आयकर अपीलीय अधीकरण, न्यायपीठ –"B" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
[Before Hon'ble Shri P. M. Jagtap, Vice President and Hon'ble Shri A. T. Varkey, JM]

I.T.A. No. 2075/Kol/2019
Assessment Year: 2012-13

Apeejay Education Trust (PAN: AAATA4462E)	Vs.	Deputy Commissioner of Income-tax (Exemption), Circle-1, Kolkata.
Appellant		Respondent

Date of Hearing (Virtual)	13.07.2021
Date of Pronouncement	22.07.2021
For the Appellant	Shri Ashish Brahma, CA
For the Respondent	Smt. Ranu Biswas, Addl. CIT

ORDER

Per Shri A. T. Varkey, JM:

This is an appeal preferred by the assessee against the order of the Ld. CIT(A)-25, Kolkata dated 11.06.2019 for AY 2012-13.

2. The assessee has raised the two grounds of appeal. The first ground of appeal reads as under:

> *"1. That the Ld. CIT(A) erred in upholding the decision of the AO to the effect that donations towards corpus of the appellant Trust- would be considered as part of Gross Income required to be applied (towards the objects for which the Trust has been formed)- in terms of the provisions of Sec. 10(23C)(vi) of the Income-tax Act, 1961."*

3. Brief facts of the case as noted by the AO are that from a perusal of accounts the fact of assessee having received corpus donation amounting to Rs.2,40,00,000/- was evident. However, the assessee did not recognize such donation as 'income' either in Income & Expenditure A/c or in the computation of income. Instead the assessee had reflected such donation in the liability side of the Balance Sheet. According to AO, he asked the assessee for explanation vide order-sheet noting dated 30.01.2015, which reads "why Corpus Donation need not been considered as income in I/E A/c as per provisions of Sect 10(23C)(vi) of the Income Tax Act, 1961 (hereinafter referred to as the Act)."

3.1. Pursuant to the query, according to AO, the Ld. AR submitted that 'Corpus Donation' is a Capital receipt and it is generally not intended to be applied and even though Corpus Donations may form part of gross receipts it would not constitute Income . Further according to AO, the Ld. AR contended that Corpus donation is actually a Capital receipt and Capital receipt should not form part of the income because it is exempted u/s 11 of the Act, and, therefore, such exemption should be given u/s 10(23C)(vi) too.

3.2 Thereafter the AO reproduced See 11(1)(d) of the Act, which deals with Corpus Donation, in case of exemption u/s. 11 of the Act which reads as follows:

> *"Subject to the provisions of Sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income-*
>
> *(d) income in the form of voluntary contributions made with a specific direction that they shall form part of the corpus of the trust or institution."*

So according to AO, it is clear from the aforesaid provision that Corpus donation is an income in the hands of the assessee which is exempted by virtue of express provision of Section 11(1)(d) of the Act only in case if the exemption is claimed u/s 11 of the Act. And the AO noted that since such specific exemption for Corpus Donation is not available u/s. 10(23C)(vi) of the Act, he was of the opinion that it needs to be treated as an income of the assessee. Thereafter Corpus Donation of Rs.2,40,00,000/- was added with the income of the assessee.

3.3. Aggrieved by the aforesaid action of AO, the assessee preferred an appeal before the Ld. CIT(A) who confirmed the action of the AO by holding as under:

> *"5.1.4. I have perused the claim of the appellant. In this case the appellant has argued that the concept of provision of section 11 are also applicable while calculating the receipt u/s. 10(23C). It is pertinent to mention here that in section 10(23C) it is stated that any income received by any person on behalf of any University any other educational institutions existing solely for educational purpose and not for the purpose of profit if the aggregate annual receipt of such University or educational institutions do not exceeding the amount of annual receipt which makes it amply clear that all the receipts u/s. 10(23C) are to be considered as revenue.*
>
> *The appellant has argued that income is different from annual receipt whereas here it is important to note that the term annual receipts has not been defined under the law. Keeping in mind the intention of the provisions annual receipt should meant receipt from the various services, fees and charges calculated by the institution. It can also include the receipt from donation. The donation as such in this case relates to the regular receipt from the student by way of fee which is segregated by the institution on its own, as a building fund or capitation*

fee. Whereas it is monthly fee which is nothing but part of annual receipts. Therefore the AO was correct in holding that Rule 2B of the Income Tax Act have not excluded any kind of receipt. Donation as part of fee is also a receipt therefore for the purpose of 10(23C) it would have been made part of income expenditure account therefore I agree with the view of the AO that the corpus donation is income in the hands of the appellant which is exempt by u/s. 11(1)(d) if it is claimed u/s. 11 but such specific exemption for corpus donation is not available u/s. 10(23C)(vi), the ground on this issue is hereby dismissed and the action of the AO is upheld."

3.4. Aggrieved by the aforesaid action of the Ld. CIT(A) the assessee is before us.

3.5. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee is an educational institution which claimed exemption u/s. 10(23C)(vi) of the Act for the receipts it received during the relevant assessment year. The AO noted that the assessee has accepted corpus donation aggregating to Rs.2.40 cr. during the year under consideration. However, the AO noted that assessee has not reflected this amount in its income & expenditure A/c, whereas it has been reflected in the liability side of Balance Sheet. On enquiry by the AO, assessee contended that corpus donation are capital receipts and so it was not treated as income, therefore, it was not routed through "Income & Expenditure A/c" because it is a Balance Sheet item. However according to AO, there is no exemption of corpus donation provided u/s 10(23C) of the Act, whereas in the case of an assessee who claims exemption u/s. 11 of the Act, there is specific provision i.e. section 11(1)(d) of the Act in terms of which corpus donations are not considered as income to be 'applied'. However, since there is no corresponding or similar provision in respect of assessee's claiming exemption u/s. 10(23)(c)(vi) of the Act, the claim of the assessee cannot be allowed; and, therefore, he treated the corpus donation as income of the assessee and made the addition. The Ld. CIT(A) has confirmed the AO's action on the ground that as per section 10(23C) of the Act the phrase used is "any income" which is received by an assessee institution and if it does not exceed the amount of annual receipt which means that all receipts are to be considered as revenue in its annual receipt like the educational institution receiving money from various services, fees and charges etc. and which includes receipt from donation also. According to him, the donation as such in this case relates to the regular receipt from the students by way of fee which is

segregated by the institution on its own, as a building fund or capitation fee. So, according to Ld. CIT(A), the donation/capitation fee is monthly fee which is nothing but part of annual receipts'. On this reasoning, he affirmed the action of the AO disallowing the corpus fund.

3.6. First of all we note that the Ld. CIT(A) was factually wrong when he stated that the donation are given by the students by way of fee which is segregated by the assessee on its own as a 'building fund or capitation fee'. We note that the assessee has received corpus donation from the following three entities/trust:

(i)	M/s. Apeejay Education Association Pvt. Ltd.		Rs.1,75,00,000/- (refer page 32 of paper book.
(ii)	M/s. Ambika Charitable Trust		Rs. 30,00,000/- (refer page 33 of paper book)
(iii)	M/s. Apeejay Trust		Rs.35,00,000/- (refer page 34 of paper book)
		Total	Rs.2,40,00,000/-

6.2. From a perusal of the aforesaid pages (page 32-34 of paper book), we note that the donors/Trusts/entities have paid the amount by the mode of RTGS/cheque the details of which are given in the aforesaid documents/receipts. So, from this fact it is evident that the corpus donation were not given by the students by way of fees which has been segregated by the assessee in the form of building fund or capitation fee etc. Therefore, we note that the Ld. CIT(A) misdirected himself by wrongly assuming the facts which is contrary to the material placed on record and, therefore, his findings are perverse.

3.7. Coming to the AO's reason for denying the claim of the assessee that since there is express provision u/s. 11(1)(d) of the Act in the case of an assessee who claims exemption u/s. 11 of the Act which provides the corpus donations are not to be considered as income to be 'applied' and since there is no corresponding or similar provision in respect of assessee's claiming exemption u/s. 10(23C)(vi) of the Act, he disallowed the claim and made the addition of Rs.2.40 cr. In this context, we note that the assessee's stand from the inception was that since the donations given by the donors were for the specific purpose with a

specific direction towards corpus, the same was not reflected in the income and expenditure account whereas it was shown in the liability side and the Balance Sheet. According to the Ld. AR Shri Ashish Brahma, CA even though there is no corresponding/similar provision excluding the corpus donation u/s. 10(23C)(vi) of the Act still the character of the donation (corpus donation) cannot be in the nature of 'income'. For that he has cited plethora of judgments which all we need not refer to. However, he drew our attention to the decision of this Tribunal, Kolkata Bench in the case of Sree Sree Ramkrishna Samity Vs. DCIT reported in (2015) 64 taxmann.com 330 (Kol) and drew our attention to para 6.9, 6.10 and 6.12 of this order to assert that donation receipts are only capital in nature and cannot be treated as income of the assessee. In this case, the Tribunal observed that since in any case a receipt which is by birth capital in nature, cannot change its character merely for want of registration of the society u/s. 12AA of the Act. Moreover, the Ld. AR also brought to our notice that the Parliament has recently clarified the doubt subsisting in the mind if any in respect of the corpus donation received u/s. 10(23C) of the Act and drew our attention to the Explanation inserted to section 10(23C) of the Act, relevant extract of which is as under:

> *"Explanation – For the removal of doubts, it is hereby clarified that for the purposes of this proviso, the income of the funds or trust or institution or any university or other educational institution or any hospital or other medical institution, shall not include income in the form of voluntary contributions made with a specific direction that they shall form part of the corpus of such fund or trust or institution or any university or other educational institution or any hospital or other medical institution."*

3.8. From a perusal of the above explanation inserted by the Finance Act, 2020 after the third proviso to section 10(23C) which provides various conditions subject to which the exemption, inter alia, u/s. 10(23C)(vi) can be availed by an assessee. After incorporating the conditions the explanation following the said proviso states that for the removal of doubts it is clarified that for the purpose of this proviso, income of the funds or trust or institution shall not include income in the form of voluntary contributions made with specific direction that they shall form part of the corpus of that institution. Here in this case, as we have noted the donors have specifically given direction to use the fund towards corpus and since the explanation is for removal of doubts and it is being clarified it is retrospective in operation and, therefore, the corpus fund donated to the assessee cannot be included in the income and expenditure account but has been rightly shown by the assessee in its liability side of the

Balance Sheet since the nature of the receipt is capital in nature. Therefore, the assessee succeeds and we allow the claim of the assessee and overturn the decision of the authorities below. Thus, this ground of appeal of the assessee is allowed.

4. Ground No. 2 reads as under:

> *"2. That the CIT(A) erred in upholding the decision of the AO to the effect that provision for gratuity payable (determined by way of actuarial valuation) – would not constitute application of income – in terms of the provisions of sec. 10(23C)(vi) of the Income-tax Act, 1961."*

4.1. Brief facts as noted by the AO are that the AO found from the Income & Expenditure account that Rs, 33,16,214/- has been booked as provision for Gratuity. According to AO, since assessee is claiming exemption u/s. 10(23C), the provision for gratuity cannot be allowed as application and this view of AO was brought to the notice of the Ld. AR vide order sheet noting dated 20-02-2015.

4.1. The AO acknowledges that in its reply the Ld. AR of the assessee supporting the claim relied on the judgment of Hon'ble Supreme Court in Bharat Earth Movers vs. CIT [2000] 112 Taxmann 61, which according to AO, was related to a company, i.e. for assessment procedure related to business and profession, and not with any trust or charitable activity i.e. exempted entities u/s.12A/12AA or 10(23C) of the Act. However, the AO noted that the Hon'ble Supreme Court in the case of Nachimuthu Industrial Association vs CIT reported in 235 ITR 190 [1999] obseved that the provision cannot be allowed as application. And only the actual expenditures made during the year can be treated as application. However, AO noted that such excess accumulation will also be exempt subject to 3rd proviso of See 10(23C) of the Act. Therefore, the AO disallowed Rs. 33,16,214/- as expenses.

4.4. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who confirmed the order of the AO by holding as under:

> *"5.2.3. perusal of AO order shows that the payment of gratuity was not made during the year therefore to that extent appellant cannot claim it as application of income. The AO has relied over the decision of in case of Nachimuthu Industrial Association Vs. CIT 235 ITR 190 (1999) – is different in nature & character than provision for statutorily payable gratuity determined as per actuarial valuation as in the instant case. It is also to point out that appellant has claimed that TDS amount was actually not received hence it cannot be treated as income,*

application or accumulation purpose. Similarly the gratuity provision has not been paid hence it cannot be treated as application of income in this year.

Keeping in view of the aforesaid decision and also keeping in mind that the payments and receipt are acknowledged on actual basis in case of exempt entities the action taken by the AO is hereby upheld and the ground of appeal is dismissed."

4.5. Aggrieved the assessee is before us.

4.6. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee claimed an amount of Rs.33,16,214/- in its income and expenditure account as provisions for gratuity liability. According to AO, an assessee claiming expenditure u/s. 10(23C) of the Act cannot be allowed this claim since the provision booked by the assessee has not been applied by the assessee. For that he relied on the decision of Hon'ble Supreme Court in the case of Nachimuthu Industrial Association Vs. CIT 235 ITR 190. According to him, only the actual expenditure made during the year can be treated as application and, therefore, he disallowed the claim of the assessee and made addition. The Ld. CIT(A) has simply confirmed the same. We note that assessee's case is that the provision for gratuity has been done as per the actuarial valuation and as such it is not an unascertained liability. According to the Ld. AR, the same has been determined by actuarial valuer as in the year end date. According to him, the actuarial value of gratuity liability is akin to ascertained liability. It was pointed out by the Ld. AR that the liability to pay gratuity is a statutory liability. According to him, actuarial valuation is a process thereby liability as on a certain date is crystallized and such a valuation cannot be compared for mere estimate of expenses to be incurred. According to him, the provision of such liability is mandated by the accounting standard applicable for preparation of financial statements and refer to the accounting standard 15 (revised) and he distinguished the case relied on by the AO in the case of Nachimuthu Industrial Association (supra). According to the Ld AR, in that case the assessee had only appropriated out of the profit of the year a sum of Rs. 3 lakhs and credited it to the 'reserve for donation account'. According to the Ld. AR, the action of the assessee in that case by appropriating out of the profit of the year a sum of Rs. 3 lakh in the 'Reserve for donation account' does not tantamount to application of the income. Therefore, the said sum (Rs. 3 lacs) was held to be not a case of application. Therefore in the peculiar facts of the case, it was observed that '*except for the making of*

entries in the assessee's own books, which entries could have been reversed if and when the assessee chose to do, the assessee has not done in anything which can be characterize the payment as donation or application of the income of the trust for any charitable purpose'' which was not the case of the present assessee as misinterpreted by the AO, therefore, according to the Ld. AR the case of Nachimuthu Industrial Association (supra) is distinguishable on facts. Therefore, according to the Ld. AR, the provision for gratuity is required to be made since it is a statutory obligation and, therefore, he prayed that the provision for gratuity need to be considered as application of income. We agree that the gratuity to the employees is a statutory obligation, and therefore is obliged by law to disburse the same when the employees demit office or superannuate. In this case, the assessee has booked provision for gratuity as per the actuarial valuation and the manner and determination of the same is a scientific process adopted by expert professionally trained in the valuation and as such it cannot be compared with mere estimate of expenses to be incurred in future. Therefore, relying on the ratio of the decision rendered by the Hon'ble Supreme Court in the case of Bharat Earthmovers Vs. CIT 112 taxmann 61 though it refers to the case of a company in respect of deduction of provision for gratuity under the head 'business and profession', however, the principle can be seen extracted in that order in the case of Metal Box Co. of India Ltd. Vs. Their workmen 73 ITR 53 (SC) wherein the Hon'ble Supreme Court has held as under:

> *"5. In Metal Box Co. of India Ltd. v. Their Workmen [1969] 73 ITR 53 (SC), the appellant-company estimated its liability under two gratuity schemes framed by the company and the amount of liability was deducted from the gross receipts in the profit and loss account. The company had worked out on an actuarial valuation its estimated liability and made provision for such liability not all at once but spread over a number of years. The practice followed by the company was that every year the company worked out the additional liability incurred by it on the employees putting in every additional year of service. The gratuity was payable on the termination of an employee's service either due to retirement, death or termination of service - the exact time of occurrence of the latter two events being not determinable with exactitude before hand. A few principles were laid down by this Court, the relevant of which for our purpose are extracted and reproduced as under :*
>
> *(i) For an assessee maintaining his accounts on mercantile system, a liability already accrued, though to be discharged at a future date, would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. It is not as if such deduction is permissible only in case of amounts actually expended or paid;*

(ii) Just as receipts, though not actual receipts but accrued due are brought in for the income-tax assessment, so also liabilities accrued due would be taken into account while working out the profits and gains of the business;

(iii) A condition subsequent, the fulfilment of which may result in the reduction or even extinction of the liability, would not have the effect of converting that liability into a contingent liability;

(iv) A trader computing his taxable profits for a particular year may properly deduct not only the payments actually made to his employees but also the present value of any payments in respect of their services in that year to be made in a subsequent year if it can be satisfactorily estimated.

6. So is the view taken in Calcutta Co. Ltd. v. CIT [1959] 37 ITR 1, wherein this Court has held that the liability on the assessee having been imported, the liability would be an accrued liability and would not convert into a conditional one merely because the liability was to be discharged at a future date. There may be some difficulty in the estimation thereof but that would not convert the accrued liability into a conditional one; it was always open to the tax authorities concerned to arrive at a proper estimate of the liability having regard to all the circumstances of the case."

4.7. Therefore, in the light of the aforesaid discussion and the ratio of the case law supra, we are of the opinion that the assessee's claim in respect of provision for gratuity as per the actuarial valuation should have been allowed in the facts and circumstances of the case; and, consequently, the impugned order of the Ld. CIT(A) is set aside and the AO is directed to allow the provision for gratuity as application of income. Therefore, ground no. 2 of the assessee's appeal stands allowed.

5. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 22nd July, 2021.

Sd/- Sd/-

(P. M. Jagtap) (A. T. Varkey)
Vice President Judicial Member

Dated: 22nd July, 2021

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – M/s. Apeejay Education Trust, 15, Park Street, Kolkata-700 016.
2 Respondent –. DCIT (Exemption), Circle-1`, Kolkata.
3. CIT(A)-25, Kolkata. (sent through e-mail)
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy, By order,

Senior Pvt. Secretary/DDO