

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, "B" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ ITA. No. 960/JP/2018
निर्धारण वर्ष / Assessment Years : 2008-09

The ITO, (Exemption), Ward-1, Jaipur.	बनाम Vs.	M/s Apollo Animal Medical Group Trust, 299, Himmat Nagar, Tonk Road, Jaipur.
स्थायी लेखा सं./ जीआईआर सं./ PAN/GIR No.: AABTA 0145 K		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

आयकर अपील सं./ CO. No. 05/JP/2020
(Arising out of ITA No. 960/JP/2018)
निर्धारण वर्ष / Assessment Years : 2008-09

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राजस्व की ओर से / Revenue by : Smt Runi Pal (Add.CIT)
निर्धारिती की ओर से / Assessee by : Shri Rajeev Sogani (C.A.) &
Miss Shivangi Samdhani (C.A.)

सुनवाई की तारीख / Date of Hearing : 28/10/2020
उद्घोषणा की तारीख / Date of Pronouncement : 22/01/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the Revenue and the cross objection filed by the assessee against the order of the Id. CIT(A)-I, Jodhpur (Camp at Jaipur) dated 22.05.2018 for the assessment years 2008-09.

2. In its appeal, the Revenue has taken the following grounds of appeal:-

"1. On the facts and the circumstances of the case and in law the Ld. CIT (Appeals) has erred in deleting the addition of surplus amounting to Rs.1,58,99,324/- made on account of rejection of exemption u/s 11 of the Act by invoking provisions of section 13(1)(c)(ii) r.w.s.13(2)(g) of the I.T. Act,1961.

2. On the facts and circumstance of the case and in law the Ld.CIT (Appeals) has erred in ignoring the facts that AO had denied exemption u/s 11 for the year under consideration as no clause of irrevocability mentioned in trust deed and also funds transferred by the trustee is the property of the founder of the trust as per trust deed.

3. On the facts and circumstance of the case and in law the Ld.CIT (Appeals) has erred in deleting the addition of surplus by ignoring the facts mentioned and certified by Auditor in part-II [Application or use of income or property for the benefit of persons referred to section 13(3)] of his audit report [Form 10B] that payment of salary was paid to Persons Specified u/s 13(3) of the I.T. Act, 1961.

4. On the facts and the circumstances of the case and in law the Ld. CIT (Appeals) has erred in deleting the addition of Rs. 7,20,000/- made on account of excess salary paid to Persons Specified u/s 13(3) of the I.T. Act,1961 without appreciating the facts that excessive salary has been given to persons specified

u/s 13(3) as compared to others staff having same educational qualifications, working conditions and services rendered.”

3. In its cross objection, the assessee has taken the following grounds of appeal:-

"1. In the facts and circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of Id. AO in reopening the assessment u/s 147 of the Income Tax Act, 1961. The action of the Id. CIT(A) is illegal, justified, arbitrary and against the fact of the case. Relief may please be granted by quashing the reassessment proceedings being illegal and without jurisdiction.

2. In the facts and circumstances of the case and in law, the Id. CIT(A) has erred in confirming the action of Id. AO in issuing notice under section 148 of the Income Tax Act, 1961 without obtaining proper sanction under Section 151 of the Income Tax Act, 1961. The action of the Id. CIT(A) is illegal, justified, arbitrary and against the fact of the case. Relief may please be granted by quashing the reassessment proceedings being illegal and without jurisdiction.”

4. Briefly the facts of the case are that the assessee appellant is a charitable trust running a veterinary college in the name of Apollo College of Veterinary Medicine. It is registered U/s 12AA vide order no. 29/8/2003-04/723 dated 27.06.2003. For the year under consideration, the assessee trust filed its return of income on 29.09.2008 declaring total income at Rs. NIL. The case of the assessee trust was selected for scrutiny and the assessment U/s 143(3) of the Act was completed vide order dated 27.08.2010 wherein the returned income was accepted. Thereafter, the case of the assessee trust was reopened by issuance of notice u/s 148 and the assessment was completed U/s 147/143(3) vide

order dated 30.03.2015 wherein the total income of Rs. 2,19,07,546 was assessed. On appeal, the Id CIT(A) sustained the action of the AO in assuming jurisdiction u/s 147, however, on merits, the additions were deleted. The Revenue is in appeal against the deletion of additions made by the Id CIT(A) and the assessee is in appeal against the action of the AO in assuming jurisdiction u/s 147 of the Act.

5. Firstly, we take up the cross objection filed by the assessee trust. At the outset, it is noted that there has been a delay in filing the cross objection by the assessee trust. After considering the affidavit placed on record and hearing both the parties, we find that there was a reasonable cause for the delay in filing the cross objection and the same is hereby condoned and the cross objection so filed by the assessee trust is admitted for adjudication.

6. In this regard, the Id. AR submitted that the provisions of section 147, being prejudicial to the interest of the assessee, are safeguarded by certain preconditions. In the present case, Id. AO has flouted such preconditions and therefore, the reopening is challenged on various grounds such as there was no failure on the part of assessee trust to disclose fully and truly all material of facts, reopening has been done on account of change of opinion, no new tangible material is in possession of the AO, audit report has been made the basis for reopening, it's a case of borrowed satisfaction and there has been incompleteness of the reasons recorded.

7. It was submitted that the proviso to section 147 provides for an additional condition for assuming jurisdiction u/s 147. It provides that where assessment already stands completed u/s 143(3) or 147, and four years from the end of relevant assessment year have elapsed then reopening can be done only if there is failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In the present case, perusal of reasons to believe reveals that Trust Deed, Report u/s 10B and Financial Statements were made basis for formation of reasons to believe that income has escaped assessment. It was submitted that the assessee trust during the original assessment proceedings duly placed on record its Trust Deed, Financial Statements and 10B Report. Therefore, the information which has been made basis for reopening was already supplied during the original assessment proceedings or even before that along with filing of return of income. Thus, there was no failure on the part of assessee trust to disclose fully and truly all material facts. It is not the case that the assessee trust failed to disclose fully and truly all the material facts as the same has not been alleged in the reasons. It is, therefore, submitted that the fact that reopening was done after 4 years and the proviso to section 147 would apply as there was no failure on the part of the assessee trust to disclose fully and truly all material facts. Fact of failure has not been mentioned in the reasons. Thus, the reopening was done without application of mind. In support, reliance was placed on the following decisions:-

- Arvind Remedies Ltd [2015] 378 ITR 547 (Mad).
- Sitara Diamond (P.) Ltd. [2012] 345 ITR 91 (Bom)

- Gujarat Lease Financing Ltd. (2013) 219 Taxman 70 (Guj)

8. It was further submitted that the details on the basis of which reasons were framed were duly placed on record during the original assessment proceedings u/s 143(3) and only after duly considering the same, Id. AO in the assessment proceedings u/s 143(3), allowed the assessee trust benefit of section 11 and 12. Therefore, while framing the original assessment, Id. AO formed an opinion accepting the returned income of the assessee trust. No new tangible material, thereafter, came to the possession of AO as nothing has been mentioned in the reasons recorded. Therefore, in such a situation by reopening the case of assessee trust, the AO has tried to change his opinion and, thus, have exceeded jurisdiction. Reliance was placed on following judgments wherein it was held that reopening on the basis of change of opinion is illegal:-

- CIT vs. Kelvinator of India Ltd [2010] 187 Taxman 312 (SC)
- CIT vs. Vaishali Avenue [2014] 48 taxmann.com 289 (Raj)
- ACIT vs. Mangalam Cement Ltd. [2017] 78 taxmann.com 334 (Jaipur - Trib.)

9. Without prejudice to the fact that same audit report was considered in the original assessment proceedings u/s 143(3), it was submitted that from the reasons itself, it is evident that no enquiry, of whatsoever nature, was made before formation of belief. Only 10B report of auditor, wherein he expressed his personal opinion, was made a base for reopening the case. It was submitted that an opinion of auditor cannot be considered as a tangible material or information.

Even the audit findings of section 142(2A) audit cannot be considered sacrosanct and cannot be acted upon unless an opportunity to assessee has been provided. Therefore, without discharging the liability as casted upon the Id. AO under section 147, she cannot just blindly place reliance on someone else's opinion. The law required AO and only AO to carry out analysis, check, cross check information received and then come to the conclusion that income has escaped. In the present case, AO has jumped to a conclusion without applying her mind. Therefore, the present case is nothing but a case of "Borrowed Satisfaction". Reopening on such basis is illegal and *void-ab-initio*. Reliance was placed on the following judicial pronouncements wherein it has been held that no valid reopening can take place when there is borrowed satisfaction:-

- RMG Polyvinyl (I) Ltd. [2017] 83 taxmann.com 348 (Delhi)
- Meenakshi Overseas Pvt Ltd. [2017] 395 ITR 677 (Delhi)
- N.C. Cables Ltd. [2017] 88 taxmann.com 649 (Delhi)
- CIT vs. D. N. Pachori [2010] 189 Taxman 420
- Balaji Health Care Private Limited (ITA No. 566/JP/2018)

In view of above, it was submitted that reassessment proceedings are illegal, without jurisdiction and, therefore, deserve to be quashed.

10. Per contra, the Id. DR/CIT relied on the finding of the lower authorities and our reference was drawn to the findings of the Id. CIT(A) which are contained at para 4.1. to 4.2 which reads as under:-

"4.1 I have given a careful consideration to the material facts on record as also the submissions made before me where after, I am

of the view that the Assessing Officer was well justified in initiating the proceedings U/s 147 of the Act. It is observed that the Assessing Officer had valid jurisdiction over the case and had recorded proper reasons before issue of notice u/s 148 of the Act. It is also observed that the notice was issued on proper and valid reasons and not as a result of mere change of opinion. The Assessing Officer on the given facts, justifiably concluded that income chargeable to tax had escaped assessment.

4.1.1 It is further observed that the provision of sec. 147 provides that if the Assessing Officer has reason to believe that any income chargeable to tax had escaped assessment, he may subject to the provision of sec. 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings. The provision of sec. 148(2) provides that the Assessing Officer shall before issuing any notice u/s 148(1), record his reasons. In view of the above provisions and as facts discussed by the Assessing Officer for issue of notice, it is observed that the Assessing Officer before issuing notice u/s 148 has recorded the reasons as provided in sec. 148(2). Prima facie the reasons recorded by the Assessing Officer are correct and true and are available on record to form a reasonable belief that the income had escaped assessment. Hence, the appellant's contention regarding initiation of proceeding u/s 147 and issuance of the notice u/s 148 are rejected.

