

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI**

**BEFORE SHRI C.N. PRASAD, HON'BLE JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, HON'BLE ACCOUNTANT MEMBER**

**ITA No. 7189, 7190 & 7191/MUM/2016
(A.Ys: 2010-11, 2011-12 & 2012-13)**

M/s. OTC Exchange of India
92/93, Maker Tower 'F',
Cuffe Parade,
Mumbai – 400 005

v. Asst. Director of Income Tax
(Exemption) – II (1)
5th floor, Piramal Chambers,
Lalbaug, Mumbai – 400 012

PAN No: AAACO 0089 Q

(Appellant)

(Respondent)

Assessee by

: Shri V. Mohan

Department by

: Shri M.C. Ningshen

Date of Hearing

: 23.04.2018

Date of Pronouncement

: 26.04.2018

ORDER

PER C.N. PRASAD, JUDICIAL MEMBER

1. These three appeals are filed by the assessee against the order of the Ld.CIT(A) -1, Mumbai for the Assessment Year 2010-11 to 2012-13.
2. The appeals for the Assessment Year 2010-11 and 2011-12 are filed against the orders of the Ld.CIT(A)-1, Mumbai dated 14.09.2016 passed u/s. 154 of the Act rejecting the application filed by the assessee

for rectification of the orders dated 20.01.2016 and 21.01.2016 passed for A.Y. 2010-11 & 2011-12 respectively in denying exemption u/s. 11 of the Act. The Learned Counsel for the assessee submitted that the assessee preferred appeals against the orders passed by Ld.CIT(A) dated 20.01.2016 and 21.01.2016 for A.Y. 2010-11 and 2011-12 denying exemption u/s. 11 of the Act and the Tribunal passed order in ITA.Nos. 2625 & 2626/MUM/2016 dated 28.07.2017 allowing the claim for exemption u/s. 11 of the Act to the assessee. Ld. Counsel submitted that in view of Tribunal's Order allowing exemption u/s.11 of the Act the appeals filed by the assessee against the order passed by the Ld.CIT(A) in rejecting the petitions filed u/s. 154 of the Act becomes infructuous and therefore it is submitted that the appeals may be dismissed as infructuous.

3. We have perused the order of the Coordinate Bench passed for the Assessment Years 2010-11 & 2011-12 in ITA.No. 2625 & 2626/Mum/2016 dated 28.07.2017 and find that the Tribunal held that, the assessee is entitled for exemption u/s. 11/12 of the Act. Therefore, in view of the decision of the Tribunal the appeals filed by the assessee for the Assessment Years 2010-11 & 2011-12 against the orders of the Ld.CIT(A) in rejecting the applications filed u/s. 154 of the Act becomes infructuous as the order of the Ld.CIT(A) was reversed by the Tribunal allowing the claim for exemption u/s. 11 of the Act. In the circumstances, the appeals

filed by the assessee for the Assessment Year 2010-11 & 2011-12 in ITA.No. 7189 & 7190/Mum/2016 are dismissed as infructuous.

4. Coming to the appeal for the Assessment Year 2012-13, Learned Counsel for the assessee submitted that the Ground No's. 1 to 6 and 8 relates to denial of Exemption u/s. 11 by the Assessing Officer and sustained by the Ld.CIT(A) and the issue is identical to that of the issue decided by the Tribunal for the immediately preceding Assessment Years i.e. A.Y.2010-11 & 2011-12 and all the contentions raised by the Assessing Officer in denying the exemption u/s. 11 during the current Assessment Year have already been dealt with by the Coordinate Bench in the order and allowed the appeals of the assessee holding that the assessee is entitled for exemption u/s. 11/12 of the Act. Therefore, Ld. Counsel for the assessee submitted that the same may be followed for the Assessment Year 2012-13 also.

5. Ld. DR fairly submitted that the issue has been decided in favour of the assessee for the Assessment Years 2010-11 and 2011-12 by the Coordinate Bench. However, he strongly supported the orders of the Ld. CIT(A)/A.O.

6. We have heard the rival submissions, perused the orders of the authorities below and the decision of the Coordinate Bench. We find that identical issue came up before the Coordinate Bench in the immediately preceding Assessment Years 2010-11 & 2011-12 wherein the Exemption u/s. 11 was denied by the Assessing Officer on the ground that investments were made in wholly owned subsidiary company and therefore it is hit by the provisions of section 11(5) r.w.s. 13(1)(d)(iii). A.O further held that the provisions of section 13(2)(a)(b)(d) & (g) of the Act are also hit. However, we find that the Coordinate Bench considering the facts and circumstances for which the investments were made in the subsidiary company, it was held that there is no violation of the provisions of section 11(5) r.w.s. 13(2) and 13(3) of the Act. It was held that the investments were made in its wholly owned subsidiary company in accordance with the directions of the SEBI and therefore there is no violation of provisions of the Act. The Coordinate Bench allowed the exemption u/s.11 of the Act to the assessee observing as under:

“5. We have heard the rival contentions and perused relevant material on record. The basic facts are not in dispute. As far as the violation of Section 11(5) is concerned, we find that this section prescribes modes of investment / depositing of trust money. As per clause (xii) of the said Section 11(5), the investment could be made ‘in any other form or mode of investment or deposit as may be prescribed’. This other form of investment or deposit has been prescribed in Rule 17C of the income Tax Rules and clause (v) of the said Rule as inserted by Income Tax (Tenth Amendment) Rules, 2006 with retrospective effect from 26/11/1999 reads as follows: -

(v) investment made by a recognised stock exchange referred to in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) (hereafter referred to as investor) in the equity share capital of a company (hereafter referred to as investee)

- (A) which is engaged in dealing with securities or mainly associated with the securities market;
- (B) whose main object is to acquire the membership of another recognised stock exchange for the sole purpose of facilitating the members of the investor to trade on the said stock exchange through the investee in accordance with the directions or guidelines issued under the Securities and Exchange Board of India Act, 1992 (15 of 1992) by the Securities and Exchange Board of India established under section 3 of that Act; and
- (C) in which at least fifty-one per cent of equity shares are held by the investor and the balance equity shares are held by members of such investor;]

Admittedly, the facts reveal that the assessee has made investment in its wholly owned subsidiary company in accordance with the directions of SEBI. The main object of subsidiary was to acquire the membership rights of the BSE / NSE so as to facilitate the members of the investor. The assessee is a recognized stock exchange by Central Government in terms of Section 4 of the Securities Contract Regulation Act. Therefore, on these facts we find that the investment in subsidiary was in tune with the requirement of Section 11(5) read with Rule 17C and there was no violation of the same and therefore, the assessee could not be visited with consequential disallowance u/s 13(1)(d)(iii).

5.2. Proceedings further, we find that the shareholders of the assessee consist only of public sector undertaking / government undertaking as evident from Page Nos. 65 of the paper book and the directors of assessee company were largely nominee directors as per Annual Return of the company as placed on Page Nos. 66 to 84 of the paper book. As per Clause IIIA of Memorandum & Articles of Association of the assessee as placed in Page Nos. 3 to 56 of the paper book, the main object of the assessee was to promote and assist dealings in securities of any nature issued by limited companies in India. Further, clause V of the said memorandum contained restrictive conditions as to distribution of dividend / bonus/ profits / remuneration / fees whatsoever to its members and the income / property of the assessee was to be applied solely for the promotion of its objects. Further, the assessee company was governed by its by-laws and chapter XV-A of the said by-laws dealt with code of ethics for directors and functionaries of exchanges and put several restrictive conditions upon directors to obtain any sort of benefits / pecuniary advantages by using their position as directors.

5.3. The case of the revenue is that the assessee was hit by the provisions of Section 13(2) & 13(3) since it extended benefit to select few members of the exchange and further no interest has been charged on the outstanding amount. However, we find that that the assessee was registered stock exchange governed by strict government / SEBI rules & regulations and the membership of the assessee exchange could be obtained by the public at large subject to fulfillment of certain entry conditions as to margins / safety / securities etc. The members of the assessee, in turn, could become sub-broker of the subsidiary company subject to fulfillment of further conditions which was in tune with the scheme framed by SEBI as evident from its letter dated 26/11/1999 titled as Floating of a subsidiary / company by a stock exchange to acquire the membership of other Stock Exchange which is placed on Page Nos. 210 to 211 of the paper book, a portion of which is extracted below: -

DIVISION CHIEF
 SECONDARY MARKET DEPARTMENT

SMD-II/POLICY/CIR-37/99
 November 26. 1999

To
 The Executive Directors/Managing Directors
 of all the Stock Exchanges

Dear Sir/Madam.

Subject: Gloating of a Subsidiary/Company by a Stock Exchange to acquire the membership of other Stock Exchange.

A meeting at a Group on Revival of Small Stock Exchanges was held on September 8, 1999, to discuss the suggestions/revival plans forwarded by the small exchanges by Their revival. the Group considered the suggestions/revival plans submitted by the small stock exchanges and recommended that small stock exchanges may be permitted to promote a subsidiary which can acquire membership rights of larger stock exchanges viz. NSE/BSE/CSE/OSE or any other exchange subject to usual conditions applicable to the other' members.

In this connection, it has been decided that small stock exchanges may promote/float a subsidiary/company to acquire membership rights of other stock exchange subject to the under noted conditions:

1. The subsidiary/company shall be 100% owned by the stock exchange promoting/floating such a subsidiary/company. The name of the subsidiary company shall not contain the words 'Stock Exchange'.
2. The members of the Stock Exchange shall register themselves as sub-brokers of the subsidiary/company to enable them trade through the subsidiary/company
3. The subsidiary/company shall not undertake any dealing in securities on its Own account.
4. The subsidiary/company shall register only the members of the stock exchange, which is promoting the subsidiary/Company as its sub-broker and no other client/sub-broker shall be entertained by the subsidiary/company
5. the sub-brokers of the subsidiary/company shall maintain separate deposit with the subsidiary/company. the Bose Minimum Copilot deposited by the sub-broker with the promoting stack exchange shall not be transferred to the subsidiary/company. This deposit to be maintained with the subsidiary/company shall be in the form of cash
6. The trading /exposure limit of the sub-brokers; shall be based on the deposit received by the subsidiary/company from the sub-brokers and these limits shall not exceed the limits as prescribed by the stock exchange of which the subsidiary/company is a member.
7. The subsidiary/company shall collect margins from the sub-brokers for the payment of margins to the respective slack exchanges of which the subsidiary/ company is a member. The margin imposed by the subsidiary/company on its subbrokers shall not be less than the margin payable to the stock exchanges of which the subsidiary/company is the member.
8. The stock exchange shall incorporate the above mentioned conditions in the Memorandum of Association/Articles of Association of the subsidiary/company.

It is quite evident that the floating of subsidiary company was in tune with SEBI directions and contradicts the stand of the revenue that the sub-broker membership of the subsidiary was open to select few and not to public at large and the benefit to select few was extended by the assessee. It is an admitted position that the assessee was being reimbursed on actual basis by the subsidiary for various services and therefore, it was wrong to infer that the assessee extended benefits as mentioned in Section 13(2) to class of persons enumerated in Section 13(3) which prima-facie weakens the conclusion of the revenue that the case of the assessee was hit by the provisions of Section 13(2) & 13(3).

5.4. It is further noted that the assessee stood gain by the rule of consistency also since the said investment in subsidiary was made by the assessee way back in FY 1999-2000 and there was no change either in shareholding pattern or activities of the assessee or its subsidiary since then. The scrutiny assessment orders for AY 2004-05 & 2005-06 as placed on Page Nos. 187 to 193 reveals that the revenue has accepted the exemption claim of the assessee in quantum assessment. Although, we are conscious of the fact that the principles of res judicata do not apply to Income Tax Proceedings yet there being no change in facts or circumstances, the revenue is debarred from shifting stands without any cogent reasons in view of rule of consistency. This is well supported by the observation of Hon'ble Apex Court rendered in Radhasoami Satsang vs. CIT [193 ITR 321] which reads as under: -

“Strictly speaking, res judicata does not apply to income-tax proceedings. Though, each assessment year being a unit, what was decided in one year might not apply in the following year; where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.”

Thus, it can be stated that although the principle of res judicata is not generally applicable to Income Tax Proceedings since an assessment for a particular year is final and conclusive between the parties only in relation to the assessment for that year and it is not binding either on the assessee or the Department in a subsequent year. However, if the earlier decision is not arbitrary or perverse or if it had been arrived at after due inquiry then the revenue is not permitted to deviate from its earlier stand.

5.5 Lastly, the revenue has alleged that the assessee failed to charge interest on the amount remaining outstanding at year-end. However, a perusal of ledger extract as produced in the paper book reveals that the same represent reimbursement of the last month of the relevant financial year which has been settled subsequently within a short span of time thereafter and hence, there was no occasion / justification to charge the interest against the same which further negates this stand of the revenue that the assessee extended pecuniary benefits to its subsidiaries in contravention of law.

5.6 The revenue has placed reliance on the decision of Hyderabad Stock Exchange Vs ADIT [supra]. However, as rightly pointed out by Ld. AR, the same is distinguishable on facts since in that case, there was clear cut finding that the assessee spent huge amount of Rs.10.41 crores for providing additional infrastructural facilities to its member brokers. The said infrastructural facilities included development of screen based trading system, terminals, net scape, browsers, computers and other accessories for participating in the Screen Based Trading System. The assessee spent further amount towards insurance of the members and setting up of interconnected stock exchange India Ltd. However, the same is not the case here rather the present assessee, in tune with the agreement with its subsidiary, is being reimbursed on actual basis for various services rendered by him and therefore, distinguishable.

5.7 The totality of above discussion leads us to an inevitable conclusion that the revenue was not justified in denying the said exemption to the assessee. Therefore, we are inclined to hold that the assessee was entitled for the said exemption u/s 11 / 12 and the appeal of the assessee stands allowed.

6. Now, we take up assessee's appeal ITA No. 2626 for AY 2011-12 where the Ld. AO, while denying the impugned exemption has determined the total income at Rs.341.62 Lacs which upon, confirmation by Ld. CIT(A) vide impugned order dated 21/01/2016 has been further contested before us. Since, we have already allowed assessee's appeal for AY 2010-2011 as above on the facts of the case, the issue being identical in all respect

except for figures and minor variations, our observations / conclusions mutatis mutandis apply to the same which results into assessee's appeal being allowed by us."

7. Since facts are identical this year following the said order, we hold that the assessee is entitled for the exemption u/s. 11 of the Act. This ground of appeal is allowed.

8. Ground No. 7 of the grounds of appeal is regarding confirming the action of the Assessing Officer in not allowing the setoff of earlier years loss against current year's income.

9. Learned Counsel for the assessee submitted that this issue is squarely covered by the decision of the Hon'ble Bombay High Court in the case of CIT v. Institute of Banking Personnel Selection [264 ITR 110]. Referring to the said decision, it is submitted that the Hon'ble High Court held that excess expenditure incurred in the earlier years can be adjusted against income of subsequent years and such adjustment would be application of income for subsequent years. Therefore, it is submitted that the excess of expenditure incurred by the assessee in earlier years should be allowed to be set off against the current year's income in view of the Hon'ble Jurisdictional High Court.

10. Ld. DR vehemently supported the orders of the authorities below.

11. We have heard the rival submissions, perused the orders of the authorities below and the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Institute of Banking Personnel Selection (supra). On a perusal of the Assessment Order, we noticed that the Assessing Officer relying on the decision of the Delhi Bench in the case of Pushpawati Singhania Research Institute for Liver, Renal & Digestive Diseases v. DDIT (Exemption) [29 SOT 316] and also taking note of the fact that the Department filed SLP against the Hon'ble Bombay High Court Judgment in the case of DIT v. Maharashtra Industrial Development Corporation (ITA.No. 2652 of 2011) which was admitted by the Hon'ble Supreme Court on the issue, the Assessing Officer held that allowing set off of brought forward deficit against subsequent year's income would amount to double/triple deduction. Therefore, he denied the set off of earlier year's expenditure against current year's income to the assessee which the Ld.CIT(A) sustained.

12. The Hon'ble Jurisdictional High Court in the case of CIT v. Institute of Banking Personnel Selection (supra) concurring with the view taken by the Hon'ble Gujarat High Court in the case of CIT v. Shri Plot Swetamber Murti Pujak Jain Mandal [211 ITR 293] held as under:

"Income derived from the trust property has also got to be computed on commercial principles and if commercial principles are applied then adjustment of expenses incurred by the trust for charitable and religious purposes in the earlier years against the income earned by the trust in the subsequent year will have to

be regarded as application of income of the trust for charitable and religious purposes in the subsequent year in which adjustment has been made having regard to the benevolent provisions contained in s. 11 and that such adjustment will have to be excluded from the income of the trust under s. 11(1)(a)."

13. Respectfully following the said decision, we hold that excess of expenditure in earlier years can be adjusted against income of subsequent years and such adjustment would be application of income for subsequent years and therefore we direct the Assessing Officer to allow the claim of the assessee for set off of excess expenditure of earlier years against current year's income following the above decision of the Hon'ble Jurisdictional High Court (supra).

14. The last issue in the appeal of the assessee i.e. ground No. 9 is in respect of not allowing the quantum of depreciation as claimed by the assessee.

15. Learned Counsel for the assessee submitted that this issue is also decided by the Hon'ble Bombay High Court in the case of CIT v. Institute of Banking Personnel Selection (supra) wherein it has been held that depreciation is allowable on the assets, the cost of which has been fully allowed as application of income under section 11 in past years. Further referring to the decision of the Hon'ble Supreme Court in the case of CIT v. Rajasthan and Gujarati Charitable Foundation Poona in Civil Appeal No. 7186 of 2014 dated 13.07.2017, Ld. Counsel for the assessee

submitted that the decision of the Hon'ble Bombay High Court was affirmed on this issue.

16. Ld. DR vehemently supported the orders of the authorities below.

17. We have heard the rival submissions, perused the orders of the authorities below. on a perusal of the Assessment Order, we find that, there is neither discussion nor any finding recorded by the Assessing Officer regarding denial of depreciation to the assessee. Further we also find that assessee has raised ground before the Ld.CIT(A) on this issue but the Ld.CIT(A) by simply following the order of his predecessor for the Assessment Year 2011-12 dismissed the appeal for A.Y. 2012-13 with a direction to follow the order for the Assessment Year 2011-12. It has been stated by the Ld.CIT(A) that in so far as the issue of carry forward of set off of deficit is concerned he is in agreement with the view taken by the Assessing Officer. Ld.CIT(A) further recorded that no submissions were made with reference to other issues raised in grounds of appeal. Therefore, there was no discussion either in the Assessment Order or in the Ld.CIT(A) order regarding disallowance of depreciation on assets. In the circumstances, we feel it appropriated to restore this matter to the file Assessing Officer for fresh examination in the light of the submissions of the assessee and the decision of the Hon'ble Supreme Court in the case

of CIT v. Rajasthan and Gujarati Charitable Foundation Poona (supra) referred above. Thus, we restore this issue to the file of the Assessing Officer who shall decide afresh in accordance with law after providing adequate opportunity of being heard to the assessee. This ground is allowed for statistical purpose.

18. In the result, appeals for the Assessment Years 2010-11 & 2011-12 are dismissed and the appeal for the Assessment Year 2012-13 is partly allowed as indicated above.

Order pronounced in the open court on the 26th April, 2018.

Sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Dated: 26th April, 2018.
Giridhar, Sr.PS/-

Sd/-
(C.N. PRASAD)
JUDICIAL MEMBER

Copy to:

1. *The Assessee.*
2. *The Revenue.*
3. *The CIT*
4. *The CIT(A)*
5. *The D.R.*
6. *Guard file.*

By order

Assistant Registrar
I.T.A.T., Mumbai