

आयकर अपीलीय अधिकरण  
मुंबई पीठ "जी"  
श्री विजय पाल राव, न्यायिक सदस्य एवं  
श्री गगन गोयल, लेखाकार सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "G", MUMBAI  
BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER &  
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

आसं. 986/मुं/2021 (नि.व.2016-17)  
ITA No. 986/MUM/2021 (A.Y.2016-17)

Sheila Gopal Foundation Construction House-B, 2 <sup>nd</sup> Floor 623, Linking Road, Khar (West) Mumbai-400 052 PAN : AABTS5672B	vs	The Commissioner of Income-tax (Exemptions), Room No.617, 6 <sup>th</sup> Floor, Piramal Chamber, Lal Baug, Parel, Mumbai-400 052
<b>APPELLANT</b>		<b>RESPONDENT</b>

Assessee represented by	Shri Sanjay Sawant
Department represented by	Shri Nikhil Choudhary (CIT – DR)

Date of hearing	28/03/2022
Date of pronouncement	01/04/2022

**ORDER**

Per Vijay Pal Rao (JM):

This appeal by the assessee is directed against the revision order dated 19/03/2021 of Commissioner of Income-tax (Exemption) passed under section 263 of the Income-tax Act, 1961 for the assessment year 2016-17.

2. The assessee has raised the following grounds:-

"1. On the facts and in the circumstances of the case and in law, the learned CIT(Exemptions) has erred in invoking provisions of Section 263 of the Act- a.) when appeal filed before CIT (A) is pending for hearing on the same subject matter;

b.) CIT(Exemptions) erred in applying his views where two views are possible, and

c.) CIT(Exemptions) erred in treating order passed by the A.O. as an erroneous order in insofar as it is prejudicial to the interest of the revenue without considering the documents and submission made by the assessee during assessment proceedings.

2. On the facts and in the circumstances of the case and in law, the learned CIT (Exemptions) erred in not considering Donation of Rs. 2,75,00,000/- to M/s. Sind Education Trust for Educational purpose which is object of the assessee trust & therefore, the A.O. allowed as an expenditure of the trust.

3. On the facts and in the circumstances of the case and in law, the learned CIT (Exemptions) has erred in holding & confirming that A.O. invoked the provisions of section 13(2) of the Act to deny exemptions claimed u/s 11 of the Act. Consequently, the A.O. taxed the surplus of the appellant of Rs. 11,64,89,840/-. The learned CIT (Exemptions) & the Assessing Officer erred in holding that the appellant has violated section 13 of the Act.

4. On the facts and in the circumstances of the case and in law, the learned CIT (Exemptions) failed to appreciate that various case laws discussed in length and also not felt relevant that on this issue assessee trust is in appeal.”

3. The assessee is a charitable trust and was granted registration under section 12A of the Income-tax Act, 1961. The assessee filed return of income on 30/09/2016 for the assessment year under consideration declaring total income at Nil after claiming exemption under sections 11 & 12 of the Income-tax Act, 1961. The assessment was completed under section 143(3) on 14/12/2018 at the total income of Rs.11,64,89,840/-. Thereafter, the Commissioner of Income-tax (Exemption) noticed that the assessment order passed by the Assessing Officer under section 143(3) dated 14/12/2018 is erroneous sofar as it is prejudicial to the interest of Revenue as the Assessing Officer has allowed the claim of expenditure on account of donation made by the assessee to another trust after holding the assessee as not eligible for exemption under section 11 of the Income-tax Act, 1961, due to violation of provisions of section 13(2) of the Income-tax Act. The Commissioner of Income-tax (Exemption) issued a show cause notice under section 263 on 09/02/2021 raising following issues:-

“(a) During the assessment proceedings the Assessing Officer had invoked provisions of section 13(2) to deny the exemption u/s 11 since the assessee had advanced donation of Rs. 12,51,00,000 to another charitable trust where the trustee of the assessee is a trustee. Scrutiny of the computation of the income in the assessment order revealed that the assessing officer had allowed expense

*pertaining to education amounting to Rs. 3,13,09,693/-. As per the details submitted by the assessee the expenditure incurred on education included an amount of Rs. 2,75,00,000 which was donation to Sind Education Trust. Since it was a donation and the assessee was denied exemption u/s 11 and income assessed as Business income the claim for deduction of donation of Rs, 2,75,00,000 cannot be allowed as expenditure.*

*The AO has passed order without the basic verification of the above facts stated above and therefore the order is prejudicial to the interest of revenue.”*

4. The assessee filed its reply to the show cause notice vide letter dated 22/02/2021 and contended that the Assessing Officer has made a disallowance of loan of Rs.12,51,00,000/- given to another charitable trust by invoking the provisions of section 13(2) r.w.s. 13(1)(c) of the Income-tax Act and, therefore, the Assessing Officer has taken a possible view so far as the donation given by the assessee to another charitable trust where the provisions of section 13(2) are not applicable. The assessee also contended that even the loan given to another charitable trust where the trustee of the assessee is also one of the trustees is hit by the provisions of section 13, the same would not tantamount to denial of the total exemption under section 11 of the Income-tax. The order of the Assessing Officer was challenged before the Commissioner of Income-tax (Appeals) and the appeal of the assessee is pending disposal. The Commissioner of Income-tax (Exemption) was not impressed with the reply and contention of the assessee and passed the impugned order by holding as under:-

*“3. The matter is considered. It is apparent from the facts and circumstances of the case that provisions of Section 13(2) were invoked to deny exemptions under Section 11 of the Act. The fact that the assessee has disputed the findings of the AO in appeal is not of relevance here. The matter in the present proceedings, are whether the assessment framed is prejudicial to the interests of revenue within the meaning of Section 263 of the Act. The AO, in the assessment proceedings has allowed expenses aggregating to Rs.3,13,09,693/-that included donation of Rs.2,75,00,000/- to M/s. Sind Education Trust. Since exemption under Section 11 of the Act was not available to the assessee foundation as per the AO, there was*

*no question of deduction of this donation. The AO has allowed this claim of the assessee on account of donation of Rs.2,75,00,000/- which was not allowable in view of the stand taken by the AO himself in the assessment proceedings. I am not convinced by the reply of the assessee trust, and after due consideration, find that the assessment framed by the AO is erroneous in **insofar** as it is prejudicial to the interests of the revenue within the meaning of Section 263 of the Act.*

*4. In view of the facts and circumstances and legal precedence as narrated above, and by virtue of the powers vested in the undersigned vide provisions of Section 263 of the I.T. Act, 1961, the assessment order dated 14/12/2018 is set aside with a direction to AO to undertake assessment proceedings de novo. The assessment proceedings shall be completed after proper examination of all the relevant issues, and after giving the assessee reasonable opportunity of being heard.”*

Thus, the Commissioner of Income-tax (Exemption) has revised the assessment order on the issue of allowing the donation of Rs.2,75,00,000/- given by the assessee to another charitable trust after denying the exemption under section 11 of the Income-tax Act and held that the order passed by the Assessing Officer is erroneous insofar as prejudicial to the interest of the Revenue within the meaning of section 263 of the Act. Consequently, he set aside the assessment order with the direction to Assessing Officer to undertake the assessment proceedings de novo. The assessment proceedings shall be completed after examination of all the relevant issue and giving reasonable opportunity of hearing to the assessee. Aggrieved by the impugned revision order, the assessee filed the present appeal.

5. Before the Tribunal, the Ld.AR of the assessee has submitted that the donation given by the assessee trust is an expenditure incurred by the assessee on charitable activity of providing education. He has further submitted that the object of the assessee trust as well as Sind Education Trust are common and identical and, therefore, the donation given to the said trust would

amount to applying the income of the assessee for charitable purpose. The Ld.AR has further contended that since the issue of denial of eligibility of exemption is binding in appeal before the Commissioner of Income-tax (Appeal), therefore, the Commissioner of Income-tax (Exemption) has no jurisdiction to invoke the provisions of section 263 on such issue pending in appeal. He has referred to clause (c) of Explanation (1) of section 263(1) of the Income-tax Act and submitted that the jurisdiction of the Commissioner is barred on an order of the Assessing Officer which is subject matter of any appeal and only to the extent where such matters had not been considered and decided in such appeal can be taken up under the provisions of section 263. The decision of the Assessing Officer in allowing the donation to another trust as expenditure while determining the total income of the assessee is one of the possible views and, therefore, the Commissioner is not permitted to invoke the provisions of section 263 merely because he does not agree with the view of the Assessing Officer. In support of his contention, he has relied upon the judgement of Hon'ble Supreme Court in case of Malabar Industries Ltd vs CIT 243 ITR 83(SC) as well as in case of CIT vs Max India Ltd 295 ITR 282 (SC) and submitted that the Hon'ble Apex Court has held that on every loss of revenue as a consequence of an order of Assessing Officer, cannot be treated as prejudicial to the interest of the Revenue. If Assessing Officer has adopted one of the course permissible in law and it has resulted in loss of revenue or where two views are possible and Assessing Officer has taken one view with which the Commissioner of Income-tax does not agree, it cannot be treated as an erroneous order prejudicial to the interest of Revenue, unless the view taken by the Assessing Officer is unsustainable in law. He has also referred

various other decisions of Hon'ble High Courts on this point to substantiate his argument. The Ld.AR has also contended that the provisions of section 13 of Income-tax Act are not applicable in the case of the assessee and violation of provisions of section 13(1)(c) does not tantamount to denial of total exemption under section 11 of the Act. Thus, the Ld.AR has submitted that the impugned revision order passed by the Commissioner of Income-tax (Exemption) is not sustainable in law and liable to be quashed.

6. On the other hand, the Ld.DR has submitted that the Assessing Officer has committed an error by not considering the issue of allowability of claim of donation given by the assessee to another trust after the assessee was held to be not eligible for exemption under section 11 of the Income-tax Act. He has further submitted that it is a logical legal consequence that the donation given by the assessee cannot be allowed as an expenditure after the assessee's eligibility for exemption under section 11 is denied. He has relied upon the impugned order of the Commissioner of Income-tax (Exemption).

7. We have considered the rival submissions as well as the relevant material available on record. The issue before us is limited, as to whether allowing the claim of donation to another trust given by the assessee would render the assessment order as erroneous insofar as prejudicial to the interest of the Revenue. At the outset, we note that the assessee has given the loan during the year under consideration to another charitable trust where the trustee of the assessee is also one of the trustees of that trust. Therefore, the Assessing Officer held that the donation given by the assessee of

Rs.12,51,00,000/- to another trust is in contravention of the provisions of section 13(2) of the Income-tax Act as one of the trustees of the assessee is also the trustee of that trust. The assessee has not disputed the factual position on the transaction of advancing loan of Rs.12,51,00,000/- during the year under consideration to another trust where the trustee of the assessee is also one of the trustees. The Assessing Officer finally held in para 4.3 as under:-

*“4.3. In view of the above discussion, once the assessee has committed default / violation of provisions of Section 13 of the Act, the assessee is not allowed to claim exemption under section 11 and 12 of the Act in respect of any income of the assessee. I therefore reject the claim of the assessee and hold that the assessee trust is not eligible for any exemption U/s.11 and accordingly tax entire income of the assessee trust denying the benefit of exemption U/s.11 in totality. Thus, surplus of Rs. 11,64,89,8407- is being added back to the income of the assessee.”*

8. It is clear from the finding of the Assessing Officer that he held the assessee trust is not eligible for any exemption under section 11 and consequently taxed the entire income of the assessee trust by denying the benefit of exemption under section 11 in totality. The Assessing Officer added the entire surplus to the income of the assessee. Therefore, the issue of claim of donation is directly consequential to the decision taken by the Assessing Officer on the eligibility of exemption under section 11 of the Act. Thus, the claim of donation allowed by the Assessing Officer while passing the assessment order is contradictory to the decision taken by the Assessing Officer as referred in para 4.3 of the assessment order. To that extent we do not find any error or illegality in the impugned order of the Commissioner of Income-tax (Exemption) as well as invoking the provisions of section 263 of the Act. However, the allowability of the claim on account of donation to another

charitable trust is also subjected to the outcome of issue of denial of the exemption under section 11 in totality which is pending before the CIT(A). Therefore, even if the Assessing officer has to consider this issue of allowability of the claim of donation given to another trust, the same has to be finally decided as per the outcome of the appeal filed by the assessee.

9. Sofar as objection raised by the assessee that the Commissioner of Income-tax (Exemption) cannot invoke the provisions of section 263 when the issue is pending before the CIT(A), we find that when the Assessing Officer has allowed the claim of donation without even without even examining such claim despite denial of benefit of exemption under section 11 in totality then the said issue cannot be said to have been pending in the appeal before the CIT(A). Even otherwise, as per clause (c) of Explanation 1 of section 263(1), the Commissioner has the power to such matter which has not been considered and decided in the appeal. Accordingly, we do not find any merit or substance in this contention and the issue raised by the assessee.

10. In the facts and circumstances as discussed above, we modify the impugned order of the Commissioner of Income-tax (Exemption) to the extent of para 4 and remit the issue of allowability of the claim of donation to the Assessing Officer instead of doing the assessment de novo. At the cost of repetition, we may clarify that we have not expressed any view either on the issue of denial of exemption under section 11 as the view taken by the Assessing Officer or the allowability of the claim of donation given to another

trust. The Assessing Officer has to take his independent view on the issue of allowability of donation.

11. In the result, appeal is partly allowed.

Order pronounced in the open court on 01/04/2022

Sd/-

(GAGAN GOYAL)

लेखा सदस्य/ACCOUNTANT MEMBER

Mumbai, Dated: 01/04/2022

Pavanan

मुंबई/ Mumbai, दिनांक/Dated: /03/2022

Pavanan

**प्रतिलिपि अग्रेषित Copy of the Order forwarded to :**

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि. , मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

BY ORDER,

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**ITAT, Mumbai**