

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

Before Shri Sanjay Arora, Accountant Member and
Shri Manomohan Das, Judicial Member

ITA No. 649/Coch/2022
(Assessment Year: 2017-18)

Bharat Charitable Hospital Society, Azad Lane, Thirunakkara Kottayam 686001 [PAN:AAATB 2233J]	vs.	CIT (Exemptions) C.R. Building I.S. Press Road Kochi 682018
(Appellant)		(Respondent)

Appellant by: K. Krishna K., Adv.
Respondent by: Smt. J.M. Jamuna Devi, Sr. D.R.

Date of Hearing: 10.07.2023
Date of Pronouncement: 28.08.2023

ORDER

Per: Sanjay Arora, AM

This is an Appeal by the Assessee agitating the revision order under section 263 of the Income Tax Act, 1961 ('the Act') dated 23.03.2022 by the Commissioner of Income Tax (Exemptions), Kochi (CIT) in respect of the assessee's assessment for Assessment Year (AY) 2017-18.

2. The facts of the case in brief are that the assessee, a charitable trust registered u/s.12AA of the Act, is running a hospital at Kottayam, Kerala. It filed its return of income for the relevant year on 14/3/2018 at nil income, claiming deduction u/s. 11 at Rs. 5049.62 lacs, i.e., the entire income, being surplus as per its income and expenditure account. It was during the assessment proceedings found to have paid salary (atrs. 99.71 lacs) to some doctors who were also its trustees, denoted by symbol (t), as under, and which was at an increase over that paid to other doctors:

Name of the Doctor	Nature of Payment	Amount (Rs.)
Dr. Vinod Viswanathan (t)	Professional Fee	Rs.26,72,100/-
Dr. A.N. Viswanathan	Professional Fee	Rs.6,30,000/-
Dr. Rajesh Menon (t)	Professional Fee	Rs.39,03,898/-
Dr. B. Srekumarn (t)	Professional Fee	Rs.33,94,500/-
Smitha Viswanathan	Professional Fee	Rs.3,84,000/-

The Assessing Officer (AO) inferring the same to be in excess, disallowed 30% thereof, i.e., Rs. 29.91 lacs, and assessed the income, vide order u/s. 143(3) dated 24/12/2019, though at nil, with the said disallowance. The assessee appealed there-against before the first appellate authority under the Act on 18/01/2020. It was subsequently show caused u/s. 263 of the Act. The Id. Pr. CIT was of the view that the AO had gone wrong in making the addition for Rs. 29.91 lacs. Once section 13(1)(c), reproduced hereunder in its relevant part, is attracted, no exemption u/s. 11 could be allowed:

Section 11 not to apply in certain cases

13. (1) Nothing contained in section 11 or section 12 shall operate so as to exclude from the total income of the previous year of the person in receipt thereof—

(a)

(b)

(c) in the case of a trust for charitable or religious purposes or a charitable or religious institution, *any income thereof*—

(i) if such trust or institution has been created or established after the commencement of this Act and under the terms of the trust or the rules governing the institution, any part of such income enures, or

(ii) if any part of such income or any property of the trust or the institution (whenever created or established) is during the previous year used or applied,

directly or indirectly for the benefit of any person referred to in sub-section (3):

Provided that

Provided further that;

(emphasis, supplied)

(the *provisos* being applicable only to a Trust established prior to the commencement of the Act, as was a common ground before us, have no application).

He, accordingly, set aside the assessment and restored the matter to file of the AO to redo the assessment after allowing the assessee an opportunity of being heard in the matter. Aggrieved, the assessee is in appeal before us.

3. The assessee's case before us was two-fold:

(a) that the impugned order is without jurisdiction inasmuch as the assessee had, prior to the issue of notice u/s. 263 by the ld. Pr. CIT on 16.02.2022, proposing to exercise the power u/s. 263 of the Act, filed an appeal before the first appellate authority on 18.01.2020, which is in fact pending disposal even to date;

(b) The second ground assails the revision as the payees under reference are qualified and established professionals in the medical field, working for the assessee for long, payment to whom would not therefore be covered u/s.13(1)(c) of the Act.

4. We have heard the parties, and perused the material on record. We find little merit in the assessee's case, which we elaborate upon ground-wise.

4.1 *Explanation(c)* to section 263 contemplates exclusion of revisionary jurisdiction in respect of matters that had been subject to consideration and decision by the first appellate authority. On 16/2/2022, i.e., the date notice u/s. 263 was issued by the revisionary authority, there had been no adjudication by the first appellate authority, admittedly outstanding even as on the date of the hearing. That is, even presuming the subject matter to be the same, and which is apparently not the case. This is as the order by the ld. Pr. CIT concerns itself with the consequence of the invocation of s. 13(1)(c) r/w. s. 13(3), while the assessee disputes the applicability of the said provision itself, i.e., claims sec. 13(1)(c) to have been, in the facts and circumstances of its case, wrongly invoked. And which in fact brings us to the assessee's second objection.

4.2 The second ground itself endorses the assessment as being erroneous. This is as the AO had admittedly not undertaken any exercise in coming to the conclusion that the payment to the doctor-trustees was in excess. He merely inferred so on the basis of the payment made to the doctor-trustees being in a sum higher than that to other

doctors working for the assessee-trust. Experience and professional standing could vary significantly across different doctors. Only the like can be compared with the like. The impugned payments would therefore warrant being compared with the remuneration of doctors with similar professional standing, i.e., in terms of qualification and experience. Where he indeed finds it as so, so that s.13(1)(c) is attracted, inasmuch as a benefit, at the expense of the charitable institution, has been extended to a specified person/s, the same would exclude any benefit u/ss. 11 & 12 of the Act, which would accordingly not apply. There is no question in such a case of making a disallowance for the amount considered as paid in excess, allowing benefit u/s.11 for the balance, as would be the case *qua* a s. 37(1) disallowance, where, as in the instant case, the rendering of the services is not in doubt. This is the second error committed by the AO, clearly prejudicial to the interest of the Revenue, even as the former was to that of the assessee, and which forms the subject matter of it's appeal.

5. For the reasons afore-stated, the impugned order has our approval. So, however, we make it clear that the AO shall, in the set-aside proceedings, undertake proper enquiry in the matter, and issue definite findings of fact. There is no ambiguity in the law in the matter, so that the matter boils down to determination of facts and decide on the *terra firma* thereof, i.e., of the facts found, on the basis of the material adduced before him, or otherwise collected by the AO, and of which the assessee is put to notice. The AO shall, needless to add, complete the assessment within the time frame provided by law. We decide accordingly.

6. In the result, the appeal filed by assessee is disposed of on the afore-said terms.

Order pronounced on August 28, 2023 under Rule 34 of The Income Tax (Appellate Tribunal) Rules, 1963

Sd/-
(Manomohan Das)
Judicial Member

Sd/-
(Sanjay Arora)
Accountant Member

Cochin, Dated: August 28, 2023

n.p.

Copy to:

1. The Appellant
2. The Respondent
3. The Pr. CIT concerned
4. The Sr. DR, ITAT, Cochin
5. Guard File

By Order

Assistant Registrar
ITAT, Cochin