4.1.2. The AO after considering the details furnished by the assessee, noted certain defects with regard to the non-compliance of provisions of sec. 11(2)(b) and 11(5) and 13(3). The Hon'ble Supreme Court in the case of CIT v. Sun Engineering Works (P) Ltd. [198 ITR 297 (SC)] held that proceedings u/s. 147 are for the benefit of revenue and are aimed at gathering the "escaped income" of an assessee. It

has been held by the Hon'ble Supreme Court that although for reassessment of income there must exist reasons to believe that income has escaped assessment, the question whether the reasons are adequate or otherwise is not for the Court to decide (Phool Chand Bajrang Lal vs. ITO, reported in 203 ITR 456). Further in the case of Raymond Woolen Mills Ltd. vs. ITO, reported in 236 ITR 34, the Hon'ble Supreme Court held that to determine 'Whether the commencement of reassessment proceeding was valid, it has only to be seen whether there is prima facie some material on the basis of which the AO could re-open the case. The sufficiency or the correctness of the material is nothing to be considered at this stage. In the instant case, reasons have been duly recorded by the AO for arriving on belief that income chargeable to tax has escaped assessment. Hon'ble Delhi High Court in the case of Usha International Ltd. (348 ITR 485 Del.) observed that "where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order, if new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of change of opinion will not apply."Further it was observed that "factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justified initiation of assessment proceedings.

4.1.3. The appellant has also duly co-operated with the AO and has furnished various details called for by him during the course of reassessment proceeding. Therefore, he cannot take a plea now that the proceedings were invalid. The Hon'ble Delhi High Court in the case of Honda siel Power Products Ltd. vs. DCIT (2011) 197 Taxman 415 (Del.) has stated that the law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment.

The disclosure must be true and full. Material facts are those facts which, if taken into account would have an adverse affect on the assessee by higher assessment of income than the one actually made. Omission to disclose may be deliberate or inadvertent. It is not relevant provided there is omission or failure on the part of the assessee. The latter confers jurisdiction to reopen the assessment. The Hon'ble Court further held that merely because material lies embedded in the material or evidence, which the AO could have uncovered but did not uncover, is not a good ground to deny or strike down the notice of re-assessment. Where the AO could have found out the truth but he did not, does not preclude the AO from exercising the power of re-assessment to bring the escaped income. The SLP filed against this decision of the Hon'ble Delhi High Court has been dismissed by the Hon'ble Supreme Court (211-TIOL-72-SC-IT).

4.1.4 The powers conferred on the Assessing Officer under the Amended provisions are wide as has been clarified by the Hon'ble Delhi High Court in the case of Bawa Abhai Singh Vs. DCIT (117 Taxman 12) in which it has been held that —

"The provisions of section 147, as amended with effect from 1-4-1989, are contextually different and the cumulative conditions spelt out in clauses (a) and (b) of section 147 prior to its amendment are not present in the amended provision. The only condition for action is that the Assessing Officer should have reasons to believe that income has escaped assessment. Such belief can be reached in any manner and is not qualified by a pre-condition of faith and true disclosure of material fact by an assessee as contemplated in the pre-amended section 147(a). Viewed in that angle, power to reopen assessment is much wider under the amended provision and can be exercised ever

after the assessee has disclosed fully and truly all the material fact."

4.1.5 In the case of Praful Chunilal Patel vs. M.J. Makwana ACIT (148 CTR 62Guj.), it has been held that where the Assessing Officer had over looked something at the first assessment, there would be no question of any change of opinion.

4.2 From the decision in the cases Supra it is clear that the Assessing Officer was fully justified to reopen the assessment for the purpose of enquiring the assessee's eligibility of exemption 11 & 12 of the Act. In view of the facts and discussion as above I hold that the Assessing Officer was well justified in initiating the proceedings u/s 147 of the Act by issue of notice u/s 148. The additional ground raised by the appellant is dismissed."

11. We have heard the rival contentions and perused the material available on record. There is no dispute and it is a settled legal proposition that for assumption of jurisdiction u/s 147, the Assessing Officer must form a prima facie opinion on the basis of material that there is an escapement of income, the opinion formed may be subjective but the reasons recorded or the information available on record must show that the opinion is not a mere suspicion, the reasons recorded and/or the documents available on record must show a nexus and relevancy to the opinion formed by the Assessing Officer regarding escapement of income and the reasons are required to be read as they were recorded by the Assessing officer. It is for the Assessing officer to disclose and open his mind through the reasons recorded by him and he has to speak through the reasons. In the present case, the reasons

recorded by the Assessing officer before issuance of notice u/s 148 read as under:-

"The assessment in this case was completed u/s 143(3) of the IT Act, 1961 on the total income of Rs. Nil on 27.08.2010.

It is noticed that during the year total income of the trust was Rs. 3,86,28,779/-. After claiming revenue expenditure of Rs. 2,27,29,455/- (including depreciation of Rs. 52,88,222/-) net surplus of Rs. 1,58,99,324/- was claimed as exempt under section 11 and transferred to the corpus fund of the trust in Balance sheet. During the year 4,51,17,188/- on purchase of land and Rs. 45,66,860/- on other assets purchased was stated to be spent on capital expenditure against which a loan of Rs. 3,50,00,000/- was taken from the bank. Due to following reasons the assessee trust is not eligible for exemption u/s 11 of Rs. 1,58,99,324/-.

i) According to the trust deed, the fund which was transferred by the trustees on dated 05-01-2002 and money and things which are receivable time to time are deemed to be the property of the founder of the trust. Further, founder of the trust was always be managing trustee for the life time.

ii) provision of irrevocability did not exist in the trust deed.

iii) Accordingly to the Sl. No. 6 of part I of 10B report, it was pointed out by the CA that funds of the trust were not invested or deposited in the manner laid down in section 11(2)(b) of the IT Act, 1961.

iv) it was also seen that funds of Rs. 50,54,000/- as FDR and Rs. 11,69,777/- as cash deposited in the Lord Krishna Bank Ltd. proof regarding applicability of section 11(5) was not filed by the assessee.

v) According to the Sl No. 4 of part II of 10B report, it was pointed out by the CA that salary of Rs. 5,70,000/- was paid to settler of the trust for being acting as a dean of the college and Rs. 3,00,000/- each to the other two trustees but management do no explain about the genuineness of those two payments.

vi) Further, the application of funds was not to be extent of 85% of receipts during the previous year.

Thus, according to Section 13(1) nothing contained in sec. 11 or sec. 12 shall operate so as to exclude from the total income and entire income of the trust is liable to pay income-tax as envisaged in the aforesaid provisions. This omission has resulted in irregular tax exemption of the trust income of Rs. 1,58,99,324/-. The same is disallowable as per provisions of Section 13(1) and to be added in the total income of the assessee.

Thus, I have reason to believe that income of Rs. 1,58,99,324/- has escaped assessment and proceedings u/s 147 and 148 should be initiated."

12. On perusal of the reasons so recorded by the Assessing officer, it is noted that the material and information on the basis of which he has formed the belief that the assessee trust is not eligible for exemption under section 11 and income to the extent of Rs 1,58,99,324 has escaped assessment is basis the review of assessee's trust deed, the financial statements and the audit report in Form 10B. It is an admitted fact that these documents were part of the assessment records which were available at the time of original assessment proceedings wherein the assessment was completed u/s 143(3) dated 27.08.2014. We therefore find that there is no new material brought on record by the Assessing officer and basis the re-appreciation of existing material

available on record, he has formed the belief that the income has escaped assessment. Another contention which has been raised by the Id AR is that in the reasons so recorded, the Assessing officer has not alleged that there is failure on the part of the assessee to disclose fully and truly all material facts and where the powers under Section 147 of the Act have to be exercised by the Assessing officer after a period of four years from the end of relevant assessment year, there has to be a failure to disclose fully and truly all material facts and information by the assessee which is not alleged by the Assessing officer in the instant case. In this regard, we note that the original assessment was completed u/s 143(3) vide order dated 27.08.2010 for the impugned assessment year 2008-09 wherein the returned income declaring total income at NIL was accepted and subsequently, the notice u/s 148 was issued on 10.01.2014 which is clearly after the expiry of four years from the end of the relevant assessment year and as per proviso to section 147 of the Act, for assumption of jurisdiction in such cases, additional requirement which has to be satisfied is that there has to be a failure on part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

13. In this regard, the observations of the **Hon'ble Delhi High Court** in case of **CIT v. Multiplex Trading & Industrial Co. Ltd.** 378 ITR 350 are relevant wherein it was held that:

"24. In our view, the question whether the Assessee could have been stated to disclosed fully and truly all material facts have to be examined in the light of facts of each case and also the reasons that led the AO to believe that income of an Assessee

has escaped assessment. In a case where the primary facts have been truly disclosed and the issue is only with respect to the inference drawn, the AO would not have the jurisdiction to reopen assessment. But in cases where the primary facts as asserted by the Assessee for framing of assessment are subsequently discovered as false, the reopening of assessment may be justified".

14. Similarly, the **Hon'ble Madras High Court** in case of **Arvind Remedies Ltd** (supra) held as under:-

"9. Explanation (1) to Section 147 of the Income Tax Act cannot be pressed into service by the Department in the instant case, because the details of such claim has been revealed during the regular assessment and complete details have been provided before the Assessing Officer. If the Assessing Officer has not considered the same at the time of passing an order under Section 143(3) of the Income Tax Act, the assessee cannot be fastened with any liability for the same. Therefore, Explanation (1) Section 147 does not get attracted to this case. In this case, we find that the finding of the Tribunal is that the Proviso to Section 147 of the Income Tax Act does not get attracted since it is clear from the order of the Tribunal that it was failure on the part of the Assessing Officer to consider the material and the assessee had placed all the materials before the Assessing Officer during the regular assessment.

10. We find from the order of the Tribunal and also on the facts as has been culled out from the assessment order in question that there is no element of failure to disclose fully and truly all material facts necessary for assessment. Therefore, there was no justification for the department for invocation of proceeding under Section 147 r/w 148 of the Income Tax Act.

12. In the light of the above, we hold that when the Assessing Officer had failed to record anywhere his satisfaction or belief that the income chargeable to tax had escaped assessment on account of the failure of the assessee to disclose truly and fully all material facts necessary for assessment. On the contrary, it was the Assessing Officer, who failed to consider the materials placed before him at the time of regular assessment for which the assessee cannot be found fault with. Therefore, the notice issued under Section 147 of the Income Tax Act beyond the period of four years was wholly without jurisdiction and cannot be sustained. Accordingly, for the reasons stated above, the substantial question of law is answered in favour of the respondent/assessee and against the appellant/Revenue."

15. The Hon'ble Bombay High Court in case of **Sitara Diamond (P) Ltd** (supra) has held as under:-

"6. We have considered the rival submissions. By the impugned notice dt. 20th June, 2011, the assessment for asst. yr. 2005-06 is sought to be reopened beyond a period of four years of the end of the relevant assessment year. The condition precedent to the exercise of the jurisdiction to reopen an assessment beyond a period of four years as spelt out in the proviso to s. 147 is that there ought to be a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year. In the present case, the sole basis on which the assessment proceedings were sought to be reopened is the order which has been passed on 5th July, 2011 for asst. yr. 2007-08. In that order, according to the Revenue, it has been held that the assessee acts as a mere facilitator and is not a manufacturer so as to entitle it to the deduction under s. 10A. The issue, however, before the Court, is as to whether that can form the basis of the reopening of the assessment beyond a period of four years. The reasons which

have been disclosed by the AO do not set out as to what facts the assessee had failed to fully and truly disclose. Even a prima facie reference to the basis on which it is sought to be inferred that there was a failure to disclose all material facts has not been set out in the reasons. In that view of the matter, we are of the view that the primary jurisdictional requirement for reopening the assessment beyond a period of four years has not been fulfilled in this case. Since the order passed by the CIT(A) for asst. yr. 2007-08 has been passed after the assessment for asst. yr. 2005-06 has been sought to be reopened by the notice dt. 29th June, 2011, we have, for the purposes of this discussion, kept that circumstance out of consideration. We have come to the conclusion that the AO having failed to establish that there was a failure on the part of the assessee to disclose fully and truly all material facts for asst. yr. 2005-06, the reopening beyond a period of four years is clearly not valid. There was a finding of fact by the AO in the assessment order for asst. yr. 2005-06 that the business activity of the assessee is manufacturing of jewellery in a Special Economic Zone. That finding, as the assessment order notes, was based upon a consideration of the facts of the case and upon examining the contentions of the assessee.

16. The Hon'ble Gujarat High Court in case of **Gujarat Leasing Financing Ltd** (supra) held as under:-

"12. The stand take by the Revenue is that as per sub-section (5) of Section 115JB of the Act, these provisions apply to every assessee, being a company, the assessee has not correctly calculated the book profit which amounts to deemed concealment on the part of the assessee and the same has resulted in escapement on account of failure on the part of the assessee in fully and truly disclosing all material facts is not finding favour with us. We are of the firm opinion that twin conditions necessary for reopening the assessment beyond the period of four years do not co-exist on record. Unless there is a failure on the part of the

assessee to disclose truly and fully all necessary facts for his assessment, the re-assessment under section 147 of the Act and the issuance of notice under Section 148 of the Act cannot be held to be valid."

17. Therefore, the fact that there is failure on the part of the assessee to disclose primary facts have to be seen and such failure should be discernable on reading of the reasons so recorded by the Assessing officer. In the instant case, as we have noted above, in the reasons so recorded, the Assessing officer has referred to the assessee's trust deed, financial statements, and the audit report filed during the course of original assessment proceedings and basis the same, has held that the income has escaped assessment. To our mind, these are all primary documentation disclosing objects and activities of the assessee trust and reflection of such activities by way of disclosure in its books of accounts which are also subject matter of audit and all these documents which are duly disclosed during the original assessment proceedings and where on reappraisal of such primary documentation, the Assessing officer is of the view that the assessee is not eligible for exemption u/s 11 and 12, it is his inference and analogy which he has drawn basis review of such primary documentation. However, as far as onus on the assessee to disclose the primary facts are concerned, the same has been duly satisfied and there is no such failure and infact, in the reasons so recorded, there is no allegation made by the Assessing officer that there is any such failure on the part of the assessee company and as we have stated above, it is for the Assessing officer to disclose and open his mind through the reasons recorded by him and he has to speak through the reasons. Therefore, we agree with the contention so advanced by the Id AR that this being a

jurisdiction requirement and in absence of any such failure on part of the assessee company, the Assessing officer cannot assume jurisdiction u/s 147 of the Act.

18. In light of aforesaid discussions and respectfully following the decisions referred supra, we are of the considered view that in the instant case, the Assessing officer doesn't have the legal basis to acquire jurisdiction for reassessment u/s 147 and thus, the notice issued under section 148 and consequent reassessment proceedings are quashed and set-aside.

19. Now, we refer to the appeal filed by the Revenue wherein the findings of the Id CIT(A) have been challenged.

20. In this regard, the Id DR relied on the findings of the AO and our reference was drawn to Para 3.1 to 3.4 of AO's order which reads as under:-

"3.1 Violation of provisions of Section 11(5):- The Details furnished have revealed that the assessee has made FDR of R&50,54,000/- and has also deposited a sum of Rs. 11,69,777/- in the bank account of Lord Krishna Bank Ltd. This is not a mode of investment approved u/s 11(5) as such the assessee has violated the provisions of section 11(5) and is not eligible for claim of exemption u/s 11.

3.2 Unreasonable payment of salary:- The details filed have revealed that the assessee has made payment of salary to persons specified U/s 13(2) of the Act as under:-

<i>S. No.</i>	<i>Name of the person</i>	<i>Amount Rs.</i>

1.	<i>Shri Sohan Singh Rathore</i>	<i>5,70,000/-</i>
2.	<i>Dr. RaJ.ID Khare</i>	<i>3,00,000/-</i>
3.	<i>Dr. S. Ramanathan</i>	<i>3,00,000/-</i>

The aforementioned persons are trustees of the trust as such they are specified persons u/s 13(3) which has rightly been mentioned in the audit report furnished u/s 12A(b) of the Act in form No, 10B. The auditor has qualified his report with observations in column No.4 of part II as under:-

"Salary of Rs.5,70,000/- was paid to settler of the trust for being acting as Dean of the College and he is devote his time and attention for the benefit of trust and achieve the object of the trust and Rs 3,00,000/- each to Dr. Raj ID Khare and Dr. S. Ramanathan, management do not explain about the genuineness of those two payments."

3.2.1 The assessee has not furnished any evidence which can justify salary to the specified persons. The salary is to be justified with the services rendered as well as the corresponding salary of the other staff having same qualification and working conditions. In such circumstances the observations made the Auditor Shri Gajanand Gupta, Chartered Accountant were after due consideration of the material produced before him and he has made the aforementioned observation as such the assessee's contention that the payment of salary was justified is not acceptable. Accordingly, in the absence of justification of salary paid to the aforementioned two persons namely Dr. Raj ID Khare and Dr. S. Ramanathan the entire salary cannot be allowed however, as both the above mentioned persons were trustees and prima facie it appears that they might be contributing to some extent in the day to day working of the trust, as such I consider it fair and

reasonable to disallow 50% of the salary paid to the aforementioned persons as such a sum of Rs. 1,50,000/- out of the salary paid to Dr. Raj I.D. Khare and a sum of Rs. 1,50,000/- out of the salary paid to Dr. S. Ramanathan is considered as payment made for personal benefit of the persons specified u/s 13(3) of the Act. Similarly in the case of Dr. Sohan Singh Rathore also there is no justification of such salary and in his case sum of Rs, 1,50,000/- is allowed and remaining salary of Rs. 4,20,000/- is disallowed. In view of the above mentioned discussion provisions of sec. 13(1)(c)(ii) and 13(2)(g) of the Act are attracted and the assessee's exemption u/s 11 is rejected and moreover a sum of Rs. 7,20,000/- as discussed above is added to the total income of the assessee trust.

(Addition- Rs. 7,20,000/-)

The assessee has furnished inaccurate particulars of income and concealed income, therefore, penalty proceedings u/s 271(1)(c) r/w 274 are initiated separately

3.3 Revocable Trust:- On perusal of the trust deed it is noticed that in the trust deed there is no clause which can justify the recoverability of the trust as such the trust is held to be a revocable trust which is not eligible to become public/charitable trust and accordingly the assessee is not eligible to claim exemption u/s 11 of the Act.

3.4 Property of the trust:- In the trust deed it is mentioned that the fund which was transferred by the trustee on 05.10.2002 and money and things which are receivable from time to time are deemed to be the property of the founder of the trust. Further the founder of the trust was always be Managing trustee for the life time. This clause in the trust deed makes the trust a private trust for personal benefit of the managing trustee as such it is not eligible to claim any exemption u/s 11.

In view of the aforementioned discussion I have come to the conclusion that the provisions of section 13(1)(c)(ii) r,w 13(2)(g) of the Act are attracted in the assessee's case and also the assessee has not complied with the provisions of section 11(5) as such keeping in view the aforementioned discussion the claim of exemption u/s 11 of the Act is rejected and the income of the trust is assessed as income from business and profession in the status of AOP subject to further disallowances made in appropriate paras

21. Per contra, the Id. AR has submitted that the assessee trust was formed on 05.10.2002 by way to Trust Deed. The Trust Deed of the assessee trust has never been amended. The trust is an irrevocable trust. Section 63 of the IT Act, 1961 provides that a transfer shall be deemed to be revocable if it contains any provision for the re-transfer directly or indirectly of the whole or any part of the income or assets to the transferor, or it in any way, gives the transferor a right to re-assume power directly or indirectly over the whole or any part of the income or assets. The trust deed nowhere mentions that the properties of the trust shall be re-transfer directly/indirectly or the transferor reserves right to re-assume power directly/indirectly. Hence, without any doubt the trust is an irrevocable trust. The assessee trust was, on the basis of same trust deed, on 27.06.2003 granted registration u/s 12AA from CIT –II, Jaipur vide order no. 29/8/2003-04/723, on 05.04.2005 obtained registration u/s 80G and on 07.09.2011 obtained registration u/s 10(23C) . Thus, in the opinion of the higher officer i.e. Commissioner the assessee trust was eligible to avail benefit of exemption u/s 11 and 12. Therefore, the Trust Deed of the assessee trust is complete in all respects and all the objectives as specified

therein are charitable. The Trust was not made with the objective of providing benefit to settler or trustee of the trust. The AO without any power pointed out defects in the Trust Deed. The AO referred the Hindi Translation of the Trust Deed and not the Original Trust Deed. The Original Trust Deed clarifies that the ownership of the amount received by trustees is vested in them for the purpose of carrying out the objects of the trust. It is further submitted that the power to grant registration and withdraw registration vests with Id. PCIT or Id. CIT as per the provisions of section 12AA. The AO only by invoking the provisions of section 13 can deny the benefit of section 11 and 12 for that particular year in which violation takes place. No violation as specified in section 13 takes place if the trust deed does not mention about irrevocability. In view of above, the action of Id. AO is illegal, against the facts of the case and, therefore, Department's ground of appeal no. 1 deserves to be dismissed.

22. Regarding Department's ground No. 3 & 4, the Id. AR submitted that the AO prejudiced his mind because of auditor's report i.e. because of auditor's personal opinion which is evident from the following query:-

"..In the audit report at Sl/No. 4 of Part II the auditor has reported that salary of 3,00,000/- each to Dr. Raj I DKhare and Dr. S. Ramanathan is not genuine. You are therefore, required to justify as to how the provisions of section 13(1)(c)(ii) of the Act are not attracted..."

23. It was submitted that the AO further confirmed the addition by just stating that the auditor has qualified his report and in the opinion of auditor the salary was excessive. It was submitted that the auditor's report is in itself erroneous and cannot be relied upon. The auditor has given his findings in para 4, instead of para 3 wherein details of payments by way of salary was to be mentioned. Further, the Form required only disclosure of details and not any opinion. The AO considered that the salary has to be justified with the services rendered as well as corresponding salary of other staff having same qualification and working, however, failed to discuss the salary of other members which were comparable and could justify why the salary was excessive and was to be disallowed. The Ld. AO did not even refer any external comparable data from which it could be understood that the salary paid by such organization to person carrying out such work was excessive. Reliance was placed on the decision of Jaipur Bench decision in case of ACIT V. Mahima Shiksha Samiti [2017] 79 taxmann.com 38 (Jaipur-Trib.) wherein it has been held that the test of reasonableness can be invoked where there is contemporary data in terms of identifiable third party transactions in similar area of operation of education. It was submitted that AO, at both the times i.e. while recording reasons as well as while framing assessment, placed sole reliance upon the auditor's opinion. Thus, the disallowance was purely made on surmises and assumption. No adverse material was brought on record. It is worth mentioning that the submissions of the assessee trust were not controverted and no defect in the same was pointed out. In view of the above, addition made by Id. AO is illegal, devoid of merits and, therefore, department's ground of appeal deserves to be rejected.

24. Regarding Department's ground No. 1, the Id. AR submitted that the AO, after observing that assessee violated the provisions of section 13(3), withdrew the benefit of section 11 and 12 by invoking the provisions of section 13(1)(c)(ii) r.w.s. 13(2)(g). As submitted above, the assessee trust did not pay excessive salary to its specified persons and, therefore, the exemption cannot be withdrawn by invoking the provisions of section 13(1)(c)(ii) r.w.s. 13(2)(g). Alternatively, it is submitted that, without agreeing, even if it is considered that the assessee trust violated the provisions of the Act by passing on the benefit to persons mention u/s 13(3) then only such part of income in violation of section 13(1)(c)(ii) can be brought to tax at MMR and entire income cannot be denied exemption under section 11. Reliance was placed on the following decisions:-

- Hon'ble Supreme Court in the case of CIT v. Fr. Mullers Charitable Institutions [2014] 51 taxmann.com 378 (SC) wherein SLP was rejected and decision of Hon'ble Court of Karnataka in the case of CIT v. Fr. Mullers Charitable Institutions [2014] 363 ITR 230 was affirmed.
- Madras High Court in the case of CIT vs Working Women Forum [2014] 365 ITR 353 (Madras)
- Bombay High Court in the case of DIT (Exemptions) v. Sheth Mafatlal Gagalbhai Foundation Trust [2001] 249 ITR 533/114 Taxman 19 (Bom.)

In view of the above, it was submitted that the action of Id. AO is illegal, against the facts of the case and, therefore, department's ground deserves to be rejected

25. We have heard the rival contentions and perused the material available on record. The Id CIT(A) has recorded his findings at para 5.3 to 5.7 of his order which read as under:-

"5.3 I have considered the facts of the case and submissions of the appellant and I find that reasons for denying exemption u/s. 11 to the assessee can be succinctly stated as under:-

i) Violation of provision of section 11(5) of I T Act, 1961

ii) Unreasonable payment of Salary to persons mentioned in section 13(3) of I.T Act, 1961

iii) Trust is held as revocable and accordingly exemption u/s 11 is not allowed,

Vi) Property of the trust is deemed to be the property of owner and not allowed the exemption u/s 11.

5.3.1 For main reason for not allowing the exemption u/s. 11, the AO alleged that the trust deed contains a clause that makes a trust a private trust for personal benefit of the meaning trustee, Thus, the AO was of the view that the assessee had violated the provisions of sec, 13(1)(c)(ii) of the Act and sec, 11(5). Section 13(1)(c) of the Act has carved out an exception from exemption in cases where a part of income of a charitable or religious trust / institution is used or applied directly or indirectly for the benefit of the settle, founder or certain other specified persons under section 13(3) of the Act, This is obviously intended to ensure that the income of such a trust / institution is not diverted towards the benefit of

persons who are closely connected with tie creation, establishment and conduct of the affairs of the trust I institution. From the provisions of section 13(1)(c)(i1), it may be seen that if any part of income or any property of the trust is applied directly or indirectly for the benefit of any trustee, etc, then the benefit of exemption under section 11 of the Act, will not be available to the trust, in respect of such income. I find that in the instant case, the AO misinterpreted the clause and even otherwise also, this clause does not alter the status of the charitable trust to private trust, it is a fact that appellant trust s registered us. 12A and thus its status as irrevocable trust, Once the property is transferred to the trust it completely belongs to the property of the trust whether it is transferred by any person in any mode, The AC failed to establish that the any benefit were passed on to the trustee. Merely because trust properties are vested in trustee, it does not mean that ownership of said properties is vested with trustee and they used these properties other than purpose and objects for which the trust was established, Thus, no benefit has been passed to the founder of the trust. In absence of any 'benefit', there was no violation of any of the conditions contained in section 13(1)(c) of the Act, as held in the assessment order Consequently, the action of the assessing officer in the denying exemption under section 11/12 of the Act is held as unjustified.

5.4 As regards violation of provision of section 11(5) of the Act, the AO observed that the AO observed that mode of certain deposits were not as per investment approved u/s, 11(5) of the Act. Before me, the appellant stated that it had made investment of Rs. 50,54,000/- and Rs, 11,69,777/- in Lord Krishna Bank, which is a Schedule Bank as per List notified by the Reserve Bank of India.

Upon perusal of Schedule-II of Reserve Bank of India Act, 1934, the name of Lord Krishna Bank Is found at page no. 61, hence there is no violation of the provisions of sec, 11(5) of the Act as alleged by the AO. Even otherwise also, as per the judgment of Karnataka High Court, in the case of CIT Vs Fr. Mullers Charitable Institutions [2014] 363 ITR 230 (Kern),, only the income from such investment or deposit, which has been made in violation of section 11(5) of the Act, that is liable to be taxed and violation of section 13(1)(d) does not result in denial of exemption under section 11 to the total income of the assessee trust.

5.5 As regards unreasonable payment of Salary to persons mentioned in section 13(3) of the Act, the AO observed that the assessee had made payments to following persons in violation of provisions of sec. 13(3):-

<i>Trustee</i>	<i>Salary Paid (Rs.)</i>	<i>Disallowed (Rs.)</i>
<i>Dr.Sohan Singh Rathore</i>	<i>Rs. 5,70,000/-</i>	<i>Rs. 4,20,000/-</i>
<i>Dr. S. Ramanathan</i>	<i>Rs. 3,00,000/-</i>	<i>Rs. 1,50,000/-</i>
<i>DR. Raj Ishwar D. Khare</i>	<i>Rs. 3,00,000/-</i>	<i>Rs. 1,50,000/-</i>
	<i>RS. 11,70,000</i>	<i>RS. 7,20,000/-</i>

5.5.1 The appellant submitted before me that these persons have, not only huge teaching experience but are also doing some research work for the college and thus are closely associated with management as also in running of the college of the assessee.

5.5.2 By filing of evidences/details regarding qualification of these persons and their working experience and valuable contribution toward attaining, the purpose and objects of the trustee, the appellant has satisfactorily proved that salary paid to these persons were not excessive or not in violation of provisions of sec. 13(3). These persons duly disclosed

salary received from trust in their respective IT returns and paid due taxes thereon.

5.6 As regards the AO's observation that in the trust deed, there was no clause which could justify the revocability of the trust, therefore, it is not eligible to become public/charitable trust and hence, exemption u/s. 11 was denied to it, the appellant referred to meaning of Revocable Transfer as provided in sec. 63 of the Act. For the sake of clarity, the same is reproduced as under:-

"Transfer" and "revocable transfer" defined for the purposes of sections 60, 61 and 62 of this section a) transfer shall be deemed to be revocable if-

(i) it contains any provision for the retransfer directly or indirectly of the whole or any part of the income or assets to the transferor, or (ii) it, in any way, gives the transferor a right to reassume power directly or indirectly over the whole or any part of the income or assets;

b) "transfer" includes any settlement, trust covenant, agreement or arrangement.

5.6.1 From the above, definition, it is clear that there must be present an express clause for revocability for a trust to be revocable and merely, absence of such a clause itself makes it irrevocable. It may be noted that the appellant trust has been granted the registration u/s 12A of the Act by Commissioner of Income Tax - II, Jaipur vide his Letter No. 722 dated 27.06.2003 w. e f. 05.10.2002. Moreover, the Trust has also registration u/s 80G of the Act by the CIT - II, Jaipur. Thus, there is no valid basis before the AO to dispute the status of trust.

5.7 In view of the above facts and discussions, it is held that the AO was not justified in concluding that the provisions of section 13(I)(c)(ii) row 13(2)(g) of the Act are attracted in appellant's case and further not justified in holding that the appellant had not complied with the provisions of section 11(5). Thus, I find that no justification on the part of the AO in denying the claim of exemption u/s 11 by taking the trust status as AOP and assessing its income as "income from business and profession". Accordingly, the AO addition made of Rs 1,58,99,324/- is hereby deleted. The ground of appeal is allowed."

"6.2 The issue has already been addressed in the para 5.5, 5.5.1 & 5.5.2 above. Since I have already held that the appellant has satisfactorily proved that salary paid to these persons were not excessive or not in violation of provisions of Sec. 13(3). These persons duly disclosed salary received from trust in their respective IT returns and paid due taxes thereon. The Addition of Rs. 7,20,000/- is hereby deleted. The ground of appeal is allowed."

26. The Id CIT(A) has returned a finding that the assessee trust is duly registered u/s 12A as well section 80G of the Act and as such, we find that the status of the assessee trust as irrevocable trust has been accepted by the Department. If for any reasons, the AO has any apprehension, which we find none in the instant case, on reading of Hindi version of the trust deed as against the English version, the matter could have been referred to the Id CIT(E) for taking appropriate action as per law. Therefore, the factual situation as far as the status of the assessee trust is concerned, it remains undisputed before us that it is a case of an irrevocable trust which is duly registered under section 12A and thus, eligible for exemption u/s section 11 and 12 of the Act.

27. Regarding violation of section 11(5) of the Act, the Id CIT(A) has returned a finding that Lord Krishna Bank is a Scheduled Bank as per Schedule-II of Reserve Bank of India Act, 1934 and therefore, the amount deposited in such bank doesn't violate the provisions of Section 11(5) of the Act. We donot see any infirmity in the said findings and the same are hereby confirmed.

28. Regarding violation of section 13(1)(c)(ii) of the Act, the Id CIT(A) has returned a finding basis review of the evidence/details regarding qualification of the specified persons and their working experience and valuable contribution toward attaining, the purpose and objects of the trustee that the assessee trust has satisfactorily demonstrated that salary paid to these persons were not excessive or not in violation of provisions of sec. 13(3) of the Act. The said findings of the Id CIT(A) remain uncontroverted before us in absence of any adverse material brought on record by the Revenue and hence, the said findings are hereby confirmed.

29. In light of above, we are of the considered view that the assessee trust is irrevocable trust which is duly registered under section 12A and thus, eligible for exemption u/s section 11 and 12 of the Act and during the period relevant to impugned assessment year, there was no violation of section 11(5) as well as section 13(1)(c)(ii) of the Act and thus, the exemption under section 11 and 12 has been rightly claimed by the assessee trust and the findings of the AO are thus set-aside and that of the Id CIT(A) are confirmed. In the result, the grounds of appeal taken by the Revenue are dismissed.

In the result, the cross-objection filed by the assessee is allowed and the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 22/01/2021.

Sd/-

(संदीप गोसाई)
(Sandeep Gosain)

न्यायिक सदस्य / Judicial Member
जयपुर / Jaipur

दिनांक / Dated:- 22/01/2021.

***Santosh**

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

1. अपीलार्थी / The Appellant- ITO (E), Ward-1, Jaipur.
2. प्रत्यर्थी / The Respondent- M/s Apollo Animal Medical Group Trust, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No.960/JP/2018 & CO No. 05/JP/2020 }

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar