

आयकर अपीलीय अधिकरण, कोलकाता पीठ “सी”, कोलकाता

IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA

श्री राजेश कुमार, लेखा सदस्य एवं श्री संजय शर्मा न्यायिक सदस्यके समक्ष

[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 202/Kol/2020
Assessment Year: 2013-14

Sitaram Bhartia Institute of Science & Research (PAN: AABTS 8833 N)	Vs.	DCIT (Exemption), Circle-11(1), Kolkata
Appellant / (अपीलार्थी)		Respondent / (प्रत्यर्थी)

Date of Hearing / सुनवाई की तिथि	20.10.2022
Date of Pronouncement/ आदेश उद्घोषणा की तिथि	04.01.2023
For the Appellant/ निर्धारिती की ओर से	Shri S. Jhajharia, A.R
For the Respondent/ राजस्व की ओर से	Smt. Ranu Biswas, Addl. CITDR

ORDER / आदेश

Per Rajesh Kumar, AM:

This is the appeal preferred by the assessee against the order of the Ld. Commissioner of Income Tax (Appeals)-25, Kolkata (hereinafter referred to as the Ld. CIT(A)”) dated 16.12.2019 for the AY 2013-14.

2. The assessee has raised following grounds of appeal:

1. That on the facts and in the circumstances of the case, the order passed by the Learned CIT(A) dated 16.12.2019 is bad in law, illegal and void abinitio both on points of law as well as facts as the same has been passed without

proper application of mind to the facts and to the circumstances of the cases and without properly considering the contentions of the appellant raised before the Learned CIT(A) and accordingly it is prayed that the order may kindly be treated accordingly.

2. *That on the facts and in the circumstances of the case, the Learned CIT(A) had grossly erred in not rendering specific instructions to the AO to re-compute the "Accumulation of Income" as specified under section 11(1)(a) of the Act on gross receipts of the Trust without placing cognizance to the submission preferred before him*

3. *That on the facts and in the circumstances of the case, the Learned CIT(A) grossly erred in confirming the action of the AO in disallowing provision for accrued and determined liability of Rs.11,02,552/-.*

4. *That on the facts and in the circumstances of the case, the Learned CIT(A) grossly erred in confirming the action of the AO in computing the Capital Gain on sale of assets at Rs.10,08,645/- as against Rs.4,14,577/- claimed.*

5. *That in view of the facts and in the circumstances of the case, the Learned CIT(A) grossly erred in not understanding the fact that even otherwise the entire income of the Appellant is exempt under 10(21) of the Act.*

6. *For that in view of the facts and circumstances the appellant craves the right to put additional grounds/ and/or to alter/amend/modify the present grounds at the time of hearing.*

3. The issue raised on ground no. 1 is general in nature and does not require any specific adjudication.

4. Issue raised in ground no. 2 is against the order of Ld. CIT(A) wherein the Ld. CIT(A) has not given specific instruction to AO to compute the accumulation of income in accordance with provision of Section 11(1)(a) of the Act on gross receipts of the trust.

5. Facts in brief are that the AO, during the assessment proceedings, observed that the administrative & establishment expenses were not directly incurred in relation to charitable purposes of trust nor were these expenditures incurred for achieving the objectives of charity. According to the AO the net income after deducting these expenses in the hands of the assessee was available for charitable activities.

Accordingly the AO computed the allowable accumulation of 15% u/s 11(1)(a) of the Act on the said net income which was calculated after deducting the expenses of Rs. 43,14,446/- incurred on account of administrative and establishment as stated in Para 3.7 of the assessment order.

6. The Ld. CIT(A) simply affirmed the order of AO on this issue by observing that the administrative and establishment expenses being attributable to the earning of income were to be deducted from the gross receipt of the trust in order to examine the net income available for application for charitable purposes for the purpose of calculation of allowable accumulation @ 15% u/s 11(1)(a) of the Act.

7. After hearing the rival parties and perusing the material on record, we are of the view that in the case of trust there is no concept of net income but of gross receipts and application of funds. In our opinion, for the purpose of calculation of accumulation of income to the extent of 15% u/s 11(1)(a) of the Act, the gross receipts are to be taken as basis and not the net income after deducting expenses which has been done by both the authorities below. The case of the assessee finds support from the decision of Co-ordinate Bench of Mumbai (Special Bench) in the case of Bai Sonabai Hirji Agiary Trust vs. ITO in [2005] 93 ITD 70 (Mum) (SB) wherein the Co-ordinate Bench has taken a view for the purpose of accumulation of income, which is deemed to be derived for the purpose of charitable activities subject to the fulfillment of other condition in that section, is to be taken on the gross receipt of the trust before deducting any sum towards application of income. In other words, the application of income has to be taken into account from the said gross receipts for the purpose of accumulation u/s 11(1)(a) of the Act. The case of the assessee is squarely covered by the decision of co-ordinate Bench of Kolkata in the case of Kanehialall Lohia Trust vs. ITO in [2020] 120 taxmann.com 208 (Kol-Trib). Accordingly we set aside the order of Ld. CIT(A) on this issue and direct the AO to compute the income to be accumulated u/s 11(1)(a) of the Act on the gross receipts. Accordingly ground no. 2 is allowed.

8. Issue raised in ground no. 3 is against the order of Ld. CIT(A) confirming the action of AO in disallowing the provisions created for accrued and determined liability of Rs. 11,02,552/-.

9. Facts in brief are that the AO during the assessment proceedings observed that the assessee has booked in the income and expenditure account a sum of Rs. 43,14,446/- representing the provisions created for payment of gratuity and leave encashment. According to the AO, the said provisions cannot be allowed as expense and accordingly Rs. 43,14,446/- was disallowed by the AO in the assessment framed. However the actual payment made by the assessee during the year of Rs. 5,29,401/- was treated as application of income.

10. The Ld. CIT(A) affirmed the order of AO on this issue by observing that the actual payment made by the assessee towards gratuity and leave encashment was rightly treated as application of income and dismissed the appeal of the assessee on this issue.

11. After hearing the rival submissions and perusing the material on record, we are of the view that the computation of income in case of charitable trust are specifically dealt with under the provisions of section 11 of Act. In the case of trust, the concept gross receipt and application of funds are adopted and whatever surplus is left is treated in accordance with provision of section 11(1)(a) of the Act based on the gross receipt and if still any income is left or is not applied for charity purpose for the same is accumulated to be carried forwards in the subsequent years to be applied for the said charitable purpose in accordance with the provisions of section 11(2) of the Act. In the present case, we note that the expenses charged to the income and expenditure account by the assessee trust has already crystallized and quantified but not paid and therefore we find merit in the arguments of the Ld. Counsel for the assessee that once the expenses are charged to the income expenditure after being foreseen with certainly are not in the nature of contingent but certainly to be considered as application of income to be discharged in the subsequent year. We also note that these were, in fact,

paid in the subsequent years. We also look at this issue from another angle where the assessee has not charged anything to the income expenditure account and resulting into surplus going up and the assessee availing the benefit of accumulation u/s 11(2) to be carried forwards for the subsequent years. But in the present case, the facts are quite different as the assessee has calculated and charged these expenses to Income and Expenditure account. We have also examined the explanation inserted after sub-section 7 of Section 11 by the Finance Act, 2022 w.e.f 1.4.2023 which is extracted below:

“Explanation- For the purpose of this section, any sum payable by any trust or institution shall be considered as application of income in the previous year in which such sum is actually paid by it (irrespective of the previous year in which the liability to pay such sum was incurred by the trust or institution according to the method of accounting regularly employed by it).

Provided that where during any previous year, any sum has been claimed to have been applied by the trust or institution, such sum shall not be allowed as application in any subsequent previous year.”

A perusal of the above amendment by Finance Act, 2022 by inserting explanation is very clear and conspicuous that w.e.f AY 2023-24 any sum payable by any trust or institution shall be considered as application of income in the previous year in which sum is actually paid by it irrespective in which the liability to pay such sum was incurred by the trust/institution according to the method of accounting regularly employed by it. So we draw strength from the said explanation to section 11(7) that prior to AY 2023-24 the expenses were allowable to the trust as application of income even on accrual basis and thereafter specifically provided to be treated as application of income on the payment basis w.e.f. AY 2023-24. We have perused the provisions of section 11(1) of the Act which specifies only application of income and not the actual spending which has been amended to by Finance Act, 2022 w.e.f. 01.04.2023 as stated above. The case of the assessee finds support from the decision of Coordinate Bench of Kolkata in the case of Apeejay Education Trust vs. DCIT in [2021] 130 taxmann.com 436 (Kolkata-Trib.). The operative part is reproduced as under:

“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 whereby 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 fulfillment 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."

