

THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai
Before Shri Shamim Yahya (AM) & Shri Ravish Sood (JM)

I.T.A. No. 7121/Mum/2017 (Assessment Year 2012-13)

ITO (Exemption)-I(2) Room No. 501 Piramal Chambers Lal Baug, Parel Mumbai-400 012.	Vs.	M/s. Empire Foundation Motilal Nagar, Srirang Sabade Road, Goregaon-W Mumbai-400 104. PAN : AAATE3549C
(Appellant)		(Respondent)

Assessee by	Shri Satish R. Mody
Department by	Shri Kamal mangal
Date of Hearing	17.01.2020
Date of Pronouncement	01.06.2020

ORDER

Per Shamim Yahya (AM) :-

This appeal is directed against order of learned CIT(appeals) dated 13.9.2017 and pertains to assessment year 2012-13.

2. The grounds of appeal read as under :-

1.1 "Whether on the facts of the case and in law, the Ld. CIT(A) erred in allowing the carry forward of deficit of Rs. 2,51,62,335/-, and directing the Assessing Officer to allow carry forward of deficit on account of excess expenditure without appreciating the fact that this would have the effect of granting double benefit to the assessee, first as 'accumulation' of income u/s. 11(1)(a) or as corpus donation u/s 11(l)(d) in earlier years/current year and then as 'application' of income u/s 11(l)(a) in the subsequent years which was legally not permissible ?

1.2 Whether, on the facts of the case and in the circumstances of the case and in law, the Ld. CIT (A) erred in allowing the claim of the assessee for carry forward of the said deficit by relying upon the judgment of Hon'TDle Bombay High Court in the case of Institute of Banking Personnel Selection, ignoring the fact that the Department has not accepted the said decision of the jurisdictional High Court on merit of the case, but due to smallness of tax effect appeal was not filed before Hon'ble Supreme Court. However, on this issue the department has filed SLPs in other cases before the Hon'ble Apex Court inclusive the case of MIDC(SLP(Civil)9891 of 2014) in which leave

has been granted and the issue is pending for adjudication before the Hon'ble Supreme Court and the case has not reached finality.

1.3 Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in allowing the claim of the assessee for carry forward of the said deficit, ignoring the fact that there was no express provision in the IT Act, 1961 permitting allowance of such claim."

3. Brief facts of the case are that assessee is a trust, registered with DIT (Exemption) u/s. 12A of the I.T. Act. The assessing officer made the following disallowances by following observation :-

"The assessee has claimed &n amount of Rs.2,51,62,641/- as deficit of the current year to be c/f to next year. The show cause notice was given to the assessee vide order sheet notings dt 16.02.2015. The claim of deficit is not allowed in view of the following reasons :

- There is no provision which allows determination of loss while computing taxable income u/s. 11. This is so because Section 11 prescribes certain conditions for claiming exemption. The first 15% of income is exempt u/s. 11(1) of the Act, the next 85% of the income requires to be spent during the year so that the entire income may be assessed as exempt. The assessee has a choice to spent a portion of the current income in the succeeding year which it could not spent for certain reasons and that portion of income can be deemed to be applied for the charitable purpose and debited from income.
- Further, the assessee has also an option to accumulate its income for certain specified purposes upto 5 years and utilize the same within a span of 5 years and in that case the amount opted to be accumulated is deemed to be applied for charitable or religious purpose and accordingly debited against income.
- It is further noted that capital expenditure on construction /acquisition of asset is also treated as ' application of income and hence the amount of capital expenditure to the extent of available income is deductible from the current income.
- Any excess expenditure 'over income ^is either out of accumulated income or out of corpus fund received by the trust. Accumulated income cannot be further subjected to deduction from the income since deduction in respect of accumulation has been claimed and allowed in the previous years and any further allowance of the same will amount to double deduction for the same outgoing. If excess expenditure is out of corpus then any corpus received is separately exempt u/s. 11(1)(d) of the Act and hence any further deduction of the same outgoing will amount to double deduction. If source of expenditure is a loan then repayment is allowable as a deduction in the year of repayment. Clearly, scheme of computation of business income has no application in determination of income u/s. 11.

Thus, in view of the above stated facts deficit of Rs. 2,51,62,641/- is not allowed to be c/f and set off against income of next year. Moreover, department has filed SLP in the case of Gems & Jewellery Export Promotion Council for Assessment Year 2004-05 on the deficit issue.”

4. Against the above order assessee appealed before the learned CIT(appeals). The learned CIT(appeals) noted that the issue is covered in favour of the assessee by the decision of honourable Bombay High Court in several case laws. He observed as under :-

“I have considered the facts of the case and the submissions made by the assessee. I find that the issue relating to carry forward of loss is covered in favour of the assessee by the decision of the Hon'ble jurisdictional Bombay High Court in the case of CIT vs. Institute of Banking and Personnel Selection (supra). In the said decision the question before the Hon'ble Court was "3. Whether, on the facts and in the circumstances of the case, the Tribunal was justified in law to allow the carry forward of the deficit of earlier year and set it off against the surplus of subsequent years when the same was not allowable in the case of assessee trust in whose case income exempted under section 11 of the Income Tax Act, 1961 ?"...."

In Para 5 of their judgement, the Hon. Jurisdictional Bombay High Court held as follows :-

"5. Now coming to question No. 3, the point -which arises for consideration is : whether excess of expenditure in the earlier years can be adjusted against the income of the subsequent year and whether such adjustment should be treated as application of income in subsequent year for charitable purposes? It was argued on behalf of the department that expenditure incurred in the earlier years cannot be met out of the income of the subsequent year and that utilization of such income for meeting the expenditure of earlier years would not amount to application of income for charitable or religious purposes. In the present case, the assessing officer did not allow carry forward of the excess of expenditure to be set off against the surplus of the subsequent years on the ground that in the case of a Charitable Trust, their income was assessable under self-contained code mentioned in section 11 to section 13 of the Income Tax Act and that the income of the Charitable Trust was not assessable under the head "profits and gains of business" under section 28 in which the provision for carry forward of losses was relevant. That, in the case of a Charitable Trust, there was no provision for carry forward of the excess of expenditure of earlier years to be adjusted against income of subsequent years. We do not find any merit in this argument of the department. Income derived from the trust property has also got to be computed on commercial principles and if commercial principles are applied then adjustment of expenses incurred by the Trust for charitable and religious purposes in the earlier years against the income earned by

the Trust in the subsequent year will have to be regarded as application of income of the Trust for charitable and religious purposes in the subsequent year in which adjustment has been made having regard to the benevolent provisions contained in section 11 of the Act and that such adjustment will have to be excluded from the income of the Trust under section 11(l)(a) of the Act. Our view is also supported by the judgment of the Gujarat High Court in the case of CIT v. Shri Plot Swetamber Murti Pujak Jain Mandal (1995) 211 ITR 293 (Guj). Accordingly, we answer question No. 3 in the affirmative i.e., in favour of the assessee and against the department."

5. Thereafter learned CIT(appeals) referred to other decisions of honourable Bombay High Court. Referring to several other decisions from ITAT, the learned CIT(appeals) held that since the issue is covered in favour of the assessee by the decision of honourable Bombay High Court and the Department has taken the matter before the honourable Supreme Court, he was bound to follow the honourable jurisdictional High Court. Accordingly he decided the issue in favour of assessee-trust.

6. Against this order revenue has filed appeal before us.

7. We have heard both the counsel and perused the records. We find that the issue is covered in favour of the assessee by the decision of honourable jurisdictional High Court as referred above. This fact has also been admitted by the revenue in the grounds of appeal and the assessing officer in his assessment order. Accordingly we hold that since the issue has already been decided by the honourable jurisdictional High Court in favour of the assessee, and learned CIT(A) has followed the same. There is no infirmity in the order of learned CIT(appeals). Accordingly we uphold the same.

8. In the result this appeal by the revenue stands dismissed.

Order has been pronounced in the Court on 01.06.2020.

Sd/-
(RAVISH SOOD)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 01/06/2020

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.

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BY ORDER,

(Assistant Registrar)
ITAT, Mumbai