R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

WRIT PETITION NO. 2866 OF 2018

Hinduja Foundation .. Petitioner

Versus

Income Tax Officer, Exemptions 1(3), Mumbai & Anr. .. Respondents

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- Mr. Mihir Naniwadekar a/w Mr. Ruturaj Gurjar for the Petitioner
- Mr. Charanjeet Chanderpal a/w Ms. Pragya Chandra for the Respondent

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CORAM : AKIL KURESHI &
M.S. SANKLECHA, JJ.

DATE : FEBRUARY 15, 2019.

P.C.:

1. The petitioner has challenged a notice of reopening of assessment dated 23.3.2018 issued by respondent - Assessing Officer under Section 148 of the Income Tax Act, 1961 ("the Act" for short).

2. Brief facts are as under:-

2.1 Petitioner - Hinduja Foundation is a registered trust. The petitioner had filed return of income for the assessment year 2013-14 on 27.9.2013 disclosing NIL income after taking benefit of Section 11 of the Act. The return was taken in scrutiny by the Assessing Officer. He passed an order of assessment under Section 143(3) of the Act on 29.1.2016 in which he accepted the petitioner's declaration of NIL Income. To reopen such assessment, the Assessing Officer issued the impugned notice which, as can be seen was done within a period of four years from the end of relevant assessment year. In order to do so, he had recorded following reasons:-

" **Reasons for re-opening of assessment u/s. 148 of the Income Tax Act, 1961 for A.Y. 2013-14**

1. The assessee is a trust which is registered with the Director of Income Tax (Exemption), Mumbai u/s. 12A under registration No. TR/H(a)/33/74-758 of the Income Tax Act, 1961. The trust is also registered with the Charity Commissioner, Mumbai.

2. The main object of the trust is as under:-
   i) Operating, Running, Continuing education and vocational school.
   ii) Establishment & support of Professorships, Instructorships, Fellowships, Lectureships, Scholarships and prizes at any school, colleges or other educational institutions.
   iii) Establishment & Maintenance of hostels and / or boarding houses to students and those connected with the institutions.
   iv) Grant of subscriptions and donations to hospitals, dispensaries, convalescent homes, asylums, nursing homes, orphanages, etc.

v. Establishment of cheap or low rent chawls / buildings / housing for the poor etc.

3. In this case, the assessee filed return of income on 27.9.2013 for the Asst. Year 2013-14 and declaring total income at Rs. NIL after claiming exemption u/S. 11 of the Income Tax Act, 1961. The assessment u/S. 143(3) of the I.T. Act,1961 has been completed in this case on 29.1.2016 assessing the total income at Rs. NIL.

4. During the course of assessment proceedings for A.Y. 2014-15 which was completed u/S. 143(3) vide order dated 31.12.2016 assessing total income at Rs. 4.29 crores, it is observed that the assessee has received of Rs. 1,98,71,842/- from P.D. Hinduja National Hospital & Research Centre (PDHNHRC) and shown as Reimbursement of expenses. Hence, the claim of exemption u/s 11 was denied.

4.1 In this regard, the assessee had not furnished any documents regarding agreement between P.D. Hinduja Hospital & Reseach Centre (PDHNHRC) during the course of proceedings for A.Y. 2014-15.

4.2 **Definition of Income as per 2(24)(iia) is reproduced as under:-**

Voluntary contribution received by a trust created wholly or partly for charitable or religious purposes or by an institution established wholly or partly for such purposes [or by an association or institution referred to in clause (*21*) or clause (*23*), or by a fund or trust or institution referred to in sub-clause (*iv*) or sub-clause (*v*) [or by any university or other educational institution referred to in sub-clause (*iiiad*) or sub-clause (*vi*) or by any hospital or other institution referred to in sub-clause (*iiiae*) or sub-clause (*via*)] of clause (*23C*) of Section 10 or by an electoral trust;]

Explanation—For the purposes of this sub-clause, "trust" includes any other legal obligation;]

From the plain reading of Section 2(24)(iia) of the I.T. Act, 1961, it is clear that any income derived from the property held under the trust forms parts of its income.

4.4 **Findings during assessment proceedings for A.Y. 2014-15**:-

If the senior functionaries are working with P.D. Hinduja National Hospital & Research Centre (PDHNHMRC), then why PDHNHMRC is not able to pay these functionaries directly, is not divulged by assessee. The question arises that why PDHNHMRC is using assessee as a tool to make payment to these functionaries. When it can reimburse it then it can pay them directly also.

4.5 **The transaction is observed as follows:-**

Whatever nomenclature used by the assessee,here assessee has received a fund / donation for its object and has utilized for the person who has donated money to the assessee.

4.6 Here donation given by PDHNHMRC is more than Rs. 50,000/-. Therefore PDHNHMRC is covered u/S. 13(3)(b) of the I.T. Act, 1961.

4.7 The assessee has reimbursed for Chief Expenditure offer (CEO) and two directors remuneration. As PDHNHMRC is itself a trust and all three persons are covered u/S. 13(3) of the I.T. Act, 1961 and therefore, PDHNHMRC is using the assessee trust as a tool so that there should not be any objection regarding denial of Section 11 of the I.T. Act, 1961 of PDHNHMRC.

Here, the assessee is only a tool in the hands of PDHNHMRC and the payment which should have been paid by itself. It has used assessee as a tool to distinguish its transaction. Hence, the assessee has routed the funds through PDHNHMRC which should have been paid by itself to distinguish the transaction.

4.8 **Section 13(3)(b) reads as under:-**

The person referred to in clause 1 of sub-section (1) and sub-section (2) are the following namely:-

any person who has made a substantial contribution to the trust or institution, that is to say, any person whose total contribution up to the end of the relevant previous year exceeds fifty thousand rupees;

Section 13(1)(c) reads as under:-

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—

(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).

Section 13(2)(g) reads as under:-

2) Without prejudice to the generality of the provisions of clause I 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),—

(*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 (3):

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;

From the plain reading of the above section 13(1)(c) & 13(2)(g) of the I.T. Act, 1961 it is clear that the transaction of assessee with PDHNHMRC is covered u/s. 13(1)(c) & 13(2)(g) r.w.s. 13(3) OF THE I.T. Act, 1961.

4.9 Accordingly, provision of Section 13(1)(c) & 13(2)(g) r.w.s. 13(3) of the I.T. Act, 1961 were invoked and exemption u/s. 11 was denied to the assessee.

5. In A.Y. 2013-14 as well, the assessee has received Rs. 76,59,018/- from PDHNHRC and again spent it on the officers / Directors of PDHNHRC and claimed it as reimbursement of expenses.

Here, PD Hinduja National Hospital & Research Centre (PDHNHRC) is covered u/S. 13(3)(b) of the I.T. Act, 1961 as it has donated / given a sum of Rs. 76,59,018/- to the assessee.

Here, assessee become 'Special Purpose Vehicle (SPV) of Hinduja Group. Assessee is making payment to three senior functionaries of PDHNHMRC, who are working with PDHNHMRC, and showing it as applicable of income.

What assessee has stated is that it has entered into agreement to provide senior functionaries.

Therefore, here again provisions of Section 13(1)(c) and 13(2)(g) r.w.s. 13(3) is applicable in A.Y. 2013-14 also and exemption u/s. 11 claimed by the assessee of Rs. 87,71,567/- needs to be looked into.

6. Therefore, in view of the above discussion and in order to arrive at the real income of the assessee, its computation needs to be re-worked for the relevant assessment year, as far as the above issue is concerned.

7. In view of the above facts, I have been reason to believe that an amount of more than Rs. 1,00,000/- which has been claimed as exempt u/s. 11 of the I.T. Act, 1961 for A.Y. 2013-14 has escaped assessment within the meaning of section 147 of the I.T. Act, 1961. Therefore, I am satisfied that this is a fit case for reopening u/S. 147

of the I.T. Act, 1961 for issue of notice u/s. 148 of the Income Tax Act, 1961.

8. The sanction u/s. 151(2) of the Income Tax Act, 1961 is solicited for issuance of notice u/S. 148 of the Act, if approved, as the assessment is completed u/s 143(3) of the Act."

3. Upon being supplied the reasons, the petitioner raised objections to the notice of reopening of assessment under communication dated 16.7.2018. Such objections were rejected by the Assessing Officer by order dated 24.8.2018 upon which this petition has been filed.

4. Mr. Naniwadekar, the learned counsel appearing for the petitioner has raised following two main contentions:-

(i) The Assessing Officer has proceeded on entirely erroneous factual basis. The impugned notice should, therefore, be quashed;

(ii) Even going by the reasons recorded by the Assessing Officer, it cannot be stated that any income chargeable to tax in the hands of the assessee had escaped assessment. In other words, the reasons recorded lack validity.

5. On the other hand, learned counsel for the Revenue opposed the petition contending that the Assessing Officer has recorded proper reasons. At this stage, the Court would not examine the sufficiency of the reasons.

6. Having heard the learned counsel for the parties and having perused the documents on record, we may recall that the impugned notice has been issued within the period of four years from the end of relevant assessment year in a case where original assessment was framed after scrutiny. It is not the case of the petitioner that the ground on which the Assessing Officer desires to reopen the assessment, came up for discussion during the original scrutiny assessment. In other words, the assessee does not press the ground of change of opinion to attack the impugned notice.

7. To appreciate the petitioner's contention, we may summarize the reasons which the Assessing Officer has recorded. These reasons are some what long but in short, what the Assessing Officer has contended is that the petitioner Hinduja Foundation had received donation from Hinduja Hospital which is also a registered trust of a sum of Rs. 76.59 lacs. This amount was spent on the officers / directors of Hinduja Hospital and was claimed as reimbursement of expenditure. According to the Assessing Officer, therefore, such receipt was hit by Section 13(3)(b) of the Act. In the process, the Assessing Officer refers to a detail exercise which he had undertaken in case of the assessee for the assessment year 2014-15. We are prepared to accept the contention of the learned counsel for the petitioner that the sum of Rs. 76.59 lacs is not accurate and in fact, the petitioner trust had received a sum of Rs. 68.16 lacs from Hinduja Hospital. However, a mere minor inaccuracy in indicating the figure in the reasons recorded, would not shake the very foundation of the reasons so as to nullify the notice of reopening based on such reasons. We are also prepared to proceed on the basis as contended by the learned counsel for the petitioner that there may be some differences in the situation emerging out of the return for the assessment year 2014-15 and the present one. Nevertheless, when we examined the situation in the present year, on the basis of reasons recorded by the Assessing Officer, we are unable to accept either of the two contentions. Once, we proceed on the basis that the petitioner Hinduja Foundation received sizable donation from

Hinduja Hospital and the Assessing Officer asserts on the prima facie information available with him that such sum was spent on the officers / directors of Hinduja Hospital, the question of applicability or non-applicability of Section 13(3)(b) in the context of the provisions contained in Section 13(1)(c)(ii) would arise. When such an issue was never examined by the Assessing Officer during the original scrutiny assessment, we would be well advised not to carry out an incisive inquiry into the question which would an inquiry, necessarily be factual as well as legal. An opinion of law can be rendered only once facts are conclusively established. It is a settled law that at the stage of examining the validity of notice of reopening of assessment in a Writ Petition, the Court would not, in exercise of the writ jurisdiction, go into the sufficiency of the reasons recorded by the Assessing Officer. Reference in this respect can be made to the decisions of the Supreme Court in the case of **Raymond Woollen Mills Ltd Vs. I.T.O. & Ors.**[1] and in the case of **ACIT Vs. Rajesh Jhaveri Stock Brokers Pvt Ltd**[2]**.**

1 (1999) 236 ITR 34 (SC)
2 (2007) 291 ITR 500 (SC)

8. In the result, the petition is dismissed.

9. At this stage, learned counsel for the petitioner prayed that the interim relief against carrying out the assessment may be continued to enable the petitioner to carry the matter in the appeal. Even in absence of continuation of stay, the Assessing Officer is unlikely be able to complete the assessment in a hurry. Request for continuation of stay is refused.

[M.S. SANKLECHA, J.] **[AKIL KURESHI, J]**