IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN

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

ITA No.459/Coch/2018 : Asst.Year 2013-2014

M/s.Love in Action Society Pulivelil, Nalanchira P.O. Trivandrum – 695 015. **PAN : AABTT5795L.**	Vs.	The Income Tax Officer (Exemption) Trivandrum.
(Appellant)		(Respondent)

Appellant by : Sri.Sameer Kapoor, CA
Respondent by : Sri.Sudhansu Shekhar Jha, DR

Date of Hearing : 23.01.2019		**Date of Pronouncement : 04.02.2019**

O R D E R

Per George George K. (JM)

This appeal at the instance of the assessee is directed against CIT's order passed u/s 263 of the I.T.Act. The relevant assessment year is 2013-2014.

2. The brief facts of the case are as follows:-

The assessee is a charitable society registered u/s 12AA of the I.T.Act. For the assessment year 2013-2014, the return of income was filed on 07.10.2013 declaring deficit of Rs.50,08,845. The assessment u/s 143(3) of the I.T.Act was completed vide order dated 29.03.2016 on a deficit of Rs.50,00,844. Subsequently, the CIT invoking powers u/s 263 of the I.T.Act issued notice to the assessee. The CIT was of the view that the assessment order dated 29.03.2016 was erroneous in so far as prejudicial to the interest of the

Revenue for the reason that during the previous year relevant to the assessment year 2013-2014, the assessee had utilized corpus donation received as application for charitable purposes. It was noticed by the CIT that the assessee had received Rs.2,38,15,619 as foreign contribution out of which Rs.1,82,93,750 was received as corpus donation u/s 11(1)(d) of the I.T.Act. The CIT was of the view that the voluntary contribution apart from the corpus donation was only Rs.55,21,860 (Rs.2,38,15,619 – 1,82,93,750). It was further noticed by the CIT that the assessee had utilized Rs.1,12,03,845 as application of income, and therefore, according to the CIT a sum of Rs.56,81,961 was utilized as application for charitable purpose out of corpus donation (Rs.1,12,03,845 – 55,21,860) which is in violation of section 11(1)(d) of the I.T.Act.

3. The case was posted for hearing on 09.03.2018. On the date of hearing none was present nor was any written submission filed on behalf of the assessee. Therefore, the CIT passed revisionary order u/s 263 of the I.T.Act vide order dated 19.03.2018. The CIT set aside the assessment order and directed the A.O. to examine whether a sum of Rs.56,81,961 being part of Corpus donation was utilized in violation of section 11(1)(d) of the I.T.Act. The relevant finding of the CIT reads as follows:-

> *"5. On a perusal of the details available on record, it is seen that the assessee has received foreign*

contribution of Rs.2,38,15,619/- out of such a sum of Rs.1,82,93,750/- was received as corpus donation u/s 11(1)(d) of the Income Tax Act with specific direction. Therefore it seems that the balance available for application was only Rs.55,21,869/- against the application claimed by the assessee at Rs.1,12,03,845/-. Considering the claim of the assessee and the availability of fund for application, it indicated that the balance amount of fund of Rs.56,81,976/- was utilized from the corpus donation violating the proviso to section 11(1)(d) of the Income Tax Act, 1961. It is seen from the records that the Assessing Officer, while completing the scrutiny assessment, failed to consider this issue. In view of the above, I am of the opinion that the impugned order u/s 143(3) dated 29/03/2016 is erroneous and prejudicial to the interests of revenue. I set aside the assessment order u/s 263 of the Income Tax Act for reconsideration of the issue by the Assessing Officer, as delineated above, after giving full opportunity of being heard to the assessee."

4. Aggrieved by the order of the CIT passed u/s 263 of the I.T.Act, the assessee has filed the present appeal before the Tribunal raising the following grounds:-

"Ground No.1
Whether the ld.CIT(E) has erred in law and circumstances of the case in invoking the provisions of sec 2363 and setting aside the assessment u/s 263 for reconsideration by the ld.AO.

Ground No.2
Whether the ld.CIT(E) has erred in law and circumstances of the case in holding that provisions of sec 11(1)(d) have been violated by utilizing corpus donations towards the total application made during the year resulting to deficit for the year.

Ground No.3
The assessee may please be allowed the right to add / delete / modify any of the above grounds of appeal at any stage."

5. The learned Counsel for the assessee has filed a paper book enclosing inter alia the case laws relied on, copy of audited accounts, copy of audit report in Form No.10B, copy of registration u/s 12A, copy of letter from the donor for corpus donation, copy of the assessee's reply dated 19.03.2016, etc. The learned Counsel for the assessee submitted that the CIT has erred in invoking the revisionary jurisdiction. According to the learned AR, the contentions precedent for invoking revisionary jurisdiction u/s 263 of the I.T.Act is absent in this case. It was submitted that there was no loss of revenue since the corpus donation if at all has been utilized, it was utilized only for the charitable purposes and the Department does not have a case otherwise, and this fact is admitted by the Assessing Officer in the assessment completed u/s 143(3) of the I.T.Act. Further, it was contended that since the corpus donation was utilized for charitable purposes, it forms the character of a voluntary contribution and subject to section 11 of the I.T.Act, the assessee is exempt for application of its income for charitable purposes.

6. The learned Departmental Representative strongly supported the order of the CIT.

7. We have heard the rival submissions and perused record. The CIT(A), in his order has held the order of the ld. A.O to be erroneous and prejudicial to the interest of revenue. The said observations have been made for foreign contributions of Rs.2,38,15,619 received during the year under consideration. It was mentioned that out of the above sum of Rs.2,38,15,619, an amount of Rs.1,82,93,750 was received as corpus donation u/s 11(1)(d). The CIT noted that total amount available for application was Rs.55,21,860 (2,38,15,619 – 1,82,93,750), whereas the total application was Rs.1,12,03,845. Therefore, the CIT was of the view that amount of Rs.56,81,976 (1,12,03,845 – 55,21,860) was utilization out of corpus donations in violation of proviso to section 11(1)(d) of the I.T.Act and directed the A.O. to examine the issue. To understand whether the CIT has correctly assumed jurisdiction u/s 263 of the I.T.Act, the relevant provision needs to be examined. Section 263 of the I.T.Act reads as follows:

> *"Sec 263. (1) The Principal Commissioner or Commissioner may call for and examine the record of a any proceeding under this Act, and if he considers that any order passed therein fry the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or can ceiling the assessment and directing a fresh assessment.*

Explanation 2.-For the purposes of this section, it is hereby declared that an order passed ry the Assessing Officer shall be deemed to be erroneous in so far as it is prejudicial to the interests of the revenue, if, in the opinion of the Principal Commissioner or Commissioner,-

(a) the order is passed without making inquiries or verification which should have been made;

(b) the order is passed allowing any relief without inquiring into the claim;

(c) the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or

(d) the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the Jurisdictional High Court or Supreme Court in the case of the assessee or any other person.

7.1 The above section states that Pr.CIT or CIT may call for and examine the record of any proceeding under this Act, and if he considers that any order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interests of the revenue, he can invoke powers u/s 263 of the I.T.Act. Therefore the condition precedent for invoking the revisionary jurisdiction u/s 263 of the I.T.Act is that order sought to be revised must be erroneous and prejudicial to the interest of the revenue.

7.2 In the instant case, the setting aside of assessment order by ld. CIT(E) with the direction to ld. A.O to reconsider the

corpus donation of Rs.56,81,976 by treating them in violation of sec 11 (1) (d), will not result to fulfillment of dual statutory condition of AO's order being *"erroneous"* and *"prejudicial to the interest of the revenue"*. For an order to be prejudicial to the interest of revenue, some loss must have occurred to the revenue. Whereas in the present case, if at all, corpus donation worth Rs.56,81,976 is considered as violating the provisions of section 11(1)(d), even then, the said donation remains to be voluntary contribution and in accordance with the provisions of section 12(1) read with section 11(1)(a), are utilized for charitable purpose as the same is evident from the deficit of Rs.50,08,844 (i.e excess of expenditure over income). Adjustment of Rs.56,81,976 with the deficit of Rs.50,08,844 will result to surplus of Rs.6,73,132 which is within the 15% stipulated amount allowed for accumulation. Interestingly this computation was made by the ld. A.O in her Pre-Assessment Order dated 14.03.2015 (page no 17 of paper book). Therefore, setting aside the order of A.O and denying the status of corpus donation has not resulted any loss to the revenue. Hence pertinent condition of section 263, of the order being *''prejudicial to the interest of the revenue"* has not been fulfilled and therefore makes the order of ld.CIT(E) bad in law.

7.3 In the case of *Malabar Industrial Co Ltd Vs CIT [2000] (SC) 243 ITR 0083*, the Hon'ble Supreme Court held as under:-

> *"5 A bare reading of this provision makes it clear that the prerequisite to exercise of jurisdiction by the*

CIT suo motu under it, is that the order of the ITO is erroneous insofar as it is prejudicial to the interests of the Revenue. The CIT has to be satisfied of twin conditions, namely, (i) the order of the AO sought to be revised is erroneous; and (ii) it is prejudicial to the interests of the Revenue. If one of them is absent-if the order of the ITO is erroneous but is not prejudicial to the Revenue or if it is not erroneous but is prejudicial to the Revenue-recourse cannot be had to s. 263(1) of the Act.

7. The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the AO. Every loss of revenue as a consequence of an order of AO cannot be treated as prejudicial to the interests of the Revenue, for example, when an ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue unless the view taken by the ITO is unsustainable in law. It has been held by this Court that where a sum not earned by a person is assessed as income in his hands on his so offering, the order passed by the AO accepting the same as such will be erroneous and prejudicial to the interest of the Revenue."

7.4 The Hon'ble Supreme Court in the case of *CIT Vs Max India Ltd [2007](SC) 295 ITR 0282*, by following the dictum laid down by the Apex Court in case of *Malabar Inudstries (supra)* has observed as under :

"2. At this stage we may clarify that under para 10 of the judgment in the case of Malabar Industrial Co. Ltd. (supra) this Court has taken the view that the phrase "prejudicial to the interest of the Revenue"

under s. 263 has to be read in conjunction with the expression "erroneous" order passed by the AO. Every loss of revenue as a consequence of an order of the AO cannot be treated as prejudicial to the interest of the Revenue. For example, when the ITO adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the ITO has taken one view with which the CIT does not agree, it cannot be treated as an erroneous order prejudicial to the interest of the Revenue, unless the view taken by the ITO is unsustainable in law."

7.5 The provisions of section 11 (1)(d) stipulate that the income in form of voluntary contributions made with a specific direction that they shall form part of the corpus of the trust or institution shall not be included in the total income of the previous year. Accordingly, corpus donations amounting to Rs.1,82,93,750 received by the assessee during the year under consideration, with the specific direction to be treated as corpus donation are eligible to be excluded from the total income of the assessee in accordance with the provisions of section 11(1)(d). Before discussing the merits of the case, for general understanding and to delve upon the issues involved, it is pertinent to understand the tax treatment for the following:

(a) Voluntary Contribution
(b) Corpus Donations
(c) Project Grants/restricted contributions

(a) <u>Voluntary contribution</u> has not been defined under the Act, however, Supreme Court in the case of *Padamaraje R Kadambande Vs CIT [1992] 195 ITR 877* held that

compassionate payment received by the assessee cannot be treated as income. It was observed in a different context that when the amount received was under compassion and discretion of the giver then it cannot be treated as income. Thus voluntary contributions in reality is not income but deemed to be so, on account of the legal fiction created by section 2(24) (iia). These contributions are exempt subject to provisions of sec. 11.

(b) The term 'corpus' has not been defined in the Act. In a broader sense, a corpus is the capital of an organisation and, therefore, such receipt shall be added directly to the corpus. It has been held in various cases that contribution towards capital purposes shall be considered as corpus donations. But in the absence of any clear cut definition or guidelines with regard to its meaning and scope, corpus has to be understood in the light of various allied provisions and case laws. According to sec. 11(1)(d), any voluntary contributions received by a trust or an institution created wholly for charitable or religious purposes with a specific direction that they shall form part of the corpus of the trust or institution and shall not be included in the total income.

(c) Project grants or restrictive contributions are to be spent as per the terms and conditions of project grant. These contributions are not voluntary contributions as it comes with attached conditions. These are considered

restrictive grants because the utilization of the same is to be done as per the conditions. These grants are not freely available to the organization to be utilised for charitable purposes. It is bound by the contractual obligations of the project/grant agreement. Such grants are tied with the specific purposes and are not available at the discretion of the recipient, therefore should not be considered as income for the purposes of sec 11 (1) and should be transferred to separate account to be spent for its predetermined purposes. Any surplus remaining should revert back to the donor or should be treated as income after obtaining approval from the donor.

7.6 We have gone through the letter of donor for the corpus funds. During the year under consideration, assessee has not received any project grants nor restrictive contributions. Whatever has been received is voluntary contribution. Now Voluntary contributions as received by the assessee are of two types; i.e. "voluntary contributions in the nature of corpus donations" as provided in section 11 (1) (d) read with section 12(1) and "voluntary contributions" per se as stipulated in section 2(24)(iia) subject to section 11.

7.7 The observation of the ld. CIT to treat an amount of Rs. 56,81,976 (out of the total deficit for the year of Rs. 1,12,03,845 after reducing foreign donation of Rs. 55,21,860 for other than corpus) is against the spirit of the statute. Provisions of section 11(1)(d) in no way have been violated by

the assessee. There has been excess of expenditure over income for the year under consideration and the same has been carried forward to the general fund in the balance sheet accumulated over the years whereas Corpus donations are separately appearing in balance sheet. (Page 1 to 12 of the paper book filed by the assessee). Therefore, the observations of the ld. CIT that the deficit for the year has been met out of the corpus donation, is not correct as is evident from the final accounts. Although no such adjustment has been made by the assessee, however there is no bar on such adjustment as per the provisions of section 11(1)(d) or u/s 12(1). The same has been held by the Delhi Bench of the Tribunal in the case of *Dharma Pratishthanam Vs ITO [(1985) Del 11 ITD 0040]*. The relevant finding of Delhi Bench of the Tribunal reads as follows:-

> *"8. That leaves us with the question whether any amount received towards corpus can be spent for running expenses and if so spent, whether it loses the exemption from the levy of tax. We have read the relevant sections carefully and we find nothing in those sections even remotely suggesting the above view. Sec. 2(24)(iia) when it provided that the voluntary contributions should be made with a specific direction that they shall form part of the corpus of the trust or institution, in order that it is not to be treated as income, it was laying emphasis on the wish, will and desire of the donor. The donor must grant it with a direction that it shall form part of the corpus. The section did not either by implication, or overtly or otherwise, enjoin upon the trust that the trustee shall retain it for ever as corpus, even if when*

an occasion arises that in order to keep the trust alive and to prevent it from failure, it should not spend any amount out of it. If a donor donates money with a specific direction that it shall form part of the corpus, the trustee is expected to honour the wish of the donor. But if the trustee utilises it for a different purpose, then it is a simple case of breach of trust for which delinquency, the trustee can be proceeded against under the Indian Trusts Act, 1882, or other appropriate legislation but that is not to say that for the misbehaviour of the trustee, the trust loses exemption under the Act. This kind of inflexibility, as contended for by the Revenue, is difficult to see or comprehend from the language of s. 2(24)(iia) or s. 12. The requirement of s. 2(24)(iia) is that the voluntary contribution, when received, should contain a stipulation that it shall form part of corpus. The trustee cannot possibly influence the donor at that time, except that the trustee should act in accordance with the confidence reposed in him by the donor. Take an example, where A makes a voluntary contribution of Rs. 1 lakh to a trust created wholly for charitable or religious purposes and it has no other income. The object of the trust is to promote education or relief of poor. How can the trustee utilise this money without buying the books, if it is for the purpose of education, or necessary utensils or provisions, if it is for providing relief to the poor by way of providing food and if the money is spent out of the donation of Rs. 1 lakh for the purchase of books, utensils, etc. Would it mean that the sum of Rs. 1 lakh would become taxable as income of the trust? We do not think that this is the object of the legislation. In any case, this is contrary to what is recommended by the Direct Taxes Enquiry Committee, which was accepted by the Government. What is earmarked for corpus is not to be treated as income not because it is spent for the purpose of the trust but because that forms the fund of the trust. It is nowhere laid down that the funds of the trust should never be spent for the purposes of the trust

unless it is a direction of the donor that the fund shall be invested in such a way as to produce income and only the income shall be spent for the purposes of the trust. Even so, if a departure is made by the trustee in the implementation of this wish of the donor, the trustee is to be penalised and not the trust. Looked at from any angle, we find it difficult to subscribe to the view so forcefully put forward before us by the learned Departmental Representative and so explained in the orders of the authorities below. "

7.8 Relying on the above order of the Tribunal, a similar view was held in the following cases:

(i) Dy.DIT Vs Suman Ramesh Tulsiani Charitable Trust [ITA No 4683/Mum/20l0 & 4684/Mum/20l0 order dated 20th January, 2012]

(ii) Thermax Social Initiative Foundation Vs ITA (Exemptions), Ward-l, Pune [ITA No.1959/PUN/2016 order dated 22nd December, 2016] in para 12 has held that:

"In our considered view, voluntary contribution if Thermax Ltd towards corpus if the trust cannot be included in the income if the assessee in clear terms of section 11 (1)(d). Our view is fortified by Vishakapatnam ITAT judgment in the case if Nagarjuna Educational Society (supra) and by Delhi ITAT, in the case if Dharma Pratishthanam (supra)"

7.9 The assessee is also entitled to carry forward the deficit for the year and set off the same in the next year(s), in the

view of dictum laid down by the Hon'ble Apex Court in as held in the case of CIT (E) Vs. Subros Educational Society [(2018) 101 CCH 0264 ISCC]. Therefore, when carry forward of deficit is allowed, it implies that the said excess utilization has been spent out from sources other than the voluntary contributions received during the year and should be out of Corpus only. For the aforesaid reasons and the judicial precedents cited supra, we are of the view that the CIT order passed u/s 263 of the I.T.Act is without jurisdiction and we quash the same. It is ordered accordingly.

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

Order pronounced on this 04th day of February, 2019.

Sd/-	Sd/-
(Chandra Poojari)	**(George George K.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cochin ; Dated : 04th February, 2019.
Devdas*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT Thiruvananthapuram.
4. The Pr.CIT
5. DR, ITAT, Cochin
6. Guard file.

BY ORDER,

(Asstt. Registrar)
ITAT, Cochin