

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K, VICE PRESIDENT
AND SHRI WASEEM AHMED, ACCOUNTANT MEMBER**

ITA No. 290, 291 & 292/Bang/2024
Assessment Years : 2017-18, 2018-19 & 2021-22

The Dy. Commissioner of Income Tax, Circle- 1, Bengaluru	Vs.	CMR Jnanadhara Trust, CA No.2, 3 rd C Cross, 6 th A Main, 2 nd Block, HRBR Layout, Bangalore.
APPELLANT		RESPONDENT

Assessee by	:	Shri Narendra Kumar Jain, Advocate
Revenue by	:	Shri D.K Mishra, CIT (DR)

Date of hearing	:	05.09.2024
Date of Pronouncement	:	03.12.2024

ORDER

PER BENCH:

These are the appeals filed by the Revenue against the order passed by the NFAC, New Delhi dated 17/05/2023 for the assessment years 2017-18, 2018-19 & 2021-22.

2. At the outset, it is observed that the grounds of appeal raised by the Revenue in all three assessment years under consideration are identical. For the sake of brevity and judicial convenience, we shall first adjudicate the appeal filed by the Revenue in ITA No. 290/Bang/2024 for

the Assessment Year 2017-18, treating it as the lead case. The findings and conclusions arrived at in this lead appeal shall, mutatis mutandis, apply to the other two appeals referred to in the cause title.

ITA No. 290/Bang/2024 for the AY 2017-18, an appeal by the Revenue.

3. The Revenue raised the following grounds of appeal:

"1. The CIT(A), Order is opposed to facts and circumstances of the case.

2. Whether on the facts and in the circumstances of the case, the CIT(A) was correct in law in holding that assessee was not hit by the provisions of section 13, whereas the AO had brought on record cogent evidence that the payment made to specified persons viz., M/s EESPL, M/s CMRECS and M/s JDCPL was unreasonable and unduly excessive, since they did not possess the extra ordinary qualification, the huge payments made by the assessee to them was not commensurate to the services rendered by them.

3. Whether on the facts and in the circumstances of the case, the CIT(A) was correct in law in ignoring the fact that the assessee was hit by provisions of section 1.3(2)(c) and 13(2)(g) as the assessee siphoned off the funds of the trust for the benefit of persons referred to in section 13(3), thereby enriching the trustees /relatives of trustees and depriving the benefit to the beneficiaries of the trust.

4. Whether on the facts and in the circumstances of the case, the CIT(A) was correct in allowing the exemption u/s 11, whereas as when assessee is hit by sec. 13, the exemption u/s 11 and 12 also has to be denied and the entire gross receipts has to be taxed in the hands of the assessee.

5. The appellant craves leave to add, alter or amend all or any of the grounds of Appeal before or at the time of the hearing of the appeal.

6. The order of the learned CIT(A),NFAC may be set-aside and the order of the A.O. may be confirmed.

4. The primary issue raised by the Revenue pertains to the alleged error by the learned CIT(A) in granting the benefit of exemption under Section 11 of the Act, despite disregarding payments made to specified persons, which are claimed to be in violation of Section 13(1)(c) of the Act.

5. Briefly stated, the facts of the case are that the assessee, a trust, engaged in educational activities, holds a valid registration certificate under Section 12A of the Act, granted vide order dated 23/05/1996. The assessee filed its return of income, declaring NIL income after claiming exemption under Section 11 of the Act. Subsequently, the case was selected for scrutiny under CASS due to payments made to persons specified under Section 13(3) of the Act. The details of such payments are as follows:

Party Name	AY 2017-18
M/s Edufice Education Services Pvt Ltd ("Edufice")	4,78,72,968
M/s CMR Education & Consultancy Services (CECS)	5,40,04,850
M/s Jaista Developers & Constructions (P) Ltd (JDCPL)	5,60,91,232

6. The Assessing Officer (AO), after examining the terms and conditions governing the transactions between the assessee and the specified persons, made certain observations, which are detailed as under:

- 1) The trust was reimbursing all expenditures incurred by the specified entities, including those related to maintenance, electricity, water, salaries, rates, taxes, and other government levies applicable to such entities.

- 2) The specified entities did not possess any extraordinary or intangible assets that could justify the receipt of such substantial payments from the trust.
- 3) The specified entities were exclusively engaged in rendering services to the assessee trust or its group concerns. Consequently, there were no other receipts recorded in the books of the specified entities from any external organizations.
- 4) Effectively, the educational activities were being conducted by the group companies under the guise of the assessee trust, which functioned merely as a name lender. Consequently, the educational scheme was operated with a profit-oriented motive. Furthermore, the specified entities were generating significant profit margins prior to disbursing salaries to directors/partners, who are specified persons as per the provisions of the assessee trust.
- 5) The specified entities were effectively overseeing and managing the administrative and commercial affairs of the trust.
- 6) The primary purpose behind the formation of the specified entities was to divert the income of the assessee trust.
- 7) The costs incurred by the assessee for services received from the specified entities were unreasonable. This is because the directors, who were employed by the specified entities, should have been drawing their salaries directly from the assessee trust, rather than diverting funds to the specified entities.

7. Given the above, the Assessing Officer (AO) was of the opinion that the provisions of Section 13(1)(c) of the Act had been violated, as the assessee trust had extended benefits to specified persons. Consequently, the AO denied the exemption claimed by the assessee under Section 11 of the Act and computed the assessee's income in accordance with the normal provisions applicable to an assessee. Furthermore, while computing the assessee's income, the AO disallowed a portion of the payments made to these entities, considering them excessive. The AO allowed payments made to these entities only to the extent of the cost incurred, plus a 5% markup on such costs for the services rendered to the assessee trust. As a result, the AO disallowed the excess payment exceeding the arm's length price (ALP), amounting to Rs. 8,60,53,373/- only.

7.1 Besides the above, the AO observed that the activities of the trust were extending to the benefit of trustee's relatives and the companies in which the trustees were interested. Therefore, the activities of the trust are against the principles of charity. The AO further treated the assessee as the AOP and denied the benefit of exemption claimed by the assessee under section 11 and 12 of the Act. The AO in doing so has referred to various case laws which are reproduced in the assessment order. As such, the income of the assessee was determined based on commercial principles at Rs. 57,98,86,745.00 only.

8. The aggrieved assessee filed an appeal before the learned CIT(A)/NFAC. After considering the facts in entirety, the learned CIT(A)/NFAC allowed the appeal, holding that the entire benefit under Section 11 of the Act cannot be withdrawn solely on the grounds of a violation of Section 13(1)(c) of the Act. Instead, such withdrawal should

be limited to the extent of excessive payments made to the specified entities. Furthermore, the learned CIT(A) deleted the addition/disallowance made by the Assessing Officer (AO), concluding that the payments made to the specified persons were neither excessive nor in violation of Section 13(1)(c) of the Act. The relevant observations of the learned CIT(A)/NFAC are as follows:

8.1 Benefit under section 11 of the Act cannot be withdrawn for entire transaction:

4. Section 11 of the Income-Tax Act, 1961 (the Act) excludes from the income of charitable or religious trusts, Income to the extent it is applied towards the objects of such trusts, during the previous year in India. It may be stated here that there are several conditions laid down under section 11 of the Act, for the purpose of claiming exemption in respect of the income of a charitable or religious trust. As regards the exemption available under section 11 of the Act, the provisions of section 13 are quite relevant. The heading of section 13 is "Section 11 not to apply in certain cases", In other words, section 13 provides that exemption under section 11 will not be available in cases of Violation of the provisions of section 13 of the Act. Besides, section 13(2) lists conditions which are deemed to be violation under sections 13(1)(c) or 13(1)(d).

(i) Section 13(1)(c) - Benefit to interested persons

Section 13 (1)(c) of the Act has carved out an exception from exemption

in cases where a part. of income of a charitable or religious trust institution enures or is used or applied directly or indirectly for the benefit of the settler, founder or certain other specified persons under section 13(3) of the Act. This is obviously intended to ensure that the Income of such a trust! institution is not diverted towards the benefit of persons who are closely connected with the creation, establishment and conduct of the affairs of the trust/institution.

(II) Section 13(1)(d) - Investment of funds of the trust / institution In modes or forms other than those specified.

Section 13(1)(d) provides that exemption from tax to charitable or religious trust / institution will be forfeited if any funds of the trust / institution are invested or deposited after 28.2.1983, otherwise than in any one or more of the forms or modes specified therein.

(iii) Section 13(2) — Bar duo to deemed use I application of the income or property of the trust by interested persons.

As per section 13(2) of the Act, without prejudice to the generality of the provisions of section 13(1)(c) and section 13(1)(d), the income or the property of the trust or institution or any part of such income or property shall, for the purposes of that clause, be deemed to have been used or applied for the benefit of persons referred to in section 13(3), in situations listed under clauses (a) to (h) thereof.

Thus, the provisions of section 13(2) are nothing but extension of the provisions of section 13(i)(c) 11;3(1)(d) of the Act.

In the present context, the provisions of sections 13(1)(c), 13(1)(d) and 13(2) of the Act, are to be perused.

Statutory Provision : sections 13(1)(c) of the Act is reproduced as follows:

13, Section 11 not to apply in certain cases,

(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

(c) in the case of a trust for char/table 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)"

From the aforesaid provisions of section 13(i)(c)(ii), it may be seen that if any part of income or any property of the trust is applied directly or indirectly for the benefit of any trustee. etc, then the benefit of exemption under section 11 of the Act, will not be available to the trust, in respect of such income.

8.2 Statutory Provision :section 13(1)(c) of the Act is reproduced as follows :

"13. Section 11 not to apply in certain cases.

(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 -

(d) in the case of a trust for charitable or religious purposes or a charitable or religious institution, any income thereof for any period during the previous year -

(i) any funds of the trust or institution are invested or deposited after the 28th day of February, 1983 otherwise than in any one or more of the forms or modes specified in sub-section (5) of section 11; or

(ii) any funds of the trust or institution invested or deposited before the 1st day of March, 1983 otherwise than in any one or more of the forms or modes specked in sub-section (5) of section ii continue to remain so invested or deposited after the 30th day of November, 1983: or

(iii) any shares in a company, other than— (A) shares in a public sector company ; (BB shares prescribed as a form or rode of investment under clause (xii) of sub-section (5) of section 11,

are hold by the trust or institution after the 30th day of November. 1983”

From the aforesaid provisions of section 13(1) d), it may be seen that if the conditions laid down there under are not fulfilled, then the trust will lose the benefit of exemption under section 11 of the Act, in respect of income referred to therein.

8.3 Statutory Provision: section 13(2) of the Act is reproduced as follows :

13. Section 11 not to apply in certain cases.

(2) Without prejudice to the generality of the provisions of clause (c) and clause (d, of sub-section (1), the income or the property of the trust or institution or any part of such income or property shall, for the purposes of that clause, be deemed to have been used or applied for the benefit of a person referred to in sub-section (3),_

(a) if any part of the Income or property of the trust or institution is, or continues to be, lent to any person referred to in sub-section (3) for any period during the previous year without either adequate security or adequate interest or both;

(b) if any land, building or other property of the trust or institution is, or continues to be, made available for the use of any person referred to in sub-section (3), for any period during the previous year without charging adequate rent or other compensation:

(c) if any amount is paid by way of salami, allowance or otherwise during the previous year to any person referred to in sub-section (3,) out of the resources of the trust or institution for services rendered by that person to such test or institution and the amount so paid is in excess of what may be reasonably paid for such services;

(d) if the services of the trust or institution are made available to any person referred to in sub-section (3) during the previous year without adequate remuneration or other compensation,.

(e) if any share, security or other property is purchased by or on behalf of the trust or institution from any person referred to in sub-section (3) during the previous year for consideration which is more than adequate;

(i) if any share, security or other property is sold by or on behalf of the trust or institution to any person referred to in sub-section (3) during the previous year for consideration which is less than adequate,

(g) if any Income or property of the trust or institution is diverted during the previous year in favour of any person referred to in sub-section 33, Provided That this clause shall not apply where the income, or the value of the property or, as the case may be, the aggregate of the income and the value of the property, so diverted does not exceed one thousand rupees;

(h) if any funds of the trust or institution are, or continue to remain, invested for any period during the previous year not being a period before the 1st day of January, 1971), in any concern in which any person referred to in sub-section (3) has a substantial interest."

From the aforesaid provisions of section 13(2), it may be seen that in respect of various circumstances referred to in clauses (a) to (h) thereof, the income or property of the trust or institution or any part of such income or property shall, for the purposes of section 13(1)(c) and 13(1)(d), be deemed to have been used or applied for the benefit of the trustee, etc. It clearly implies that section 13(2) is nothing: but an extension of section 13(1)(c) 13(1)(d).

(iii) Statutory Provision :section 164(2) are also relevant, which are reproduced as follows:

"164 Charge of tax where share of beneficiaries unknown.

(2) In the case of relevant income which is derived from property held under trust wholly for charitable or religious purposes, or which is of the nature referred to in sub-clause (i) of clause (4) of section 2 or which is of the nature referred to in sub-section 4A) of section 11 tax shall be charged on so much of the relevant income as is not exempt under section 11 or section 12, as if the relevant income were not so exempt. The income of an association of persons:

Provided that in a case where the whole or any part of the relevant income is not exempt under section 11 or section 12 by virtue of The provisions contained in clause (c) or clause (d) of sub-section (1) of section 13, tax shall be charged on the relevant income or part of relevant income at The maximum marginal rate.'

From the aforesaid provisions of section 164(2), it may be seen that in the case of relevant income referred to therein, tax shall be charged on so much of the relevant income, as is not exempt under section 11 or 12, as if the relevant income not so exempt were the income of an association of persons (AOP). It clearly implies that only that part of the relevant income which is not exempt under section 11 or section 12 is brought to tax, as the income of an AOP and the balance of income of the charitable trust / institution, will remain exempt.

Further, as per the proviso to section 164(2), where the whole or any part of the relevant income is not exempt "Under section 11 or section 12, by virtue of the provisions of section 13(1)(c) or section 13(1)(d), tax shall be charged on Vie. relevant income or part of relevant Income, at the maximum marginal rate.

In view of the afore td proviso to section 164(2) the Courts have held that in case of violation of the conditions under section 13(1)(c) or 13(1)(d) of the Act, only the relevant income or part of such relevant income is liable to be taxed at maximum marginal rate. It is also held that the violation of section 13(1)(c) or 13(1)(d) does not result in denial of exemption under section 11, in respect of the total income of the assessee. In other words, only the non-exempt income, in view of the provisions of section 13(1)(c) / 13(1)(d) would fall in the tax-net and the other income of the charitable trust / institution would remain exempt under the provisions of section 11 of the Act.

Board Circular:

In the present context it is apposite to peruse paragraph 28 of Circular No.387 dt.&.7. 9 , issued by the CBOT, under the heading "Levy of income-tax at maximum marginal rate in the case of charitable and religious trusts which forfeit tax exemption'. Paragraph 28.6 of the aforesaid circular is reproduced as follows:

"28.6 It may be noted that new sub-section I) inserted in section 161 of the IT Act, which provides for taxation of the entire income received by trusts at the maximum marginal rates is applicable only in the case of private trusts having profits and gains of business. So far as public charitable and religious trusts are concerned, their busyness profits are not exempt from tax, except in the cases failing under clause (a) or clause (b) of section 11(4AA) of the IT Act. As the maximum marginal rate of tax under the new proviso to section 164(2) applies to the whole or a part of the relevant income of a charitable or religious trust which forfeits exemption by virtue of the provisions of the IT Act in regard to investment pattern or use of the trust property for the benefit of the settlor, etc., contained in section 13(1)(c) and (d) of that Act, the said rate will not apply: to the business profits of such trusts which are otherwise chargeable to fax. In other word, where such a trust contravenes the provisions of section 13(1) (c) or (d) of the Act, the maximum marginal rate of income-tax will apply only to that part of the income which has forfeited exemption under the said provisions.

As per the aforesaid paragraph 28.6 of the aforesaid Circular, where such a trust contravenes the provisions of section 13(1)(c) or 13(1)(d) of the Act the maximum Marginal rate of income-tax will apply only to that part of income, with has forfeited exemption under the said provisions."

XX

Payment made to the specified entities is not excessive:

(i) Edufice Education Services Pvt Ltd

The assessment order is perused with care along with the submissions made by the appellant.

It is the contention of the appellant that the company M/s. Edufice Educational Services (P) Ltd consists of experts who research, review and then curate a learning experience for each grade, for each learning area in the schooling system and that the company researches latest research based teaching techniques, assessments, contemporary books, techniques and teaching tools that would augment the learning experience while the company also structures learning experiences that challenge the students and thereby harbor a quest for mastery According to the appellant, attention is paid to each and every student and performance of each student is evaluated with an intention to formulate a curriculum which could be each student oriented.

Further, the appellants case is that the students are trained in conceptual understanding and are equipped with various skills and so, it is in the interest of the appellant that, the services rendered by M/s. Edufice Educational Services (P) Ltd are exclusive to the benefit of the appellant for the reason that, if the company provides the same services to different schools, it would be detrimental to the interest of the appellant, it is submitted by the appellant that, the company M/s, Edufice Educational Services (P) Ltd has taken over the intellectual part of education and it is only the administrative part of education and it is only the administrative party of which the appellant is responsible and so, the intellectual input should in ' command a higher price than what has been paid.

Though the contentions are raised even before the AO, the same have not been discussed by the AO while arriving at the conclusion that M/s. Edufice Educational Services Pvt. Ltd does not possess any extra-ordinary qualification or an intangible asset so as to demand such huge payment. Such a conclusion regarding the Intellectual capability of the service provider without going into the details of service provided iris-a-vis the intellectual scholastic content, cannot hold ground especially when the said conclusion is merely drawn on the basis of analysis of profit margins of the service provider, more so when the such analysis of the said profit margin is just based on tangible costs without ever considering the intellectual inputs. The appellant is right is contending that intellectual input should command a higher price and the AO had ignored this aspect completely. Considering the activities of the service

provider, the process of arriving at a net margin ignoring the fact that, the task carried out is highly technical and intellectual in nature cannot be justified.

Further, the appellant is right in contending that the AO had erroneously taken a cue from section 44AD in applying the profit margin to arrive at the so called arm's length price. In fact the presumptive taxation scheme of section 44AD is designed to give relief to small taxpayers (having small turnover upto the ceiling specified in the said provision) engaged in any business (except the business of plying, hiring or leasing of goods carriages referred to in section 44AE) and this is applicable to the assessee mentioned therein the section whose income is computed on presumptive basis at the rate of 8% of the turnover or gross receipts of the eligible business for the year. At the same time, a person may voluntarily disclose his business income at more than 8% of turnover or gross receipt and the said provision does not preclude an assessee from disclosing higher income. This is to say that the profit rate mentioned in the said provision is not a maximum permissible rate nor it can be used to benchmark profit rate for any business of any turnover. The arm's length price that can be used as a comparison to benchmark the profits needs to be computed by analyzing the profit margins of similar/identical businesses having more or less matching turnovers and operating in the same geographical area. Such a computation of arm's length price is not done by the AO as he had adopted the profit rate mentioned in section 44AD of the IT Act as a benchmark. The AO had not gone into the services offered by M/s. Edufice Educational Services Pvt. Ltd nor any comparables operating in the same line of business are identified by the AG to benchmark the profit margin in order to hold that appellant's profit margin is abnormal. Even after taking a cue from section 44AD of the IT Act, the AO had further scaled it down stating that in the case under consideration the turnover is substantial and therefore, a reasonable profit percentage would be 5%, since, higher the turnover, the lower would be the profit margin. The AO's stand suffers contending that intellectual input should command a higher price and the AO had ignored this aspect completely. Considering the activities of the service provider, the process of arriving at a net margin ignoring the fact that, the task carried out is highly technical and intellectual in nature cannot be justified.

Further, the appellant is right in contending that the AC had erroneously taken a cue from section 44A0 in applying the profit margin to arrive at the so called arm's length price. In fact, the presumptive taxation scheme of section 44AD is designed to give relief to small taxpayers (having small turnover upto the ceiling specified in the said provision) engaged in any business (except the business of plying, hiring or leasing of goods carriages referred to in section 44AE) and this is applicable to the assessee mentioned therein the section whose income is computed on presumptive basis at the rate of 8% of the turnover or gross receipts of the eligible business for the year. At the same time, a person may voluntarily disclose his business income at more than 8% of turnover or gross receipt and the said provision does not preclude an assessee from disclosing higher income. This is to say that the profit rate mentioned in the said provision is not a maximum permissible rate nor it can

be used to bench mark profit rate for any business of any turnover. The arm's length price that can be used as a comparison to benchmark the profits needs to be computed by analyzing the profit margins of similar/identical businesses having more or less matching turnovers and operating in the same geographical area. Such a computation of arm's length price is not done by the AO as he had adopted the profit rate mentioned in section 44AD of the IT Act as a bench mark. The AO had not gone into the services offered by is. Edufice Educational Services Pvt. Ltd nor any comparables operating in the same line of business are Identified by the AO to benchmark the profit margin in order to hold that appellant's profit margin is abnormal. Even after taking a cue from section 44AD of the IT Act, the AO had farther scaled it down stating that in the case under consideration the turnover is substantial and therefore, a reasonable profit percentage would be 5%, since, higher the turnover, the lower would be the profit margin. The ACA's stand suffers on two counts. On, section 44A0which applies to a specified class of assesses cannot be taken as a bench mark and two, scaling it down even further does not have any basis either technical or arithmetic. The AO had not made cut a case to justify his arm's length price, least of it, he had not brought on record any comparable cases to substantiate the profit rate arrived at by him,

Hence, it can be said that the arm's length price computed by the AO stands unsubstantiated and uncorroborated. In such a circumstance, the bench mark adopted by the AO on estimated basis cannot be taken into consideration for holding that the appellant-assessee had conferred unreasonable and excessive benefit on the specified person M/s. Edufice Educational Services Pvt, Ltd ufs.13(3)."

XX

(ii) CMR Education and Consultancy Services

The assessment order is perused with care along with the submissions made by the appellant.

It is the contention of the appellant that the company MIS CMR Education and Consultancy services The firm provides Value Addition Courses, English language courses, Computer skills, International Programmes,

seminars on various, subjects, Fashion Designing, Web hosting and also Air Hostess Training for which the firm has entered into an agreement with the appellant that, the appellant has to payl % royalty on the total fees collected.

Further, the appellants case is that, it is In the interest of the appellant that, the services rendered by MIS CMR Education and Consultancy services are exclusive to the benefit of the appellant for the reason that, if the company provides the same services to different schools, it would be detrimental to the interest of the appellant, The appellant submitted that, the techniques evolved by the service provider are in house and that they have also intellectually contributed to evolving the techniques. Further it is submitted that this

intangible asset has not been valued at all, since the same is developed in house. Stating so, the appellant submitted that had this intangible asset been valued and as allowable under the provisions of the act, has been allowed, the margins would have been far lesser. It is the contention of the appellant that the Assessing Officer has not considered this aspect at all.

These contentions have not been discussed by the AO while arriving at the conclusion that M/s CM JR Education and Consultancy services does not possess any extra-ordinary qualification or an intangible asset so as to demand such a huge payment. Such a conclusion by the AO dis- regarding the intellectual capability of the service provider without going into the details of service provided vis-a-vis the intellectual scholastic content, cannot hold ground especially when the said conclusion is merely drawn on the basis of analysis of profit margins of the service provider, more so when the such analysis of the said profit margin is just based on tangible costs Without ever considering the intellectual inputs. The appellant is right is contending that intellectual input should command a higher price and the AG had ignored this aspect completely. Considering the activities of the service provider, the process of arriving at a net margin ignoring the fact that, the task. carried out by the service provider Is highly technical and intellectual In nature cannot be justified.

Further, the appellant is right is contending that the AO had erroneously taken a cue from section 44AD in applying the profit margin to arrive at the so called arm's length price. In fact the presumptive taxation scheme of section 44AD is designed to give relief to small taxpayers (having small turnover upto the ceiling specified In the said provision) engaged In any business (except the business of plying, hiring or leasing of goods carriages referred to in section 44AE) and this is applicable to the assessee mentioned therein the section whose income is computed on presumptive basis at the rate of 8% of the turnover or gross receipts of the eligible business for the year,, t the same time, a person may voluntarily disclose his business income at more than 8% of turnover or gross receipt and the said provision does not preclude an assessee from disclosing higher income, This is to say that the profit rate mentioned in the said provision is not a maximum permissible rate nor it can be used to bench mark profit rate for any business of any turnover. The arm's length price that can be used as a comparison to benchmark the profits needs to be computed by analyzing the profit margins of similar/identical businesses having more or less matching turnovers and operating in the same geographical area. Such a computation of arm's length price is not done by the AQ as he had adopted the profit rate mentioned in section 44AD of the IT Act as a bench mark. The AO had not gone into the services offered by M/s Education and Consultancy services nor any comparable assessee operating in the same line of business are identified by the AO to benchmark the profit margin in order to hold that appellant's profit margin is abnormal. Even after taking a cue from section 44AD of the IT Act, the AO had further scaled it down stating that in the case under consideration the turnover is substantial and therefore, a reasonable profit percentage would be 5%, since, higher the turnover, the lower would be the profit margin. The AO's stand suffers on two counts. One, section 44AD which applies to a specified class of assessee

cannot be taken as a bench mark and two, scaling it down even further does not have any basis either technical or arithmetic. The AO had not made out a case to justify his arm's length price, least of it, he had not brought on record any comparable cases to substantiate the profit rate arrived at by him. Hence, it can be said that the arm's length price computed by the AO stands unsubstantiated and uncorroborated. In such a circumstance, the bench mark of adopted by the AO on estimated basis cannot be taken into consideration for holding that the appellant-assesses had conferred unreasonable and excessive benefit on the specified person M/s CMR Education and Consultancy services u/s. 13(3)."

(iii) Jaista Developers and Construction Pvt Ltd.

"It is a common practice in the market and also as per the said` procedure laid down for valuation of construction that, if the owner himself supervises the construction, a deduction of 10% is allowed towards the probable savings in construction cost consequent to self supervision.

In the present case, the appellant is running various educational institutions and also a university. What was being constructed by M/s. Jaista Developers & Constructions(P) Ltd was a campus for the university. The appellant being in the field of education has employed experts in the said field. There are no qualified personnel to look after the construction activity. Hence, in the interest of the organization the work of construction was entrusted to a group which falls under the definition of specified persons, only for the reason of better control and management and also to have quality work.

As explained as per the provisions of sector AD of the act, a profit margin of 8% is considered as the minimum profit to be earned from construction activity. As explained if the owner supervises there could be 10% savings on the cost of construction. In the present case the owner is not supervisor and hence the margin of 10% available to the owner would also be to the benefit of the contractor who himself supervises the construction activity.. Hence, in the absence of the owner supervising the construction activity, the margin of the contractor could be upto 1 %.The company M/s Jaista Developers & Construction (P) Ltd has +declared a margin of 17.63% which is well within the margins prevalent in, the market.

We submit that, there no case, the Assessing Officer to hold that, the net margin of the specified person M/s Jaista Developers Constructions (P) Ltd is excessive and 'therefore a portion of the payment made is to be disallowed.

M/s Jaista DevelopersConstructions (P) Ltd is independently assessed to tax and has paid taxes at 3 being the tax payable by a company. There is no tax planning involved with an intention to evade tax. Had the company declared profit of less than8% and saved on taxes, there would not have been a case for the Assessing Officer to hold that, the payments made are excessive and therefore require disallowance in the hands of the appellant. The appellant is being put to hardship only for the reason that, the company M/s. Jaista

Developers & Construction (P) Ltd declared the actual profits earned without window dressing in the books.

We submit that, under the circumstances, the margin of 17% is reasonable and justified and therefore cannot be considered excessive.

In the light of the above facts, we submit that, the analysis made by the Assessing Officer is prima-facie incorrect and not based on facts. The Assessing Officer has not analysed the issues in the right perspective. The conclusions of the Assessing Officer are on mere presumptions and surmises. The action of the Assessing Officer in holding that, the expenditure to the extent of Rs.1,05,58,895/- is excessive is unjustifiable. The Assessing Officer has also ignored the fact, that there is no tax planning involved in as much as the company M/s Jaista Developers & Constructions (P) Ltd has, declared substantial Income and has paid taxes at 35% of such income being the rate applicable to private limited companies. We request the Hon'ble Commissioner of Income Tax (Appeals) to kindly consider the submissions above and hold that, there is no excessive payment as alleged and hence no disallowance warranted.

According to the AO, the profit margins of the company, whose gross receipts are predominantly from the related enterprises only, before payment of salaries to specified persons u/s. 13(3) and after payment of the same are in the order of 1763% and 1257% respectively, and this as per AO is not at arm's length, in terms of Sec.13(2)(c) and sec.13(2)(g) Hence AO computed arm's length price by allowing a profit margin of 5% apart from the actual cost incurred. This being so, the AO while taking a CUE from the provisions of section 44AD had scaled down the profit margin to 5% and applied to the contractor company to arrive at its 'profit'. Neither the A.O explained as to why there was a scaling down nor any comparable cases were brought on record by the AO to substantiate that the profit margin derived by the contractor is excessive. The contention of the appellant regarding the aspect of self-supervision merits consideration. The AO's stand suffers on two counts. One, section 44AD which applies to a specified class of assesses cannot be taken as a bench mark and two, scaling it down even further does not have any basis either technical or arithmetic. The AO had not made out a case to justify his arm's length price, least of it. He had not brought on record any comparable cases to substantiate the profit rate arrived at by him. Hence, it can be said that the arm's length price computed by the AO stands unsubstantiated and uncorroborated. In such a circumstance, the bench mark adopted by the AO on estimated basis cannot be taken into consideration for holding that the appellant-assessee had conferred unreasonable and excessive benefit on the specified person M/s Jaista Developers and Constructions Private Limited u/s. 13(3).

It is also significant to note that burden of proof lies on the AO to prove that the provisions of section 13 apply in a case.

Section 13 starts with a non-obstante clause and hence by virtue of the said provisions, exception to the exemption provided by section 11. is carved out

and an assessee is denied the benefit of exemption under section 11 of the Act, in a case where there is violation of the provisions of section 13 of the Act. It is also relevant to state here that a person who makes a positive statement is required to establish the same. It is not for the person against whom the averment is made to establish negatively that the state of affairs averred by the other person does not exist. The onus lies on the AO to bring on record cogent material / evidence to establish that the trust or charitable institution is hit by the provisions of section 13. The AO will have to prove to the hilt, on the basis of positive evidence brought on record, that the trust has committed a violation of the provisions of section 13 of the Act. If the AO is not able to discharge the burden of proof, which lies on him, then he cannot deny the benefit of exemption under section 11 to the trust, on the basis of alleged violation of section 13 of the Act. Therefore, the exception has to be stated and established by the AO. In other words, burden of proof lies on the AO.

In support of the aforesaid view, reliance is placed on the following legal precedents-

- 1. Surat City Gymkhana Vs Dy. CIT [2002] 254 ITR 733 (Guj)*
- 2. CIT Vs Kamala Town Trust [2005] 1279 ITR 89 (All)*

10. In continuation, the appellant in the submission stated that:

"Order u/s 143(3) of the act, has been concluded in the case of the appellant for the A. Vs. 2014-15, 2015-16 and also 2016-17. The returned income has been accepted and there have been no adverse findings in respect of transaction with specified persons U/s 13(1) of the act. Copies of the orders attached. The facts remain the same for the AY 2017-18 also. Under the circumstances, in the absence of any fresh evidence on record and the facts remaining the same, the department could not have taken an adverse stand for the A. Y. 2017-18 ignoring the orders passed u/s 143(3), of the act, in the immediate preceding three assessment years. The order passed by the Assessing Officer for the A Y 2017-18 is against the principle of consistency and therefore the Assessing Officer has violated the principle of consistency. The Assessing Officer has erred in doing so.

It was found to be true that no additions were made in the assessment orders for the A.Y. 2014-15, 2015-16 and 2016-17.

11. In view of the foregoing discussion on the issue, it is held that the AO having not brought on record any material evidence to show that the appellant had conferred excessive and unreasonable benefit on the above mentioned related parties, is not right in drawing the inference that there is a violation hit by the provisions of section 13 of the IT Act."

9. Being aggrieved by the order of the learned CIT(A)/NFAC, the revenue is in appeal before us.

10. The learned DR before us submitted that the assessee the activities of the assessee are commercial in nature which is evident from the payment made by the trust to the companies in which the trustees are interested. As such the trustees are the family members of the trust and drawing handsome salary from the trust. Besides, the trustees are also holding interest in the companies to which the payment is being made by the trust and in turn the trustees are again drawing salary from such companies. Furthermore, these companies also paying taxes on the maximum marginal rate which is the diversion of funds of the trust and against the violation of the provisions of section 13(1)© of the Act.

11. On the other hand, the learned Authorized Representative (AR) before us submitted a paper book, spanning pages 1 to 165, a compilation of case laws from pages 166 to 205, and written submissions from pages 1 to 7, all of which are on record. Among other contentions, the learned AR submitted that the revenue has framed scrutiny assessments under section 143(3) of the Act for the assessment years 2014-15 to 2016-17 wherein all the transactions with the specified persons were accepted without invoking the provisions of section 13(1)© of the act. Accordingly, the Id. AR contended that the principles of consistency should be applied.

12. Both the Id. DR and AR before us vehemently supported the orders of the respective authorities below as favourable to them.

13. We have heard the rival contentions of both parties and carefully perused the materials available on record. In the present case, the exemption claimed by the assessee under Section 11 of the Act was denied by the Assessing Officer (AO) in the assessment framed under Section 143(3) of the Act, on account of certain payments made by the assessee to the specified persons, invoking the provisions of section 13(1)(c) of the Act. However, the learned CIT(A), after considering all relevant facts and details, allowed the exemption claimed by the assessee under Section 11 of the Act. The Revenue is now in appeal before us against the findings of the learned CIT(A). Before addressing the issue raised by the Revenue, i.e., whether the assessee is eligible for exemption under Section 11 of the Act, it is pertinent to note that in the assessee's own case for the earlier assessment years—AYs 2014-15, 2015-16, and 2016-17—the exemption under Section 11 was allowed by the Revenue in assessments framed under Section 143(3) of the Act. The first issue that arises is whether the Revenue can take a different stand in the assessee's own case for the current year as compared to the stance adopted in the earlier years or subsequent years. While the principle of *res judicata* does not apply to tax proceedings, the 'Principle of Consistency' must be observed. The principle mandates that where the facts and circumstances remain unchanged, there should be no variation in the treatment from the earlier years. The Revenue cannot deviate from its decisions taken in prior years without demonstrating a change in the factual matrix. Certainty and finality are essential in litigation, including tax matters. An earlier decision on the same issue cannot be revisited unless it is found to be arbitrary or perverse. If such a decision was made after due inquiry, with all material facts considered,

and no fresh facts are available in subsequent assessments, the Revenue cannot disturb a settled issue in subsequent proceedings.

13.1 In this regard, the Hon'ble Supreme Court, in the case of Radhasoami Satsang v. CIT [1992] 193 ITR 321, has observed as follows:"

". . . strictly speaking, res judicata does not apply to income-tax proceedings. Again each assessment year being a unit, what is decided in one year may not apply to the following year but where a fundamental aspect permitting through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in subsequent year."

13.2 Similarly, the Hon'ble Supreme Court has directed to adopt the principles of consistency in the case of CIT versus Excel Industries Ltd reported in 358 ITR 295 wherein it was held as under:

"28. Secondly, as noted by the Tribunal, a consistent view has been taken in favour of the assessee on the questions raised, starting with the assessment year 1992-93, that the benefits under the advance licences or under the duty entitlement pass book do not represent the real income of the assessee. Consequently, there is no reason for us to take a different view unless there are very convincing reasons, none of which have been pointed out by the learned counsel for the Revenue."

13.3 However, in genuine cases, the Revenue Department may identify a different fact pattern or circumstances that justify a divergent view from that taken in earlier years. In other words, a departure from the decisions made in earlier assessment years is justified when the facts or circumstances in the relevant assessment year differ from those in the earlier years. Nevertheless, the onus of establishing such a change in the factual pattern lies with the Revenue. The Hon'ble Supreme Court, in the

case of M/s Godrej & Boyce Manufacturing Co. Ltd. [81 taxmann.com 111], held that the principles of res judicata will not apply unless the Revenue establishes compelling reasons for departing from a settled issue.

13.4 Turning to the facts of the present case. It is undisputed that scrutiny assessments were carried out under the provisions of Section 143(3) of the Act for the assessment years 2014-15 and 2016-17. The copies of the assessment orders are placed at pages 59 to 68 of the paper book. This fact was also acknowledged by the learned CIT(A) in his order, which was not disputed by the Revenue. In each of these assessment years, the assessee made payments to specified persons as defined under Section 13(1)(c) of the Act, on a similar basis, which were accepted by the Revenue without any adverse remarks. For clarity, we refer to the notice issued under Section 142(1) of the Act for the assessment year 2016-17, dated 22 June 2018, wherein the following questions were raised:

"16) Whether under section 13(1)(c) of the Act, any income or property of the trust ensures/is used/is applied directly or indirectly for the benefit of any person referred to under section 13(3). If yes, provide details thereof.

17) Whether any activities of the trust can be classified under Section 13(2) of the Act. If yes, please submit details of the same.

13.5 From the questions raised by the Revenue, it is evident that, after conducting the necessary inquiries and applying due consideration, the Revenue had accepted the payments made to specified persons as fair and reasonable in the earlier assessment year. Considering this, we are of the view that the Revenue should not take a divergent position from

the one adopted in the earlier assessment year. It is also noteworthy that the learned Departmental Representative (DR), during the hearing, did not point out any material differences between the facts of the present case and those of the earlier assessment years. Therefore, in view of the above, we find no infirmity in the order of the learned CIT(A) and, consequently, we decline to interfere with his findings. Accordingly, the ground of appeal raised by the Revenue is hereby dismissed.

13.6 In the result, the appeal filed by the revenue is hereby dismissed.

Coming to the ITA Nos. 291-292/Bang/2024 for the AYs 2018-19 and 2021-22

14. At the outset, we note that the issues raised by the Revenue in the captioned grounds of appeal are identical to those raised by the Revenue in the immediately preceding ground of appeal in ITA No. 290/Bang/2024. Accordingly, the findings rendered in ITA No. 290/Bang/2024 in this order shall apply equally to the issues raised in the captioned appeals. As outlined in paragraph No. 13 of this order, we have resolved the issue against the Revenue and in favor of the assessee. Both the learned Departmental Representative (DR) and the Authorized Representative (AR) have agreed that the findings in ITA No. 290/Bang/2024 for AY 2017-18 shall also apply to the issues raised in the captioned ITA Nos. 291-292/Bang/2024 for AYs 2018-19 and 2021-22. Therefore, the grounds raised in both the appeals filed by the Revenue are hereby dismissed.

14.1 In the result, both the appeals filed by the Revenue are hereby dismissed.

15. In the combined result, all the appeals of the Revenue are hereby dismissed.

Order pronounced in court on 3rd day of December, 2024

Sd/-
(GEORGE GEORGE K)
Vice President

Sd/-
(WASEEM AHMED)
Accountant Member

Bangalore
Dated, 3rd December November, 2024
/ vms /
Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore