IN THE INCOME TAX APPELLATE TRIBUNAL
"B'' BENCH : BANGALORE

BEFORE SHRI B.R BASKARAN, ACCOUNTANT MEMBER AND
SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA Nos.947 & 948/Bang/2017
Assessment year : 2008-09

AbherajBaldota Foundation, Baldota Enclave, AbherajBaldota Road, Hospet – 583 203. PAN – AABTA 0454 B	Vs.	The Dy. Commissioner of Income-tax Circle-1, Bellary.
APPELLANT		RESPONDENT

Appellant by	:	Smt. Tanmayee Rajkumar, Advocate
Respondent by	:	Shri R.N Siddappaji, Addl. CIT (DR)

Date of hearing	:	22.07.2019
Date of Pronouncement	:	.07.2019

O R D E R

PerB.R Baskaran,Accountant Member

Both the appeals filed by the assessee are directed against the order passed by the Ld CIT(A),Gulbharga and both relate to asst. year 2008-09.

2. The appeal numbered as ITA No.947/Bang/2017 relates to asst. order passed u/s 143(3) of the Act and other appeal relates to rectification order passed u/s 154 of the Act. Since issue urged in both the appeals are arising out of common set of facts, they were heard together and are being disposed of by this common order, for the sake of convenience.

3. In both the appeals, the assessee is aggrieved by the decision of ld CIT(A) in confirming assessmentof unutilized amount out of accumulated income u/s 11(3) of the Act.

4. The facts relating tothe case are stated in brief:-

The assessee is a trust and it filed its return of income for the year under consideration declaring NIL income. The saidreturn of income was processed u/s 143(1) of the Act. Subsequently the AO noticed that the assessee has claimed deduction u/s 11(2) of the Act in the assessment year 2003-04 for accumulation ofincome generated during the period from 1/4/2002 to 31/3/2007 to the extent of Rs.100.00 lakhs, i.e., as per the resolution passed on 1/4/2002 the assessee had proposed to accumulate a sum of Rs.1 crore duringthe period from 1/4/2002 to 31/3/2007 for the purpose of construction and maintenance of community and cultural hall. Accordingly, it appears that the assessee has accumulated funds and claimed deduction u/s 11(2) of the Act over the period from 1.4.2002 to 31.3.2007. The AO noticed that the assessee has accumulated a sum of Rs.91.65 lakhs during the above said period. The AO noticed that theassessee has not utilized the accumulated income for the purpose for which it was accumulated as mentioned in Form No.10 before the expiry of 31/3/2007 or before 31.3.2008. The AO further noticed that the unutilized amount is liable to be taxed as income of the assessee u/s 11(3) of the Act during the year relevant to the asst. year 2008-09. Accordingly he re-opened the assessment of AY 2008-09 by issuing notice us/ 148 of the Act.

5. Before the AO, the assessee filed another Form No.10 on 04/12/2010 requesting for extension of time for application of unutilized amount by changing the "object of accumulation" in terms of sec. 11(3A) of the Act. In this connection, the assessee submitted that it had filed Form No.10 on 29-09-2008 proposing to accumulate a sum of Rs.10.00 crores from 1.4.2007 to 31.3.2012 for construction of "Baldota Kala Academy". Accordingly, it was prayed that the unutilized accumulated funds may be considered as accumulated as per the above said Form No.10 u/s 11(2) of the Act and accordingly, not to be assessed as income of the assessee for asst. year 2008-09. However, the AO did not accept the request of the assessee for the reason that the assessee has made this application u/s 11(3A) of the Act only during the course of re-assessment proceedings, that too, after detection by the department about violation of provisions of sec.11(2) of the Act by not applying funds.Accordingly, the AO added the unutilized amount of Rs.91.65 lakhs to the total income of the assessee.

6. It is pertinent to note that the assessee appears to have filed anapplicationin Form No.10 for asst. year 2008-09proposing to accumulatea sumof Rs.180.00 lakhs in terms of sec.11(2) of the Act. However, the income of the assessee for the period relating to asst. year 2008-09 was 148.60 lakhs and hence deduction u/s 11(2) appears to have been restricted to the extent of Rs.148.60 lakhs. We noticed that,in the reassessment proceedings, the AO added the impugnedamount of Rs.91.65 lakhs to the above said income of the assessee originally assessed and hence the income

before deduction u/s 11(2) of the Act for assessment year 2008-09 came to be worked out to Rs.240.26 lakhs. The AO, in the reassessment proceedings, inadvertently allowed deduction of Rs.180.00 lakhs u/s 11(2) of the Act against the above said income of Rs.240.26 lakhs and the same has resulted in net addition of Rs.60.26 lakhs only, asagainst the proposed addition of Rs.91.65 lakhs u/s 11(3) of the Act, i.e., deduction to the extent of Rs.31.40 lakhs (being the shortfall between proposed accumulation of Rs.180 lakhs and actual income of Rs.148.60 lakhs) came to be allowed u/s 11(2) of the Act against the addition of Rs.91.65 lakhs made by the AO u/s 11(3) of the Act. The AO took the view that the entire income of Rs.91.65 lakhs should be assessed u/s 11(3) of the Act. Hence the AO passed a rectification order u/s 154 of the Act without giving deduction u/s 11(2) of the Act against the income assessed u/s 11(3) of the Act.

7. The assessee filed appeals challenging the orders passed u/s 143(3)r.w.s. 147 of the Act as well as u/s 154 of the Act. The ld CIT(A) however aggreed with the view taken by the AO and accordingly dismissed both the appeals. Aggrieved by the orders so passed by Ld CIT(A), the assessee has filed these appeals before us.

8. The ld AR submitted that the provisions of sec. 11(2) allow accumulation of income for 5 years. However, in the instant case, the assessee had sought for accumulation for 4 years only. Accordingly, the Ld A.R submitted that the assessee should have been given extension of at least one year to utilize the accumulated

income towards the objects mentioned in Form No.10 of the Act.She submitted that the above said form was available before the AO before the completion of assessment proceedings and hence the same should have been considered by the AO as per the decision rendered by Hon'ble Supreme Court in the case of Nagpur Hotel Owners' Association (2001)(114 Taxman 225/ 247 ITR 201). Accordingly, the Ld A.R submitted that the AO was not justified in assessing the unutilized amount of accumulated funds in asst. year 2008-09. In the alternative, the ld ARsubmitted that the income so assessed forms part of current year's income and hence the AO should have allowed deduction u/s 11(2) of the Act by admitting fresh Form No.10 filed by the assessee before him seeking accumulation of Rs.10 crores with the objective of construction of Baldota Kala Academy. The ld AR placed her reliance on the decision rendered by Hon'ble Kolkatta High Court in the case of CIT Vs. Natwarlal Chowdhury Charity Trust (1990) 52 Taxmann330,wherein the deduction of 25% u/s 11(1)(a) was allowed against the income assessed u/s 11(3)(b) of the Act for failure of the assessee to invest or deposit the accumulated amount in accordance with sec. 11(5) of the Act. The ld AR submitted that, by applying the analogy of Hon'ble Calcutta High Court,the assessee should have been allowed deduction u/s 11(2) of the Act.

9. On the contrary, the ld DR placed his reliance on the decision rendered by Mumbai Benchof ITAT inthe case of The Trustees, the B.N.Gamadia Parsi Hunnarshalal (2002) 77 TTJ 274, wherein the Tribunal has expressed the view that deduction u/s 11(1) and 11(2) is allowed in respect of "income derived from property".

However, the provision of sec. 11(3) of the Act uses the expression 'income of such person' in contradistinction to the words 'income derived from property' used in other sub sections of section 11. It further held that the income so assessed u/s 11(3) of the Act is by virtue of deeming provisions of sec.11(3) of the Act. Accordingly, the Tribunal has expressed the view that the"deemed income" assessed u/s 11(3) of the Act should not be taken as part of "income derivedfromproperty" for the purpose of allowing benefit of accumulation u/s 11(2) of the Act. Accordingly, the ld DR submitted that the orders passed by ld CIT(A) do not call for any interference as the sameis in accordance with the view expressed by Mumbai Bench of ITAT in the above said case.

10. In the rejoinder, the ld AR submitted that the provisions of sec. 11(3) mandates assessment of income accumulated u/s 11(2) for failure to comply with three typesconditions. U/s 11(3)((a) of the Act,if the accumulated income is applied for purposes other than charitable orreligious purposesorceases to be accumulated are set apart from application thereto, thenthe same is assessable as income of the assessee u/s 11(3) of the Act. The ld AR submitted that, in this kind of situation, the accumulated income will not be in the possession ofassessee, as the same would have already been used for other purposes. Hence the income assessed u/s 11(3)(a) will not be available for further accumulation and yet the same is assessed as income of the assessee, meaning thereby, the deemed income concept would apply to this category of income assessed u/s 11(3) of the Act. On the contrary, in the instant case, the income of the assessee is assessed u/s 11(3)(c) of the Act for

failure of the assessee to utilize the amount for the purposes for which it was accumulated before the period mentioned in FromNo.10. Hence, the assessee is still in possession of accumulated income. Accordingly the Ld A.R contended that the income so assessed will not, in strict sense, fall under the category of "deemed income". Hence the accumulated income, assessed as income of the assessee, should be given the benefit of accumulation u/s 11(2) of the Act.

11. We have heard the rival contentions and perused the record. The Income-tax Act provides exemption to income derived from property held for charitable or religious purposes as per the provisions of sec. 11 to 13 of the Act. As per sec. 11(1) of the Act exemption is given to the extent the income is applied for charitable or religious purposes and further deduction is given for the income accumulated up to 15% of the income, meaning thereby, the charitable or religious trust is required to apply 85% of its income for the purposes mentioned in its objects. However, if the assessee is not able to apply 85% of the income for charitable or religious purposes, then another option is given under the provisions of sec. 11(2), whereby the assessee can apply to the assessing officer in prescribed form for accumulating income subject to the conditions prescribed in sec.11(2) of the Act. One of the conditions is that the accumulation can be done for a period not exceeding 5 years. If the assessee does not apply the amount so accumulated u/s 11(2) within the period originally mentioned before the AO at the time of accumulation of income, then the same is deemed to be income of the assessee u/s 11(3)(c) of the Act of the previous year immediately

following the expiry of the period of accumulation originally intimated to the AO.

12. In the instant case, the assessee had proposed to accumulate a sum of Rs.1.00 crore during the period from 1/4/2002 to 31/3/2007 as per the resolution passed by it on 1/4/2002, for the purposes of construction and maintenance of community and cultural hall. Accordingly, the assessee was given deduction u/s 11(2) of the Act for the income accumulated during the period from 1.4.2002 to 31.3.2007. The aggregate amount so accumulated was Rs.91.65 lakhs. Admittedly the assessee did not utilize the amounts so accumulated for the above said purpose and hence, as per the provisions of sec. 11(3)(c) of the Act, the same is liable to the assessed as income of the assessee for asst. year 2008-09. Admittedly the assessee did not offer the amount voluntarily while filing return of income for asst. year 2008-09 and hence the AO was constrained to reopen the assessment u/s 147 of the Act.

13. We notice that the assessee is exercising the option of accumulation granted u/s 11(2) of the Act every year. Accordingly the assessee has put a plea before the AO that the income so assessed u/s 11(3)(c) of the Act should also be allowed to be accumulated u/s 11(2) of the Act.

14. We noticed that the Mumbai Bench of the Tribunal has considered an identical issue in the case of The Trustees, the B.N. Gamadia Parsi Hunnarshala (Supra) and has taken the view that the benefit of accumulation shall not be available to income

assessed u/s 11(3) of the Act. For the sake of convenience we extract below the relevant discussions made by the Mumbai Bench in the above said case.

> *"7. We have carefully considered the rival submissions and perused the record. We are unable to persuade ourselves to agree with the view taken by the Hon'ble Calcutta High Court (cited supra). A careful perusal of the language employed in section 11 of the Act makes it crystal clear that exemption is available only on the 'income (within the meaning of section 11 and not on the 'deemed income'). Consequently, the assessee cannot accumulate deemed income either under section 11(1)(a) or 11(2) of the Act. Section. 11(l)(a) reads as under:*
>
> *"Sec. 11(1): Subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income*
> *(a) income derived from property held under trust wholly for charitable or religious purposes, to the extent to which such income is applied to such purposes in India; and, where any such income is accumulated or set apart for application to such purposes in India, to the extent to which the income so accumulated or set apart is not in excess of twenty-five per cent of the income from such property."*
>
> *Sec. 11(1)(d) speaks of income in the form of voluntary contributions.*
>
> *Explanation (1) to section 11 reads as under:*
>
> *"For the purposes of clause (a) and (b)*
> *(1) in computing the twenty-five per cent of the income which may be accumulated or set apart, any such voluntary contributions as are referred to in section 12 shall be deemed to be part of the income."*
> *Section 12 in turn says that any voluntary contributions received by a trust shall for the purposes of section 11 be deemed to be income derived from property. Again*

section 11(2) speaks of the 'income referred to in clause (a) or clause (b) of sub-section (1) r/w the Explanation to that subsection'. ***Thus, section 11(2) also deals with the income derived from property held under trust.*** *Sub-clause of 11(2) permits the assessee to accumulate some amount up to a period not exceeding 10 years. Section 11(3) of the Act deals with the consequences if the amount accumulated is not utilised for the specified purposes.*

Section 11(3) is extracted here for immediate reference

"Section 11(3): Any income referred to in sub-section (2) which—
(a) is applied to purposes other than charitable or religious purposes as aforesaid or ceases to be accumulated or set apart for application thereto, or
(b) ceases to remain invested or deposited in any of the forms or modes specified in sub-section (5), or
(c) is not utilised for the purposes for which it is so accumulated or set apart during the period referred to in clause (a) of that sub-section or in the year immediately following the expiry thereof,
shall be deemed to be the income of such person of the previous year in which it is so applied or ceases to be so accumulated or set apart or ceases to remain so invested or deposited or, as the case may be, of the previous year immediately following the expiry of the period aforesaid.'
[underline, italicised in print, is ours]

8. It may be noted that wherever the legislature intended to confer any benefit to the assessee under section 11 of the Act, the benefit was restricted to the 'income derived from property' as could be seen from section 11(1)(a), (b) and (c) of the Act. Section 11(l)(d) uses the expression 'income' in the form of voluntary contributions. However, specific exemption was granted if such income is received with a specific direction that they shall form part of the corpus of the trust. In other words, voluntary contributions for the purposes of incurring day-to-day expenditure of the trust would not fall under sub-clause (d). Section 12 of the Act governs such voluntary contributions wherein it was stated that such

contributions would be deemed to be income derived from property held under trust. Thus, income from voluntary contributions are deemed as income specified under section 11 (1)(a), (b) and (c) of the Act. ***The intention of the legislature, as could be seen from a reading of section 11 of the Act, is to allow a charitable trust to accumulate a portion of income derived from property and not other incomes.*** *However, by virtue of section 12, voluntary contributions are deemed to be income from property and, therefore, Explanation (1) was added to section 11(1) of the Act which specified that in computing twenty-five per cent of the income which may be accumulated, voluntary contributions should be taken into account as they are deemed to be part of the income.* ***Thus, it can be seen that wherever the legislature intended to include deemed income as part of the income 'derived from property' it was spelt out clearly.*** *However, section 11(3) of the Act uses the expression 'income of such person' in contradistinction to the words 'income derived from property' used in other sub-sections of section 11. Thus, it cannot be said that deemed income under section 11(3) of the Act should be taken as part the income derived from property for the purposes of allowing the benefit of accumulation.*

9. The matter may also be looked from another angle. The assessee would be allowed to accumulate income if there is real income. Something which is not in the possession of the assessee cannot be accumulated or utilised at a later date. Under section 11(3) the sum which is applied to the purposes other than the charitable or religious purposes would also be treated as deemed income of the assessee though the accumulated income is not available with the assessee because it was applied for a different purpose. Reversing to section 11(1)(a) and 11(2) of the Act, 25 per cent of the income can be accumulated or set apart for an application to some specified purposes in India which means such amount should be available with the assessee for application. In the case of deemed income where the amount is already spent by an assessee (for the purposes other than charitable purposes) it cannot be said that the assessee accumulates with an intention to apply it for a rightful

purpose. Thus, even on the limited count the assessee cannot claim the benefit of accumulation because the accumulation is allowed only if the intention of the assessee is to apply the same for a specific purpose. Thus, assessee cannot claim the benefit of accumulation with respect to the deemed income. In the case of Director of Income-tax v. G. Shewnarain Tantia [1993] 199 ITR 215 (Cal.), the Hon'ble High Court of Calcutta analysed the meaning of the word 'income' used in section 11 of the Act. The Hon'ble Calcutta High Court observed that the 'income' contemplated by the provisions of section 11 is the real income and not income as assessed or assessable. They have also followed the earlier decision of the same High Court in the case of CIT v. Jayshree Charity Trust [1986] 159 ITR 280 (Cal.) wherein the Hon'ble Court observed that what is deemed to be income can neither be spent nor accumulated for charitable purposes and the word 'application' or accumulation' can only be of real income which has actually been received by assessee. Their Lordships further observed that the deeming provisions should not be construed in a way to frustrate the object of section 11, the objects of section 11 being application of income received by it for charitable purposes.

10. The Hon'ble Calcutta High Court has also referred to the decision of Hon'ble Madras High Court in the case of CIT v. Rao Bahadur Calavala Cunnan Chelly Charities [1982] 135 TTR 485 (Mad.) and agreed with the view expressed by the Hon'ble Madras High Court: It may be noted that the Hon'ble Madras High Court observed that in the context of section 11(1)(a) of the Act "income' means the income which is available in the hands of the assessee because accumulation of 25 per cent is possible only from the income available with the assessee and not the deemed income. It could thus be seen that deemed income under section 11(3) of the Act is different from the income contemplated under section 1 l(1)(a) and 11(2) of the Act and, therefore, the assessee is not entitled to claim the benefit of accumulation out of such deemed income.

11. In the case of CIT v. Natwarlal Chowdhury (cited supra), the Hon'ble High Court, with due respect, has not

analysed this section in the correct perspective. In our humble opinion the different expressions i.e., 'income derived from property' and 'income', used by the legislation under sections 11 and 12 of the Act missed the attention of their Lordships or the impact of the difference in the expressions were not brought to their Lordships notice. In fact, a different view was expressed by the Hon'ble Calcutta High Court in [1993] 199 ITR 215 (Cal.) (supra) in a later decision. Under these circumstances, and in the light of the decision of the Hon'ble Bombay High Court in the case of CIT v. Thane Elec. Supply Co. [1994] 206 ITR 727 (Bom.) at 738 we hold that the assessee is not entitled to the benefit of accumulation of deemed income which is taxable under section 11(3) of the Act.

12. The assessee relied upon certain decisions in support of its contention that a legal fiction has to be carried to its logical conclusion. We fully agree with this proposition that a legal fiction no doubt has to be carried to its logical conclusion but at the same time it cannot be stretched to an extent that frustrates the object of the particular provision. In the instant case, we have highlighted one possibility where an assessee might have applied the income for the purposes other than charitable purposes and thus there is no money available with the assessee in which event it cannot be Raid that the assessee can accumulate deemed income for some specified purposes. Such an interpretation would lead to anomalous situation which is not contemplated under section 11(1)(a) and 11(2) of the Act because an assessee is entitled to exemption only on such income which is either applied for charitable purposes or intended to be applied for charitable purposes and not otherwise.

13. The circular issued by the CBDT (supra) is in consonance with the intention of the legislature and also the plain meaning that can be ascribed to section 11 of the Act. Under these circumstances, we do not find any infirmity in the orders of tax authorities. We, therefore, dismiss the appeal filed by the assessee."

15. We notice that the Mumbai Bench of ITAT has drawn a distinction between the expression 'income derived from property' and 'income of such person' as used in sec. 11(1) and 11(3) of the Act respectively. It has also brought out that the provisions of sec.11(2) allows accumulation of income derived from property only. Admittedly the income assessed during the year under consideration does not falls under the category of 'income derived from property'. Under the deeming provisions of sec. 11(3) of the Act, it falls under the category of "income of such person".

16. The Ld A.R placed her reliance on the decision rendered by Hon'ble Calcutta High Court in the case of Natwarlal Chouwdhury Charitable Trust (supra). It can be noticed that the Mumbai bench of Tribunal has considered the above said decision rendered by Hon'ble Calcutta High Court and has taken the view that the same cannot be followed for the reasons discussed in the order, particularly in view of the fact that the difference between the expressions "income derived from property held under the trust" and "income" were not brought to the notice of Lordships. Since the Mumbai bench of Tribunal has rendered its decision by critically analyzing the provisions of sec. 11(1) to 11(3) of the Act and has passed a reasoned order, we are inclined to follow the same. Accordingly we are of the view that the decision taken by the Mumbai Bench in the above said case can be applied to the case on hand.

17. The ld AR submitted that the Mumbai bench has considered the possibility of non-availability of funds, if the accumulated

income is used for other purposes. Even, in the absence of availability of funds, the funds so diverted shall be assessed as deemed income of the assessee. Accordingly it held that the benefit of accumulation of income shall not be available to deemed income, since there will not be any fund available for such accumulation. The Ld A.R submitted that the above said observations made by Mumbai bench of ITAT would apply only to income assessed u/s 11(3)(a) of the Act. In the instant case, income is assessed u/s 11(3)(c) of the Act, since the assessee did not apply the accumulated income within the period of accumulation. Accordingly she submitted that the assessee is in possession of accumulated income and hence the same should be allowed to be accumulated. However we noticed that the Mumbai Bench of Tribunal has expressed the view as an alternative view. In the first instance, it has held that the benefit of accumulation shall be available only to the "income derived from the property" and not to "deemed income". Since the income assessed u/s 11(3) of the Act cannot be considered to be an income derived from the property, the above said argument of the assessee shall fail. In any case if the argument of the assessee is accepted as correct for a moment then the provisions of sec. 11(3)(c) would be renders otiose, since the assessee would be filing application for accumulation u/s 11(2) of the Act after every expiry of the period of accumulation without applying it for stated objectives. This would result in non-taxing of income perpetually and it would defy the intention of the legislature in introducing sec. 11(3) of the Act.

18. Accordingly we are of the view that the assessee shall not be eligible to accumulate the income assessed as deemed income u/s 11(3) of the Act. Accordingly, we are of the view that the Ld CIT(A) was justified in confirming the action of the assessing officer in assessing entire amount of Rs.91.65 lakhs as income of the assessee without granting any benefit of accumulation. Accordingly we confirm the order passed by ld CIT(A) in both the appeals.

19. In the result, both the appeals of the assessee are dismissed.

Order pronounced in the Open Court on **26th July, 2019.**

Sd/-	**Sd/-**
(Beena Pillai)	**(B.R Baskaran)**
Judicial Member	**Accountant Member**

Bangalore,
Dated, 26th July, 2019.
/ vms /

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.