R.M. AMBERKAR
(Private Secretary)

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

INCOME TAX APPEAL NO. 2022 OF 2017

CIT (Exemptions), Mumbai .. Appellant

Versus

Kalyani Charitable Trust .. Respondent

....

- Mr. N.C. Mohanty for the Appellant

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CORAM : UJJAL BHUYAN &
MILIND N. JADHAV, JJ.

DATE : FEBRUARY 4, 2020.

P.C.:

1. Heard Mr. Mohanty, learned standing counsel, revenue for the appellant.

2. This appeal under Section 260A of the Income Tax Act, 1961 (**"the Act"** for short) is preferred by the revenue against the order dated 10.1.2017 passed by the Income Tax Appellate Tribunal, Mumbai "A" Bench, Mumbai (**"Tribunal"** for short) in Income Tax Appeal No. 198/Mum/2015 for the assessment year 2010-11.

3. Appellant has projected the following two questions as substantial questions of law:-

> (i) Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified by relying upon the decision of CIT(A) in which the CIT(A) erred in relying on the lease agreement between the assessee and the lessor ignoring the fact that the transaction is not at arm's length and is between interested parties?
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> (ii) Whether on the facts and in the circumstances of the case and in law, the Tribunal failed to take into account the advance of Rs. 6.68 crores to M/s. Kalyani Education Pvt Ltd claimed to be "deposit for leased assets" and payment of Rs. 5 Lakhs as monthly rental against a property of Rs.31 Crores which in itself proves that the lease deed is for diverting the funds of the assessee to its interested concern?

4. Respondent is a charitable trust which is registered with the Director of Income Tax (Exemption), Mumbai under Sections 12A and 80G of the Act. In assessment proceedings for the assessment year 2010-11, Assessing Officer took the view that respondent - assessee had diverted an amount of Rs. 6,68,00,000.00 to M/s. Kalyani Education Pvt Ltd. After issuing notice to the respondent - assessee and after hearing, Assessing Officer held that M/s. Kalyani Education Pvt Ltd is an excluded person under Section 13(3) of the Act. There is an agreement between the respondent - assessee and the excluded person. Signatory of the respondent - assessee who is a trustee is also a substantial shareholder of the excluded person. After referring to Sections 13 and 11 of the Act, Assessing Officer by his assessment order dated 26.3.2013 concluded that the agreement was a colourable device and funds to the extent of Rs. 6,68,00,000.00 of the respondent - assessee was diverted for the benefit of the excluded person. Therefore, it was held that provisions of Section 13(1)(c)(ii) and Section 13(2)(g) read with Section 13(3)(cc) of the Act would be attracted. Consequently, Assessing Officer held that exemption under Section 11 of the Act would be denied to the respondent - assessee to the above extent.

5. Respondent assailed the said order of the Assessing Officer before the Commissioner of Income Tax (Appeals) (I), Mumbai i.e the first appellate authority. By the appellate order dated 8.10.2013, the first appellate authority observed that findings of the Assessing Officer were based on suspicion and in facts and circumstances of the case, respondent - assessee was entitled to exemption under

Section 11 of the Act. Consequently, Assessing Officer was directed to delete the additions and to allow the exemption to the respondent - assessee.

6. Aggrieved by the said order of the first appellate authority, revenue preferred appeal before the Tribunal. However, Tribunal by the order dated 10.1.2017 dismissed the appeal of the revenue. Aggrieved, revenue is in appeal before us.

7. Submissions made by Mr. Mohanty, learned standing counsel, revenue have been considered.

8. We have already noticed the ground and reasons why the Assessing Officer declined exemption under Section 11 of the Act. In the appellate proceedings, the first appellate authority held that in the facts and circumstances of the case, question of applicability of Section 13 of the Act did not arise. Therefore, Assessing Officer was in error in denying the exemption under Section 11 of the Act. Relevant portion of the order passed by the first appellate authority is extracted hereunder:-

> "5.4 I have considered the facts and circumstances of the case and it is on record that the amount of Rs.6,68,00,000/- has been paid to M/s Kalyani Education Pvt. Ltd. as a deposit for leased asset in terms of agreement dtd. 01.07.2008 for the use of premises. As per clause 7.2 of the said lease agreement (noted in the assessment order) the appellant has obtained the lease of the premises/property commencing from 1.4.2009. There is stipulation of monthly lease rent (Rs.5 lacs) to the total amount of Ks.9 Cr. by the end of 31.03.2014. The electrical charges, water charges on the user of the facilities and premises are also to be borne by the appellant as per clause 7.3(i. ii, iii & iv) of the agreement. As per clause 7.7(ix), advance payment of rent every month is also stipulated. However, the AO has reached the conclusion of colourable device and diversion of funds to the benefit of 'specified person' as in section 13(2) of the I.T. Act.
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> 5.5 It is on record that the deposit of Rs.6,68,00,000/- as above is in pursuance of a valid lease agreement for the user of premises and various other facilities and fixed assets in the nature of building, ground etc. by the appellant in the process of carrying out educational activities/charity. It has not been questioned by the AO that leased asset in the form of land, construction and equipments (used by the appellant for its purpose as also noted in the assessment order at pg.12 in the reply of assessee) to the extent of Rs.7,70,00,000/- were utilised by the appellant during the year. It is proved from the copy of electricity bills and other state govt. records like rent of the land, tax receipt, electricity bill etc. that the premises and the leased asset as envisated in the agreement have actually been used by the appellant for its purposes.
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> Thus, the findings of the AO on this issue are based on suspicion by ignoring the actual activities and transaction on this

account where the leased assets were actually being used by the appellant for more than the amount of Rs.6,80,00,000/- deposit paid against investments/payable for assets of the leaser (M/s Kalyani Education Pvt. Ltd.) to the extent of Rs.7,70,00,000/- (Exhibited on pg.12 of the assessment order). After considering the above facts and the judicial pronouncements relied upon by the appellant, I find that there is no case of any benefit given/derived by specified person. Therefore, the conclusion reached by the AO and denying the exemption u/s 11 of the Act to the appellant for the year, solely based on the issue of undue benefit to specified person, is unjustified for being not based on facts hence liable to be rejected. In view of the above facts and the decision in the case of CIT Vs. Kamla Town Trust Alld.) 279 ITR which clearly supports the ground of the appellant, where it was that - "Even when there is some transaction involving the interested persons, it is not sufficient to attract section 13, unless some benefit is proved by the revenue." Hence, it is held that there is no applicability of section 13 of the I.T. Act on the facts and issue during this year as decided by AO for denying exemption u/s 11 of the Act.

5.6 In view of facts and circumstances of the case on this issue, the appellant is entitled u/S. 11 of the I.T. Act. Hence, the AO is directed to delete the additions and allow exemption to the appellant u/S. 11 r/w S. 12 and 13 of the I.T. Act"

8.1. From the above, it is seen that the first appellate authority considered the lease agreement and the fact that the deposit was made pursuant to the same for user of premises and other assets, such as, building, building ground etc. for carrying out educational activities / charity. As a matter of fact, the first appellate authority came to the conclusion that respondent assessee had proved that the premises and the assets envisaged in the lease agreement were actually used by the respondent assessee for its educational activities / charitable purposes. In such circumstances, the first appellate authority held that there was no case of any benefit given / derived by specified person. Holding that denial of exemption was unjustified being not based on facts, the first appellate authority directed the Assessing Officer to delete the additions and to allow the exemption.

9. In further appeal by the revenue, Tribunal after hearing the mater, did not interfere with the order passed by the first appellate authority and held as under:-

> " 7. We have considered rival contentions and carefully gone through the orders of the authorities below and found from record that assessee is a charitable trust engaged in promotion of education and allied activities. Assessee was running school, college of Engineering, Pharmacy, Management etc., With respect to each and every query of the AO, the CIT(A) has dealt in great detail and after giving detailed finding, reached to the conclusion that deposit of Rs.6,68,00,000 was in pursuance of valid lease agreement for the user of the premises and various other facilities and fixed asset in

nature of building, ground etc., In the process of carrying out educational activities / charity, the assessee has used the premises and other leased assets for its purpose after recording detailed finding at para 4.32 -5.6, the CIT(A) reached to the conclusion that there is no case of any benefit being diverted by the assessee trust to the interested persons. Accordingly, denial of exemption u/s.11 by the AO was not correct. Accordingly there is no application of Section 13 of IT Act. Detailed finding recorded at para 4.32 to 5.6 has not been controverted by DR by bringing any positive material on record. The same do not warrant any interference on our part."

9.1. Tribunal reiterated as a finding of fact that deposit of Rs. 6,68,00,000.00 was in pursuant of a valid lease agreement for user of the premises and various other facilities. Respondent - assessee had used the premises and other leased assets for carrying out educational activities / charitable purposes. Tribunal further held that departmental representative of the revenue could not controvert the findings of fact returned by the appellate authority.

10. Issues involved in the present appeal are pure questions of fact. Not only are these questions of fact but there is concurrent findings of fact as well. In appellate proceedings under Section 260A of the Act, we are not inclined to interfere with such concurrent findings of fact, more so when there is no question of perversity in the findings of the lower appellate authority below.

11. Consequently, we do not find any merit in the appeal. Appeal is accordingly dismissed. However, there shall be no order as to cost.

[MILIND N. JADHAV, J.] **[UJJAL BHUYAN, J.]**

Ravindra M. Amberkar

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