

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

**BEFORE SHRI PRAMOD KUMAR (VICE PRESIDENT) AND
SHRI RAVISH SOOD (JUDICIAL MEMBER)**

**ITA No.1901/MUM/2020
(Assessment Year: 2012-13)**

Income Tax Officer (E) 1(4)
Room No. 507, 5th Floor,
Piramal Chambers, Lalbaug,
Lower Parel, Mumbai – 400 012

Vs. Kutchi Sarvodaya Nagar,
P. Ltd. Lokhande Marg, Near
Aryan Guru High School,
Govandi, Mumbai – 400 018

PAN No. AAATK0678E

(Revenue)

(Assessee)

Assessee by : Shri Pradip Kapasi, A.R
Revenue by : Shri Gurbinder Singh, D.R

Date of Hearing : 16/09/2021
Date of pronouncement : 21/09/2021

ORDER

PER RAVISH SOOD, J.M:

The present appeal filed by the revenue is directed against the order passed by the CIT(A)-3 Mumbai, dated 29.01.2020, which in turn arises from the order passed by the A.O u/s 143(3) of the Income Tax Act, 1961 (for short 'Act') dated 26.03.2015 for A.Y. 2012-13. The revenue has assailed the impugned order on the following grounds before us:

- “1. Whether, on the facts and in circumstances of the case and in law the Ld. CIT (A) 3, Mumbai has erred in accepting that assessee is not involved in business activities as per the provision of section 2(15) of the IT Act and allowing the benefit of exemption u/s. 11 of the Income tax Act, 1961 to the Appellant.
2. Whether, on the facts and in circumstances of the case and in law the Ld. CIT(A), Mumbai has erred in deciding that provisions of s. 13(2) are not applicable even though the trustees were beneficiaries.
3. Whether, on the facts and in circumstances of the case and in law the Ld.CIT(A)-3, Mumbai has erred in allowing the exemption u/s 11 of the IT Act to the assessee, by ignoring the facts brought on record by the Assessing officer that during the year, the assessee has received Rs.6,87,50,000/- as transfer fee, and trustees are elected members amongst the owners of the houses at Kutchi Sarvodaya Nagar, Govandi.
4. The appellant prays that the order of the Commissioner of Income Tax (Appeals)-3, Mumbai be set aside and that of the Assessing Officer be restored.
5. The Appellant craves leave to amend or alter any ground or add a new ground which may be necessary.”

2. Briefly stated, the assessee trust which is registered with the Director of Income Tax (Exemption), Mumbai u/s 12A of the Act had filed its return of income for A.Y. 2012-13 on 27.09.2012 a/w its Income and expenditure account, balance sheet and audit report in Form No. 10B, declaring an income of Rs.nil. Subsequently, the case of the assessee trust was selected for scrutiny assessment u/s 143(2) of the Act.

3. During the course of the assessment proceedings, it was observed by the A.O that a perusal of the records revealed that the only activity of the assessee trust in the last 50 years was that of constructing housing for its members. It was noticed by the A.O that the assessee trust was providing housing to deserving vegetarians. It was further observed by the A.O that the assessee trust had acquired 51000 Sq. yards of land from Shri V.K. Chheda at Rs.2.75 per sq. yard. On a further perusal of the records it was noticed by the A.O that 352 persons had come forward to participate and had contributed an amount of Rs.501/- each as membership fees. It was observed by him that the assessee trust had collected membership fees of Rs.17,62,352/- from which certain amount was

utilized for purchasing the aforesaid plot way back in the year 1962. It was noticed by the A.O that as per the 'trust deed' only a person of the age of 25 years or above who would make a declaration that he was strictly a vegetarian was eligible to become a member of the assessee trust. On a perusal of the Income and expenditure account and the balance sheet of the assessee trust, it was gathered by the A.O that the assessee had collected an amount of Rs.52.21 crores from its members as installments till date for construction of flats. Also, the assessee had collected transfer fees of Rs.7,05,86,200/- till date by way of fees for transfer of membership. Insofar the year under consideration was concerned, it was observed by the A.O that the assessee had during the year earned an interest on its investments amounting to Rs.2,63,53,733/-. Backed by the aforesaid facts, the A.O being of the view that the activities of the assessee trust were purely commercial in nature, thus, declined its claim for exemption u/s 11 of the Act. Also, the A.O applied the provisions of Sec. 13(2) of the Act, as well as ruled out the applicability of the principles of mutuality to the case of the assessee. Observations of the A.O qua the aforesaid issues in question are culled out as under :

- (1) Applicability of 1st proviso to section 2(15) : The activities of the trust are limited to its member and the assessee is providing housing to the deserving vegetarians. There is no restriction on members in selling the membership to other vegetarians along with embedded right to get the flat / block / tenement etc. The trust is collecting Rs. 5 lakhs from incoming member as transfer fees. The incoming member has to fill some forms provided by the trust and pay transfer fees of Rs.5 lakhs to the trust. Thus, the activities of the appellant are in nature of business as the trust is getting transfer fees for this purpose.
- (2) Applicability of provision of Section 13(2): The A.O observed that the trust deed of the assessee clearly states that the members are entitled for the flat/tenement and the trustees are elected from these Members. The flats are being constructed from the contributions made by the members and once the construction is completed, the property of the trust will be transferred to the members and trustees. Thus, only interest of the members in becoming the member of the trust is to get the flat / tenement. Hence, the provisions of section 13(2) r.w.s 13(3) is applicable to the assessee.
- (3) Assessee under mutuality concept : In the mutual association the members subscribe for the primary purpose of benefiting themselves, while in a charitable

institution people subscribe for charitable object without any expectation in return. In this case, the members have contributed only for the purpose of their own benefit and for acquiring certain amenities. The AO relied on the decision of the Hon'ble Apex Court in the case of Bangalore Club Vs. CIT & Anr. being Civil Appeal No. 124 of 2007 dated 14.01.2013. The total income of the appellant is computed at a loss of Rs.2,56,20,780.

Accordingly, the A.O after declining the assessee's claim for exemption u/s 11 of the Act, vide his order passed u/s 143(3), dated 26.03.2015 assessed its income at a loss of (-) Rs.2,59,20,780/-.

4. Aggrieved, the assessee carried the matter in appeal before the CIT(A). It was observed by the CIT(A) that a similar issue had come up before his predecessor in the assessee's own case for A.Y. 2011-12, wherein vide his order passed in appeal No. CIT(A)-1/38/E-II/2014-15, dated 27.03.2015 he had decided the issue in favor of the assessee and allowed the appeal. It was further noticed by the CIT(A) that on further appeal by the revenue the ITAT, Mumbai had vide its order passed in ITA No. 3391/Mum/2015, dated 30.10.2017 decided the issue in favour of the assessee trust. Backed by the aforesaid facts, the CIT(A) respectfully followed the view taken by the Tribunal in the assessee's own case and allowed the appeal of the assessee.

5. The revenue being aggrieved with the order of the CIT(A) has carried the matter in appeal before us. The Id. Authorized Representative (for short 'A.R') for the assessee at the very outset of the hearing of the appeal submitted that the issues involved in the present appeal were squarely covered by the order passed by the Tribunal in the assessee's own case for A.Y 2011-12 in ITA No.3391/Mum/2015, dated 30.10.2017. It was submitted by the Id. A.R that as the CIT(A) had followed the aforesaid order of the Tribunal, therefore, no infirmity arises from his order and the appeal filed by the revenue being devoid and bereft of any merit was liable to be dismissed.

6. Per contra, the Id. Departmental Representative (for short 'D.R') relied on the assessment order. However, the Id. D.R fairly admitted that the issues involved in the present appeal were squarely covered by the order passed by the Tribunal in the assessee's own case for A.Y. 2011-12 in ITA No. 3391/Mum/2015, dated 30.10.2017.

7. We have heard the Id. Authorized Representatives for both the parties, perused the orders of the lower authorities and the material available on record. As stated by the Id. A.R, and rightly so, the issues involved in the present appeal are squarely covered by the order that was passed by the Tribunal in the assessee's own case for the immediately preceding year i.e A.Y 2011-12 in ITA No. 3391/Mum/2015, dated 30.10.2017, wherein it was held as under:

- "5. On appraisal of the above mentioned finding we nowhere found the activity of the assessee out of the purview of memorandum of association. The AO raised the first point that the assessee was admitting the new member of trust art was selling the house to them, but the CIT(A) on appraisal of the record observed that the members were enrolled 1962 and no new member was admitted in general except against defaulter. The resolution dated 30.11.1963 lay down the scheme of housing. The application for increase in the number of members was moved to the charity commissioner on 24.02.1982 in view of the memorandum of the trust. It was also observed that the cost of the construction, development fees not exceeding of Rs.7,50,000/- as decided by the committee to meet the deficit and construction costs collected by way of development fees do not amount to business transaction. The nominated persons/new members were also not debarred from any subsequent transfer. The objects of the trust under which housing and building promotion was carried out and for which the defaulting members were substituted remain approved/registered u/s 12A of the I.T. Act, 1961, for the purpose of the objects of the trust and accepted in assessment in earlier year as charity activities. So far as the alienation of the flats is concerned, nothing came into notice that the flats were sold in the open market. So far as the transfer of the old member to the new member is concerned, the trust was not receiving any profit on account of substitution of defaulting member. The fees charge for admission was only towards the cost of construction which was not out of the purview of the objects of registration u/s 12A of the I.T Act. So far as the receipt of fees from incoming member for the fulfilment of the object who was admitted under the eligibility of the own defaulting member under the scheme duty intimated and approved by the charity commissioner. These activities were admitted in the past. So far as applicability of the provision of section 13(2) is concerned, the same is applicable when the trust was deriving the benefit from alienation of flat to anyone in the open market but no such instance came into the notice. Here we also observed that no instance came into the notice in connection with the violation of the principle of mutuality being no single

transaction cut of the trust as highlighted. In said circumstances, we are of the view that the CIT(A) has passed the order judiciously and correctly which is not required to be interfere with at this appellate stage, therefore, these issues are decided in favour of the assesses.”

As the CIT(A) had followed the aforesaid order of the Tribunal that was passed in the assessee’s own case for the immediately preceding year i.e A.Y 2011-12 qua the issues in question in the present appeal before us, therefore, finding no infirmity in the view taken by him we uphold the same.

8. Resultantly, the appeal filed by the revenue is dismissed.

Order pronounced in the open court on 21.09.2021

Sd/-
(Pramod Kumar)
VICE PRESIDENT

Sd/-
(Ravish Sood)
JUDICIAL MEMBER

Mumbai;

Dated: 21.09.2021

*PS: Rohit

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.

BY ORDER,
//True Copy//

(Sr. Private Secretary)
ITAT, Mumbai