

IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI S. RIFAUR RAHMAN, AM

आयकर अपील सं/ I.T.A. No.5597/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2013-14)

Maharashtra Housing & Area Development Office of Finance Controller, MHADA, 4 th Floor, Griha Nirman Bhavan, Kala Nagar, Bandra (E), Mumbai-400051.	बनाम/ Vs.	ACIT (Exemption)-2(1) Piramal Chambers, Lalbaug, Mumbai-400012.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAAJM0344H		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Assessee by:	Shri Nishant Thakkar/Ms. Jasmine Amalsadvala	
Revenue by:	Shri S. H. Usmani (DR)	

सुनवाई की तारीख / Date of Hearing: 19/09/2022
घोषणा की तारीख /Date of Pronouncement: 12/10/2022

आदेश / ORDER

PER ABY T. VARKEY, JM:

This is an appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-01, Mumbai dated 28.06.2017 for assessment year 2013-14.

2. The grounds of appeal preferred by assessee are as under: -

“1.0 Denial of exemption under s. 11

The learned CIT(A) erred on facts and circumstances of the case and in law in upholding the Assessment Order appealed against denying exemption under s.11 of the Act.

Relief claimed: The appellant be granted exemption under s.11 of the Act.

2.0 Engaged in Business:



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The learned CIT(A) erred on facts and in law in confirming the assessment order appealed against insofar as the assessment order holds that Proviso to s.2(15) of the Act applies to the appellant disentitling the appellant to the exemption under s.11 of the Act, without appreciating that the activities of the appellant are not in the nature of trade, commerce or business or any activity of rendering any service in relation to any trade, commerce or business.

Relief claimed: The appellant be declared one to which Provisos to s.2(15) of the Act do not apply.

3.0 Claim of Rs.115,21,66,023/- in computation of income on account of expenditure not considered/income wrongly considered in accounts.

The learned CIT(A) erred on facts of the case and in law in confirming addition of Rs.115,21,66,029/- being claim in computation of income on account of "Expenditure not considered / Income wrongly considered in accounts", without appreciating that the such adjustments were carried out in computation as per auditors notes and without appreciating the fact that the notional interest and establishment expense capitalized on work-expenditure and thereby allegedly claimed twice, is in fact not claimed twice as alleged.

Relief claimed: The addition of Rs.115,21,66,029/- be directed to be deleted.

4.0 Repayment of loan not considered as application of Income – Rs.98,35,946/- =

The learned CIT(A) erred on facts and in law of the case in confirming the addition of Rs.98,35,946/which amount represented repayment loan, without appreciating that repayment of loan amounted to application of income.

Relief claimed: The addition of Rs.98,35,946/= be directed to be deleted.



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5.0 Denial of deduction towards cost of sales –Rs.108,86,00,019/-

The learned CIT(A) erred on facts and in law in confirming the addition of Rs.108,86,00,019/- on the alleged ground that the claim amount to double deduction, without appreciating that the amount of Rs.108,86,00,019/- represented part application of income.

Relief claimed: The addition of Rs.108,86,00,019/- be directed to be allowed as deduction.

6.0 Denial of 15% to be set apart u/s 11(1)(a) with reference to 724,74,44,615/-

The learned CIT(A) erred on facts and in law in confirming action of the Assessing Officer of not computing amount to be set apart @ 15% u/s 11(1)(a) with reference to Rs.724,74,44,615 in place of Rs.690,00,14,055/as shown in Assessment Order or to the amount as may be determined in place thereof.

Relief claimed: The appellant be allowed to Set apart 15% U/s 11(1)(a) w.r.t Rs 7,24,74,44,615/- or to the amount as may be determined.

7.0 Form No.10 for accumulation of income u/s 11(2) of the Act not considered

The learned CIT(A) erred on facts and in law in confirming action of the Assessing Officer disregarding the application made in Form No 10 for accumulation of income U/s 11(2) of the Act. Relief claimed: Application made in Form 10 as filed by the Appellant be considered.

8.0 Levy of Interest u/s 234B & 234C

The learned CIT(A) erred in law and on facts in confirming the dismissing Ground of appeal before him, challenging the charge of interest u/s 234B & 234C of the Act, on the ground that it was consequential, without appreciating that the appellant was denying the very application of s.234B & 234C of the Act to it, for the fact that the appellant was not under obligation to pay advance tax.



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Relief claimed: Interest u/s 234B & 234C of the Act be directed to be deleted.

The appellant craves leave to add to, alter, amend or modify the ground(s) of appeal.”

3. Ground nos. 1 and 2 are against the order of the Ld. CIT(A) upholding the action of the AO whereby the AO has denied the exemption claimed by the assessee u/s 11 of the Income Tax Act, 1961 (hereinafter “the Act”) on the ground that proviso to Section 2(15) of the Act is applicable to the assessee.

4. At the outset, the Ld. Counsel for the assessee submitted that the aforesaid issue is covered by the decision of the Co-ordinate Bench of the Tribunal in assessee’s own case in [ITA. No. 6678/Mum/2013 for AY. 2010-11 order dated 04.06.2019, ITA. No. 894/Mum/2018 for AY. 2012-13 and ITA. No.895/Mum/2018 for AY. 2014-15 order dated 23.11.2020] wherein the issue has been decided in favour of the assessee. According to the counsel for the assessee, since there is no change in facts and circumstances in the relevant assessment year (AY. 2013-14) the same may be allowed in favour of the assessee.

5. Per contra, the Ld. DR relied on the action taken by the AO/CIT(A) and could not point out any change in facts or law vis-à-vis the earlier year AY. 2010-11, AY. 2012-13 & AY. 2014-15.

6. We have heard both the parties and perused the records and the decision cited in the assessee’s own case for AY. 2010-11, AY. 2012-13 & AY. 2014-15. We note that the assessee is a statutory authority which came into existence under the “**Maharashtra Housing Area**



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Development Act, 1976” (MHAD Act, 1976) on 05.12.1977. Right from its inception till AY. 2002-03, the assessee enjoyed exemption u/s 10(20A) of the Act and accordingly, the assessee was not required to file its income tax return. However by Finance Act, 2002, sub-section 20(A) of Section 10 was omitted from the statute w.e.f. 01.04.2003 and so the assessee applied for registration u/s 12A of the Act as it was carrying out its statutory obligations for providing housing to poor/needy sections of the society which it reckons falls under the ambit of “charitable purposes” as defined u/s 2(15) of the Act. And assessee was granted registration u/s 12A of the Act w.e.f. AY. 2003-04 and accordingly its surplus income over expenditure was subject to exemption in the manner laid down in Section 11 to 13 of the Act. But in AY. 2009-10, proviso to Section 2(15) of the Act was inserted w.e.f 01.04.2009, whereby a restriction has been imposed on the trusts/assessee carrying out general public utility. Citing this proviso, Ld. DIT(Exemption) withdrew the certificate granting registration u/s 12A of the Act vide order dated 22.12.2011. The assessee preferred an appeal before this Tribunal (ITA. No.435/Mum/2012) and the Tribunal vide order dated 22.03.2013 was pleased to restore the registration u/s 12A of the Act. This action of Tribunal was challenged by the Revenue before the Hon’ble High Court which was dismissed vide order dated 18.04.2016 in Income Tax Appeal No. 2174 of 2013. Meanwhile, the AO while passing the assessment order for AY. 2010-11 for taking note of the cancellation/withdrawal of the registration u/s 12A of the Act, denied exemption u/s 11 of the Act. It was challenged by the assessee before



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the Ld. CIT(A) and thereafter before this Tribunal (ITA. No.6678/Mum/2012). And by order dated 04.06.2019, this Tribunal was pleased to allow the exemption claimed by the assessee u/s 11 of the Act. Thereafter, the AO while framing the assessment order have been following their predecessor's orders of denying exemption to the surplus income of the assessee which have been challenged before this Tribunal and as noted (supra), Tribunal has been consistently allowing the claim of the assessee u/s 11 of the Act from AY. 2010-11, AY, 2012-13 & AY. 2014-15 as well as AY. 2015-16 (ITA. No.4133/Mum/2019) vide order dated 13.10.2021. The operative part of the Tribunal decision in ITA. No.894/M/2018 for AY. 2012-13 and in ITA. No.895/Mum/2018 for AY. 2014-15 dated 23.11.2020 reads as under: -

“9. The ground No.2 and 3 of the appeal are taken up together as both these grounds are interconnected. The assessee has been claiming the benefit of registration under section 12A of the Act. The Assessing Officer denied the exemption available to the assessee under section 11 of the Act on the ground that the activities of the assessee fall within the meaning of ‘advancement of any other object of general public utility’ as specified in proviso to section 2(15) of the Act. We find that for the identical reason benefit under section 11 of the Act was denied to the assessee in assessment year 2010-11. The assessee carried the matter in appeal before the Tribunal in ITA No.6678/Mum/2013. The Tribunal vide order dated 04/06/2019 examined the issue of assessee's eligibility to claim the benefit of exemption under section 11 threadbare. In a detailed order, after considering various judicial pronouncements and different facets of the arguments raised by rival sides, the Tribunal concluded that the activities carried out by the



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assessee fall within the ambit of 'charitable purpose' under section 2(15) of the Act and the proviso to said section does not get attracted. For the sake of brevity the entire detailed findings of the Tribunal are not reproduced, however, the relevant findings and operative part of the order is quoted herein below:-

“36. From the aforesaid discussion and the rebuttal made by Ld. Sr. Counsel, we do not find that the reasons cited by the Ld. Special Counsel in any way, diminishes the assessee's claim or its entitlement to claim benefit u/s. 11; or persuade us to come to a conclusion that the assessee's activities are done purely for a profit motive. Whether an activity construes business or is in the nature of business is largely dependent upon the factor, whether such activity is actuated by profit motive or not. Merely because MHADA builds tenements and sells them does not lead to any inference that MHADA's activities are in the nature of trade, commerce or business. We have already discussed in detail that assessee's activity is no way can be held for the profit motive or for carrying out systematic business, albeit all its policy as well as conduct is to provide shelter to the needy and poor people in line with the mandate of Constitution of India.

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44. The aforesaid decision clearly clinches the entire issue not only to the nature and scope of definition of 'charitable purposes' in section 2(15) but also the scope of restriction provided in proviso to section 2(15). If the principle laid down by Hon'ble High Court is applied here in this case, then ostensibly under the facts and circumstances of the case the assessee as discussed above, would not only be held as an institution carrying out 'charitable purposes' but its activities clearly are beyond the scope of restrictive provisions of the proviso. The most



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crucial test and the findings which needs to be seen specifically if the proviso to section 2(15) is to be applied in the cases like assessee is to see, whether their activities can be reckoned as in the nature of trade, commerce and business. Some of the tests of applicability of proviso in cases like that of assessee which are statutory bodies providing housing needs to the needy and poor people can be short listed in the following manner:

- i) Is the Institution supported/promoted by the state?
- ii) Is it constituted under an Act of the Legislature?
- iii) Has the Institution been incorporated for implementing the directive principles enunciated in the Constitution of India?
- iv) Are the activities of the institution closely regulated and controlled by the state?
- v) Has the institution been conferred with powers which a businessman would never enjoy, say, eviction of a tenants or closure of roads etc.?
- vi) Is the institution required to carry out activities like repairs to building, demolition of dangerous structures etc. which would not be the duties of a businessman carrying on building activities?
- vii) Does the institution look after the elementary needs of a citizen by providing basic housing?
- viii) Does the state subsidize the activities of the Institution?
- ix) Is the Institution managed by Government servants or private businessmen?
- x) Is there a restriction placed on who can purchase the properties? That is, income criteria has to be met, the applicant or his family member should not already be in possession of a housing unit?
- xi) Are the prices at which the Institution is to sell its properties closely regulated and monitored?



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xii) Does the Institution sell properties at below the market price? If it sells the property at below the market price, is it substantially below the market price?

xiii) In implementation of its objects and purpose does the Institution sell its properties at a low price and consciously and deliberately forgoes the profit which it could easily have made.

xiv) Does the Institution stick to its resolve to sell properties at predetermined rates even though the demand supply position for housing is such that it could have sold the properties at a much higher rate? xv) Does it sell properties by inviting bids and allotting the property on the basis of a draw of lots rather than allotting the properties by holding an auction which would ensure the receipt of the highest price?

xvi) Does the Institution sell its properties primarily to the economically less fortunate at a concessional price rather than the maximum price available from any free purchaser who would offer a higher price? xvii) Is the making of profit deliberately shunned?

xviii) Does the institution continues to operate and run its activities as per its framed policy and rules and sells its properties in the manner and at the rates as per its regulations even though the demand for the properties of the institution far exceeds their supply? If the aforesaid tests are applied on the facts of the present case which have been discussed in detail hereinabove, the only inference /conclusion which can be drawn is that the assessee passes through all the tests and it is not existing or carrying out its activity under the restrictive conditions as envisaged in proviso to section 2(15), i.e., carrying out its activities in the nature of trade, commerce or business with profit motive.

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48. In view of our aforesaid finding, we do not deem it fit to enter into the semantics of other arguments as raised by the Ld. Sr. Counsel like assessee being a unique organization, therefore, it is to be treated as existing for charitable purpose; or on the issue that it is existing for giving relief to the poor. Our finding is mostly confined to Proviso to section 2(15), that is, the assessee is not covered by the restriction as envisaged therein and its activities fall within ‘ advancement of objects of general public utility’ , hence existing for “ charitable purpose” .

49. Further, the issues raised in ground No.3 will become purely academic in view of our finding given above that the assessee is entitled for benefit u/s.11 and accordingly, its income and expenditure have to be computed in terms of section 11 to section 13.”

7. Since the Ld. DR could not point out any change in facts or law respectfully following the decision of the Co-ordinate Bench of this Tribunal as decided in AY. 2012-13 and AY. 2014-15, we set aside the order of the Ld. CIT(A) and direct the AO to allow the exemption u/s 11 of the Act to the assessee.

8. Coming to the other issue raised in ground nos. 3 to 8, the Ld. AR fairly submitted that the Ld. CIT(A) has not decided these issues so we restore the same back to the file of the Ld. CIT(A) with the direction to decide the same after giving reasonable opportunity to the assessee. The ground nos. 3 to 8 are allowed for statistical purposes.



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9. In the result, the appeal of the assessee is partly allowed for statistical purposes.

Order pronounced in the open court on this 12/10/2022.

Sd/-

(S. RIFAUR RAHMAN)
ACCOUNTANT MEMBER

Sd/-

(ABY T. VARKEY)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 12/10/2022.

Vijay Pal Singh, (Sr. PS)

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार / (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai