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

BEFORE SHRI M. BALAGANESH, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. Nos.1857 to 1859/Mum/2019

(**निर्धारण वर्ष** / Assessment Years: 2011-12, 2013-14 & 2014-15)

Indian Cancer Society 74 Jerbai Wadia Road, Parel, Mumbai.	**बनाम**/ Vs.	Asstt. Director of Income Tax (Exemption)-II(1) 5th Floor, Piramal Chamber, Lalbaug, Mumbai.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAATI0001K		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri Percy Pardiwala/Sukhsagar Syal (AR)
Revenue by:	Shri Mallikarjun Utture (DR)

सुनवाई की तारीख / Date of Hearing: 05/08/2019

घोषणा की तारीख /Date of Pronouncement: 07/08/2019

आदेश / O R D E R

PER AMARJIT SINGH (JM):

The above mentioned appeals have been filed by the assessee against the different order passed by the Commissioner of Income Tax (Appeals)-3, Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Ys. 2011-12, 2013-14 & 2014-15. Since the common question of law and facts are involved in the present appeal, therefore, all the appeals are taken up together for adjudication.

ITA. NO.1857/M/2019

2. The present appeal has been filed by the assessee against the order dated 25.01.2019 passed by the Commissioner of Income Tax (Appeals)-3,

Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the A.Y. 2011-12.

3. The assessee has raised the following grounds: -

> " On the facts and circumstances of the case and in law, the CIT(A) has erred in upholding the action of the AO in assessing the difference between the actual rent received by the appellant and the rent which as per the AO should have been received as 'deemed rental income'.
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> 2. On facts and circumstances of the case and in law, the CIT(A) failed to appreciate that there is no provision in the Act, which allows the AO to substitute the actual rent received with a notional rent, which according to the AO ought to have been received.
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> 3. On the facts and circumstances of the case and in law, the CIT(A) erred in pass a nonspeaking order, whereby it upheld the order of the AO without giving any reasons for the same.
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> The Appellant craves leave to add, to amend, to alter, to withdraw, to modify and/or to substitute any or all the foregoing grounds of appeal and to submit such statements, documents and papers as may be considered necessary either at or before the appeal hearing."

4. The brief facts of the case are that the assessee filed its return of income on 30.09.2011 along with the income & Expenditure Account, Balance Sheet and Audit Report in Form No.10B declaring total income to the tune of Rs. Nil. The assessee is a registered Charitable Organization with DIT(Exemption), Mumbai u/s 12A under Vide Registration No. INS/I(a)/16/74-75 dated 24.08.1974. Accordingly, the assessee claimed exemption u/s 11 of the I.T. Act. The case was selected for scrutiny. Notices, u/s 143(2) & 142(1) of the Act were issued and served upon the assessee. During the year under consideration, the assessee received the rent of Rs.32,98,954/- on account of hiring of the building of the Indian Cancer Society situated at Maharashi Karve Road to various doctors and other medical professionals. The assessee was receiving very low rent from the tenants. The AO treated the notional rent prevailing in the area and

assessed rent@ of Rs.134 per sq.ft. per month which worked out to the tune of Rs.40,00,838/-(Rs.134 X 29857 sq. ft.). The assessee had assessed the rent to the tune of Rs.2,08,999/- (Rs.7 X 29,857 sq.ft. =Rs.2,08,999/-) Differential rent was assessed in sum of Rs.4,55,02,068/- and added to the income of the assessee. The total income of the assessee was assessed to the tune of Rs.5,16,28,330/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who confirmed the addition, therefore, the assessee has filed the present appeal before us.

ISSUE Nos. 1 & 2

5. Both the issues are in connection with the confirmation of the addition of difference between the actual rent received by the appellant and the rent which should have been received by the assessee as 'deemed rental income'. It is argued by the Ld. Representative of the assessee that the assessee has applied the income derived from property held under trust as per the objects of the trust but the AO applied the normal provisions of Income-tax Act and computed income u/s 14 of the I.T. Act, 1961 as stated in Chapter IV which has no relevance in computing the income of the assessee u/s 11 of the I.T. Act, 1961 as stated in Chapter III of the Income Tax Act, 1961, therefore, the assessing deemed rental income @ of Rs.134 per sq. ft per month is not justifiable, hence, actual rent is liable to be taken into consideration in accordance with law. It is also argued that the rent has been fixed at Rs.7 per sq. ft per month which was approved by the Hon'ble High Court and also by Charity Commissioner in 2003 and finally in 2003 by Collector, therefore, the assessee is unable to increase the rent unilaterally. Collector is the owner of the land and has given it to the appellant at Rs.1 per year along with the annual license fee of Rs.3,25,000/- based on the recovery of Rs.7 as rent which is not veriable at the instance of

the assessee, therefore, the assessing the deemed (notional rent) by AO which has been confirmed by the CIT(A) is not justifiable, hence, the finding of the CIT(A) is liable to be set aside in the interest of justice and in support of these contention, the Ld. Representative of the assessee has placed reliance upon the **Circular No.5-P(LXX-6) of 1968 dated 19.06.1968** and the decision of the Hon'ble Gujarat High Court in case of **CIT Vs. Ganga Charity Trust Fund (1986) 29 Taxman 413 (Guj).** It is specifically argued that the assessee was not entitled to claim the standard deduction in view of the provisions u/s 24(a) of the Act because the assessee is only entitled to claim the expenses which has actually been incurred, therefore, assessing deemed rent is not justifiable in view of the decision of Hon'ble ITAT Mumbai Bench 'B' in case of titled as **ACIT, Central Circle Vs. Nandlal Tolani Charitable Trust (2014) 42 taxmann.com 154 (Mum).** However, on the other hand, the Ld. Representative of the Revenue has strongly relied upon the order passed by the CIT(A) in question. It is not in dispute that the assessee is a Charitable Trust and is claiming exemption u/s 11(1)(a) of the Act. The assessee claimed actual expenses incurred to earn the rental income. However, the assessee is not liable to be claim standard deduction u/s 24(a) of the Act. In the case of trust the actual rent and the actual expenses is liable to be consideration for the allowance of the claim u/s 11(1)(a) of the Act. In this regard, we find support in the decision of the Hon'ble ITAT in case of **ACIT, Central Circle Vs. Nandlal Tolani Charitable Trust (2014) 42 taxmann.com 154 (Mum).** The Hon'ble Gujarat High Court has also given the finding in the case of **CIT Vs. Ganga Charity Trust Fund (1986) 29 Taxman 413 (Guj)** which is reproduced as under:-

> "*There can be no actual application or setting apart or accumulation of income derived from trust property unless it is actually available for*

application or accumulation in the hands of the trustees. Where an assessee is following the mercantile system of accounting. income oat accrual basis may be reflected in the account books but such notional income is incapable of actual application or accumulation under section 11(1)(a) and the assessee-trust is called upon to pay income-tax for want of such application or accumulation, it would result it, rendering the benevolent provision fund in section 11(1)(a) nugatory. The Tribunal was, therefore, right in coming to the conclusion that the income' derived from trees) property he determined on commercial principles and in doing to all outgoings, including outgoing by wav/ of income-tax paid by the assessee-trust must be deducted and it was only from the surplus income in the hands of the trustees that the question of application or accumulation or accumulation or setting apart of income could arise, Regarding the change and the system of accounting. the assessee -trust experienced difficulty in the assessment year 1971-72 because of non-receipt of interest from the parties with which it had placed its funds by way of deposits and deposits and so it decided to switch over to cash switch over to cash system of accounting. So that it might not be required to pay income-tax on notional income. There is nothing in the Act which precludes the assessee who bona fide desires to switch over to another system of accounting doing so. There was no finding of fact that the switch over to that cash system of accounting in the previous year relevant to the assessment year 1972-73 was no! bona fide. Besides, it was not shown by department that the change lacked durability or regularity and was merely a stop-gap arrangement to avoid payment of tax. In such a situation one jailed to understand why a bona Mc assessee should be precluded from switching over to another system of accounting which he found convenient rind whit-h would reflect his real income. Circumstances had compelled the trustees to switch over to cash system of accounting which was the only course open to a prudent trustee for preserving the property of the trust. Thus, the assessee was entitled to switch over to the cash method of accounting."

6. The Hon'ble High Court has interpreted the provisions u/s 11(1)(a) of the Act and also interpreted the application of income held under trust for Charitable or religious purpose which is described as under: -

"**5.** Section 11(1)(a) with which we are concerned reads as under:

"(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;"
>
> On a plain reading of this sub-section it becomes clear that the income referred to in clause (a) is not liable to be added to the total income of the previous year of the assessee in receipt of the income to the extent to which such income is applied for the purposes of the trust in India and, where such income is accumulated or set apart for application to such purposes in India, to the extent to which the income is accumulated or set apart is not in excess of the income from such property. It is, therefore, clear that the income derived from property-must be such as can be applied for the purposes of the trust or accumulated or set apart for such application at a future date not exceeding 25 per cent of the income from such property. The word 'applied' was construed by the Supreme Court in H.E.H. Nizam's Religious Endowment Trust v. CIT [1966] 59 ITR 582 and the Supreme Court stated that it envisaged actual application of the income for the purposes of the trust. Similarly, the word 'accumulated' meant the income so set apart during the year for future spending on such purpose. There can be no actual application or setting apart or accumulation of income derived from trust property unless it is actually available for application or accumulation in the hands of the trustees. Where an assessee is following the mercantile system of accounting income on accrual basis may be reflected in the account books, but such notional income is incapable of actual application or accumulation under section 11(1)(a) and if the assessee-trust is called upon to pay income-tax for want of such application or accumulation, it would result in tendering the benevolent provision found in clause (a) of section 11(1) nugatory. Therefore, on plain reading of section 11(1)(a) the view taken by the Tribunal commends to us."

7 The Hon'ble High Court of Calcutta in case of titled as **CIT Vs. Jayashree Charity Trust (1986) 159 ITR 280 (Cal)** has also specifically held as under:-

> *"The words of a statute must be construed so as to give a sensible meaning to them. The words ought to be construed utres magis valeat quam pereat. The entire object of section 11 is to grant immunity to the income of a charitable trust from income-tax. The immunity, however, is confined "to the extent to which such income is applied to such purposes in India". The exemption will be denied if the income is not actually applied for charitable purpose. Only 25% of the income or Rs. 10,000, whichever is lower, can be accumulated for application to charitable purpose. If a portion of the income of a charitable trust is not applied for charitable purposes or is accumulated beyond the permitted limit, that portion will not qualify for the immunity from taxation under section 11. This exclusion from the immunity must be confined to the real income of*

the trust. The amount of income which is taken away by deduction at source under section 194 is not available to the trust for application to charitable purposes. Section 198 provides that the amounts deducted by way of income-tax shall be deemed to be "income received". What is deemed to be income can neither be spent nor accumulated for charitable purpose. "Application" or "accumulation" can only be of real income which has actually been received by an assessee. The deeming provisions of section 198 should not be construed in a way to frustrate the object of section 11. The entire income that has been actually received by the assessee has been applied for charitable purpose. The immunity from taxation that has been granted by section 11 cannot be denied to the assessee on the ground that the notional income remains unspent or unaccumulated for the purpose of charity. This view is supported by Circular No. 5-P (LXX-6) dated 19-5-1968 issued by CBDT's. The said circular made it clear that the word 'income' in section 11(1)(a) must be understood in a commercial sense. In the instant case, the entire income of the trust, in the commercial sense, had been spent for the purpose of charity. There was no reason to deny the benefit of exemption granted by section 11 to that portion of the income which had been taken away by deduction at source on the ground that the amount had not been spent or accumulated for the purpose of charity."

8. On appraisal of the above mentioned decisions, we find that the provisions u/s 11(1)(a) of the Act speaks about the actual receipt of the income and actual expenses incurred for that and deemed income is not to be assessed. In the present case, the factual situation is not different such as land has been allotted by the Collector vide letter dated 24.07.1979 and the valuation has been done in view of the valuation report dated 27.01.1986 in which the valuation assessed of the carpet area which was accepted by Charity Commissioner as per the clause-8 of the order lies at page no 33 to 50 of the paper book. The consent terms has been executed before the Hon'ble High Court of Bombay in Writ Petition no. 3040 of 1988 which lies at page no. 26 to 32 of the paper book. Moreover, the notification dated 11.06.1988 is on the file which lies at page no. 25 of the paper book speaks about this fact that the provisions of Part-II of the Act Bombay Rents, Hotel and Lodging House Rates Control, Act, 1947 is not applicable to the case of the assessee trust, therefore, in the said circumstances and in view of

above discussed law, no deemed rent is liable to be assessed in the case of the assessee, hence, the finding of the CIT(A) is not justifiable, hence, is hereby ordered to be set aside. Accordingly, all the issues are decided in favour of the assessee against the revenue.

ITA. Nos. 1858/M/2019 & 1859/M/2019

9. The facts of the present case are quite similar to the fact of the case as narrated above while deciding the ITA. No.1857/M/2019, therefore, there is no need to repeat the same. However, the figure is different. The matter of controversy is also the same. The finding given above in ITA. No.1857/M/2019 is quite applicable to the facts of the present case as mutatis mutandis. Accordingly, we allowed the claim of the assessee.

10. In the result, appeals filed by the Assessee are hereby ordered to be allowed**.**

Order pronounced in the open court on 07/08/2019

Sd/-	**Sd/-**
(M. BALAGANESH)	**(AMARJIT SINGH)**
लेखा सदस्य **/ ACCOUNTANT MEMBER**	**न्यायिक सदस्य/JUDICIAL MEMBER**

मुंबई Mumbai दिनांक Dated : 07/08/2019
Vijay/ Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार /(Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**