Considering these facts and also the decisions of the coordinate bench , we are not in agreement with the Ld. CIT(A) on this issue and direct the AO to delete this disallowance.

12. Issue raised in ground no. 4 is against the Ld. CIT(A) wrongly confirming the order of AO in computing the capital gain on sale of assets at Rs. 10,08,645/- as against assessee capital gain at Rs. 4,14,577/-.

13. Facts in brief are that the assessee has sold old asset at Rs. 10,08,648/-. The WDV of such asset was shown at Rs. 5,94,071/-. The assessee computed the capital gain at Rs. 4,14,577/- and the same was offered as income through income and expenditure account. According to the AO, the assessee was registered u/s 12AA of the Act and the entire expenditure incurred for acquisition of capital assets has been treated as application of income for charitable purposes in the year in which the acquisition was made. According to the AO, since the assessee has written off the cost of the capital asset fully in the year of acquisition and therefore there is no cost left to be taken as WDV or cost of acquisition as capital asset was fully written off in the year and accordingly the AO treated the entire sale consideration as capital gain.

14. In the appellate proceedings, the Ld. CIT(A) dismissed the appeal of the assessee by observing and holding as under:

15. After hearing the rival submissions and perusing the material on record, the undisputed facts as borne out from the order passed by authorities below are that the assessee trust is duly registered u/s 12AA of the Act. Once the trust or institution is registered u/s 12AA of the Act there is no dispute or controversy that whatever is purchased by the assessee even on capital account is treated as application of income. The Ld. CIT(A) has observed that the assessee has been benefitted twice. Once by way of allowing cost of acquisition of application of income in the year of acquisition and secondly by allowing depreciation on the same. We have also perused the amendment brought in by Section 11 by inserting sub-section 6 by Finance (No. 2) Act, 2014 w.e.f. 1.4.2015 providing that the income of the trust is required to be applied or accumulated or set apart for application, then, for such purposes, the income shall be determined without any deduction or allowance by way of depreciation or otherwise in respect of any asset, acquisition of which has been claimed as an application of income under this section in the same or any other previous year. In other words, it has been specifically provided in Section 11 that no deduction by way of depreciation shall be allowed on the assets which has been

claimed by the trust as application of asset w.e.f. AY 2015-16. However keeping in view the various judicial decisions passed by various judicial forums on the issue that the assessee is entitled to claim the application of income as well as depreciation on the cost of acquisition of the capital assets. In the present case, we note that the assessee has partly claimed the depreciation on this asset and when the asset was sold the remaining WDV which was determined by reducing the depreciation from the cost of acquisition claimed till date existed in the books of account. In our considered view to this extent we find merit in the contention of the Ld. A.R that whatever left in the books of account in the form of WDV has to be allowed while computing the capital gain till A.Y. 2015-16. In our considered view this has to be allowed till the AY 2014-15 and accordingly we set aside the order of Ld. CIT(A) and direct the AO to accept the capital gain as calculated above. Accordingly ground no. 4 is allowed.

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

Order is pronounced in the open court on 4th January, 2023

Sd/-
(Sonjoy Sarma /संजय शर्मा)
Judicial Member/न्यायिक सदस्य

Sd/-
(Rajesh Kumar/राजेश कुमार)
Accountant Member/लेखा सदस्य

Dated: 4th January, 2023

SB, Sr. PS

Copy of the order forwarded to:

1. Appellant- Sitaram Bhartia Institute of Science & Research, C/o, M/s Salarpuria Jajodia & Co., 7, C.R. Avenue, 3rd Floor, Kolkata-700072.
2. Respondent – DCIT (Exemption), Circle-11(1), Kolkata

3. Ld. CIT(A)-25, Kolkata (sent through e-mail)
4. Pr. CIT- , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata