IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 96/CTK/2018: Assessment Year : 2010-2011
ITA No.207/CTK/2017: Assessment Year : 2011-2012
ITA No. 208/CTK/2078: Assessment Year :2012-2013

Orissa Computer Academy, Prashanti Vihar, Pubasasana, Kasualyaganga, Bhubaneswar.	Vs.	DCIT, Circle 1(2), Bhubaneswar
PAN/GIR No.AAAAO 0070 D		
(Appellant)	..	(**Respondent**)

Assessee by : Shri P.K.Mishra, AR
Revenue by : Shri Piyush Kolhe, CIT DR

Date of Hearing : 04/07/ 2018
Date of Pronouncement : 05 /07/ 2018

O R D E R

Per N.S.Saini, AM

These are appeals filed by the assessee against the separate orders of the CIT(A)- 1,Bhubaneswar dated 19.5.2014 for the assessment year 2010-2011 and dated 27.3.2017 for the assessment years 2011-12 & 2012-13, respectively.

2. The assessee has raised the following grounds in the respective assessment years as under:

ITA No.96/CTK/2018: A.Y. 2010-11.

"1. For that, the denial of claim of exemption U/s.11 of the Act and taxation of income over expenditure determined of Rs.13,62,91,651.00 by the Authorities below is illegal, unjustified, wrong and without any basis,

as such the same is liable to be deleted and the income is liable to be declared as exempted from tax.

2. For that, the learned C.I.T (A) should not have confirmed the illegal action of the learned A.O. in denying the benefit of exemption on the ground that, section 11(4),11(4A) and 13(1)(c) have been violated, particularly when, there is no such violation of any of the provisions and the claim of the Assessee are within the four corners of the Law.

3. For that, the allegation of the Authorities below that the Assessee has Collected exorbitant fees over and above the fee structure is not only wrong but also without any basis and contrary to facts on record, as such denial of exemption on this ground is liable to be rejected and is liable to be quashed in the interest of justice.

4. For that, the learned C.I.T(A) has committed gross error of law in following the findings of his predecessors and in denying the exemption U/s.11 of the Act to the Assessee/Appellant, particularly when, the Assessee has fulfilled all the required conditions of the Law and is lawfully entitled to claim exemption. The denial of exemption by the learned C.I.T.(A) being unjustified in the eye of law is liable to be quashed in the interest of justice.

5. For that, the denial of Exemption U/s.11 and 12 of the Act by the Authorities below being illegal and since the claim of the Appellant is correct in the eye of law, the same needs to be allowed and the excess of income over expenditure is liable to be declared as exempted from Tax in the interest of justice.

6. For that the learned A.O as well as the Learned C.I.T.(A) have committed gross error of law in not giving credit of capital Expenditure while determining the Surplus and taxing it, particularly when after appropriation of capital Expenditure, there is loss of Rs. 46,11,675.00.As such impugned determination of surplus is not correct , hence needs to be deleted in the interest of justice.

7. For that, disallowance and addition of Honorarium paid to Sarmistha Rath following the statement given by her 5 years before and without examining the present situation is not only illegal but also arbitrary, as such the same is not sustainable in the eye of law as such addition made under this head is liable to be deleted in the interest of justice."

ITA No.207/CTK/2017: A.Y. 2011-12

1. For that, the impugned orders passed by the Forums below are not just and proper under the facts and in the circumstances of the case, as such the impugned disallowance of exemption and consequential additions made therein are liable to be deleted in the interest of justice.
2. For that, the disallowance of claim of exemption U/S.12A of the Act and taxation of income over expenditure of Rs.13,62,91,651.00 by

the Authorities below on the ground of violation of section 11 and 13 is illegal, unjustified and without any basis, as such the levy of tax on the exempted income of Rs.13,62,91,651.00 is liable to be deleted and the income is liable to be declared as exempted from tax.

