THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 6279/Mum/2019 (Assessment Year 2012-13)

ITO(E)-1(1) Room No. 508 5th Floor, Piramal Chambers, Lalbaug Mumbai-400 012.	Vs.	Aditya Birla Foundation C-1, Aditya Birla Centre S.K. Aahire Marg, Worli Mumbai-400 030. PAN : AAATA0382P
(Appellant)		(Respondent)

Assessee by	Shri Ronak Doshi
Department by	Shri Rajeev Harit
Date of Hearing	12.08.2021
Date of Pronouncement	28.10.2021

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Revenue is directed against the order of learned Commissioner of Income Tax (Appeals) [in short learned CIT(A)] 19.7.2019 pertains to Assessment year (A.Y.) 2012-13.

2. The grounds of appeal read as under :-

1. "Whether, on the facts and in circumstances of the case and in law the Ld.CIT(A)-3, Munibai was right in allowing the appeal of the assesses on the issue of denial of exemption u/s.ll of the Act, without appreciating the fact that the Revenue has not accepted the said decision and has filed an appeal before the Hon'ble ITAT in its own case in A.Y.2011-12 which is pending for adjudication."

2. "Whether, or) l he facts and in the circumstances of the case and in law the Ld. CIT(A) was justified hi allowing the assessee 's claim of exemption of Rs. 3,96,94,179/- being the interest income accrued hut not received during the previous year as the assessee followed the mixed system of accounting i.e. cash system for receipts and mercantile system for expenses without appreciating the fact that the assessee is a company registered u/s 25 of the Companies Act, 1956 and was statutorily required to follow mercantile system ".

3. "Whether, on the facts and in the circumstances of the case and in law, the learned CIT(A) was justified in deleting addition of Rs. 10,91.68.410/-

made by the AO u/s 13(3) of the I.T. Act on account of receiving lower rent from the related party without appreciating that the DVO has determined the market value of the said property to Rs.2,6I,I7,50I/- being value of lease rentals of Hospital building at the rate ofRs.4.45/-per month per sq. ft and for staff quarters at Rs. 3.94/- per months per sq.ft. which is still higher than the rate charged by the assessee trust i.e. 4.10/- per month per sq. ft. for hospital building and Rs. 3/- per month per sq. ft. for staff quarters. The As the DV'O has determined the rental value higher than the rent actually received, so there is no doubt about the fad that the assessee trust is not receiving adequate rent".

4. "Whether, on the facts and in the circumstances of the case and in law, the Ld. CIT(A) was justified in allowing the assessee 's claim of accumulation of income without appreciating the fact that in the return of income & form 10B, deficit has been claimed leaving no scope of accumulation u/s 11(2) of the I.T. Act which is permitted for specific purposes".

5. "The appellant prays that the order of the Commissioner of Income Tax(Appeal)-3. Mumbai he set aside and (hat of the Assessing Officer be restored. "

3. At the outset both the counsel agreed that the issues are duly covered by the ITAT order in assessee's own case for A.Y. 2011-12. Learned Counsel of the assessee has filed a written submissions in this regard are as under :-

Ground No.	Ground by Department	Case Laws relied upon
1	Denial of exemption u/s 11 by AO without appreciating that the department has challenged the order of CIT(A) before ITAT for AY 2011-12	1. ITAT Order passed in Assessee's own case for AY 2011-12 (ITA No. 4065/Mum/2019) 2. Surat City Gymkhana (300 ITR 214) (SC) 3. Hiralal Bhagwati v. CIT(246ITR 188)(Guj.) 4. DIT(I-) v. Gemological Institute of India [2019] 263 Taxman 348 (SC)
2	CIT(A) erred in holding that interest income is assessable on receipt basis instead of Mercantile	5. United Commercial Bank v. CIT (240 ITR 355)(SC) 6. J.K Bankers v. CIT (94 ITR 107) (All. HC) 7. CIT v. Ganga Charity Trust Fund (162 ITR 612) (Guj)

		WITHOUT PREJUDICE, IN AY 2011-12, THE ITAT HAS HELD AS UNDER: 13. In this view of the matter the Assessing Officer is correct principally in holding that the assesses is required to account for the interest on accrual basis. However, we note that the assesses is accounting for the interest on receipt basis/fence, assesses must have accounted for the interest of earlier year which has been received during the year on receipt basis. Hence, by this change of method of accounting the assessee 's income would include interest income of earlier year received during this year as well as interest income accrued for the year. This will amount to taxing more interest income than that what is legitimately taxable for this year. Hence we are of the opinion that from the interest accrued for the year the interest income of earlier year which had accrued in earlier year but were accounted for on receipt basis during this year should be reduced. The resultant figure should be added to the income of the assessee. Thus, a direction being given to avoid, taxing the same interest income twice.	
3	Addition on account of lease rental by invoking section 13(3).	8. ITAT Order passed in Assessee's own case for AY 2011-12 (ITA No. 4065/Mum/2019) (Para 22 and 24)	
		Proposition 1: If the value of a transaction has been approved by a competent authority, it is not open for income-tax authorities to question the same	
		4	Virendra v. Appropriate Authority (327 ITR 1 85) (Bom HC)
		5	CIT v. Shriram Pistons and Rings Ltd. (181 ITR 230) (Del HC)
		Proposition II: Reference to DVO cannot be made without rejecting books of accounts.	
		6	Sargam Cinema v. CIT (328 ITR 513) (SC)
		7	Amol Chand Vurshncy Sewa Sansthan v. ACIT (142 ITD 658) (Agra T)
		Proposition III: Adequate rent is not equivalent to Fair Market rent	
		8	Commissioner of Gift-Tax v. Indo Traders and Agencies (P.) Ltd, (131 ITR 313) (Mad)
		9	Commissioner of Gift-tax v. Nelson & Co. (245 ITR 347) (Mad)
		Proposition IV: On the facts of the case, provisions of section 13(3) cannot be applied	
		1	HDFC Bank Ltd. v. ACIT (WP No. 462 of 2017)
		2	DIT v. Span Foundation (178 Taxman 436)
4	CIT (A) erred in allowing assessee's claim for accumulation of income u/s 11(2) of the Act read with Form 10B		ITAT Order passed in Assessee's own case for AY 2011-12 (ITA No. 4065/Mum/2019) (Para 25 to 28)

4. Per contra learned Departmental Representative did not dispute the proposition that issues have already been dealt with by ITAT in the preceding year.

5. Upon careful consideration we find that the ITAT has decided the same issues earlier in the aforesaid order as under :-

6. Apropos ground No. 1&2

(ITAT adjudication for A.Y. 2011-12)

> "11. We have carefully considered the submission and perused the record. We note that the assessee is a trust. It is undisputed that the assessee is following mercantile system of accounting as per its audit report and accounts. However, it is also undisputed that the assessee is accounting for interest income on receipt basis. As a result of this finding, the Assessing Officer has found that Rs. 3,96,94,179/-being interest accrued have not been accounted by the assessee on the ground that it is accounting for the same on the basis of cash system i.e. receipt basis. We note that section 145(1) of the Act provides that income chargeable under the head 'profits and gains of business or profession' or 'income from other sources' shall subject to the provisions of sub-section (2) be computed in accordance with either cash or mercantile system of accounting regularly employed by the assessee. Thus it is amply clear that the method of accounting provided in the Act is either cash or mercantile and hence it cannot be mixed of hybrid system any more. Thus it is also clear that as per assessee's accounting system duly followed certified by the auditor is mercantile system of accounting. Hence, by only accounting for interest on receipt basis and other aspect of income and expenditure on mercantile basis assessee is following hybrid system which is not permissible. Now assessee's contention is that learned CIT(A) has accepted that the assessee is following this system for long time and Revenue has not disputed the same. Here we note that there is no doubt that this system is not permissible in the present assessment year as per the sanguine provisions of the Act as enshrined of section 145 of the Act. Just because wrong system has been followed for quite some time, it has been claimed that the same should be allowed to continue. In this regard we refer to Hon'ble Supreme Court decisions that there is no heroism in perpetuating an error. It was held that to perpetuate an error is no heroism. "To rectify it is the compulsion of judicial conscience. In this we derive comport and strength from wise and inspiring words of justice Bronsm in Pierce Vs. Delameter. A judge ought to be wise enough to know that he is fallible and therefore ever ready to learn, great and honest enough to discard all mere pride of opinion and follow the truth wherever it may lead and courageous enough to knowledge his error". [Hon'ble Supreme Court in Distributors Baroda (47 CTR 349)]. Further it has been held that once the court comes to a conclusion that a wrong order has been passed it become the solemn duty of

the court to rectify the mistake rather than perpetuate the same. [Hotel Balaji & Ors. Vs. State of Andhra Pradesh & Ors. (AIR 1993 SCI 048)].

12. This aspect is further accentuated on the specific facts of this trust where as noted by the Assessing Officer the assessee trust is required to apply its income as per the mandate of the Act. Furthermore, section 11 also provides for a situation where the income is accrued but not received by the trust. Explanation (2) to section 11(1) clearly states that if the income expended fall short of 85% of the income for the reason that the income has not been received during the year or for any other reason then an option is given to the assessee to intimate the Assessing Officer that the same would be spent in the year of receipt or in the immediately following year as the case may be. This further makes this case of the assessee distinguishable and the assessee cannot be allowed to circumvent the provisions of applying income by reducing income at source itself. The case laws referred by learned Counsel of the assessee where accounting on receipt basis followed in earlier year was allowed to be continued, were on the facts of each case. Accordingly, we are of the considered opinion that the system followed by the assessee of only accounting interest income on receipt basis is not sustainable.

13. In this view of the matter the Assessing Officer is correct principally in holding that the assessee is required to account for the interest on accrual basis. However, we note that the assessee is accounting for the interest on receipt basis. Hence, assessee must have accounted for the interest of earlier year which has been received during the year on receipt basis. Hence, by this change of method of accounting the assessee's income would include interest income of earlier year received during this year as well as interest income accrued for the year. This will amount to taxing more interest income than that what is legitimately taxable for this year. Hence we are of the opinion that from the interest accrued for the year the interest income of earlier year which had accrued in earlier year but were accounted for on receipt basis during this year should be reduced. The resultant figure should be added to the income of the assessee."

7. Since facts are identical we follow the same. The order of learned CIT(A) is set aside and our direction to the Assessing Officer shall apply mutatis mutandis in this year also. Hence, this issue raised by the Revenue is partly allowed.

8. <u>Apropos ground No. 3</u>

(ITAT adjudication for A.Y. 2011-12)

"22. Upon careful consideration we note that after examining shareholding pattern of the person specified, learned CIT(A) has given a finding that clause (a) to (d) of section 13(3) of the Act are not applicable. Further learned CIT(A) has given a finding with respect to section 13(3)(e) of the Act the said clause

is not applicable here. Learned CIT(A) has given a finding that he has examined the shareholding pattern of ABHSL and also compared the same with the list of the trustees of the appellant trust. He has found that Mrs. Rajshree Birla, Mr. B.L. Shah and Mr. Ashwin Kothari are the three people who are the Trustees of the Appellant Trust and shareholders of ABHSL. That however, the total shares held by these three persons collectively are 30 shares as compared to the total share capital of 50,000 shares of ABHSL. That thus, even collectively, the shareholding of the Trustees in ABHSL is far below the threshold of 20%. Hence learned CIT(A) held that in view of specific provisions of section 13 of the Act he held that ABHSL is not a related party under section 13(3) of the Act and thus addition made by the Assessing Officer is deleted.

23. We find that apparently there is no error in the finding of learned CIT(A). Learned CIT(A)-DR could not cogently rebut the learned CIT(A)'s finding but tried to make out of the case that the shareholder list of ABHSL may be obtained and thereafter further examination can be done. In this regard we are of the opinion that there is no such case made out by the Assessing Officer in the assessment order. He has simply made a presumption without actually analyzing the facts. It is settled law that mere presumption is not sustainable. Whatever material the Assessing Officer has referred in the assessment order does not prove that this transaction is transaction between the related concerns. In absence of any cogent material brought on record by learned Departmental Representative, we are not inclined to direct any further roving inquiry. In this view of the matter we are of the considered opinion that there is no infirmity in the order of learned CIT(A) in this regard.

24. As regards the other aspects in this regard i.e. quantification of rent we find that once the assessee is not falling the ambit of section 13(1) of the Act this issue does not arise. In any case, the act of the Assessing Officer of notional addition or through DVO is not sustainable on the touchstone of Hon'ble Bombay High Court decision in the case of Virendra Vs. Appropriate Authority & Ors. (327 ITR 185). In as much as in the said case it was held that approval by the competent authority is fair estimate. Moreover, the decision of Hon'ble Bombay High Court in the case of Tip Top Typography (supra) does not mandate this type of computation of rental income done by the Assessing Officer. Accordingly, in the background of the aforesaid discussion and precedent, we uphold the order of learned CIT(A). Since the two decisions of Hon'ble Bombay High Court are in favour of the assessee, other decisions of the Tribunal in this regard are not being dealt with. As we are not upholding the order of learned CIT(A) on the principal of res judicata, the decision of Hon'ble Apex Court in New Jehangir Vakil Mills Co. Ltd. (supra) is not applicable."

9. Since facts are identical, respectfully following the precedent, we uphold the order of learned CIT(A).

10. Apropos ground No. 4

(ITAT adjudication for A.Y. 2011-12)

"25. Brief facts are that the assessee had filed application for accumulation of income in Form 10 for the previous year on September 30, 2011 along with return of income. However, Assessing Officer has failed to give effect to Form 10. The assessee made following submission before learned CIT(A) :-

> "The Appellant humbly submits that without prejudice to its main contention that set off of the deficit of earlier years is allowable against the income of the current year, the assessed income should be considered as deemed application in the year under consideration, since Section 11(2) of the Act provides that if the application or deemed application of the income falls short of 85% of the income, the short-fall shall not be included in the total income of the previous year of the person in receipt of the income, provided certain conditions are fulfilled. The relevant extract of the section as relevant to the year under consideration is reproduced below for ready reference:
>
> *"11.*
> *(2) Where eighty-five per cent of the income referred to in clause (a) or clause (b) of sub-section (1) read with the Explanation to that subsection is not applied, or is not deemed to have been applied, to charitable or religious purposes in India during the previous year but is accumulated or set apart, either in whole or in part, for application to such purposes in India, such income so accumulated or set apart shall not be included in the total income of the previous year of the person in receipt of the income, provided the following conditions are complied with, namely:—*
>
> *[(a) such person furnishes a statement in the prescribed form and in the prescribed[3] manner to the Assessing Officer, stating the purpose for which the income is being accumulated or set apart and the period for which the income is to be accumulated or set apart, which shall in no case exceed five years;*
>
> *(b) the money so accumulated or set apart is invested or deposited in the forms or modes specified in sub-section (5);*
>
> *(c) the statement referred to in clause (a) is furnished on or before the due date specified under sub-section (1) of section 139 for furnishing the return of income for the previous year:"*
>
> The section provides that where 85% of the income is not applied or is hot deemed to have been applied but the same is accumulated or set apart by furnishing a statement in the prescribed form wherein the purpose and the period of accumulation is specified, the same will not be included in the total income provided the statement of accumulation has been furnished before the date of filing the return of income as per section 139(1) and the amount so accumulated or set apart has been invested in the modes specified in section 11 (5) of the Act.

The Appellant submits that it had submitted Form 10 on September 30, 2011 which is well within the time specified for filing the return of income as per section 39(1) of the Act. Further, the purpose as well as the period of accumulation was specified in Form 10. Furthermore, the Appellant even invested the accumulated amount in the modes specified in section 11(5) of the Act. Thus, the Appellant humbly submits that all the conditions of section 11(2) of the Act are satisfied.

The Appellant, therefore, submits that the Form 10 filed by the Appellant be given effect to and thus, the income computed by the AO be treated as accumulated or set apart under section 11(2) of the Act."

26. Considering the above learned CIT(A) granted relief as under :-

"I have considered the facts of the case and the submissions made by the Appellant. It is not disputed that the Appellant had filed Form No. 10 along with its return of income. Thus, after giving effect to the appellate order if there is any surplus income for the current year for set off of past deficit, if any, then the AO is directed to consider Form No. 10 filed by the Appellant and compute the income as per law."

27. Against the above order Revenue is in appeal.

28. Both the counsel fairly agreed that this is consequential issue and learned CIT(A) has passed a correct order. Hence, we uphold the order of learned CIT(A)."

11. Since the facts are identical and learned CIT(A) has passed identical order we uphold the same.

12. In the result, Revenue's appeal is partly allowed.

Pronounced in the open court on 28.10.2021.

Sd/-	Sd/-
(AMARJIT SINGH)	(SHAMIM YAHYA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai; Dated : 28/10/2021

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//

(Assistant Registrar)
PS ITAT, Mumbai