CIT(A) observed that the facts borne out from the records that the trust has entered into agreement with the company for providing necessary training to its students in the hospital, owned by the company for which an advance of Rs. 2,50,000/- has been paid. The said amount has been adjusted towards fee payable to the company for giving

training to its students; therefore, it cannot be considered as a diversion of funds to the persons as specified u/s 13(3) of the Act.

3.6 As regards the advance of Rs.19,95,817/- to Dr K M Mahaboob and two others for construction of building on the lease-hold land owned by the trustees, the CIT(A) has given a categorical finding that the assessee company benefited out of the transaction with the trustees by construction of the building on the lease-hold land owned by the trustees. The CIT(A) further observed that the trust has constructed the building by spending part of the amount towards construction and adjusted the amount towards license fee payable over a period of 20 years which works out to Rs. 1,24,154/- per annum for a building consisting of plinth area of 1111.65 sq.mtrs which is far below the prevailing market rent. The CIT(A) referring to the decision relied upon by the Id AR, in the case of Shubram Trust vs DIT(Exempt) reported in 317 ITR (AT) 65, observed that the facts of the case relied by the Assessing Officer, is different from the facts of the present case and hence, cannot be applied. The CIT(A) further observed that moreover, there is force in the contention of the assessee trust that there is aggregate credit balance of Rs. 41,14,000/- as on 1.4.2004 in the name of the trustees, which was in excess of the aggregate of amounts treated by the Assessing Officer as diverted for the benefit of trustees. Therefore, these payments can at the best only be treated as repayments. With these observations, the CIT(A) observed that there is no diversion of funds so as to benefit the trustees; accordingly, deleted the addition made by the Assessing

Officer and allowed the benefit of exemption claimed by the assessee u/s 11 of the Act.

4 Aggrieved by the order of the CIT(A), the assessee is in appeal before us. The Id DR submitted that the Id CIT(A) erred in holding that there is no diversion of funds of the trust so as to benefit the trustees, despite the Assessing Officer has brought out clear instances of diversion of funds to the person as specified u/s 13(3) of the Act. The Id DR further submitted that the assessee trust has given advance to M/s Moidu's Medicare Pvt Ltd for which no explanation has been offered by the assessee, though the assessee claims to have repaid the amount taken from the trustees, the payment has been directly accounted in the name of the company which clearly shows that the explanation offered by the assessee is an afterthought to escape from the provisions of section 13(1)(c) of the Act.

4.1 Similarly, as regards the amount has been spent towards construction of the building in the lease-hold land belonging to the trustee, though the rent agreement with the trustees provides for adjustment of advances against annual license fee payable, no adjustment was made in the books of account which clearly shows that the assessee has given advance to the persons as specified u/s 13(3) of the Act and come out with explanation by stating that the trustees have benefited out of arrangements with the trust; but the facts

brought out by the Assessing Officer clearly indicate that there is clear diversion of trust funds as specified u/s 13(3) of the Act, which violates section 13(1)(c)(ii) of the Act whereby the Trust is not entitled to exemption u/s 11 of the Act. Therefore, it was submitted that the Assessing Officer has rightly denied the benefit of exemption and prayed that his order should be upheld.

4.2 On the other hand, the Id AR for the assessee strongly supported the order of the CIT(A). The Id AR referring to the paper book filed by the assessee, submitted that the documents submitted before the Assessing Officer as well as the CIT(A) clearly indicate that the trust has repaid the amount taken from the Trustees; but inadvertently debited the payment in the name of the company as per the instructions of the Trustee, who is also the director of the company. Even assuming for a moment that the debit has been appeared in the company account, is without any benefit to the trustees; there is credit balance in the name of the trustees, if the debit balance is adjusted against the credit balance, still there is a credit balance in the name of the trustees and therefore, the said transaction cannot be considered as an isolated transaction for the purpose of section 13(1)(c) or (d) of the Act. The Id AR referring to the paper books submitted that the assessee has entered into an agreement with the company for providing nursing training to its students in the Hospital owned by the company for which an advance payment of Rs. 2,50,000/- has been paid and the same has been adjusted towards license fee payable for the trust and the same has been adjusted in the subsequent

year. Therefore, the debit balance cannot be considered as a diversion of funds.

4.3 As regards to debit balance appeared in the name of Dr K M Mahaboob & two others,, the Id AR submitted that the Trust has entered into a license fee agreement for construction of building and using the building for running its institution for which the part of the cost has been incurred by the trust to be adjusted against annual fee payable. The CIT(A), after considering the relevant facts has rightly upheld that there is no diversion of funds to the person's specified u/s 13(3) of the Act and therefore, his order should be upheld.

5 We have heard both the parties and perused the relevant material on record. The Assessing Officer denied the benefit of exemption u/s 11 of the I T Act for the reason that the assessee has diverted its funds to the persons as specified u/s 13(3) of the Act. The Assessing Officer further observed that as per the provisions of section 13(1)( c)(ii) of the Act, if any part of income or any property of the trust or the institution, is used or applied, directly or indirectly for the benefit of any person referred to in sub.sec (3), then the trust will not get the benefit of exemption provided u/s 11 of the I T Act. According to the Assessing Officer, the trust has diverted its funds to the persons as specified u/s 13(3) of the Act. The Assessing Officer has brought out three instances of diversion of funds to the specified persons. According to the Assessing Officer, the debit

balance appeared in the name of M/s Moidu's Medicare Pvt Ltd., in the books of trust and in the books of National Hospital College of Nursing, an institution under the assessee's trust, is clearly a diversion of funds to the persons as specified u/s 13(3) of the Act. The Assessing Officer has brought out another instance of diversion of funds with regard to advance of Rs. 19,95,817/- to Dr K M Mahaboob and two others for construction of building on the lease-hold land belonging to the trustees. According to the Assessing Officer, the said transaction is clearly a diversion of funds, which violates the provision of section 13(1)(c) of the Act. Therefore, he opined that the trust has diverted its funds in contravention of provisions of section 13(1)(c), thereby not entitled to exemption u/s 11 of the I T Act 1961.

5.1 The provisions of section 13(1)(c) imposed certain restriction on utilization of income of the trust which claims exemption u/s 11 of the Act. As per clause (c) of sub.sec (1) of section 13, if any part of income or any property of the trust or the institution, is used or applied directly or indirectly for the benefit of any person referred in sub. Section (3), then the trust is not entitled to exemption u/s 11 of the I T Act. Similarly, provisions of sec. 164(2) states that in a case where the whole or any part of the relevant income is not exempt u/s 11 or sec. 12 by virtue of the provisions contained in clause (c) or clause (d) of sub.sec. (1) of section 13, tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate. Therefore, if the trust diverts its fund then, only part of the income is chargeable to tax at the maximum marginal

rate of tax; but not the whole income of the trust. This provisions further supported by the decision of the Hon'ble Bombay High Court in the case of DIT(Exemption) vs Sheth Mafatlal Gagalbai Foundation Trust reported in (2001) 249 ITR 533 and also the decision of the Hon'ble Karnataka High Court in the case of CIT vs Fr. Mullers Charitable Institutions reported in (2014) 363 ITR 230. We further observe that the Hon'ble Supreme Court has dismissed the Special Leave Petition filed by the revenue against the order of the Hon'ble Karnataka High Court, in the case of CIT vs Fr. Mullers Charitable Institutions, in SPL( C ) No.22223 of 2014 reported in (2015) 371 ITR 370. In view of the clear provisions of the Act and also the decision of the Hon'ble Supreme Court in the case, cited supra, it is clear that in case there is violation referred to section 13(1)(c ) c), then tax can be charged on such income which violates the provisions of section 13(1)( c); but not the whole income of the Trust. The CIT(A), after considering the relevant provisions has rightly upheld that the only amounts that have been diverted by the assessee trust can only be assessed to tax at the maximum marginal rate. Accordingly, we do not find any infirmity in the findings of the CIT(A) and hence, the same is upheld.

5.2 Coming to the specific instances of diversion of funds, the Assessing Officer has brought out three instances of diversion of funds to the persons as specified u/s 13(3) of the Act. As per the Assessing Officer the debit balance in the name of M/s Moidu's Medicare Pvt Ltd of Rs. 8,17,434.55; debit balance in the name of National Hospital College of Nursing of Rs. 1,65,361.72 and debit

balance of Rs. 19,95,817/- to Dr K M Mahaboob and two others for construction of building on the lease-hold land belonging to the trustees, is clearly a diversion of funds specified u/s 13(1)(c) of the Act. The CIT(A) has discussed the issue at length in his order at pages at 5.1 to 5.3(2). The relevant portion of the findings extracted below:

*5.1 Now coming to the specifics of funds diverted by the assessee, the contention of the Id counsel was that the assessee trust had repaid an amount of Rs.8,17,434.55 against the loan availed from Dr K Moidu, the Managing Trustee to M/s Moidu's Medicare Pvt Ltd upon the instruction of Dr K Moidu, the Managing Trustee, who is also the Managing Director of the firm M/s Moidu's Medicare Pvt Ltd., instead of debiting this amount to the account of the Managing Trustee, the accountant of assessee trust inadvertently debited this amount to the account of M/s Moidu's Medicare Pvt Ltd. In the subsequent year the mistake was rectified by the assessee trust. Therefore, there is reasonableness in the argument of the assessee trust that this amount represents repayment of loan availed from the Managing Trustee and the amount was paid to M/s Moidu's Medicare Pvt. Ltd, upon the instruction of the Managing Trustee, who is also the Managing Director in that firm, in order to avoid multiple transactions and save time.*

*5.2 As regards debit balance of Rs. 1,65,361.72 in the books of National Hospital College of Nursing, an institution under the assessee trust, in the name of M/s Moidu's Medicare Pvt Ltd, it was the contention of the -assessee trust that they had made an advance payment by way of cheque to M/s Moidu's Medicare Pvt Ltd as training charges of nursing students in accordance with the agreement entered into with them on 01/06/2002. The Assessing Officer's argument that there is no evidence to suggest that the payment was made in accordance with the agreement is devoid of any merit. The fact that there was an agreement dated 01/06/2002, is not in dispute. As per this agreement, the assessee trust is required to pay Rs. 650/- per student as training charges to M/s Moidu's Medicare Pvt Ltd is also not disputed. The Assessing Officer neither in the assessment order nor in the remand report has brought on record any evidence to show that this advance payment was used by the trustees for their personal benefit. In view of this, there is no reason to hold that the amount due from M/s Moidu's Medicare. Pvt Ltd was an amount diverted to benefit the trustees.*

*5.3 With regard to advance of Rs. 19,95,817/- to Dr K M Mahaboob and two others for construction of Nursing College building on the land belonging to trustees, it was stated by the assessee trust that this amount was paid for construction of a building on the land owned by the trustees in order to house the college of nursing, as per the license agreement dated 01/09/2002 entered in to by the assessee trust with the trustees. The total cost of construction of the building was Rs. 70.84 lakhs. Although as per license agreement, the entire cost of construction was to be met by the assessee trust, the aggregate expenditure incurred by the assessee trust was only Rs. 24.83 lakhs, and the balance amount was met by the trustees. The total plinth area of the building is 1111.65 sq mtrs and the lease rent per annum is Rs. 1,24,154/-, which works out to Rs. 9.30 per sq mtr. Therefore, it cannot be said that the advance rent given by the assessee trust*

*is neither excessive nor unreasonable in view of the fact that the monthly rent per square metre per month comes only to Rs. 9.30/-.*

*5.3 (1) I have carefully considered the submission of the assessee trust. The fact that the assessee trust had paid rent for 20 years in advance which was utilized for construction of nursing college building in a piece of land owned by the trustees. According to the Assessing Officer, this payment by assessee trust is a clear cut violation of provisions of section 13(1)(ii) as the beneficiaries falls under the category of persons referred in section 13(3)(cc). However, I do not agree with the findings of the Assessing Officer for the reason that the advance payment of rent was made in terms of an agreement entered in to by the assessee trust with the trustees. Moreover, substantial cost of construction was met by the trustees themselves. Further, I find that the rent to be paid for the building at Rs. 9.30/- per sq. metre per month (1111.65 sq.metre Rs. 1,24,154/- per annum) is very reasonable. The decision of the Hon'ble ITAT, Bangalore Bench in the case of M/s Ssubhram Trust Vs DCIT(Exemption) 317 ITR (AT 65) relied by the Assessing Officer in the remand report is not applicable to the facts of this case as in that case, the assessee had constructed a community hall in a land belonging to HUF, Karta of which was one of the trustees, and there was no investment by the trustee in that building. However in the instant case out of the total investment of Rs. 70.84 lakhs, only the balance of Rs. 24.83 was the contribution of the assessee trust towards the construction. Further, the rent fixed in that case was Rs. 1,00,066/-, which the Hon'ble Tribunal observed was made ignoring the business capacity of the building whereas in the appellant's case the rent works out only to Rs. 10,346/- per annum which is quite reasonable considering the utility of the building to the Trust and the market rent for similar properties. In view of this, it cannot be held that the trustees have in any way benefitted from the rent advance received from the trust.*

*5.3(2) Moreover, there is force in the contention of the assessee trust that there was an aggregate credit balance of Rs. 41,14,000/- as on 01/04/2004 against trustees, which was in excess of the aggregate of amounts treated by the Assessing Officer as diverted for the benefit of trustees. Therefore, these payments can at the best only be treated as repayments."*

5.3 The Act prohibits persons specified under section 13(3) to get direct or indirect benefit from the trust or institution claims exemption u/s 11 of the Act. The specified persons cannot use funds or property of the trust for their personal purpose. As per clause (c) of sub.sec (1) of section 13, if any part of income or any property of the trust or the institution, is used or applied directly or indirectly for the benefit of any person referred in sub. Section (3), then the trust is not entitled to exemption u/s 11 of the I T Act. If any specified person gets any

benefit from the trust money or asset, then definitely it would hit by the provisions of section 13(1)(c) of the Act. Question whether all transactions between trustees and trust are hit by the provisions of section 13(1)(c) of the Act ?. No doubt normal commercial transactions between the persons specified u/s 13(3) and the trust are not regarded as diversion of trust fund or property for the benefit of trustees, if they are like any other commercial transactions with outsiders. Therefore, to decide whether a particular transaction between the trust and trustees is hit by the provisions of section 13(1)(c) or not, have to be judged from the basic nature of transactions. In this case, the facts borne out from the records clearly indicate that there is no diversion of funds to the persons as specified u/s 13(3) of the Act. The amount outstanding in the name of M/s Moidu's Medicare Pvt Ltd is a repayment of amount taken from Dr K Moidu, Managing Trustee. The Trust has repaid an amount of Rs. 10 lacs by cheque in the name of M/s Moidu's Medicare Pvt Ltd as per the instructions of Dr K Moidu and debited to the account of the company instead of to the account of Dr K Moidu. The said mistake has been rectified by passing necessary journal entries in the books of account in the subsequent financial year. Therefore, there is reasonableness in the arguments of the Id AR of the assessee trust that this amount represents repayment of loan availed from the Managing Trustee and the amount was paid to M/s Moidu's Medicare Pvt Ltd upon the instructions of the Managing Trustee.

5.4 As regards the debit balance of Rs. 1,65,361.72 in the books of National Hospital College of Nursing, the facts borne out from the records clearly shows that the said debit balance is on account of an agreement entered between the trust and the company for providing nursing training to its students of the Trust. The Trust has paid Rs. 2,50,000/- in advance towards training fee and the same has been adjusted against fee payable for its students. The Assessing Officer neither in the assessment order nor in the remand report has brought out any evidence to show that this advance was used by the trustee for their personal benefit. Therefore, we are of the considered view that there is no diversion of funds in so far as the debit balance in the name of M/s Moidu's Medicare Pvt Ltd and hence, the CIT(A) was right in holding that there is no diversion of funds of the Trust so as to get benefit to the trustees referred to in section 13(3) of the Act.

5.5 As regards the debit balance of Rs. 19,95,817/- to Dr K M Mehaboob and two others, the facts borne out from the records clearly indicate that the Trust has entered into an agreement dated 1.9.2002 with the trustees for construction of National College of nursing in the land owned by the Trustees to be used for the purpose of running its nursing college. As per the agreement, the trust has to incur a total cost of construction; however, the facts indicate that the trust has incurred only part of the construction cost and the remaining amount has been spent by the trustees. The total plinth area of the building is 1111.65 sq.,mtrs and the lease rent was Rs 1.24,154/- which works out to Rs. 9.30

per sq,mtr. The amount of Rs 24.83 lacs incurred for construction of the building has been debited to the advance account of Dr K M Mehaboob and two others. The Trust has debited annual license fee payable to the advance account over a period of 20 years. This rent was fixed for the building works out to less than the prevailing market rate. Therefore, we are of the considered opinion that the said transaction cannot be considered as an isolated transaction to hold that the assessee has diverted its funds to the benefit of the persons as specified u/s 13(3) of the Act. Moreover, we find that there is an aggregate credit balance of Rs. 41.14,000/- as on 1.4.2004 in the name of the trustees which was in excess of aggregate of the amount treated by the Assessing Officer as diversion of funds for the benefit of trustees. If the debit balance appeared in the name of the persons as specified u/s 13(3) of the Act, is adjusted against the credit balance appeared in the name of the trustees, still there is a credit balance in the books of account of the trust in the name of the trustees. Therefore, we are of the considered opinion that there is no diversion of funds to persons as specified u/s u/s 13(3) of the Act. The CIT(A), after considering the relevant facts has rightly held that there was no diversion of funds and hence, we uphold the order of the CIT(A). It is ordered accordingly.

6 In the result, the appeal filed by the revenue is dismissed.

Order pronounced in the open Court on this 11<sup>th</sup> day of Sep 2017.

Sd/-

Sd/-

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|----------------------------|--------------------------|
| <b>( GEORGE GEORGE K )</b> | <b>(MANJUNATHA.G )</b>   |
| <b>Judicial Member</b>     | <b>Accountant Member</b> |

Cochin: Dated 11<sup>th</sup> Sep 2017

**Raj\***

Copy to:

1. Appellant -
2. Respondent -
3. CIT(A)
4. CIT,
5. DR
6. Guard File

By order

Assistant Registrar  
ITAT, COCHIN