3. For that, the learned C.I.T(A) should not have confirmed the illegal action of the learned A.O. in denying the benefit of exemption on the ground that, section 11(4),11(4A) and 13(l)(c) have been violated, particularly when, there is no such violation of any of the provisions and the claim of the Assessee are within the four corners of the Law.

4. For that, when law on this issue is well settled in favour of the Assessee/Appellant, the learned C.I.T(A) should not have ignored the explanation of the Assessee purposefully to confirm the demand raised by the learned A.O., as such the impugned order passed by the learned C.I.T(A) being not sustainable in the eye of law, is liable to be quashed in the interest of justice.

5. For that, the learned C.I.T(A) has committed gross error of law in following the findings of his predecessors and in denying the exemption U/S.12A of the Act to the Assessee/Appellant, particularly when, the Assessee/Appellant has fulfilled all the required conditions of the Law and is lawfully entitled to claim exemption. The denial of exemption by the learned C.I.T(A) being unjustified in the eye of law is liable to be quashed in the interest of justice.

6. For that, since Smt. Sarmistha Rath has been working for the Society for the whole day and is not a Housewife, the disallowance of Honorarium of Rs.6,00,000.00 paid to Smt. Sarmistha Rath relying on one statement recorded in 2005 is illegal and contrary to the facts on record, as such the impugned addition is liable to be deleted in the interest of justice.

7. For that, the learned C.I.T(A) should not have blindly confirmed the disallowance of Honorarium paid to Smt. Sarmistha Rath of Rs.6,00,000.00. without examining the facts on record, as such the impugned disallowance being unsustainable in the eye of law is liable to be deleted in the interest of justice.

8. For that, the learned A.O. as well as the learned C.I.T(A) have committed gross error of law in disallowing Rs.2,43,180.00 on account of belated payment of EPF without examining the facts on record by wrongly holding that, there was no submission made by the Assessee. The impugned disallowance being made on wrong presumption of fact is liable to be deleted in the interest of justice."

ITA No.208/CTK/2017: A.Y. 2012-13

1. For that, the impugned orders passed by the Forums below are not just and proper under the facts and in the circumstances of the case, as such the impugned disallowance of exemption and consequential additions made therein are liable to be deleted in the interest of justice.
2. For that, the disallowance of claim of exemption U/S.12A of the Act and taxation of income over expenditure of Rs.9,26,71,490.00 by the Authorities below on the ground of violation of section 11 and 13 is illegal, unjustified and without any basis, as such the levy of tax on the exempted income of Rs.9,26,71,490.00 is liable to be deleted and the income is liable to be declared as exempted from tax.

3. For that, the learned C.I.T(A) should not have confirmed the illegal action of the learned A.O. in denying the benefit of exemption on the ground that, section 11(4),11(4A) and 13(l)(c) have been violated, particularly when, there is no such violation of any of the provisions and the claim of the Assessee are within the four corners of the Law.

4. For that, when law on this issue is well settled in favour of the Assessee/Appellant, the learned C.I.T(A) should not have ignored the explanation of the Assessee purposefully to confirm the demand raised by the learned A.O., as such the impugned order passed by the learned C.I.T(A) being not sustainable in the eye of law, is liable to be quashed in the interest of justice.

5. For that, the learned C.I.T(A) has committed gross error of law in following the findings of his predecessors and in denying the exemption U/S.12A of the Act to the Assessee/Appellant, particularly when, the Assessee/Appellant has fulfilled all the required conditions of the Law and is lawfully entitled to claim exemption. The denial of exemption by the learned C.I.T(A) being unjustified in the eye of law is liable to be quashed in the interest of justice.

6. For that, the disallowance of exemption u/s.12A of the Act by the authorities below being illegal and since the claim of the appellant is correct in the eye of law, the same needs to be allowed and the excess of income over expenditure is liable to be declared as exempted from tax in the interest of justice."

3. At the outset, ld A.R. of the assessee submitted that the facts and issues involved in all the appeals are identical and, therefore, he will be arguing the appeal of the assessee for assessment year 2010-2011 and same should also be taken as the arguments of the assessee for the assessment years 2011-12 & 2012-13 also.

4. Ld D.R. also agreed with the above submissions of ld A.R. of the assessee. As all the three appeals were heard together, they are being disposed of by this common order as under:

5. The brief facts of the case are that the Assessing officer observed that the main source of income of the assessee was from fees from students since out of total receipts of Rs.27,69,01,889.67, the amount received as student fees was Rs.27,30,88,254/- and the assessee institution is running profitably, it has been charging exorbitant fees from the students and it has all the ingredients of a business undertaking. The Assessing Officer further observed that the assessee is charging fees over and above the stipulated amount fixed by the concerned authority. The financial results of the educational institutions show increasing surplus from year to year. The assessee society spends substantial amount for advertisement for soliciting students. Thus, the Assessing Officer considered that the assessee society is running business undertakings in the form of educational institutions for which the restrictive provisions of section 11(4A) are applicable. The Assessing Officer further observed that the institutions have also all the ingredients of business undertakings. The

assessee society is running educational institutions like business undertakings as contemplated u/s 11(4) and running them with profit motive. The Assessing Officer relied on the decision of Hyderabad Bench of the Tribunal in the case of Vodithala Education Society v. ADIT (Exemption), (2008) 20 SOT 353 (Hyd), wherein it was held that the assessee, having collected money over and above the rate prescribed by concerned authority, is not a charitable institution u/s.2(15) as it is a clear case of sale of education and the purpose of organization was to make profit. The Assessing Officer observed that the assessee society can be considered as running with profit motive. He observed that the institutions are running profitably and there is profit motive in view of decision in the case of CIT v. National Institute of Aeronautical Engineering & Educational Society, (2009) 226 CTR (Uttarakhand) 582. The Assessing Officer further observed that the provisions of section 13(1)(c) have been violated since substantial amounts have been paid to the founding members as under:

Honorarium of Rs.20,34,004/- paid to founders as under:

1. Dr. Bhabani Charan Rath : Rs.10,57,728/-
2. Smt. Sarmistha Rath` : Rs. 3,82,456/-
3. Sri Subrat Prasanna Mishra: Rs. 4,34,561/-
4. Smt. Sanghamitra Mishra : Rs. 1,68,259/-

6. The Assessing Officer observed that the founding members are required to work to attend the objects of the trust and not to enrich

themselves with substantial payments from the institution. Smt. Sarmista Rath has admitted to be a house wife, hence funds of the trust has been misused for payment of remuneration.

7. The Assessing Officer further observed that according to the provisions of section 11(4), the running of educational institution is a business and not incidental to the fulfilment of the objectives of the assessee society. Hence, income from such institutions are taxable even when section 11 is valid.

8. The Assessing Officer further found that the assessee society runs five colleges. It collects life member fees of Rs.5,000/- and ordinary member fees of rs.500/- per year. Balance sheets of educational institutions do not reflect collection of such amounts or any such corpus funds created. No separate books of account have been maintained for the society. The accounts of the society are maintained alongwith educational institution which violates provisions of section 11(4A). Since no separate books of account are being maintained, the restrictive provisions of section 11(4A) is attracted. Hence, the benefit of exemption u/s.11 is not available.

9. The CIT(A) after considering the submissions of the assessee held as under:

> "3. I have considered the matter. It has been submitted by the appellant that facts of the case are similar to that of the assessment year 2009-2010 wherein, relief has been allowed partly. However, no elaborate submissions have been made and it is not stated in what manner the issues are similar. It is well settled that the principle *of res judicata* is not applicable in taxation matters. Facts of the case may differ from year to year.

The AO has given a finding that the appellant society is selling education in the guise of charitable purpose and is extracting exorbitant price from the students thereby the educational institutions run by the appellant society is run like commercial venture. The appellant has not disputed the observations of the AO that the judgment delivered in the case of CIT v. National Institute of Aeronautical Engineering & Educational Society by the Uttarakhand High Court is applicable. The appellant has also not disputed the observation of the AO that the decision of the ITAT, Hyderabad in the case of Vodithala Education Society is applicable to the case of the appellant. The decision of the ITAT, Hyderabad in the case of Vodithala Education Society v. ADIT (Exemptions) II, Hyderabad, [2008] 20 SOT 353 (HYD.) relevant to the appellant's case is reproduced as under:

> *"19. Under article 41 of the Constitution of India, it is the responsibility of the State to provide education to all citizens of this country. The State may discharge its obligation through State owned or State recognized educational institutions. When State/Central Government grants recognition to the private educational institutions, it creates an agency to fulfil its obligation under the Constitution. Therefore, the private institutions, are functioning as agents of the State/Central Government. It is the primary responsibility and obligation of the State to provide education to the citizens. Therefore, the educational institutions while acting as agents of the State have to collect the fees as prescribed by the Government. The students are given admission to the private educational institutions in recognition of their 'right to education' under the Constitution. Therefore, charging of any amount over and above the fee prescribed by Government, either as capitation fee or otherwise, in consideration of admission to educational institution, is a patent denial of a citizen's right to education under the Constitution. Education is in the concurrent list of the Constitution. Therefore, both the Central and State Governments are competent to enact law with regard to education. In other words, it is the responsibility/obligation of both the Central and State Governments to provide education to all the citizens of the country. Despite various cultural and linguistic differences, India is united because of tolerance and piousness of the people. Education is considered to be pious in this country. Ancient days 'Gurukulams' were established to impart knowledge to people. Due to efflux of time and civilization, the earlier "Gurukulams' are now called as Schools, Colleges. In other words, it is known as educational institutions. However, the Indian civilization continue to*

recognize education as one of the pious obligation of the human society. When the people of this country considered education as a pious one, it cannot be made as a saleable commodity in the guise of encouraging private institution to support the State in the process of establishing educational institutions. To establish and administer educational institutions, are considered to be a charitable object. The way in which the exorbitant amounts are collected by the assessee-society for admission under the management quota, shows that they are not administering the educational institutions for pious and charitable purpose, but, with a profit motive. When the assessee sells the seat of the professional course in the college and collects money, can we say there is no profit motive. In other words, when the assessee admits students under management quota in consideration of an amount, which is over and above the fees prescribed by the Government, can we say there is no profit motive? The obvious answer to this question is in Negative. When the assessee collects money over and above the fees prescribed by Government, it clearly exposes the intention of the assessee to earn profit. It is also to be remembered that collection of capitation fees for admission to any educational institution is made as an offence punishable in this country. In spite of that, the assessee was bold enough in collecting the money over and above the fees prescribed by the Government.

20. The Apex Court in the case of T.M.A. Pal Foundation v. State of Karnataka [2002] 8 SCC 481 had an occasion to consider the right of the aided and unaided private educational institutions. The Constitutional Bench of the Supreme Court elaborately considered the right of establishing private educational institutions and found that collection of capitation fees being the worst part of mal-administration, can properly be subject-matter of regulatory control of a State. The Apex Court further observed that receiving donations by educational institutions connected with admission of students has to be treated as collection of capitation fees. The Apex Court observed that the right to admit students being an essential facet of the right to administer educational institutions of their choice, the State Government/University may not be entitled to interfere with their right so long as the admission to the unaided educational institution is on a transparent basis and merit is ⌜3*\ *adequately taken care of. It was also observed that the unaided institutions cannot be regulated with regard to charging of fees, however, such institution shall not charge*

capitation fees. This judgment was considered by another Bench of the Apex Court in the case of Islamic Academy of Education (supra). The majority Judges of the Apex Court after considering the judgment in the case of TMA Pai Foundation (supra), observed that there can be no fixing of rigid fee structure by the Government. Each institute must have the freedom to fix its own fee structure, taking into consideration the need to generate funds to run the institution and to provide facilities necessary for the benefit of the students. The educational institutions must also be able to generate surplus which must be used for the betterment and growth of that educational institution. It was further observed that the surplus funds cannot be diverted for any other use or purpose and cannot be used for personal gain or for any other business or enterprise. The Apex Court further directed all the State Governments and concerned authorities to set up committee headed by a Hon'ble Retired High Court Judge who shall be nominated by the Hon'ble Chief Justice of the High Court. For the purpose of convenience, we reproduce the direction of the Apex Court as reported in pages 720-722 of Islamic Academy of Education's case (supra)."

It is also seen that the registration u/s.1O(23C) has been denied to the appellant by the CCIT, Bhubaneswar for the exemption of income from the educational institutions run by the appellant.

The AO has also applied the restrictive provisions of section 11(4) and 11(4A) to deny benefits of section 11 to the appellant. The AO observes that the accounts of the society and educational institutions have not been maintained separately. Thus, the assessee is not satisfying the condition of section 11(4A), hence ineligible for benefits of section 11. These observations of the AO have not been contradicted by the appellant.

The AO has given his finding that an amount of Rs.3,82,456/- was paid to Smt. Sarmista Rath, Founder and member of the appellant society for no services rendered. Smt. Rath has admitted in post search, that she is a housewife and not involved in any vocation or profession. The submissions made by the appellant before the AO do not contradict the findings of the AO that she was given the salary/honorarium for the reason that she is the wife of the founder member/Chairman of the Society. The finding of the AO that she has been paid salary without rendering any service is correct, hence violates provisions of section 13(1)(c). In case of a charitable trust, if it is found that provisions of section 13(1)(c)(ii) read with section 13(3) are not followed, trust would lose its exemption in entirety, with result that assessment of its income will be made according to

provisions of the Act as held by Hon'ble Delhi High Court in Director of Income-tax (Exemption) *v.* Charanjiv Charitable Trust [2014] 43 taxmann.com 300 (Delhi). It was held that;

"27. In the aforesaid view of the matter, we hold that the findings of the Tribunal on this aspect cannot be upheld. We uphold the findings of the AO and hold that in advancing the amount of Rs.8,60,16,000/- to APIL the assessee committed a violation of the provisions of Section 13(1) (c)(ii) read with Section 13(2) and Section 13(3) of the Act. The trust was accordingly not eligible for the exemption under section 11 of the Act for both the years. Accordingly, the excess of income over expenditure is taxable and at the same time the amount paid to Smt. Rath is liable to be taxed at the maximum marginal rate.

In view of the above discussion and for the finding of the AO that the educational institutions are run like commercial organisations, the violation of provisions of section 11(4) and 11(4A), non-registration u/s.10(23C) and for violation of provisions of section 13(1)(c) the determination of income by the O is confirmed i.e. even if the appellant enjoys benefit of section 11, the excess of income over expenditure is taxable in view of violation of various provisions of the Act as narrated."

10. Ld A.R. of the assessee argued and submitted that in the assessment year 2009-2010, the CIT(A) has allowed deduction u/s.11 of the Act to the assessee on the very same set of facts. The revenue challenged the order of the CIT(A) before the Tribunal and the Tribunal dismissed the appeal of the Revenue vide order dated 11.1.2013 in IT(SS) No.71,72 and 73/CTK/2012 for the assessment years 2005-06, 2007-08 and 2009-2010 and ITA No.575/CTK/2012 for the assessment year 2006-07 by observing as under:

"As the ld CIT DR was not able to point out any controverting material insofar as the ld CIT(A) has in his well reasoned order considered the issues in its totality to delete the addition so made by the Ao when the crux of the issue related to expenditure have been incurred under the provisions of Section was claimed on those years incomes which has been deleted by the ld CIT(A) on the fact

finding as noted by the AO. In other words, compliance to section 11 succeeds the justification holding exemptions u/s.12A which has not been established otherwise by the revenue as of now. In this view of the matter, we do not find any infirmity in the impugned orders of the ld CIT(A) for all the AYs under consideration, which we uphold and dismiss the appeals of the revenue. The additions as made by the AO and considered by the ld CIT(A) reproduced do not require further deliberation being self explanatory as also pointed out by the ld Counsel for the assessee are covered by the order of the Tribunal in assessee's own case. The ld CIT DR has not been able to bring out any further controverting material for our consideration. We, therefore, uphold the impugned orders of the ld CIT(A) and dismiss the appeals of the Revenue."

11. Ld A.R. further argued and submitted that in the assessment year 2015-16, the Assessing Officer has allowed deduction u/s.11 of the Act to the assessee on the very same set of facts vide order dated 12.10.2017 passed u/s.143(3)of the Act.

12. On the above stated facts, it was the submission of ld A.R. of the assessee that the order of the CIT(A) should be set aside and the appeals of the assessee should be allowed allowing deduction u/s.11 of the Act to the assessee in the years under appeal.

13. On the other hand, ld D.R. could not controvert the above submission of ld A.R. of the assessee.

14. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the undisputed facts of the case are that the assessee is a society duly registered u/s.12AA of the Act. The registration u/s.12AA of the Act stands enforced for all the years under appeal. In the years under

appeal, the assessee is engaged in running four educational institutions. The Assessing Officer disallowed the claim of exemption u/s.11 & 12 of the Act in the years under appeal, which was also confirmed by the CIT(A).

15. We observe that on similar facts, the assessee was held entitled for exemption u/s.11 & 12 of the Act by the Tribunal for the assessment years 2000-2001 to 2009-2010 consistently. Further, in subsequent assessment year i.e. 2015-16, the Assessing Officer himself has held in an assessment made u/s.143(3) of the Act that the assessee is entitled for exemption u/s.11 & 12 of the Act.

16. In view of the above consistent decisions of the Tribunal in the earlier assessment years and the decision of the Assessing Officer in the assessment year 2015-16, we find force in the arguments of ld A.R. of the assessee that there is no reason to take a different view in the three assessment years under appeal.

17. Ld D.R. could not point any distinguishable facts which were existing in these three years and not existed in the earlier years or in the assessment year 2015-16. We, therefore, following the above order of the Tribunal passed in the case of the assessee itself in the assessment years 2000-2001 to 2009-2010 direct the Assessing Officer to allow exemption u/s.11 & 12 of the Act to the assessee in accordance with law.

18. Further, be it stated that the Assessing Officer observed in the assessment years under appeal, that certain payments were made to the

relatives of founder members without rendering of any service by them in violation of provisions of section 13 of the Act. The amounts which have been paid in violation of the provisions of section 13 of the Act are to be charged to tax at maximum marginal rate. From the orders of the lower authorities, it is not clear that how much payment was made in violation of provisions of section 13 of the Act. We, therefore, for this limited purpose, restore the matter back to the file of the Assessing Officer to determine the amount which was paid by the assessee in violation to provisions of section 13 of the Act and thereafter complete the assessment afresh as per law.

19. Needless to mention that the Assessing Officer shall allow reasonable opportunity of hearing to the assessee before determining the said amount. Thus, the orders of lower authorities are set aside on this issue.

20. In the result, appeals filed by the assessee are allowed for statistical purposes as indicated above.

Order pronounced on 05/07/2018.

Sd/-	sd/-
(**Pavan Kumar Gadale)**	**(N.S Saini)**
JUDICIALMEMBER	**ACCOUNTANT MEMBER**

Cuttack; Dated 05 /07/2018
B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Orissa Computer Academy, Prashanti Vihar, Pubasasana, Kasualyaganga, Bhubaneswar
2. The Respondent. DCIT, Circle 1(2), Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

BY ORDER,

SR.PRIVATE SECRETARY
ITAT, Cuttack