

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR**

**BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
SHRI MANISH BORAD, ACCOUNTANT MEMBER**

**ITA No. 325/Jodh/2019
(ASSESSMENT YEAR- 2014- 2015)**

ACIT, Circle (Exemption), Jodhpur	vs	M/s. Vidya Bhawan Society, Mohan Singh, Mehta Marg, Fatehpur, Udaipur (Raj.)
(Appellant)		(Respondent)
PAN No.		

Assessee By	Shri Amit Kothari, CA
Revenue By	Shri S.M.Joshi, JCIT DR
Date of hearing	23/03/2023
Date of Pronouncement	24/03/2023

ORDER

PER KUL BHARAT, J.M.:

The present appeal filed by the Revenue for the assessment year 2014-15 is directed against the order of Ld. CIT(A)-1, Udaipur dated 27.06.2019. The Revenue has raised following grounds of appeal:-

- 1) *“On the facts and the circumstances of the case and in law the Ld. CIT(A) has erred in allowing exemption u/s 11 of the I. T. Act, 1961 without appreciating the fact that the assessee society has made investment amounting to Rs. 37,350/- and thus provisions of section 13(1)(d)(iii) r.w.s. 11(5) of the Income Tax Act, 1961 were clearly attracted in this case.*

2) *On the facts and the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the addition of surplus of Rs. 2,11,32,268/- without appreciating the fact that the assessee trust has violated the provisions of section 11(5) of the Act and therefore as per section 13(1)(d)(iii) of the Act, benefits of section 11 & 12 are not allowable.*

3) *On the facts and the circumstances of the case and in law the Ld. CIT(A) has erred in allowing capital loss of Rs. 2,96,322/- on sale of fixed asset as revenue expenditure ignoring the fact that the fixed asset is of the capital in nature.*

4) *On the facts and the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the disallowances amounting to Rs. 10,84,776/- made on account of prior period expenses without appreciating the fact that the expenses did not pertain to the year under consideration.*

5) *On the facts and the circumstances of the case and in law the Ld. CIT(A) has erred in deleting the disallowances amounting to Rs. 19,33,611/- made on account of gratuity provision ignoring the fact that expenses on provisions are not allowable expenses.*

6) *The appellant craves the right to add, amend or modify any ground of appeal.”*

2. Facts giving rise to the present appeal are that the assessee filed its return of income, declaring total income at INR NIL on 03.10.2014. The return of income was processed u/s 143(1) of the Income Tax Act, 1961 (“the Act”). Thereafter, the case of the

assessee was selected for scrutiny assessment and the assessment u/s 143(3) of the Act was framed vide order dated 30.12.2016. The Assessing Officer (“AO”) while framing the assessment noticed that the assessee had made investment in shares of TISCO Ltd. amounting to INR 37,350/-. The AO treated it to be violation of the provision of section 13(1)(d)(iii) of the Act. He therefore, treated the surplus amounting to INR 2,11,32,268/- as business income and further made addition on account of disallowance on loss of sale of fixed asset of INR 2,96,322/-, disallowance on prior period expenses of INR 10,84,776/- and gratuity expenses of INR 19,33,611/-. Thus, the AO assessed the income of the assessee at INR 2,44,46,977/-.

3. Aggrieved against this, the assessee preferred appeal before Ld.CIT(A), who after considering the submissions, allowed the appeal of the assessee.

4. Aggrieved against the order of Ld.CIT(A), the Revenue is in appeal before this Tribunal.

5. **Ground Nos. 1 to 2** raised by the Revenue are inter-connected.

6. Apropos to Ground Nos. 1 & 2 raised by the Revenue, Ld. JCIT DR on behalf of the Revenue relied on the assessment order and submitted that Ld.CIT(A) was not justified for deleting the impugned

addition as there is clear contravention of the provisions of section 13(1)(d)(iii) of the Act.

7. On the other hand, Ld. Counsel for the assessee, Sri Amit Kothari, CA opposed these submissions and submitted that the issue raised in these grounds are squarely covered by the decision of the Co-ordinate Bench of the Tribunal rendered in the case of *M/s. Santokba Durlabhji Trust Fund vs ITO (ITA No.169/Jaipur/2012* in favour of the assessee. He further contended that the matter travelled upto Hon'ble Rajasthan High Court and Hon'ble Rajasthan High Court in ITA No.275/2016 vide order dated 12.09.2017 decided the issue in favour of the assessee. Therefore, he submitted that there is no infirmity in the order of Ld.CIT(A), same needs to be upheld.

8. In re-joinder, Ld. JCIT DR submitted that against the judgement of Hon'ble Rajasthan High Court, the Revenue has preferred special petition which is pending before the Hon'ble Supreme Court.

9. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. We find that Ld.CIT(A) has decided the issue by observing as under:-

4.2 *"I have considered the facts of the case, assessment order and appellant's submission. The AO noted that the assessee had invested in shares of TISCO Ltd. amounting to Rs. 37,350/- as on 31-03-2014 and also had shown dividend income of Rs. 1,656/- which was claimed exempt u/s. 10(34) of the Act. The AO held that the assessee's case is covered under the provisions of sec. 13(1)(d)(iii) of the Act and accordingly, treated the surplus of Rs. 2,11,32,268/- as income from business and profession. The appellant claimed that its case is squarely covered by the decision of the Hon'ble ITAT, Jaipur Bench, Jaipur in the case of M/s. Santokaba Durlabhji Trust fund (supra) and the AO did not accept this fact for the reason that further appeal against this order was preferred by the Department before the Hon'ble Rajasthan High Court. The appellant pointed out that this appeal of the Department has also been decided by the Hon'ble Rajasthan High Court vide order dated 12-09-2017 in D.B. Income Tax Appeal No. 275/2016. The copies of both these orders have been furnished by the appellant society. Upon perusal of the same, the appellant's claim is found to be correct. In the appellant's case as well in the case of M/s. Santokaba Durlabhji Trust fund (supra), the issue for consideration was that whether the assessee is eligible to claim u/s. 11 even though provisions of section 13(1)(d)(iii) are attracted where the assessee held shares of TISCO or invested in share of TISCO. The Hon'ble ITAT, Jaipur in the case of M/s. Santokaba Durlabhji Trust fund vs. ITO (ITA No. 169/JP/2012 AY 2008-09) decided the issue in favour of the assessee trust by holding as under:-*

"4.4 We have heard the rival contentions and case laws and carefully perused the material available on the record. The controversy in question be dealt with by framing following question:

i. Whether the trust was obliged to convert its TISCO share holding into specified securities by the due date or thereafter? In our considered view there cannot be dispute on this issue that the trust should had converted the TISCO share into investment of permissible securities in this behalf.

ii. Whether the nonconversion of TISCO corpus shares into permissible securities will disentitle the assessee from the benefits of secs. 11 and 12 from the entire income.

OR

Conjointly reading sec. 164(2), it will disentitle the benefits on the portion of the income attributable to impermissible securities to be taxed at maximum marginal rates after applying other provisions of the Act?

4.5 In our considered view the provisions of secs. 11, 12, 13 and 16(2) are to be conjointly read and the CBDT circular referred to above being a beneficial circular is to be also applied. A combined reading leads to a harmonious construction, proviso to section 164(2) is very important, Legislature has clearly contemplated that in a case where the whole or part of the relevant income is not exempt under section 11, by virtue of violation of section 13 (1) (d), tax shall be

charged on the relevant income or part of the relevant income at the maximum marginal rate. CBDT Circular No. 387, dated July 6, 1984, issued by the Central Board of Direct Taxes [152 ITR (St.) 1] also supports this proposition. Section 164 (2) refers to the relevant income which is derived from property held under trust wholly for charitable or religious purposes. If such income consists of severable portions, exempt as well as taxable, the portion which is exempt is to be left out and the portion which is not exempt is charged to tax as if it is the income of the association of persons. This is subject to application of other provisions of Act like exemptions, deduction etc. Therefore, a proviso was inserted by the Finance Act, 1984, with effect from April 1, 1985, under which in cases where the whole or any part of the relevant income is not exempt under section 11 or section 12, because of the contravention of section 13 (1) (d), then tax shall be charged on such income or part thereof, as the case may be, at the maximum marginal rate. In other words, only non-exempt income portion would fall in the net of tax, as if it was the income of an association of persons.

4.6 In the case of Maftlal Gagalbhai Foundation (supra) also it was held by the High Court that as per proviso to section 164 (2), it is, inter alia, laid down that in cases where the whole or part of the relevant income is not exempt by virtue of section 13 (1) (d), tax shall be charged on the relevant income or part of the relevant income at the maximum marginal rate. The phrase "relevant income or part of relevant income" is required to be read in contradistinction to the phrase "whole income" under section 161 (1A). This is only by way of comparison. Under section 161 (1A) which begins with a non obstante clause, it is

provided that where any income in respect of which a person is liable as a representative assessee consists of profits of business, then tax shall be charged on the whole of the income, in respect of which such person is so liable at the maximum marginal rate. Therefore, reading the aforesaid two phrases show that the Legislature has clearly indicated its mind in the proviso to section 164 (2), when it categorically refers to forfeiture of exemption for breach of section 13 (1) (d), resulting in levy of maximum marginal rate of tax only to that part of income, which has forfeited exemption. It does not refer to the entire income being subjected to maximum marginal rate of tax. This interpretation is also supported by Circular No. 387 dated July 6, 1984 [152 ITR (St.) 1]. It was also held that in law, there is a vital difference between eligibility for exemption and withdrawal of exemption/forfeiture of exemption for contravention of the provisions of law. These two concepts are different. They have different consequences. In the circumstances, it was held that there was merit in the contention of the assessee that in the present case, the maximum marginal rate of tax would apply only to the dividend income from shares in Mafatlal Industries Ltd. and not to the entire income. Accordingly, the aforesaid question was answered in the negative, that is, in favour of the assessee and against the Department.

4.7 We find merit in the contention of Id. Counsel for the assessee that the proposition of apportionment of income eligible for benefits u/s 11 and 12 between exempted or, non exempted income is upheld by Hon'ble Supreme Court in Dawoodi Bohra Trust (supra). Thus Hon'ble Supreme court has

rationally dealt with this situation and instead of denying the entire benefits of sec 11 and 12 even for a technical, venial or smaller breach a sound and reasonable proposition has been laid down. In view of the foregoings we have no hesitation to hold that the entire benefits of sec. 11 and 12 cannot be forfeited from the trust and the corresponding dividend income from TISCO shares will not be eligible for Benefits of sec. 11 and 12.

5.1 Now we advert to the assessee's contention that income not eligible for benefits of sec 11 and 12 is to be subjected to other provisions of the IT Act and thereafter the taxable income is to be subjected to maximum marginal rate. We find force in this argument. As per the scheme of the Act, first the trust income is to be worked out, thereafter, benefits of provision of secs. 11 and 12 are to be applied. Remainder income is than to be treated with regular provisions of the Act and resultant income i.e. taxable income is to be subjected to maximum marginal rates. Applying this scheme of the I T Act to assessee case the non-beneficial income is in the form of dividend income from TISCO shares. There is no dispute between the parties about the nature of income being dividend and quantum thereof. In the backdrop of these facts the dividend income being exempt from income by express provisions of sec 10(34), the dividend income is exempt from Income Tax. This being so, in the result there remains no tax liability on the trust. Consequently we hold accordingly and delete the additions in this behalf. Our judgment is fortified by the judgments cited by the assessee's counsel (supra) which deal with the issue before us with precision and which we respectfully follow. Apropos the case

laws cited by Id DR - They have been considered by above judicial precedents to arrive at the above conclusion, which we are respectfully following. We may hasten to add that even department has not been taking any particular stand and allowing the benefits of sec 11 and 12 in some of the years, then rethinking and refusing the benefits by reopening the assessments. Thus even the department has its own share of interpretations, leading to repetitive proceedings. In consideration of all the foregoing, we allow the appeal filed by the assessee."

The appellant has also relied on this decision before the AO, however, the AO did not accept the same by stating that the Department has preferred appeal before the Hon'ble Rajasthan High Court. Subsequently, the Hon'ble Rajasthan High Court dismissed the Department's appeal. The decision of Hon'ble Rajasthan High Court in the case of CIT vs. Santokba Durlabhji Trust Fund is quoted at [2018] 93 taxmann.com 324 (Rajasthan). The head note is also reproduced as under:-

"Section 13, read with section 11, of the Income-tax Act, 1961 - Charitable or religious trust - Denial of exemption (Sub-section (1)(d)) - Assessee-trust was running a hospital cum research institute - It filed return declaring nil income = In course of assessment, Assessing Officer found that assessee had received gift of shares of company 'T' which were subsequently written off - Assessing Officer took a view that assessee was under an obligation to dispose off or convert said shares into permissible investments which it failed to do and thereby contravened provisions of section

13(1)(d). Accordingly, Assessing Officer disallowed assessee's entire claim for exemption of income - Tribunal held that denial of exemption under section 13(1)(d)(iii) was to be restricted to only income earned from shares to be taxed at marginal rate under section 164(2), and not entire income of assessee - Whether, on facts, view taken by Tribunal was just and proper and, thus, same did not require any interference -Held, yes [Paras 9 and 12] [In favour of assessee]"

Respectfully following the ratio laid down in the above judgment of higher forum, it is held that the AO was not justified in holding that the assessee's case is covered with the provisions of sec. 13(1)(d)(iii) of the Act and further not justified treating the surplus of Rs. 2,11,32,268/- as income from business and profession. The addition made on this account is directed to be deleted. The ground nos. 1 & 2 raised by the appellant regarding these issues are allowed."

10. The Revenue has not rebutted the finding of Ld.CIT(A) that the issue is squarely covered by the judgement of Hon'ble Rajasthan High Court. Therefore, we do not see any reason to interfere in the findings of Ld.CIT(A), the same is hereby affirmed. Ground Nos.1 & 2 raised by the Revenue are thus, rejected.

11. Apropos to **Ground Nos. 3 to 5**, Ld. JCIT DR supported the assessment order of the AO and submitted that Ld.CIT(A) was not justified in deleting the additions.

12. On the other hand, Ld. Counsel for the assessee supported the order of Ld.CIT(A) and submitted that the issues are covered in favour of the assessee. Therefore, there is no infirmity into the order of Ld.CIT(A).

13. We have heard Ld. Authorized Representatives of the parties and perused the material available on record and gone through the orders of the authorities below. We find that Ld.CIT(A) has given a finding on fact by observing as under:-

5. *“Vide ground no. 3, the appellant has objected to the addition of Rs.2,96,322/- on account of disallowance of loss on sale of fixed assets, addition of prior period expenses of Rs. 10,84,776/- and addition of Rs. 19,33,611/- on account of disallowance Of provisions of gratuity. Regarding these additions, the AO discussed as under in the assessment order:-*

"4.1. Disallowance of loss on sale of fixed assets:- In the Income & Expenditure account the assessee has claimed loss of Rs. 2,96,322/- on sale of fixed asset which is a capital loss and therefore, cannot be allowed as revenue expenditure. Therefore, addition of Rs. 2,96,322/- is made to the total income of the assessee.

Addition:- 2,96,322/-

4.2. Prior Period Expenses:- In the Income & Expenditure account the assessee has claimed Rs. 10,84,776/- as prior period expenses. As this expenses is not pertains to the

AY 2014-15 therefore the same cannot be allowed as revenue expenditure for the A.Y. 2014-15 and accordingly made addition of Rs.10,84,776/- is made to the total income of the assessee.

Addition:- 10,84,776/-

4.3. Gratuity Provision:- Assessee has claimed expenditure of Rs. 19,33,611/- on account of Gratuity Provision. As expense on provision basis are not allowed therefore, the addition of Rs. 19,33,611/- is hereby made.

Addition:-19,33,611/-"

5.1 Regarding these issues, the appellant has submitted as under:-

4) "Disallowance and Additions of expenses:

<i>Disallowance of loss on sale of fixed assets</i>	<i>Rs.2,96,322/-</i>
<i>Addition of prior period expenses</i>	<i>Rs.10,84,776/-</i>
<i>Disallowance of provision of gratuity</i>	<i>Rs.19,33,611/-</i>

In this connection, it is humbly submitted that it is settled law that the profit and loss account should be prepared on commercial principles and not under the Income Tax Act. Thus, when the computation of income for the trusts or institutions is to be made on commercial principles and not head-wise as per statutory provisions, there is no question of any disallowances. The Hon'ble Supreme Court in CIT vs. Programme for Community Organisation [(2001) 248 ITR 1 (SC)] had approved the Kerala High Court's decision in the same case [(1997) 228 ITR 620 (Ker)] as to the manner of computation. It was held that income has to be computed on commercial basis and not head-wise on statutory basis. The expenditure would be a charge on the

income, while the net income along with donations other than corpus donation, will form the eligible base out of which the Assessee is expected to apply 85%. This has also been explained in CBDT circular no. 5P dated 19.06.1998.

Therefore, there is no question of making separate disallowance for loss on sale of fixed assets, like-wise prior period expenses are nothing but mostly written-off amount of unrecoverable debit balances (bad-debts), which in fact cannot be characterised as prior period expenses when the same were written off during the year under consideration.

As far as provision of gratuity for Rs. 19,33,611/- is concerned, we have not claimed the same as application of funds in our computation. Hence, there is no question of adding this back to our Income.

As already submitted, all expenses are charge on the income by applying the commercial principles and thus, no addition was warranted on this account. It is, therefore, prayed to kindly delete the same."

5.2 I have considered, the facts of the case, assessment order and appellant's written submissions. The AO made the addition of Rs.2,96,322/- on account of disallowance of loss on sale of fixed assets by holding that the same is capital loss and cannot be allowed as revenue expenditure. Besides, the AO also made the addition of prior period expenses of Rs. 10,84,776/- and addition of Rs. 19,33,611/- on account of disallowance of provisions of gratuity. The appellant also submitted that it is settled law that the profit and loss account should be prepared on commercial principles and not under the Income Tax Act. The

appellant relied on the decision of the Hon'ble Supreme Court in CIT vs. Programme for Community Organisation [(2001). Considering the facts of the case, I am inclined to agree with the appellant's arguments. In the said judgment of the Hon'ble Apex Court, it was held that income has to be computed on commercial basis and not head-wise on statutory basis; the expenditure would be a charge on the income, while the net income along with donations other than corpus donation, will form the eligible base out of which the Assessee is expected to apply 85%. The Hon'ble ITAT Mumbai 'E' (Special Bench) in the case of Bai Sonabai Hirji Agiary Trust vs. ITO [2005] 93 ITD 70 (MUM.)(SB) following the judgment of the Hon'ble Apex in the case of CIT v. Programme for Community Organisation (supra), held as under:-

'The issue had come up for consideration before the Regular Bench and the Bench made a detailed reference to the President, Tribunal, for constituting a Special Bench for deciding the issue. The very fact that the Regular Bench deemed it proper to make a detailed reference to the President proved that the ground taken before it was admitted by the Bench and therefore, a reference was made to the President, Tribunal, under section 255(3). Once the President, Tribunal, has constituted the Special Bench and, has referred the question to the Special Bench, the Special Bench is bound to decide the issue under section 255(3). In view of the above facts, the technical objection raised by the Commissioner was rejected. [Para 8]

It is clear from the decision of the Supreme Court in CIT v. Programme for Community Organisation [2001] 248 ITR 1/

116 Taxman 608 that deduction of twenty five per cent is to be allowable not on total income as computed under the Income-tax Act. Any amount or expenditure, which is application of income, is not to be considered for determining twenty five per cent to be accumulated. When it is established that trust is entitled to full benefit of exemption under section 11(1), the said trust is to get the benefit of twenty five per cent and this twenty five per cent has to be understood as income of the trust under the relevant head of section 11(1). In other words, income that is not to be included for the purpose of computing the total income would be the amount expended for purposes of trust in India. As per the statutory language of the section 11(1)(a) the income which is to be taken for purpose of accumulation is the income derived by the trust from property. Thus, any expenditure which is in the shape of application of income is not to be taken into account. Having found that trust is entitled to exemption under section 11(1), one should go to the stage of income before application thereof and take into account 25 per cent of such income. The same has to be taken on 'commercial' basis and it need not be the 'total income' as computed under the Income-tax Act. The sum which is spent and applied by the assessee for charitable purposes should not be required to be excluded for purpose of taking amount to be accumulated. It is difficult to accept that outgoings which are in the nature of application of income are to be excluded. The income available to the assessee before it was applied should be directed to be taken. Twenty five

per cent of the above income was to be allowed as a deduction. [Para 9]

In the instant case, there is no dispute that the appellant trust is registered u/s. 12A and eligible for benefit of sec. 11 & 12 and the appellant society is expected to apply 85% of surplus, thus, since when all expenses are charged on the income by applying the commercial principle, therefore, no addition is warranted. Accordingly, it is held that there is no question of making separate disallowance for loss on sale of fixed assets, like-wise prior period expenses which were mostly written-off amount of unrecoverable debit balances (bad-debts), and in fact cannot be characterized as prior period expenses. As regards the provision of gratuity for Rs. 19,33,611/-, the appellant society established that it had not claimed the same as application of funds in its computation. Accordingly, the AO is directed to delete the additions made on these 'accounts. The ground no. 2 raised by the appellant regarding these issues is allowed.

6. The next issue is regarding the AO's action in not allowing the credit of tax already deducted at source. There is no mention/ discussion on the indicated controversy in the assessment order. As per provision of I. T. Act, 1961, every tax payer is to be given credit of the TDS made against him in a particular financial year, as per law. The Assessing Officer is accordingly, directed to allow necessary credit of TDS to the appellant as per law after satisfying himself with the original evidence in support thereof produced before him. The ground of appeal is treated as allowed.”

14. The aforesaid finding on fact has not been rebutted by the Revenue by placing any contrary material on record. Moreover, the Revenue has not brought to our notice any other binding precedent other than what is relied in the impugned order. Therefore, we do not see any infirmity into the order of Ld.CIT(A), the same is hereby affirmed. Ground Nos. 3 to 5 raised by the Revenue are thus, rejected.

15. **Ground No.6** raised by the Revenue is general in nature, needs no separate adjudication hence, dismissed.

16. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 24/03/2023.

Sd/-

Sd/-

(MANISH BORAD)
ACCOUNTANT MEMBER

(KUL BHARAT)
JUDICIAL MEMBER

Amit Kumar

Copy to:

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4. The CIT(A)
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Asstt. Registrar
Jodhpur Bench