

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

Before Shri Chandra Poojari, AM & Shri George George K, JM

ITA No.20/Coch/2017 : Asst.Year 2010-2011

M/s.The Choice Foundation C/o.M/s.Kuruvilla & Jose Chartered Accountants 41/695, Chittoor Road Kochi – 682 018 PAN : AAATC1588P.	Vs.	The Asst.Commissioner of Income-tax, Range – 4 Ernakulam.
(Appellant)		(Respondent)

Appellant by : Sri. K.M.Jose
Respondent by : Sri. A.Dhanaraj, Sr.DR

Date of Hearing : 15.01.2018	Date of Pronouncement : 29.01.2018
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ORDER

Per George George K., JM

This appeal at the instance of the assessee is directed against CIT's order dated 22.12.2016 passed u/s 263 of the Income-tax Act, 1961. The relevant assessment year is 2010-2011.

2. The grounds raised read as follows:-

"1. The Commissioner of Income Tax (Exemptions), Kochi has vide order under section 263 of the Income Tax Act, 1961 come to the finding that by virtue of section 13(8) of the Income Tax Act nothing contained in section 11 or 12 of the Act shall operate so as to exclude any income from the total income of the assessee for the AY 2010-11

and accordingly the Appellant is not entitled to the deduction u/s.11(1)(d) of an amount aggregating to Rs.2,08,91,000/-.

2. The above finding is not in accordance with law for the following reasons.

2.1 The provisions of section 13(8) of the Act is applicable only if the first proviso to section 2(15) of the Act are applicable to the assessee and accordingly the provisions of section 13(8) will not survive if the appellant is not hit by the first proviso to section 2(15).

2.2 The Order of the Commissioner of Income Tax (Appeals)-III in the Assessee's own case for the AY 2010-11 in ITA No.316/EXEM/EKM/CIT(A)-III/15-16 has confirmed that the provisions of section 2(15) of the Act is not applicable to The Choice Foundation, the Appellant, and accordingly the very basis on which the Order u/s.263 is passed does not survive and accordingly the whole proceedings u/s. 263 are void and bad in law.

3. Without prejudice to the above it is respectfully submitted that there are several infirmities in the proceedings u/s.263 as detailed below and rendering it null and void.

3.1 any proceedings u/s.263 is valid only if the twin conditions of;

- prejudicial to revenue and*
- erroneous*

are simultaneously fulfilled. In the above case there is no error at all in the Order u/s.143(3) r.w.s. 147 in so far as it relates to claim for deduction u/s.11(1)(d) of a sum of Rs. 2,08,91,0001-representing corpus donation received during the year. Since all the conditions for claiming eligibility as prescribed U/S 11(1)(d) have been complied with the Appellant is entitled under law

to get the deduction u/s.111(1)(d) as claimed. Anything else would amount only a change of opinion, which does not justify any proceedings u/s.263.

3.2 The Assessee has filed an Appeal against the order u/s.143(3) r.w.s. 147 before the Commissioner of Income Tax Appeals)-III on 23/04/2015 which was finally disposed off by the Order of the Commissioner of Income Tax (Appeals)-III dated 07/07/2016. The Order u/s. 263 which is the subject matter of the Appeal was issued on 22/12/2016. The notice u/s.263 was issued on 02/05/2016 which is during the pendency of the appeal and is therefore invalid since no proceedings u/s.263 can be initiated when the assessment is under appeal.

3.3 The doctrine of merger would also apply in this case and once the issue was considered and decided by the Commissioner of Income Tax (Appeals)-III with regard to the applicability of the provisions of section 2(15) of the Act no revision can be done u/s.263 by invoking the provisions of section 2(24)(ii)(a), section 2(15) or 13(8) of the Act. Reliance is placed on the decision in, CIT v. Alagendian Finance Limited (2012) 293 ITR 1 (SC)

For these and other grounds that may be urged at the time of the hearing, it is prayed that the Order of the Commissioner of Income Tax (Exemptions), Kochi may be set aside and appropriate reliefs granted."

2.1 The assessee has also raised additional ground. The additional ground reads as follow:-

"In view of the decision of the Apex Court in CIT v. Alagendra Finance Ltd reported in 293 ITR 1 (SC) in the case of the Appellant the matter with regard to

the eligibility of the deduction u/s 11 (1)(d) of the Corpus Donation received by the Appellant amounting to Rs.2,08, 91,000/- was not the subject matter of the re-assessment proceedings u/s 147 read with section 148 of the Income Tax Act as confirmed by the reasons for initiating the proceedings under section 148 issued by the Assessing Officer. The period of limitation provided for under subsection (2) of section 263 of the Act would begin to run from the date of the date the Intimation u/s 143(1). By virtue of provisions of subsection (2) of section 263 the period of limitation for initiating a valid proceedings u/s 263 would expire on 31.03.2014. Therefore the revisional jurisdiction has been invoked by the Commissioner of Income Tax (Exemptions) vide his notice dated 02-05-2016 and Order dated 22-12-2016 which are both beyond the period of limitation and therefore invalid.

For these and other grounds that may be urged at the time of the hearing, it is prayed that the Order of the Commissioner of Income Tax (Exemptions), Kochi may be set aside and appropriate relieves granted."

2.2 The above additional ground raised is a pure legal issue, which goes into the root of the case and does not require any fresh investigation of facts. Hence, the additional ground raised is admitted and taken on record for adjudication.

3. Brief facts of the case are as follows:-

3.1 The assessee is a Trust. It is engaged in running of schools. For the assessment year 2010-2011 return of income was filed on 18.10.2010 declaring `Nil' income after claiming exemption u/s 11 of the Income-tax Act. The return was processed u/s 143(1) of the Income-tax Act. The assessment

was reopened by issuance of notice u/s 148 and reassessment u/s 143 r.w.s. 147 of the Income-tax Act, was completed vide order dated 10.03.2015 by assessing the total income at Rs.6,96,60,510. Subsequently order u/s 154 of the Income-tax Act was passed by order dated 06.08.2015 wherein the total income of the assessee was reduced to Rs.1,60,56,579.

3.2 Subsequently notice was issued u/s 263 of the Income-tax Act. The reasons for issuing notice u/s 263 of the Act was to bring to tax a sum of Rs.2,08,91,000 received by the assessee. According to the assessee this amount of Rs.2,08,91,000 was corpus fund and was not forming part of total income by virtue of section 11(1)(d) of the I.T.Act. The CIT was of the view that the amount of Rs.2,08,91,000 would be forming part of the total income of the assessee-trust due to the following reasons:-

- (i) It is a voluntary contribution and, therefore, income of the assessee within the meaning of section 2(24)(iia) of the Income Tax Act, 1961.
- (ii) If it is to be treated as a corpus donation (there are no materials in the records to prove that it is a voluntary contribution received with a specific direction that they should form part of the corpus of the institution), the same can only be excluded

in computing the total income under the provisions of section 11 & 12 of the Income Tax Act, 1961.

- (iii) By virtue of section 13(8) of the Income Tax Act, the Assessing Officer had held that nothing contained in section 11 or section 12 shall operate so as to exclude any income from the total income of the assessee for the assessment year 2010-2011.

3.3 In response to notice u/s 263 of the Income-tax Act, the assessee filed objections vide its letter dated 10.05.2016. The gist of the submissions are reproduced in para 3 of the impugned order of the CIT. The CIT, however, rejected the contentions / objections for the proposed revision u/s 263 of the Income-tax Act and passed revisionary order on 22.12.2016. The relevant finding of the CIT in passing the revisionary order u/s 263 of the Income-tax Act reads as follow:-

"4. I have gone through the submissions made by the assessee during the course of the proceedings u/s 263 of the Income Tax Act and I find that the assessee has not adduced any convincing reply to the proposed revision under section 263 of the Income Tax Act. As already mentioned, It is a voluntary contribution and, therefore, income of the assessee within the meaning of section 2(24)(ia) of the Income Tax Act, 1961. If it is to be treated as a corpus donation, the same can only be excluded in computing the total income under the provisions of section 11 & 12 of the Income Tax Act, 1961. By virtue of section 13(8) of the Income Tax Act, the Assessing Officer had held that nothing contained

in section 11 or section 12 shall operate so as to exclude any income from the total income of the assessee for the assessment year 2010-11. Accordingly, I am of the opinion that the income assessed for the assessment year 2010-11 is short by Rs.2,08,91,000/-.

5. In the light of the above discussion, I find that the assessment order passed by the Assessing Officer u/s 143(3) of the Income Tax Act dated 10/03/2015 for the assessment year 2010-11 is erroneous in so far as it is prejudicial to the interests of revenue. Accordingly, invoking the provisions of section 263 of the Income Tax Act, 1961, the assessment order dated 10/03/2015 is set aside with a direction to the Assessing Officer to redo the same afresh after considering all issues raised herein above and after affording an opportunity of being heard to the assessee."

4. Aggrieved by the order passed u/s 263 of the I.T.Act, the assessee has preferred the present appeal before the Tribunal. The learned Counsel for the assessee has filed a paper book comprising of 86 pages enclosing various case laws, copy of the specimen letter of the donor for donating the building fund, copy of specimen receipt given to the donor etc. The learned AR has also filed a brief written submission/ argument note. The gist of the brief written submission is that order passed u/s 263 of the I.T.Act is barred by limitation. It was submitted by the learned AR that limitation period should be reckoned from the date of intimation u/s 143(1) of the I.T.Act and not from the date of reassessment. The learned AR relied on the judgment of the Hon'ble Apex Court

in the case of *CIT v. Alagendran Finance Ltd. [(2007) 293 ITR 1 (SC)]* for the above contention.

4.1 On merits, it was contended that there is no error at all in the order passed u/s 143(3) r.w.s. 147 of the I.T.Act. According to the learned AR, the donation are voluntary contributions and the donors specifically mentioned that the donations are to be utilized for infrastructure development, viz., building fund. It was submitted that since there are specific expression by the donors that contributions are to be utilized for the specific purpose, the donations can only be treated as corpus donation and by virtue of section 11(1)(d) of the I.T.Act, same does not form part of total income. The learned AR had produced the copy of the specimen letter of the donor to the above effect and also receipt given by the assessee to the donor.

4.2 The learned Departmental Representative, on the other hand, supported the revisionary order passed u/s 263 of the Income-tax Act, 1961.

5. We have heard the rival submission and perused the material on record. In the instant case, the return of income for assessment year 2010-2011, was filed on 18.10.2010. It was submitted by the learned AR that by virtue of second proviso after sub-clause (e) to section 143(1) of the I.T.Act, intimation / assessment u/s 143(1) of the I.T.Act is to be completed within a period of one year from the end of the

financial year in which the return of income was filed, i.e. on or before 31.03.2012. According to the learned AR, in view of section 263(2) of the I.T.Act, the period of limitation for initiating a valid proceedings u/s 263 would expire on 31.03.2014 and since revisionary jurisdiction has been invoked in this case by the Commissioner of Income-tax (Exemption), vide notice dated 02.05.2016, the same is beyond the period of limitation. The learned AR had relied on the judgment of the Hon'ble Apex Court in the case of *CIT v. Alagendran Finance Ltd. (supra)*

5.1 The above contention that the revisionary jurisdiction is barred by limitation will hold good, if the period of limitation is reckoned from the date of intimation u/s 143(1) of the I.T.Act. On the contrary, if the period of limitation is reckoned from the date of reassessment order (reassessment order dated 10.03.2015), the revisionary order u/s 263 of the I.T.Act would be valid and within the time limit prescribed u/s 263(2) of the I.T.Act.

5.2 The Hon'ble Apex Court in the case of *Alagendran Finance Ltd. (supra)* had categorically held that time limit u/s 263(2) of the I.T.Act has to be reckoned from the date of assessment order and not from the date of reassessment when the issue raised in the revision u/s 263 of the I.T.Act was not subject matter of reassessment u/s 147 of the I.T.Act. The relevant observation of the Hon'ble Apex Court at para 15 of the judgment reads as follow:-

“15. We, therefore, are clearly of the opinion that keeping in view the fact and circumstances of this case and, in particular, having regard to the fact that the Commissioner of Income-tax exercising its revisional jurisdiction reopened the order of assessment only in relation to lease equalization fund which being not the subject of the reassessment proceedings, the period of limitation provided for under sub-section (2) of section 263 of the Act would begin to run from the date of the order of assessment and not from the order of reassessment. The revisional jurisdiction having, thus, been invoked by the Commissioner of Income-tax beyond the period of limitation, it was wholly without jurisdictional rendering the entire proceeding as nullity.”

5.3 The above judgment of the Hon'ble Apex Court was followed by the Ahmedabad Bench of the Tribunal in the case of *Cine Line Circuits Company vs. The Commissioner of Income-tax-I* in ITA No.198/Ahd/2013 & ITA No.1315/Ahd/2013 order dated 20.01.2017. The Cochin Bench of the Tribunal in the case of *T.R.Raghavan, Elite Fabrics v. DCIT* in ITA Nos.350 and 351/Coch/1989, order dated 22.09.1993 had also held on identical facts that the revisional jurisdictional u/s 263 of the I.T.Act is barred by limitation. In the instant case, admittedly, the intimation u/s 143(1) of the I.T.Act was issued and this fact was mentioned in the notice issued u/s 263 of the I.T.Act (notice dated 02.05.2010). The Hon'ble Bombay High Court in the case of *CIT v. Anderson Marine & Sons Pvt. Ltd.* [(2004) 266 ITR 694 (Bom.)] had held that an intimation u/s 143(1) of the I.T.Act is an order which is amenable for revision u/s 263 of the I.T.Act.

5.4 In the instant case, the subject matter of revision is regarding the eligibility of deduction u/s 11(1)(d) of corpus donation that the assessee had received amounting to Rs.2,08,91,000. The corpus donation amounting to Rs.2,08,91,000, whether it is eligible for deduction u/s 11(1)(d) of the I.T.Act was not subject matter of reassessment proceedings u/s 147 r.w.s. 148 of the I.T.Act. This is evident from the reasons initiated for proceedings u/s 148 of the I.T.Act and also the reassessment order completed u/s 143(3) r.w.s. 147 of the I.T.Act. (which are placed at pages 77 to 86 of the paper book filed by the assessee).

5.5 In view of the judgment of the Hon'ble Apex Court in the case of *Alagendian Finance Limited (supra)*, since the revisional jurisdiction to reopen the order of assessment was exercised in respect of corpus donation received, which was not subject matter of reassessment proceedings u/s 147 r.w.s. 148 of the I.T.Act, the period of limitation provided u/s 263(2) of the I.T.Act would begin to run from the date of intimation u/s 143(1) of the I.T.Act and not from the date of order of reassessment. As mentioned earlier, if the period of limitation is to be reckoned from the date of intimation u/s 143(1) of the I.T.Act, the Commissioner ought to have initiated revisionary proceedings on or before 31.03.2014. In the instant case the notice u/s 263 of the I.T.Act was issued much subsequently, i.e., on 02.05.2016 and order u/s 263 of the I.T.Act was completed on 22.12.2016. Hence the

revisional jurisdiction is beyond the period of limitation u/s 263 of the I.T.Act and is a nullity.

5.6 The learned Departmental Representative had submitted that the issue of limitation was not raised before the CIT, hence cannot be raised before the Tribunal. This contention of the learned DR cannot be entertained since the issue of limitation is a pure legal issue going into the root of the case and does not require examination of fresh fact. Therefore, going by the dictum laid down by the judgment of the Hon'ble Apex Court in the case of *National Thermal Power Company Ltd. Vs. CIT [(1998) 229 ITR 383 (SC)]*, the Tribunal is duty bound to consider the legal issue though raised before it for the first time.

5.7 Even on merits, we find that the amount received by the assessee was voluntary in nature and the donors had specifically mentioned that their donations are towards infrastructure development. A copy of the specimen letters from the donors confirming their voluntary contribution and partaking the nature of corpus of the trust, is enclosed at page 65 of the paper book filed by the assessee. A copy of the receipt issued by the assessee is also enclosed at page 66 of the paper book filed by the assessee. The building fund is capital in nature and forming part of corpus of the trust. The words "Corpus Fund" are not defined in the Income-tax Act. Normally, "Corpus Fund" denotes a permanent fund separately accounted and capital in nature. Therefore, the

receipt of voluntary contributions towards "infrastructure fund" is a voluntary contribution towards the corpus fund and is therefore exempted u/s 11(1)(d) of the I.T.Act. The Mumbai Bench of the Tribunal in *Chandraprabhu Jain v. ACIT [(2016) 50 ITR (Trib.) 355 (Mum-Tri.)]* had held that the building fund is forming part of the corpus fund eligible for deduction u/s 11(1)(d) of the I.T.Act. Therefore, the initiation of the proceedings u/s 263 of the I.T.Act for disallowing the claim u/s 11(1)(d) of the corpus donation on the ground that it is not voluntary and not capital in nature is not in accordance with law and hence void. It is ordered accordingly.

6. In the result, appeal filed by the assessee is allowed.

Order pronounced on this 29th day of January, 2018.

Sd/-
(Chandra Poojari)
ACCOUNTANT MEMBER

Sd/-
(George George K.)
JUDICIAL MEMBER

Cochin ; Dated : 29th January, 2018.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT (Exemption), Kochi.
4. The JCIT(A) (Exemption), Kochi.
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin