

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "SMC", MUMBAI**

BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER

ITA NOS. 4965 & 4966/MUM/2015 : (A.Ys : 2010-11 & 2011-12)

The Pathare Prabhu Charities Vs. ITO (Exemptions)-11(1),
Pathare Prabhu Dnyati Bhuvan No. 3, Mumbai (Respondent)
Jagannath Shankerseth Road,
Thakurdwar, Mumbai 400 002.
PAN : AAATP0303P (Appellant)

Assessee by : Shri Hiro Rai
Revenue by : Shri Sumit Kumar

Date of Hearing : 14/09/2016

Date of Pronouncement : 05/10/2016

ORDER

The captioned two appeals by the assessee relate to Assessment Years 2010-11 & 2011-12 and involve a common issue. In both the appeals, the singular grievance of assessee is that the income-tax authorities have erred in denying exemption u/s 11 & 12 of the Income Tax Act, 1961 (in short 'the Act') with respect to the income earned from a contract entered with M/s. Karishma Catering Services Pvt. Ltd. Since the issue and the facts and circumstances in both the assessment years are similar, appeal for Assessment Year 2010-11 is taken up as the lead case in order to appreciate the controversy.

ITA NO. 4965/MUM/2015 (Assessment Year : 2010-11)

2. This appeal by the assessee is directed against the order of CIT(A)-1, Mumbai dated 11.08.2015, pertaining to the Assessment Year 2010-11, which in turn has arisen from order dated 06.03.2013 passed by the Assessing Officer, Mumbai under section 143(3) of the Act.

3. In this appeal, assessee has raised the following Grounds of appeal :-

"1. The learned Commissioner of Income Tax (Appeals) erred in upholding the denial of exemption u/s 11 and 12 by the Assessing Officer, by application of the provisions of section 11(4A).

2. The learned Commissioner (Appeals) failed to appreciate that the transaction with the caterer was in substance a mere passive letting of property, which could in no way be regarded as a business.

3. The learned Commissioner (Appeals) erred in going by the nomenclature of the income, and did not appreciate that the mere nomenclature of an income did not necessarily determine its true character.

4. The learned Commissioner (Appeals) erred in not perusing the various clauses of the agreement, which clearly demonstrated that nothing was to be done by the appellant other than allowing the use of the space by the caterer.

5. The learned Commissioner (Appeals) erred in stating that the Assessing Officer had clearly brought out that it was not mere letting out of property, but also so many facilities had been allowed to the caterer.

6. The learned Commissioner (Appeals) erred in distinguishing the cases cited before him from the facts of the case before him.

7. The learned Commissioner (Appeals) was wrong in holding that since the income of the appellant was flowing from the business of the caterer, who was unrelated to the appellant, the income of the appellant was also in the nature of business income.

8. *Your appellant pray that the order of the learned Assessing Officer be modified by holding that the income received by your appellants from the caterer was not in the nature of business income, and by allowing exemption u/s 11 and 12 to your appellants."*

4. Though the appellant-trust has raised multiple Grounds of appeal, the solitary issue is with regard to the benefit of exemption u/s 11 & 12 of the Act in relation to transaction entered with M/s. Karishma Catering Services Pvt. Ltd., which according to the assessee, in substance represents letting of property giving rental income, whereas the Assessing Officer treats it as a 'Business income' not covered by the provisions of Sec. 11(4A) of the Act.

5. Before I proceed to address the controversy in detail, a brief background is appropriate. The appellant is a Trust set-up in 1901 and is registered with the Charity Commissioner, Mumbai as well as with the Director of Income-tax (Exemptions), Mumbai u/s 12A of the Act. At the time of hearing, the learned representative for assessee explained that the appellant-trust is carrying out activities of 'charitable purpose' involving measures for alleviating the members of Pathare Prabhu community. The appellant-trust provides subsidies in the field of education, medical and housing by providing scholarships, accommodations at subsidised rates, etc. to the deserving members of the Pathare Prabhu community. It was also explained that such activities have been carried out since incorporation and that there is no dispute on the same. Notably, the assessee owns three halls in a building known as "The Pathare Prabhu Charities Sabhagraha Sankul" located at Andheri (W), Mumbai. Assessee-trust gave the above halls to

M/s. Karishma Catering Services Pvt. Ltd. for a period of 10 years starting from August, 2008 to July, 2018 in terms of an agreement dated 25.8.2008, a copy of which is placed in the Paper Book at pages 1 to 17. In terms of the said agreement, assessee is to receive monthly compensation of Rs.3,00,000/- and the agreement provides for increase in the monthly compensation after every three years by 10%. For the year under consideration, assessee received a sum of Rs.39,00,000/- from M/s. Karishma Catering Services Pvt. Ltd. and such amount has been credited in the Income & Expenditure Account as 'Royalty'. It would also be pertinent to note here itself that prior to the agreement dated 25.8.2008, a similar agreement had been entered with M/s. Karishma Catering Services Pvt. Ltd. which was effective for 10 year period from March, 1997 to July, 2008. In the course of assessment proceedings for Assessment Year 2010-11, the Assessing Officer show-caused the assessee as to why the income credited in the Income & Expenditure Account by way of 'Royalty' be eligible for exemption u/s 11 & 12 of the Act on the ground that the same was 'Business income' not covered by the scope of Sec. 11(4A) of the Act.

6. Before the Assessing Officer, the plea of assessee was that the contract with M/s. Karishma Catering Services Pvt. Ltd. was, in substance, in the nature of a rental contract for use of hall and assessee was receiving a fixed monthly income plus applicable service tax irrespective of the number of days for which M/s. Karishma Catering Services Pvt. Ltd. was booking the hall. According to the assessee, the only obligation of assessee was to make the space available to M/s. Karishma Catering Services Pvt. Ltd. and insure the building and it was

M/s. Karishma Catering Services Pvt. Ltd. which was independently booking the hall, charging for hall and catering services from the customers. It was also contended by the assessee that it had obtained a Certificate u/s 197(1) of the Act for lower deduction of tax at source u/s 194I of the Act which indicates that the amount paid by M/s. Karishma Catering Services Pvt. Ltd. to the assessee was in the nature of 'rent'. The Assessing Officer has not accepted the explanation of assessee. According to the Assessing Officer, the amount received from M/s. Karishma Catering Services Pvt. Ltd. could not be construed as 'rent', but it was a receipt in the nature of 'Business income'. According to the Assessing Officer, the terms of agreement did not mention that the money is being paid for the space utilized or rent. The Assessing Officer also observed that if it was a rental income, why assessee would have shown it in the Income & Expenditure Account as 'Royalty'. Further, the Assessing Officer held that such business activity was neither incidental to the attainment of the objectives of Trust and nor the assessee was maintaining separate books of accounts and, therefore, the exemption could not be allowed on such income in terms of Sec. 11(4A) of the Act also. Accordingly, the Assessing Officer assessed the total income at Rs.39,00,000/-, being the Royalty income received, as against Rs. NIL returned by the assessee. The said action of the Assessing Officer has further been affirmed by the CIT(A) and accordingly, assessee is in further appeal before the Tribunal.

7. Before me, the learned representative for the assessee has vehemently argued that the activity of deriving income by letting out the property to M/s. Karishma Catering Services Pvt. Ltd. cannot be

construed as an activity of business and therefore provisions of Sec.11(4A) of the Act are not attracted at all. The sum and substance of the plea is that though the nomenclature used is 'Royalty', but in essence it is in the nature of rent because it is earned for giving right to use the premises owned by the assessee-trust. In support, my attention was drawn to the various clauses of the agreement to point out that assessee has no role to play in the activities being carried out by the other concern for providing services to the customers. The assessee was only required to provide the use of space, as the owner of the property, and thus the receipt has to be understood as income by way of rent. On this aspect, it has also been pointed out that even in the earlier years, similar contract/agreement existed with M/s. Karishma Catering Services Pvt. Ltd. and the income received has been held to be eligible for exemption u/s 11 & 12 of the Act and for that matter, reference has been made to the assessment order dated 19.12.2008 passed u/s 143(3) of the Act for Assessment Year 2006-07, a copy of which has been placed in the Paper Book at pages 18 to 20. In the course of hearing, the learned representative also relied upon the following decisions for the proposition that even in the cases where charitable institutions have let out property as marriage hall, etc., same has been held to be eligible for exemption u/s 11 & 12 of the Act and not liable to be treated as 'Business income' :-

- i) CIT v. Samyuktha Gowda Saraswatha Sabha, 245 ITR 242 (Mad)
- ii) CIT v. Gordhandas Bhagwandas Charitable Trust, 136 Taxman 161 (Mad)
- iii) DIT v. Sahu Jain Trust, 243 CIT 131 (Cal)

- iv) CIT v. Sri Rao Baghadur ADK Dharmaraja Educational Charity Trust, 300 ITR 365 (Mad)
- v) DDIT v. Habib Ismail Hospital & Medical Trust, 19 ITR(Trib) 223 (Mum)

8. On this aspect, the Id. DR appearing for the Revenue has primarily reiterated the stand of the Assessing Officer which I have already noted in the earlier paras and is not being repeated for the sake of brevity. The Id. DR also referred to the order of CIT(A) to point out that in the present case, many facilities have been allowed by the assessee to M/s. Karishma Catering Services Pvt. Ltd. and therefore it was not a case of simple letting out of property so as to assess the income as rental income liable for exemption u/s 11 & 12 of the Act. In effect, the Id. DR supported the stand of lower authorities that income derived from M/s. Karishma Catering Services Pvt. Ltd. was liable to be assessed as 'Business income'.

9. I have carefully considered the rival submissions. In the present case, the factual matrix lies in a narrow compass. The appellant is a charitable trust incorporated in 1901 duly registered with the Charity Commissioner, Mumbai and is also enjoying registration u/s 12A of the Act with the Director of Income-tax (Exemptions), Mumbai. For the Assessment Year under consideration, assessee filed its return of income claiming exemption u/s 11 & 12 of the Act, as in the past years. The Assessing Officer has not disputed the claim of assessee for exemption u/s 11 & 12 of the Act in principle, but he has denied the exemption in relation to one stream of income, which has been

described as 'Royalty income' of Rs.39,00,000/- received from M/s. Karishma Catering Services Pvt. Ltd. According to Assessing Officer, said stream of income is not eligible for claim of exemption u/s 11 & 12 of the Act because the same is in the nature of business income not incidental to the attainment of objectives of the Trust and, therefore, the benefit of Sec. 11 & 12 of the Act have been denied.

10. In order to appreciate the stand of Assessing Officer, it is appropriate to refer to the agreement dated 25.8.2008 between the assessee and M/s. Karishma Catering Services Pvt. Ltd. which brings out the terms and conditions in terms of which assessee has earned the income of Rs.39,00,000/- during the year under consideration. Certain clauses of the said agreement, which are relevant, are being reproduced hereinafter :-

"1. The Charities hereby grant to the Caterer and the Caterer herein accepts from the Charities, the exclusive right to cater to all the functions to be held in any of the 3 halls comprised in the said Complex for a period of 10 years w.e.f August 2008 upto July 2018, subject to the terms, conditions, covenants and stipulations herein contained.

2. In this Agreement the words "Exclusive Catering Contract" shall mean :

- (i) A right, for the duration of this Agreement to use, in common with the Charities all the premises at the said Complex of the Charities.*
- (ii) An exclusive right to cater food and hard and soft beverages in the Complex at the functions held at the said*

Complex, subject to the rights of the Trust reserved hereunder.

(iii) Providing, decorating and other required services at the function to be held at the Complex.

3. In consideration of the Charities having granted to the Caterer the "Exclusive Catering Contract" as aforesaid, the Caterer shall pay to the Charities, as and by way of "Royalty" @ Rs.3,00,000/- (Rupees three lacs only) per month plus the service tax and any other levy or tax payable in respect of such Royalty for the first period of three years from the commencement of this Agreement, and thereafter there shall be an increase of 10% after every three years. Thus the Caterer shall pay to the Charities the following amounts, during the respective periods shown below plus the service tax and other levy or tax as applicable from time to time –

	<u>Period</u>	<u>Royalty per month</u>
1.	<i>1st August 2008 to 31st July 2011</i>	<i>Rs.3,00,000/-</i>
2.	<i>1st August 2011 to 31st July 2014</i>	<i>Rs.3,30,000/-</i>
3.	<i>1st August 2014 to 31st July 2017</i>	<i>Rs.3,63,000/-</i>
4.	<i>1st August 2017 to 31st July 2018</i>	<i>Rs.3,99,300/-</i>

The aforesaid "Royalty" shall be paid by the Caterer every month in advance, on or before the 10th day of each Calendar month. In the event of the default in payment of the "Royalty" on or before the aforesaid stipulated date for a continuous period of 2 months, the Caterer shall be liable to pay interest @ 12% p.a. on the defaulted amount from the due date of payment, till the payment to and realization thereof by the Charities."

"5. The Caterer shall be at liberty, during the subsistence of the Agreement, to take bookings for celebration of marriages, engagement, receptions, birthday parties, conferences and other get-togethers in the complex, between 6.00 A.M to 12.00 mid-night on such terms and conditions as it may deem fit. The Caterer shall

ensure that no loud music is played, nor any controversial or objectionable or political programmes are conducted at the Complex.

6. It is expressly agreed and understood by and between the parties hereto that the Royalty mentioned in Clause 3 above shall be payable to the Charities, irrespective of whether or not the Caterer gets sufficient business through bookings for the use of the said Complex.”

“13. The Caterer shall employ its own servants, employees and staff and the Caterer shall be solely responsible and liable for payment and/or disbursement of wages, salaries, emoluments and other dues and to grant such other benefits as may be payable to the servants, employees and staff engaged and employed by the Caterer, which may be payable by contract or by virtue of statutory requirements. The Caterer shall at all times keep the Charities, its Trustees and office bearers indemnified against any claim, demand or liability which may be made against the Charities and/or which the Charities may incur or become liable to pay by reason of the non observance or non performance of the requirements of this Clause, to be on the part of the Caterer to be observed and performed.

14. The Caterer shall bear the cost of obtaining/renewing the Licence/s required for the purpose of conducting the activities in pursuance of this Agreement and also of its subsequent renewal or alterations in the terms of the aforesaid licence.”

“32. The Caterer shall accept full responsibility for every function held in any part of the Complex.”

“36. The Caterer shall give its own quotation for all catering done on the Complex to its various customers.”

“46. The Caterer shall be fully responsible for any matters/claims arising out of its catering services and shall maintain sufficient comprehensive insurance cover to meet all claims by the third parties

including for accidents and food poisoning and shall indemnify the Charities against any such claims.”

The aforesaid clauses of agreement clearly bring out that so far as assessee-trust is concerned, it has been paid by M/s. Karishma Catering Services Pvt. Ltd. for providing right to use the premises owned by the assessee. It is also notable that the booking of hall, catering of food and other services to the customers is entirely the prerogative of M/s. Karishma Catering Services Pvt. Ltd. and assessee-trust is no way responsible for the same. It is also noteworthy that assessee is to receive a fixed monthly sum irrespective of whether or not M/s. Karishma Catering Services Pvt. Ltd. gets sufficient business through bookings for the use of the hall/premises in question. Considering the mechanics of agreement dated 25.8.2008, in my view, it would be inappropriate to hold that assessee is engaged in carrying out any business activity jointly with M/s. Karishma Catering Services Pvt. Ltd. Factually, there is no material to suggest that any facilities have been allowed by the assessee to M/s. Karishma Catering Services Pvt. Ltd. other than allowing use of the property, which in simple terms tantamount to rental arrangement. No doubt, M/s. Karishma Catering Services Pvt. Ltd. is engaged in carrying out the business activities, but so far as assessee is concerned, it is receiving a fixed sum as compensation for allowing the use of property owned by it. Therefore, *qua* the assessee such receipts are in the nature of rental income only. The inference of Assessing Officer to the contrary in the instant year is devoid of any factual support and is a clear departure from the stand of Revenue in the past years. Notably, the Preamble of the agreement

itself contains an averment that prior to this, a similar agreement existed between the assessee and M/s. Karishma Catering Services Pvt. Ltd. from March, 1997 to July, 2008. At the time of hearing, the learned representative for the assessee had asserted that the income received in the earlier years in terms of a similar contract have not been understood to be 'Business income' and that even in the assessment finalised u/s 143(3) of the Act for Assessment Year 2006-07, such income has been accepted to be eligible for exemption u/s 11 & 12 of the Act. In my considered opinion, considering the past history, which has not been controverted by the Revenue, wherein assessee got the benefit of exemption in respect of the impugned income, there is no justification for disallowing the benefit of Sec. 11 & 12 of the Act in the instant year. Thus, on this count itself I find no reason to hold that the income earned from M/s. Karishma Catering Services Pvt. Ltd. is a 'Business income' not incidental to the attainment of objectives of the Trust.

11. In the case of *Samyuktha Gowda Saraswatha Sabha (supra)* the Hon'ble Madras High Court was considering the case of an assessee whose objectives were education and other objects of general utility and it was deriving income by letting out a marriage hall. The income from letting out of the marriage hall was construed as a 'Business income' by the Assessing Officer, which was not upheld by the Hon'ble High Court. As per the Hon'ble High Court, letting out of property was an activity for fulfilling the objectives of the Trust and could not be considered as an activity of business so as to deny exemption u/s 11 & 12 of the Act. In the case of *Sahu Jain Trust (supra)*, the Hon'ble

Calcutta High Court was considering the income derived from sub-letting of tenanted properties. The Assessing Officer held that such income was not incidental to attainment of objectives of the Trust and hence applying provisions of Sec. 11(4A) of the Act, exemption u/s 11 of the Act was denied. The Hon'ble High Court held that where the trust was deriving rental income by way of sub-letting to enable it to carry out its charitable objectives in an effective manner, the exemption could not be denied by the Assessing Officer by invoking Sec. 11(4A) of the Act. The Hon'ble High Court, in particular, noted that in the past assessee had got the benefit of exemption in respect of such rental incomes. In my considered opinion, the aforesaid judicial pronouncements clearly bring out that the impugned income earned by the assessee from providing right to use of a property owned by it cannot be construed to be an income from business activity and rather, it is an activity undertaken to enable it to carry out its charitable activities in an effective manner. Therefore, the action of Assessing Officer is liable to be negated.

12. Before parting, I may also touch upon the arguments of Assessing Officer that the impugned income has been shown by the assessee itself as 'Royalty' in the Income & Expenditure Account. It is quite well understood that mere nomenclature of a receipt is not determinative of its nature. What is required to be seen is the terms and conditions in terms of which a particular receipt has been earned, and for that matter, in the instant case, the terms of agreement clearly establish that the receipt is essentially for allowing right to use of a property owned by the assessee and is thus liable to be treated as a receipt in

the nature of rent. In the course of hearing, the learned representative submitted that the nomenclature of 'Royalty' has been used by the assessee perhaps with the intention to avoid any complications associated with a tenancy arrangement, though in essence the income has been earned for letting out of property. In any case, in my considered opinion, the nomenclature is not the final determinant of the nature of a receipt and, therefore, the stand of Assessing Officer on this aspect is untenable.

13. In the end, I conclude by holding that the Assessing Officer erred in not construing the income received from M/s. Karishma Catering Services Pvt. Ltd. as an income incidental to the attainment of the objectives of the Trust. The stand of Assessing Officer is hereby reversed and he is directed to allow exemption u/s 11 & 12 of the Act on such income, in view of the aforesaid discussion.

14. At the time of hearing, the learned representative has also made an alternative plea to the effect that even if the impugned activity is to be understood as a business activity, yet it is eligible for exemption u/s 11 & 12 of the Act because it falls within the exceptions prescribed u/s 11(4A) of the Act. Since the assessee has already succeeded on its preliminary plea, the aforesaid alternative plea of assessee is not being adjudicated as it is only academic in nature.

15. In the result, appeal of the assessee is allowed, as above.

16. Insofar as appeal of assessee for Assessment Year 2011-12 is concerned, it was a common point between the parties that the facts and circumstances in ITA No. 4966/Mum/2015, for Assessment Year 2011-12 are *pari materia* to those considered by us in ITA No. 4965/Mum/2015, for Assessment Year 2010-11, thus, my decision therein shall apply *mutatis mutandis* in this appeal also.

17. Resultantly, both the appeals of assessee are allowed.

Order pronounced in the open court on 5th October, 2016.

Sd/-
(G.S. PANNU)
ACCOUNTANT MEMBER

Mumbai, Date : 5th October, 2016

SSL

Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "SMC" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai