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

BEFORE SHRI PRASHANT MAHARISHI, AM
AND
MS. KAVITHA RAJAGOPAL, JM

ITA Nos. 721& 722/Mum/2021

(Assessment Years2015–16& 2016–17)

India ITME society 1210/1211/1212, Dalmal Tower, A Wing, 12th Floor, Plot no. 211, Nariman Point, Mumbai-400 021	Vs.	CIT (Exemption) Room no. 617, 6th Floor, Piramal Chamber, Lalbaug, parel, Mumbai-400 012
(Appellant)		**(Respondent)**

PAN No. AAATI 2855 B

Assessee by	:	Mr. Vipul Joshi, AR
Revenue by	:	Mr. Sandeep Raj, CIT DR

Date of hearing: 24.02.2023
Date of pronouncement : 27.02.2023

O R D E R

PER PRASHANT MAHARISHI, AM:

01. Assessee has filed appeal for A.Y. 2015-16 and 2016-17 against Revision order passed by learned Commissioner of Income Tax (Exemption), Mumbai [CIT (E)] under Section 263 of the Income-tax Act, 1961 (the Act) for both the years on 18th March, 2021.

02. By respective orders, assessment orders passed under Section 143(3) of the Act by the learned Assessing Officer on 13 December 2017 and 15 December 2018 were held to be erroneous and prejudicial to the interest of the Revenue.

03. For A.Y. 2015-16, the assessee has raised following grounds of appeal:-

> *"1. BREACH OF THE PRINCIPLES OF NATURAL JUSTICE*
>
> *1.1 The Learned Commissioner of Income-tax (Exemption), Mumbai ["Ld. CIT], erred in framing the revision order u/s, 263 of the Income-tax Act, 1961 ["the Act"] by not giving proper, sufficient and effective opportunity of being heard to the Appellant.*
>
> *1.2 It is submitted that in the facts and the circumstances of the case, and in law, the revision order is required to be held as bad and illegal as the same is passed in breach of the principles of natural justice, as well as with non-application of mind to the facts and the contentions brought on record by the Appellant.*
>
> *WITHOUT PREJUDICE TO THE ABOVE*
>
> *2. REVISION ILLEGAL*
>
> *2.1 The Ld. CIT erred in passing the order u/s. 263 of the Act, revising the assessment order passed by the A.O. u/s. 143 (3) of the Act.*
>
> *2.2 It is submitted that in the facts and the circumstances of the case, and in law, the order is bad, illegal and void, as necessary pre- conditions for initiating the revision proceeding as well as the completion thereof were not fulfilled.*

2.3 Without prejudice to the generality of the above, the CIT failed to appreciate that:

(i) The assessment order framed was not "erroneous" within the meaning of section 263 of the Act; and

(ii) In any case, the assessment order was not "prejudicial to the interest of the revenue" within the meaning of section 263 of the Act.

2.4 It is submitted that in the facts and the circumstances of the case, and in law, no revision u/s. 263 of the Act was called for.

WITHOUT FURTHER PREJUDICE TO THE ABOVE

3. ON MERITS

3.1 Otherwise also, it is submitted that in the facts and the circumstances of the case, and in law, on merits also, no revision u/s. 263 of the Act was called for.

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4. The Appellant craves leave to add, alter, delete or modify all or any the above ground at the time of hearing."

04. For A.Y. 2016-17 also assessee has raised identical grounds of appeal.

05. Brief fact of the case shows that assessee is organizing exhibition on every four years on the latest developments and advancement of technology in the field of textile

machinery. The assessee is a Trust registered under Section 12A of the Act as well as holding recognition under Section 80G of the Act. By virtue of registration under Section 12A of the Act, the trust has claimed exemption under Section 11 & 12 of the Act.

06. For A.Y. 2015-16, assessee filed return of income on 19thSeptember, 2015, at ₹16431070/-. The return was picked up for scrutiny and total income of the assessee was assessed at returned income by order under Section 143(3) of the Act on 13thDecember, 2017 by the Dy. Commissioner of income tax (Exemption) 1(1), Mumbai [the ld AO]

07. The learned CIT (E), Mumbai on examination of the record prima facie found that order passed by the learned Assessing Officer is erroneous and prejudicial to the interest of the Revenue on following grounds:-

> *"On verification of assessment records of AY 16-17of the assessee, it is noticed that assessee has given advance of Rs.4.01 cr in A.Y. 2012-13, Rs. 1 cr in AY. 2011-12 and Rs 1 Cr in A.Y. 2012-13, out of the accumulated amount u/s 11(2) of the Act in A. Y. 2005-06 and A.Y 2007-08 for the purchase of land at Sanand, Ahmadabad. The above advances given for the Sanand Land was received back in A.Y. 2015-16 and A.Y. 2016-17 of the amount Rx3.94,78,750 and Rs 30,00,000/- respectively against the total advance of Rs. 601 Crore. The assessee had accumulated the received back amount of Rs.394,78,750 and Rs 30,00,000/- in AY 15-16 and AY 16-17 respectively*

as deemed application U/s 11(2). As the assessee had re-accumulated the amount from the advance paid out of the previous year's accumulation u/s 11(2) of the Act, there is recurring accumulation u/s 11(2) for the same amount, which is against the intent of section 11(2) and 11(3)(c) of the Act.

(b) In view of the above, the amount of Rs.3,94,78,750/- received back from the advance paid out of the accumulation should have been considered as income of the assessee, but it was left to be assessed during the year under consideration i.e. A.Y 2015-16.

(c) In accordance with the provisions of clause (a) of sub-section 11(2) of the Act, assessee can accumulate such income which has been furnished as statement in prescribed manner to the Assessing officer, stating the purpose of accumulation and can be accumulated or set apart for not more than 5 years. As the assessee has re-accumulated the same amount after receiving back from the amount paid as advance, which has been given from accumulation of A.Y. 2005-06 and A. Y. 2007-08. The assessee has violated the provision of section 11(3)(c) of the Act in A. Y. 2015-16. The AO has passed order without the basic verification of the above facts statedabove and therefore the order is prejudicial to the interest of revenue."

08. Accordingly, notice was issued to the assessee. In response to the notice, assessee submitted a reply that assessee has accumulated the surplus in accordance with

law, provisions of Section 11(2) (b) are satisfied and the Provisions of Section 11(3) of the Act are not applicable. It was stated that advance received back on cancellation of property is after applying the provisions of Section 11(3) of the Act and the money received back cannot be treated as income under Section 11(3) of the Act.

09. The learned PCIT examined the explanation of the assessee and held that the learned Assessing Officer has failed to make necessary enquiries and therefore, it is erroneous and prejudicial to the interest of the Revenue and directed the learned Assessing Officer to re-do the assessment. Against this order, assessee is in appeal before us.

010. The facts shows that assessee has made accumulation of income in earlier years , subsequently that money could not be utilized and therefore offered the same as income in the year in which time for accumulating expired. Therefore, regular income as well as income accumulated in earlier years, which could not be utilized, was clubbed together. Out of total income of that assessee has once again accumulated the income. Therefore, in nutshell, if such a practice were allowed, there would be non-taxation of income once accumulated perennially.

011. The learned Authorized Representative submitted six pages note along with factual paper book containing 70 pages also on several judicial precedent. He first narrated the facts stating that assessee is a trust having an object of promotion of textile standardization and to organize

international textile machinery exhibitions. Undoubtedly, the assessee is entitled to deduction under Section 11, 12 and 13 of the Act. In A.Y. 2005-06 and 2007-08, assessee has accumulated ₹6.01 crores under Section 11(2) of the Act for constructing a permanent exhibition complex. Accordingly, in terms of agreement with the Government of Gujarat for construction of state of art world-class exhibition at Sanand, Gujarat, assessee paid ₹4.01 crores for A.Y. 2010-11, ₹ 1 crore in A.Y. 2011-12 and further ₹ 1 crore in A.Y. 2012-13 towards the land component. The above amount was part of the fund accumulated of ₹14.75 crores as on year ended on 31st March, 2005. However, later on for some reasons, Government of Gujarat returned the above amount invested, to the assessee. ₹ 3.94 crores was returned in A.Y. 2015-16 and ₹30 lacs returned in A.Y. 16-17. The return amounts were added as the part of the total income under the head income from property held under the Trust. From the total income including the above amount returned back, assessee applied for accumulation under Section 11(2) of the Act. He submitted that whether assessee is entitled to accumulate out of the above returned sum or not has been examined by the learned Assessing Officer during the course of assessment proceedings. He referred to letter dated 10th August, 2016, 21 November 2017 & 28 November 2017 stating that this issue was examined threadbare by the learned Assessing Officer, therefore, it cannot be stated that the order passed by the learned

Assessing Officer is erroneous and prejudicial to the interest of the Revenue.

012. He further submitted that notice under Section 263 of the Act was issued on 9th March, 2021 to be attended to by 15 March 2021. He submitted that the notice was issued after more than 3 years from the date of the assessment order. He stated that in the notice explanation (2) of Section 263 of the Act was neither referred and nor invoked. For this, proposition he referred to the order of the Hon'ble Gujarat High Court in case of PCIT vs. Shreeji Prints (P) Ltd. (2021) 130 taxmann.com 293 (Guj.)(HC).

013. He further stated that there is no reference or discussion on the issue in the order under Section 263 of the Act for which the revision proceedings were initiated. Therefore, the order without linking that what should have been done by the learned Assessing Officer that is not been done, the order passed under Section 263 of the Act cannot be sustained.

014. It was stated that whether income once accumulated u/s 11 (2) of the Act for capital expenditure was added to revenue u/s 11 (3) of the act can accumulate once again be claimed u/s 11 (2) of The Act. It is covered in favour of the assessee by the decision of Honourable Calcutta High court in Natwarlal Chaudhary case 189 ITR 656 [Cal] . There is an also a view that u/s 11 (3) the amount of accumulation not utilized become deemed income. Deemed income cannot be accumulated. Only real and actual income can be accumulated. Such is the view

of ITAT in B N Gamadia Parsi Trust 77 TTJ 274 and Kol High court in 199 ITR 215 in Tantias case as well as Madras High court in Rao Bahadur's case 135 ITR 485. Thus on the debatable issue, when LD AO has taken one view, revision u/s 263 of the Act is prohibited.

015. The LD CIT DR relied up on the order of the LD PCIT. He submitted that view that is unsustainable taken by the LD AO makes the order erroneous and prejudicial to the interest of revenue.

016. We have carefully considered rival contentions and perused the Assessment order as well as revisionary order.

017. The Hon'ble Calcutta High Court in the case of CIT vs. Natwarlal Chowdhury Trust, reported in MANU/WB/0135/1989 : 189 ITR 656 has held that the assessee is entitled to accumulate 15% of the total income which is inclusive of the deemed income specified under Section 11(3) of the Act. Thus, from the above judgment, it is transpired that the assessee can claim the benefit of accumulation even on the deemed income specified under the provisions of Section 11(3) of the Act. However, it is pertinent to note that the assessee has already claimed the benefit of exemption under Section 11(2) of the Act with respect to the deemed income specified under Section 11(3) of the Act and if the same is allowed to accumulate again, then the assessee will be claiming the benefit twice and if the same continues, perennially.

018. The Trustees, The B.N. Gamadia Parsi Hunnarshala vs. Assistant Director of Income Tax (12.04.2001 - ITAT Mumbai) : MANU/IU/5003/2001 it was held that Deemed income is different from income contemplated under provision of statutes and therefore Assessee shall not entitle to claim benefit of accumulation out of such deemed income

> "9. The matter may also be looked from another angle. The assessee would be allowed to accumulate income if there is real income. Something, which is not in the possession of the assessee, cannot be accumulated or utilized at a later date. Under Section 11(3) the sum which is applied to the purposes other than the charitable or religious purposes would also be treated as deemed income of the assessee though the accumulated income is not available with the assessee because it was applied for a different purpose. Reversing to Section 11(1) (a) and 11(2) of the Act, 25 per cent of the income can be accumulated or set apart for an application to some specified purposes in India, which means such amount should be available with the assessee for application. In the case of deemed income where the amount is already spent by an assessee (for the purposes other than charitable purposes) it cannot be said that the assessee accumulates with an intention to apply it for a rightful purpose. Thus, even on the limited count the assessee cannot claim the benefit of

accumulation because the accumulation is allowed only if the intention of the assessee is to apply the same for a specific purpose. Thus, assessee cannot claim the benefit of accumulation with respect to the deemed income. In the case of Director of Income-tax v. G. Shewnarain Tantia (1993) MANU/WB/0145/1991 : 199 ITR 215 (Cal), the Hon'ble High Court of Calcutta analyzed the meaning of the word 'income' used in Section 11 of the Act. The Hon'ble Calcutta High Court observed that the 'income' contemplated by the provisions of Section 11 is the real income and not income as assessed or assessable. They have also followed the earlier decision of the same High Court in the case of CIT v. Jayshree Charity Trust (1986) MANU/WB/0118/1984: 159 ITR 280 (Cal) wherein the Hon'ble Court observed that what is deemed to be income can neither be spent nor accumulated for charitable purposes and the word 'application' or accumulation' can only be of real income which has actually been received by assessee. Their Lordships further observed that the deeming provisions should not be construed in a way to frustrate the object of Section 11, the objects of Section 11 being application of income received by it for charitable purposes.

10. The Hon'ble Calcutta High Court has also referred to the decision of Hon'ble Madras High Court in the case of CIT v. Rao Bahadur Calavala Cunnan Chelty Charities (1982) MANU/TN/0381/1979 : 135 ITR 485 (Mad) and agreed with the view expressed by the Hon'ble Madras High Court. It may be noted that the Hon'ble Madras High Court observed that in the context of Section 11(1)(a) of the Act "income" means the income which is available in the hands of the assessee because accumulation of 25 per cent is possible only from the income available with the assessee and not the deemed income. It could thus be seen that deemed income under Section 11(3) of the Act is different from the income contemplated under Section 11(1) (a) and 11(2) of the Act and, therefore, the assessee is not entitled to claim the benefit of accumulation out of such deemed income.

11. In the case of CIT v. Natwarlal Chowdhury cited supra, the Hon'ble High Court, with due respect, has not analyzed this section in the correct perspective. In our humble opinion the different expressions i.e., 'income derived from property' and 'income', used by the legislation under Sections 11 and 12 of the Act missed the attention of their Lordships or the impact of the difference in the expressions were not brought to their Lordships notice. In fact, a different

view was expressed by the Hon'ble Calcutta High Court in (1993) MANU/WB/0145/1991: 199 ITR 215 (Cal) (supra) in a later decision. Under these circumstances, and in the light of the decision of the Hon'ble Bombay High Court in the case of CIT v. Thane Elec. Supply Co. (1994) MANU/MH/0282/1993: 206 ITR 727 (Bom) at 738 we hold that the assessee is not entitled to the benefit of accumulation of deemed income which is taxable under Section 11(3) of the Act.

12. The assessee relied upon certain decisions in support of its contention that a legal fiction has to be carried to its logical conclusion. We fully agree with this proposition that a legal fiction no doubt has to be carried to its logical conclusion but at the same time, it cannot be stretched to an extent that frustrates the object of the particular provision. In the instant case, we have highlighted one possibility where an assessee might have applied the income for the purposes other than charitable purposes and thus there is no money available with the assessee in which event it cannot be said that the assessee can accumulate deemed income for some specified purposes. Such an interpretation would lead to anomalous situation, which is not contemplated under Section 11(1) (a) and 11(2) of the Act because an assessee is entitled to exemption only

on such income, which is either applied for charitable purposes or intended to be applied for charitable purposes and not otherwise.

13. The circular issued by the CBDT (supra) is in consonance with the intention of the legislature and the plain meaning that can be ascribed to Section 11 of the Act. Under these circumstances, we do not find any infirmity in the orders of tax authorities. We, therefore, dismiss the appeal filed by the assessee."

019. We find that the issue has been examined In Circular No. 29; R. No. 20/22/CS-IT(AI), dated 23.08.1360 and Circular 5P (LXX-6) of 1968 dated 19.06.1968. In the former Circular it is categorically mentioned that when the amounts are taxed u/s. 11(3) the benefit which would have been available to trust in respect of 25% of its income or Rs. 10,000/- u/s. 11(1) (a) would also be lost. In the later circular issue has been re-examined and legal position has been clarified stating that only the Income disclosed in the account will be eligible for exemption u/s. 11(1) and will be eligible for permitting accumulation of 25%. It is categorically explained that deemed income charged u/s. 11(3) is in excess of income shown in its account. Thus, from both these circulars it can be seen that the exemption u/s. 11(1) is not available for the deemed income u/s. 11(3).

020. The Bombay High Court in the case of Bajaj Auto Finance Ltd. vs. CIT reported in ITR No. 25 of 2000 has also held that Once, reliance is placed upon a decision of a Court and/or Tribunal to make a claim, then even if the Assessing Officer has a different view and does not accept the view, yet the claim itself becomes debatable.

021. Honourable Supreme Court held that where there are two views on an issue, if LD AO takes one of the views, it could not be said that order passed by him is erroneous and prejudicial to the interest of revenue. Hon Supreme court held that:-

> "2. At this stage we may clarify that under paragraph 10 of the judgment in the case of Malabar Industrial Co. Ltd. v. CIT MANU/SC/3008/2000: (2000) 243 ITR 83 this Court has taken the view that the phrase "prejudicial to the interests of the revenue " under Section 263 has to be read in conjunction with the expression "erroneous" order passed by the assessing officer. Every loss of revenue as a consequence of an order of the assessing officer cannot be treated as prejudicial to the interests of the revenue. For example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the revenue, unless the view taken by the Income Tax

Officer is unsustainable in law. According to the learned Additional Solicitor General, on an interpretation of the provision of Section 80HHC(3) as it then stood the view taken by the assessing officer was unsustainable in law and therefore the Commissioner was right in invoking Section 263 of the Income Tax Act. In this connection, he has further submitted that in fact the 2005 amendment, which is clarificatory and retrospective in nature itself, indicates that the view taken by the assessing officer at the relevant time was unsustainable in law. We find no merit in the said contentions. Firstly, it is not in dispute that when the order of the Commissioner was passed there were two views on the word "profits" in that section. The problem with Section 80HHC is that it has been amended eleven times. Different views existed on the day when the Commissioner passed the above order. Moreover, the mechanics of the section have become so complicated over the years that two views were inherently possible. Therefore, subsequent amendment in 2005 even though retrospective will not attract the provision of Section 263 particularly when as stated above we have to take into account the position of law as it stood on the date when the Commissioner passed the order dated March 5,1997, in purported exercise of his powers under Section 263 of the Income Tax Act."

[Commissioner of Income Tax vs. Max India Ltd. (01.11.2007 - SC): MANU/SC/8239/2007]

022. Therefore, the view taken by LD AO is debatable therefore, the powers u/s 263 of the act of the ld PCIT are ousted. Therefore, the orders of the LD PCIT for both these years are not sustainable. Hence, we quash them.

023. In the result, Appeal of assessee is allowed for both the years.

Order pronounced in the open court on 27.02.2023

Sd/-	Sd/-
(KAVITHA RAJAGOPAL)	(PRASHANT MAHARISHI)
(JUDICIAL MEMBER)	(ACCOUNTANT MEMBER)

Mumbai, Dated:27.02.2023
Sudip Sarkar, Sr.PS and Dragon
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/ Asst. Registrar
Income Tax Appellate Tribunal, Mumbai