

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "H" MUMBAI**

**BEFORE SHRI RAVISH SOOD (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 1359/MUM/2017
Assessment Year: 2013-14**

Kohinoor Education Trust,
Kohinoor Corporate Office,
Senapati Bapat Marg, Dadar (W),
Mumbai-400 028.

The Assistant Commissioner of
Income Tax (E)-1(1),
Mumbai.

PAN No. AABTK2616D
Appellant

Respondent

Assessee by : Shri Jayesh Dadia, AR
Revenue by : Shri K. Bhoopathi, DR

Date of Hearing : 13/11/2019
Date of pronouncement : 27/12/2019

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the order passed by the Commissioner of Income Tax(Appeals)-1, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The 1st ground of appeal

The Ld CIT(A) has erred in law and on the facts of the case in confirming the action of the Assessing Officer in denying exemption under section 11 and 12 of the Income Tax Act. The action is unjustified and unwarranted.

The 2nd ground of appeal

The Ld CIT(A) has erred in law and on the facts of the case in confirming the action of the Assessing Officer in holding that the petitioner has violated / contravened provisions of section 13 and accordingly denying exemption under section 11 & 12 of the Income Tax Act. This is factually incorrect and unwarranted. Without prejudice the disallowance is excessive.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2013-14 on 28.09.2013 declaring total deficit of Rs.29,07,56,555/-. The Trust is registered as a charitable organization with CIT (Exemption), Mumbai u/s 12A of the Act.

During the course of assessment proceedings, the Assessing Officer (AO) noticed that the assessee, during the year under consideration, has credited its fixed assets investment by an amount of Rs.19.66 crores. Out of it an amount of Rs.19.38 crores pertains to land at Kurla. The said land was acquired from M/s Kohinoor Planet Construction Pvt. Ltd. for a total consideration of Rs.18.45 crores. The AO found that the directors and major shareholders of Kohinoor Planet Construction Pvt. Ltd. are Shri Unmesh Manohar Joshi and Mrs. Madhavi Unmesh Joshi, who are also trustees in the appellant-trust. The AO further found from the agreement that the market value of the said asset is stated to be only Rs.16,46,59,000/- whereas, the assessee stated it to have purchased the same for a consideration of Rs.18,45,00,000/-. Therefore, the AO held that there has been contravention of provisions of section 13(2)(e), wherein it has been stipulated that for the purpose of clause (c) and clause (d) of sub-section 1, the income or the property of the trust shall be deemed to have

been used for the benefit of the person referred to in sub-section (3) of section 13, if any share, security or other property is purchased by or on behalf of the trust or institution from any person referred to in sub-section (3) during the previous year for consideration which is more than adequate. On the basis of the above reasons, the AO held that as there is violation of provisions of section 13, the assessee shall not be eligible for exemption u/s 11 & 12 of the Act. Accordingly, he computed the income of the assessee as per the normal provisions of the Act.

4. In appeal before the Ld. CIT(A), the assessee contended *inter alia* that Courts have consistently held that the assessee-trust should not be denied exemption of the entire income but only to the extent of benefit transferred to the trustees. Thus it was stated before him that as the AO himself has stated that there is an excess consideration of Rs. 1,98,41,000/- , he should have been denied exemption only to the extent of Rs. 1,98,41,000/- and not the entire income and that also in the year when the transaction took place i.e. AY 2010-11 and not during the assessment year under consideration.

However, the Ld. CIT(A) was not convinced with the above explanation of the assessee for the reason that the appellant itself is not denying that the asset has been transferred to the fixed asset account during the year itself and hence the relevant assessment year is the year under consideration, since it is following mercantile system of accounting. Referring to the provisions of section 13(2)(e), the Ld. CIT(A) held that the income of the trust is deemed to have been applied for the benefit of a person referred to in section 13(3). Thus he confirmed the order of the AO.

5. Before us, the Ld. counsel for the assessee relies on the decision in *Jamsetji Tata Trust v. Joint Director of Income Tax* (2014) 44 taxmann.com 447 (Mumbai-Trib.); *Gurdayal Berlia Charitable Trust v. 5th ITO* (1990) 34 ITD 489 (Bom); *DIT (Exemption) v. Sheth Mafatlal Gagalbhai Foundation Trust* (2001) 249 ITR 533 (Bom); *CIT v. Fr. Mullers Charitable Institutions* (2014) 51 taxmann.com 378 (SC).

Relying on the above decisions and filing a copy of it, the Ld. counsels submits that in case of a charitable trust, it is only income from investment or deposit which has been made in violation of section 11(5) that is liable to be taxed and violation u/s 13(1)(d) does not amount to denial of exemption u/s 11 of total income of assessee-trust.

6. On the other hand, the Ld. Departmental Representative (DR) relies on the order of the Ld. CIT(A) and submits that the appellant has not denied that the market value as per the transfer deed is Rs.16.46 crores, whereas the assessee has purchased the same for a consideration of Rs.18.45 crores from M/s Kohinoor Planet Construction Pvt. Ltd. The directors and major shareholders of this company are Mr. Unmesh Manohar Joshi and Mrs. Madhavi Unmesh Joshi, who are also the trustees of the appellant-trust. Thus as per the provisions of section 13(2)(e), income of the trust is deemed to have been applied for the benefit of the person referred to in section 13(3) of the Act. Thus the Ld. DR argues that the order passed by the Ld. CIT(A) be affirmed.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for our decisions are given below.

In the case of *Jamsetji Tata Trust* (supra), the Tribunal held that “violation of section 13(1)(d) and section 13(2)(h) would disqualify exemption of income from investment in non-conforming of section 11(5) but not entire income of the trust, if other income of trust otherwise fulfils conditions of exemptions.

In *Gurdayal Berlia Charitable Trust* (supra), the Tribunal held that “there is nothing in section 11(5) which can be interpreted to mean that if a portion of the accumulated income of the trust is not invested in specified securities, the exemption u/s 11 which had already been granted to the trust in earlier years would be withdrawn. Therefore, the assessee-trust could not be denied exemption u/s 11 and only its income from dividend should be brought to tax at the prescribed rate because such income was not from specified securities”.

In *Sheth Mafatlal Gagalbhai Foundation Trust* (supra), the Hon’ble Bombay High Court held that “violation of section 13(1)(d) by the assessee trust will attract maximum marginal rate of tax only on that part of income which has forfeited exemption under said provisions and not on entire income of trust”.

In *Fr. Mullers Charitable Institutions* (supra), the Hon’ble Supreme Court held that “in case of a charitable trust, it is only income from investment or deposit which has been made in violation of section 11(5), that is liable to be taxed and violation u/s 13(1)(d) does not amount to denial of exemption u/s 11 of total income of assessee-trust”.

We are of the considered view that the ratio laid down in the above decisions should be followed in the present case. Therefore, the assessee-

trust should not be denied exemption of the entire income but only to the extent of benefit transferred to the trustees. Accordingly, we set aside the order of the Ld. CIT(A) and direct the AO to frame an order keeping in mind the ratio laid down in above decisions. Thus the 1st and 2nd ground of appeal are partly allowed for statistical purposes.

8. The 3rd ground of appeal

The Ld CIT(A) has erred in law and on the facts of the case in confirming the action of the Assessing Officer in disallowing claim of depreciation of Rs.3,89,59,057/-

9. The AO observed that the assessee has claimed depreciation of Rs.3,89,59,057/- as expenditure though the value of asset has been claimed as utilization in the year under consideration and earlier years. Further observing that the assessee shall not be eligible for any exemption u/s 11 & 12 of the Act, the AO made a disallowance of the above sum of Rs.3,89,59,057/-.

10. In appeal, before the Ld. CIT(A) the assessee submitted that it has filed an application u/s 154 dated 01.12.2016 before the AO which is still pending. The Ld. CIT(A) accordingly directed the AO to dispose of the appellant's petition u/s 154 expeditiously.

11. Before us, the Ld. counsel for the assessee submits that the issue is decided in favour of the assessee in *CIT v. Jawaharlal Nehru Port Trust* (2016) 383 ITR 339 (Bom.) and *CIT v. Rajasthan & Gujarati Charitable Foundation* (2018) 89 taxmann.com 127 (SC).

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

12. We have heard the rival submissions and perused the relevant materials on record. In the case of *Jawaharlal Nehru Port Trust* (supra), the Hon'ble Bombay High Court held that assessee-trust could claim depreciation in respect of fixed assets even when entire amount attributable to purchase of said assets was claimed as application of income in terms of section 11. This is the position prior to 01.04.2015.

In *Rajasthan & Gujarati Charitable Foundation* (supra), the Hon'ble Supreme Court held that in case of a charitable institution registered u/s 12A, even though expenditure incurred for acquisition of capital assets was treated as application of income for charitable purposes u/s 11(1)(a), yet depreciation would be allowed on assets so purchased. This is the position prior to 01.04.2015.

By following the ratio laid down in the above decisions, we delete the disallowance of Rs.3,89,59,057/- made by the AO and allow the 3rd ground of appeal.

13. The 4th ground of appeal

The Ld CIT(A) has erred in law and on the facts of the case in confirming the action of the Assessing Officer in disallowing interest of Rs.6,06,00,000 claimed by the assessee. Without prejudice the disallowance is excessive.

14. The assessee has claimed interest on loan at Rs.6,06,42,778/- under the head 'establishment expenses'. The assessee explained before the AO that it had obtained term loan from various banks towards construction of

educational complex building at Kohinoor Education Trust at Kurla; that the interest of Rs.22.16 crores have been paid by the assessee for the year under consideration out of which an amount of Rs.16.11 crores pertain to period prior to the asset being put to use and consequently has been debited to the Capital-Works-In-Progress (CWIP) ; that the balance amount of Rs.6.06 crores pertains to the period after the asset has been put to use and accordingly has been claimed as revenue expense in the year under consideration.

However, the AO was not convinced with the above explanation of the assessee for the reason that the interest element debited to the CWIP in the preceding year was Rs.14.04 crores and after including the interest of Rs.2.07 crores, the interest element included in the CWIP has increased to Rs.16.11 crores ; on comparison of CWIP for both the years, it is seen that the major component which has been transferred to the fixed assets from the CWIP is only the cost of the land and other expenses related to the development of land which admittedly the assessee had not paid till the end of the year.

Observing that the major transfer is on account of land and accordingly, the assessee's contention that the treatment is on account of the asset being put to use is incorrect as the loan taken for building the capital asset has been utilized towards the CWIP and no new utilizable asset has come into existence as on 31.03.2013, the AO disallowed the claim of interest of Rs.6,06,00,000/-.

15. In appeal, the Ld. CIT(A) observed that the observations of the AO have not been rebutted by the appellant in the submissions made.

Therefore, he confirmed the disallowance of Rs.6.06 crores made by the AO.

16. Before us, the Ld. counsel for the assessee submits that the trust has incurred interest liability of Rs.6,06,42,778/- on the loan availed from various banks. It is stated by him that the amount has been spent and incurred, which is nothing but for the purpose of school building which was constructed for carrying out object of the charitable trust. Finally, it is explained by him that Rs.6,06,42,778/- is nothing but application of trust income and therefore, should be allowed as deduction while computing income u/s 11 of the Act. Further referring to the fixed asset schedule as well as CWIP account, it is stated by him that during the year, one building on which substantial amount was spent and the entire amount of loan was utilized on this building which came into existence and put to use. Thus it is stated by him that the assessee is eligible for deduction of interest of Rs.6,06,42,778/- u/s 11 or alternatively u/s 36(1)(iii) r.w.s. 37 of the Act.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

17. We have heard the rival submissions and perused the relevant materials on record. In the instant case, we find from the fixed asset schedule as well as CWIP account that during the year under consideration substantial amount was spent on one building and the entire amount of loan was utilized on this building which came into existence and put to use. It is well settled that once asset is put to use, interest incurred thereafter, is allowable as deduction. There is no dispute on the fact that the assessee-trust has incurred interest liability of

Rs.6,06,42,778/- on the loan availed from various banks. In the present the amount has been incurred, which is nothing but for the purpose of school building which was constructed for carrying out object of the charitable trust. It is nothing but application of trust income and therefore, allowable as deduction while computing income u/s 11 of the Act.

In view of the above facts, we delete the disallowance of Rs.6,06,00,000/- made by the AO and allow the 4th ground of appeal.

18. In the result, the appeal is partly allowed.

Order pronounced in the open Court on 27/12/2019.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Mumbai;

Dated: 27/12/2019

Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai