

**IN THE INCOME TAX APPELLATE TRIBUNAL
“D” Bench, Mumbai**

**Before Shri S. Rifaur Rahman, Accountant Member
and Shri Ravish Sood, Judicial Member**

**ITA Nos.5596 & 5018/Mum/2017
(Assessment Years: 2009-10 & 2010-11)**

Maharashtra Housing & Area
Development Authority,
Office of the Finance Controller,
MHADA, 4th Floor, Griha Nirman
Bhavan, Kala Nagar, Bandra (E),
Mumbai – 400 051

Asst. Commissioner of Income Tax
(Exemption)-2(1),
Piramal Chambers, Lalbaug,
Mumbai – 400 012
Vs.

PAN – AAAJM0344H

(Appellant)

(Respondent)

Appellant by: Shri Nishant Thakkar &
Ms. Jasmin Amalsadvala, A.Rs
Respondent by: Shri S.C. Tiwari, D.R
Date of Hearing: 17.10.2019
Date of Pronouncement: 24.10.2019

ORDER

PER RAVISH SOOD, JM

The present appeals filed by the assessee are directed against the respective orders passed by the CIT(A)-1, Mumbai, dated 08.05.2017 and 28.06.2017, for A.Y 2009-10 and A.Y 2010-11, which in turn arises from the respective orders passed by the A.O under Sec.271(1)(c), dated 25.03.2015 for A.Y. 2010-11 and order under Sec.143(3) r.w.s 263, dated 20.03.2015 for A.Y. 2009-10. As the issues involved in the captioned appeals are more or less interlinked, therefore, the same are being taken up and disposed off together by way of a consolidated order. We shall first advert to the appeal of the assessee for A.Y. 2009-10, which in turn arises from the order passed by the CIT(A), affirming the assessment framed by the A.O

under Sec.143(3) r.w.s 263 of the Income-tax Act, 1961 (for short 'Act'). The assessee has assailed the impugned order by raising the following grounds of appeal before us:

“1.0 Denial of exemption under s.11

The learned CIT(A) erred on facts and circumstances of the case and in law in upholding the Assessment Order appealed against denying exemption under s.11 of the Act.

Relief claimed: The appellant be granted exemption under s.11 of the Act.

2.0 Engaged in Business:

The learned CIT(A) erred on facts and in law in confirming the assessment order appealed against insofar as the assessment order holds that Proviso to s.2(15) of the Act applies to the appellant disentitling the appellant to the exemption under s.11 of the Act, without appreciating that the activities of the appellant are not in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business.

Relief claimed: The appellant be declared one to which Proviso to s.2(15) of the Act do not apply.

3.0 Excess Capitalization of Interest - Rs.8,55,43,351/-

The learned CIT(A) erred on facts of the case in confirming addition of Rs. 8,55,43,351/- being excess capitalization of interest which was offered as income, and the action of the AO in making separate addition amounted to double addition.

Relief claimed: The addition of Rs.8,55,43,35 1/= be directed to be deleted.

4.0 Excess Capitalization of Administrative Expenses- Rs.5,78,27,457/-

The learned CIT(A) erred on facts of the case in confirming addition of Rs.5,78,27,457/- being excess capitalization of Administrative expense which was offered as income, and the action of the AO in making separate addition amounted to double addition.

Relief claimed: The addition of Rs.5,78,27,457/- be directed to be deleted.

5.0 Additions based on Notes towards subsidies received of Rs. 3,75,43,000:

The learned CIT(A) erred on facts of the case in confirming addition of Rs.3,75,43,000/- without appreciating the fact that the subsidy was received in a previous year prior to previous year relevant to A.Y.2003-04.

Relief claimed: The addition of Rs.3,75,43,000/- be directed to be deleted

6.0 Additions based on Notes towards Premium for Lease of Plot amounting to Rs.24,45 524/-

The learned CIT(A) erred on facts of the case in confirming addition of Rs.24,45,524/- without appreciating the fact that the receipts was pertaining to previous year relevant to A.Y.2006-07.

Relief claimed: The addition of Rs. 24.45,524/- be directed to be deleted.

7.0 Additions based on Notes towards non materialization of Liability amounting to Rs. 6,69,945/-

The learned CIT(A) erred on facts of the case in confirming addition of Rs.6,69,945/- without appreciating the fact that same was a provision entry not pertaining to previous year relevant to A.Y.2009-10.

Relief claimed: The addition of Rs. 6,69,945/-be directed to be deleted.

8.0. Additions based on Notes towards Short Term Deposit amounting to Rs. (-) 1,61,94,124/-

The learned CIT(A) erred on facts of the case in confirming addition of Rs.1,61,94,124/- without appreciating the fact that same represented unreconciled Short Term Deposit balance carried forward from previous year prior to previous year relevant to A.Y.2003-04.

Relief claimed: The addition of Rs.1,61,94,124/- be directed to be deleted.

9.0 Levy of Interest u/s 234B

The learned CIT(A) erred in law and on facts in confirming the dismissing Ground No.15 of the appeal before him, challenging the charge of interest, on the ground that it was consequential, without appreciating that the appellant was denying the very application of s.234B of the Act to it, for the fact that the appellant was not under obligation to pay advance tax.

Relief claimed: Interest u/s 234B be directed to be deleted.

The appellant craves leave to add to, alter, amend or modify the ground(s) of appeal.”

2. Briefly stated, the assessee which is a local authority created by the Government of Maharashtra is registered as a charitable organisation with the Director of Income-tax (Exemption), Mumbai under Sec.12A of the Act. Original assessment was framed by the A.O under Sec.143(3), vide his order dated 27.12.2011 and the income of the assessee was assessed at Rs.528,65,24,460/-. Subsequently, the assessment order passed under Sec.143(3), dated 27.11.2011 was ‘set aside’ by the Director of Income-tax (Exemption), vide his order passed under Sec.263, dated 28.03.2015, with the following directions:

- “6. It is also seen on perusal of the order u/s. 143(3) of the Income Tax Act, 1961 passed by the A.O that the above proviso to provision of Sec.2(15) of the Income Tax Act, 1961 was not considered while framing the said order u/s143(3) of the Income Tax Act,1961.
7. In view of the above, I am of the opinion that the order for A.Y. 2009-10 passed by the A.O in this case is erroneous and prejudicial to the interest of revenue and therefore is set aside to be done afresh after considering the proviso to Sec.2(15) of the Income Tax Act, 1961.”

Observing, that the A.O while framing the assessment under Sec.143(3), dated 27.11.2011 had failed to verify the applicability of the *first proviso* to Sec.2(15) of the Act, the Director of Income-tax (Exemption), was of the view, that the assessment framed by him was erroneous insofar it was prejudicial to the interest of the revenue. Accordingly, on the basis of his aforesaid conviction the Director of Income-tax (Exemption), had vide his order passed under Sec.263, dated 28.03.2014 ‘set aside’ the assessment order passed by the A.O under Sec.143(3), dated 27.12.2011, and directed him to frame a fresh assessment after considering the *proviso* to Sec.2(15) of the Act.

3. In order to give effect to the directions given by the Director of Income-tax (Exemption), Mumbai, in his order passed u/s 263, the A.O issued a notice under Sec.143(2), dated 01.04.2014 to the assessee. After necessary deliberations, the A.O was of the view that as the case of the assessee was hit by the post amended Sec.2(15) of the Act, therefore, having lost its character as that of being an institution existing for a “charitable purpose”, the assessee would not be entitled for exemption under Sec.11 of the Act. Accordingly, the A.O after

declining to allow the assessee's claim for exemption under Sec.11, therein brought its entire income amounting to Rs.408,60,37,166/- to tax. Apart there from, the A.O in the absence of a proper explanation of the assessee included the difference in the amount of the interest capitalised and interest paid amounting to Rs.8,55,43,351/- within the sweep of the income of the assessee for the year under consideration. Also, certain other additions aggregating to an amount of Rs.111,49,43,946/- pertaining to issues which the assessee could not reconcile/substantiate during the course of the assessment proceedings was made in its hands. On the basis of his aforesaid deliberations, the A.O vide his order passed under Sec.143(3) r.w.s 263, dated 20.03.2015 assessed the income at Rs.528,65,24,460/-.

4. Aggrieved, the assessee assailed the assessment framed by the A.O before the CIT(A). However, the CIT(A) not finding favour with the contentions advanced by the assessee, dismissed the appeal.

5. The assessee being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. At the very outset of the hearing of the appeal, it was submitted by the Id. Authorized Representative (for short 'A.R') for the assessee, that the order passed by the Director of Income Tax (Exemption), Mumbai, under Sec.263, dated 28.03.2014 had been quashed by the Tribunal, vide its order passed in **Maharashtra Housing & Area Development Authority, Mumbai Vs. Director of Income Tax (Exemption), Mumbai** in **ITA No.2490/Mum/2014, dated 20.03.2018**. (copy placed on record). It was submitted by the Id. A.R, that the Tribunal taking cognizance of the fact that as the assessed income as per the original assessment dated 27.12.2011 vis-a-vis assessed income as per the order passed under Sec.143(3) r.w.s 263, had remained the same at Rs.528,65,24,460/-, therefore, no prejudice was caused to the revenue in the backdrop of the 'Original' assessment framed in its hands. The Id. A.R drawing our attention to the observations of the Tribunal submitted, that as the assessment framed by the A.O under Sec.143(3), dated 27.12.2011 was not found to be prejudicial to the interest of the revenue, therefore, the Tribunal, for the said reason, had quashed the order passed by the Director of Income Tax (Exemption) under Sec.263, dated 28.03.2014. On the basis of the aforesaid facts, it was the claim of the Id. A.R, that now when the order passed by the Director of Income Tax (Exemption), dated 28.03.2014 under Sec. 263 in itself has been quashed by the Tribunal, therefore, in the absence of the said very

foundation, the consequential assessment framed by the A.O under Sec. 143(3) r.w.s 263, dated 20.03.2015 could not be sustained and will have to meet the same fate.

6. Per contra, the Id. Departmental Representative (for short 'D.R') did not controvert the aforesaid factual averments raised by the counsel for the assessee.

7. We have heard the authorised representatives for both the parties, perused the orders of the lower authorities and the material available on record. Admittedly, the assessment in the case of the assessee was framed vide order passed under Sec.143(3), dated 27.12.2011 at an income of Rs.528,65,24,460/-. Observing, that the assessment framed by the A.O under Sec.143(3), dated 27.12.2011 was erroneous insofar it was prejudicial to the interest of the revenue, the Director of the Income Tax (Exemption), Mumbai, had vide his order passed under Sec.263, dated 28.03.2014 'set aside' the assessment order, with a direction to the A.O to frame a fresh assessment after considering the *proviso* to Sec.2(15) of the Act. We find that in order to give effect to the directions given by the Director of Income Tax (Exemption) in his order passed under Sec.263, dated 28.03.2014, the A.O had vide his order passed under Sec.143(3) r.w.s 263, dated 20.03.2015 once again assessed the total income of the assessee at Rs.528,65,24,460/-. On appeal against the aforesaid order passed under Sec.143(3) r.w.s 263, dated 20.03.2015, the assessment framed by the A.O was upheld by the CIT(A). The assessee being aggrieved with the upholding of the aforesaid consequential assessment by the CIT(A), has carried the matter in appeal before us.

8. We have given a thoughtful consideration to the issue before us and find that the order passed by the Director of Income Tax (Exemption), Mumbai, under Sec.263, dated 28.03.2014 had been vacated by a coordinate bench of the Tribunal i.e ITAT "B" Bench, Mumbai, in **Maharashtra Housing & Area Development Authority Vs. Director of Income Tax (Exemption), Mumbai in ITA No. 2490/Mum/2014, dated 20.03.2018**. As observed by us hereinabove, the Tribunal had observed, that as the assessed income as per the 'Original' assessment order passed under Sec.143(3), dated 27.12.2011 vis-a-vis the assessed income as per the order passed under Sec.143(3) r.w.s 263, dated 30.10.2015 had remained the same at Rs.528,65,24,460/-, therefore, no prejudice was caused to the revenue in terms of the income originally assessed. Accordingly, being of the view that the twin conditions envisaged in Sec. Sec.263 were not found to be satisfied, therefore, the order passed by the Director of

Income-tax (Exemption), Mumbai under Sec.263, dated 28.03.2014 was vacated by the Tribunal. In fact, the Tribunal while concluding as hereinabove, had observed as under:

“12. We have considered rival contentions and gone through the orders of the authorities below. We have also perused the order passed by Coordinate Bench in case of Slum Rehabilitation Authority (supra). The facts and circumstances in the case before us are same in so far as CIT has invoked power u/s.263 on the plea that AO has not considered proviso to Section 2(15) while deciding the case, accordingly, he was directed to consider proviso to Section 2(15). We found that the order passed by the AO while giving effect to the direction of CIT, the assessed income comes to the very same figure at which it was originally assessed by the AO vide order dated 27/12/2011. Thus, the assessed income as per the original assessment dated 27/12/2011 vis-à-vis assessed income as per the order passed u/s.143(3) r.w.s. 263 dated 30/10/2015 comes to the very same figure of Rs.528,65,24,460/-. Accordingly, we observe that no prejudice has been caused to the Revenue in terms of assessed income and tax thereon. Once it is held that no prejudice has been caused to the Revenue, invocation of powers u/s.263 was not justified, in so far as twin condition of Section 263 with regard to order of AO being erroneous as well as prejudicial to interest of revenue is not complied with. Respectfully following the decision of the Co-ordinate Bench as narrated above, we do not find any merit in the order so passed by CIT u/s.263.”

In the backdrop of the aforesaid facts, we are persuaded to subscribe to the contentions of the Id. A.R, that now when the order under Sec.263, dated 28.03.2014 had been vacated by the Tribunal, therefore, the consequential assessment framed by the A.O under Sec.143(3) r.w.s 263 cannot be allowed to exist on a standalone basis, and thus has to meet the same fate. We thus in terms of our aforesaid observations quash the assessment framed by the A.O under Sec. 143(3) r.w.s 263, dated 20.03.2015. As we have quashed the assessment framed by the A.O under Sec.143(3) r.w.s 263, dated 20.03.2015, therefore, we refrain from adverting to and therein adjudicating the issues which has been assailed by the assessee on merits in its appeal before us.

9. The appeal of the assessee is allowed in terms of our aforesaid observations.

A.Y. 2010-11
ITA No.5018/Mum/2017

10. We shall now advert to the appeal of the assessee against the order passed by the CIT(A)-1, Mumbai,, dated 08.05.2017, which in turn arises from the order passed by the A.O under Sec.271(1)(c), dated 25.03.2015 for A.Y. 2010-11. The assessee has assailed the impugned order on the following grounds of appeal before us :

“1. **Specific Cause of Penalty not Specified**

The learned CIT(A) erred on facts and in law in not appreciating that the learned AO had issued notice dated 18th March, 2013 Under s.271(1)(c) of the Act without specifying whether the appellant had "concealed income" or "furnished inaccurate particulars of income".

2. Denial of exemption under Sec.11 – Basis for Penalty

The learned CIT(A) erred on facts and in law in sustaining the Order dated 25th March, 2015 of penalty which is levied for reasons, among others, that the appellant made a wrong claim for exemption under s. 11 of the Act ignoring Proviso to s.20 S) of the Act without appreciated Particularly that the issue involved was controversial and that the claim of the appellant for exemption under s. 11 of the Act was legitimate and bona fide.

3. Penalty on the basis of information disclosed

The learned CIT(A) erred on facts and in law in sustaining the Order dated 25th March, 2015, passed by the learned AO under s.271(1)(c) of the Income Tax Act, 1961 without appreciating that the individual additions/disallowances forming the basis of penalty were all disclosed by the appellant in the accounts and thus, the appellant had not concealed any income or furnished inaccurate particulars.

4. Period of Limitation

The learned CIT(A) erred on facts and in law in not appreciating that when the appeal of the appellant against the assessment order was pending before Honourable ITAT, the levy of penalty was premature in terms of the provisions of s.275 of the Act.

The appellant craves leave to add to, alter, amend or modify the ground(s) of appeal.

11. Briefly stated, the assessee had filed its return of income for A.Y. 2010-11 on 30.09.2010, declaring its total income at Rs.nil. Subsequently, the case of the assessee was selected for assessment under Sec. 143(2) of the Act.

12. In the course of the assessment proceedings, the A.O holding a conviction that the case of the assessee was hit by the *proviso* to Sec.2(15) of the Act, thus declined its claim for exemption under Sec.11 of the Act. On the basis of his aforesaid deliberations, the income of the assessee was assessed by the A.O at Rs.475,73,11,574/-. On appeal, the CIT(A), vide his order dated 29.10.2013 upheld the assessment framed by the A.O.

13. The AO after receiving the order passed by the CIT(A), wherein the assessment framed was affirmed by the appellate authority, therein called upon the assessee to 'show cause', vide his notice dated 03.03.2015, as to why penalty under Sec.271(1)(c) may not be imposed on it. As the explanation given by the assessee did not find favour with the A.O, therefore, the latter being of the view that the assessee had furnished inaccurate particulars of income imposed a penalty of Rs.147,00,09,276/- under Sec.271(1)(c) of the Act.

14. Aggrieved, the assessee assailed the penalty imposed by the A.O under Sec. 271(1)(c) in appeal before the CIT(A). However, the CIT(A) not being persuaded to subscribe to the contentions advanced by the assessee upheld the penalty imposed by the A.O under Sec. 271(1)(c) of the Act.

15. The assessee being aggrieved with order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee, at the very outset of the hearing submitted, that the Tribunal while disposing off the quantum appeal of the assessee, had vide its order passed in **Maharashtra Housing & Area Development Authority Vs. Addl. DIT (Exemption)-1(1), Mumbai (ITA No. 6678/Mum/2013, dated 04.06.2019)**, while accepting the claim of the assessee, had concluded, that as it was not hit by the *proviso* to Sec. 2(15) of the Act, therefore, it was eligible for claim of exemption u/s 11. It was averred by the Id. A.R, that the Tribunal had observed that as the activities of the assessee would fall within the realm of "advancement of objects of general public utility", therefore, it existed for a "charitable purpose" within the meaning of Sec. 2(15) of the Act. In order to fortify his aforesaid contention, the Id. A.R had drawn our attention to the observations of the Tribunal recorded at Para 49 of its order. On the basis of his aforesaid contentions, it was submitted by the Id. A.R that now when the quantum additions made by the A.O under Sec.143(3) no more survive, therefore, the penalty imposed under Sec.271(1)(c) was liable to be struck down.

16. Per contra, the Id. Departmental Representative (for short 'D.R') did not controvert the aforesaid contentions advanced by the counsel for the assessee.

17. We have heard the authorized representatives for both the parties, perused the orders of the lower authorities and the material available on record. As observed by us hereinabove, the A.O while framing the assessment under Sec. 143(3), vide his order dated 18.03.2013, had declined the assessee's entitlement towards claim of exemption under Sec.11, for the reason, that its activities were hit by the *proviso* to Sec.2(15) of the Act. After so observing, the A.O had made certain further additions in the hands of the assessee and finally assessed its income at Rs.475,73,11,574/-. On appeal, the order passed by the A.O under Sec.143(3), dated 18.03.2013 was upheld by the CIT(A). In the meantime, the A.O, vide his order passed under Sec.271(1)(c), dated 25.03.2015 had imposed a penalty of Rs.147,00,09,276/- on the

assessee. On further appeal, the order passed by the A.O under Sec.271(1)(c) was affirmed by the CIT(A). Admittedly, the appeal filed by the assessee against the order of the CIT(A), dated 29.10.2013, wherein the assessment framed by the A.O was upheld by the said first appellate authority, had been set aside by a coordinate bench of the Tribunal in **Maharashtra Housing & Area Development Authority Vs. Addl. DIT (Exemption)-1(1), Mumbai (ITA No.6678/Mum/2013, dated 04.06.2019)**. As is discernible from the order, the Tribunal had observed, that as the assessee would not be hit by the *proviso* to Sec.2(15), therefore, it was existing for a "charitable purpose" within the meaning of Sec. 2(15), and was thus entitled for benefit under Sec.11 of the Act. It was further observed, that as the assessee had been held to be entitled for benefit under Sec. 11, therefore, assailing of the additions of Rs.3,14,83,738/- on merits by the assessee would be merely rendered as academic. In sum and substance, pursuant to the order of the Tribunal, the additions made by the A.O does not survive anymore. In fact, the Tribunal while concluding as hereinabove had observed as under:

48. In view of our aforesaid finding, we do not deem it fit to enter into the semantics of other arguments as raised by the Ld. Sr. Counsel like assessee being a unique organization, therefore, it is to be treated as existing for charitable purpose; or on the issue that it is existing for giving 'relief to the poor'. Our finding is mostly confined to Proviso to section 2(15), that is, the assessee is not covered by the restriction as envisaged therein and its activities fall within 'advancement of objects of general public utility', hence existing for "charitable purposes".
49. Further, the issues raised in ground no.3 will become purely academic in view of our finding given above that the assessee is entitled for benefit u/s. 11 and accordingly, its income and expenditure have to be computed in terms of section 11 to section 13.
50. With these observations, the assessee's appeal is treated as allowed."

In the backdrop of the aforesaid facts, we are of the considered view that now when pursuant to the aforesaid order of the Tribunal, the additions made by the A.O, vide his order passed under Sec.143(3), dated 18.03.2013, does not survive any more, therefore, the penalty imposed by him under Sec.271(1)(c), vide his order dated 25.03.2015 cannot be sustained and has to be vacated. Accordingly, in terms of our aforesaid observations, the penalty imposed by the A.O under Sec.271(1)(c) of Rs.147,00,09,276/- is vacated.

18. The appeal of the assessee is allowed in terms of our aforesaid observations.

19. The appeal of the assessee for A.Y. 2009-10 in ITA No.5596/Mum/2017 and for A.Y. 2010-11 in ITA No. 5018/Mum/2017 are both allowed in terms of our aforesaid observations.

Order pronounced in the open court on 24.10.2019

Sd/-
(S. Rifaur Rahman)
ACCOUNTANT MEMBER
मुंबई Mumbai; दिनांक 24.10.2019
PS. Rohit

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

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.

सत्यापित प्रति //True Copy//

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