IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2021

CORAM :

The Hon'ble MR.JUSTICE T.S.SIVAGNANAM
and
The Hon'ble MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

T.C.A.No.326 of 2015

Commissioner of Income tax,
Chennai.

... Appellant/Appellant

Vs

M/s.Sri Vekkaliamman Educational
and Charitable Trust,
No.108, East Madha Street,
Royapuram,
Chennai – 600 013.

... Respondent/Respondent

PRAYER : Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras, "C" Bench, Chennai dated 10.09.2014 passed in I.T.A.No.970/Mds/2014 against the order of the Commissioner of Income Tax (Appeals)-VII, Chennai-34, dated 27.12.2013 in ITA No.292/12-13 for the Assessment year 2010-2011, against the Assessment order of the Deputy Director of Income-Tax/Exemptions II, Chennai, dated 25.02.2013 for PAN AAFTS7863Q for the Assessment year 2010-11.

For Appellant : Mr.J.Narayanasamy, Senior Standing Counsel.

For Respondent : Mrs.T.C.A.Sangeetha.

J U D G M E N T

(Delivered by T.S.SIVAGNANAM, J)

This Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961 ('the Act' for brevity) is directed against the order dated 10.09.2014 in I.T.A.No.970/Mds/2014 passed by the Income Tax Appellate Tribunal "C" Bench, Chennai (for brevity "the Tribunal") for the Assessment Year 2010-2011.

2.The Appeal was admitted on 22.07.2015 to decide the following substantial questions of law;

> "1.Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in holding that the assessee is entitled to claim depreciation on the assets even though the cost of purchase of asset was already treated as application of income under Section 11?
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> 2.Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that there is no violation within the meaning of Section 13 (1) © read with Section 13 (2) and Section 13 (3) of the Income Tax Act when the building contract work was awarded to the Managing Trustee, thereby allowing him to earn profit from the said contract and the assessee is entitled for exemption under Section 11?
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> 3.Whether on the facts and in the circumstances of the case, the Tribunal was right in law in denying the exemption under Section 11 of the Act on the entire income of the assessee, even though it held that the "investment" in gold bullion is in violation of the provisions of Section 11 (5) read with Section 13 (10) (d) of the Act, more so when the Supreme Court in the case of CIT v. Dawoodi Bohra Jamat (2014) 364 ITR 31 (SC) at para 15 has clearly held that Section 13 enacts a complete bar to the availability of exemption under Section 11?"

3.We have elaborately heard Mr.J.Narayanaswamy, Learned Senior Standing Counsel appearing for the Appellant / Revenue and Mrs.T.C.A.Sangeetha, Learned Counsel appearing for the Respondent / Trust.

4.It is not disputed rather conceded before us that substantial question of law No.1 has to be answered against the Revenue in the light of the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax Vs.Rajasthan and Gujarati Charitable Foundation Poona reported in (2018) 402 ITR 0441 (SC), wherein it was held that normal depreciation could be considered as legitimate deduction in computing real income of assessee on general principles or u/s.11 (1)(a) of the Act. Accordingly, the substantial question of law No.1 is answered against the Revenue by complying the above decision.

5.In so far as the third substantial question of law is concerned, in the Assessee's own case in T.C.A.No.890 of 2019 dated 24.09.2020, the Division Bench of this Court had set aside the order passed by the Tribunal and remanded the matter to the Tribunal to consider the issue afresh and in accordance with law. The operative portion of the Judgment reads as follows:

> "3.We have elaborately heard Ms.T.C.A.Sangeetha, learned counsel for the appellant/assessee and Mr.J.Narayanaswamy, learned Senior Standing Counsel appearing for the respondent/Revenue.
>
> 4.The assessee is a registered Public Charitable Trust, which has established and administering an educational institution. It has been granted registration under Section 12A of the Act. For the assessment year under consideration (AY 2010-11), the assessee filed their return of income declaring its total income as 'Nil' and claiming exemption under Section 11 of the Act. The case was taken up for scrutiny and notice under Section 143(2) of the Act was issued on the assessee on 14.09.2011. In the scrutiny assessment, certain disallowances/additions were made and the taxable income of the assessee was determined as Rs.2,52,28,792/- by order dated 25.02.2013. Aggrieved by such order, the assessee filed appeal before the Commissioner of Income Tax (Appeals)-VII, Chennai (for brevity "the CIT(A)"). By order dated 27.12.2013, the assessee's appeal was allowed. Aggrieved by the same, the Revenue filed appeal before the Tribunal.
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> 5.We have gone through the grounds of appeal raised by the Revenue before the Tribunal and for easy reference, we quote the same hereunder:-
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> "5.1.The ld CIT(A) erred in holding that investment made in gold bullion to the extent of Rs.41.24 is not an investment in the modes other than specified in Sec.11(5) of the Act.
>
> 5.2.The ld CIT(A) failed to appreciate the fact that the Assessing Officer had categorically analysed the issue and observed that the investment in gold bullion amounting to Rs.26.85 lakhs in M/s.Prince gem & Jewellery P. Ltd. for the purpose of distribution of prizes and awards to meritorious students could not be

substantiated with evidence by the Trust by way of name of student, address, etc.

5.3.The ld CIT(A) failed to appreciate that similar investment in Joyalukkas in the form of 26 gold coins weighing 50 gms each and the assessee could not substantiate with evidence that the said investments were utilised for the purpose of gold metals either in the current year or in the subsequent year (Asst. Year 2011-12).

5.4.The ld CIT(A) ought to have appreciated that in the final accounts of Asst. Year 2011-12, the said investment in gold towards purchase of gold medals were not shown as application of income.

5.5.The ld CIT(A) ought to have appreciated the fact that purchase of gold bullion and gold coins cannot be considered as a transaction connected with the educational activity."

6.On a perusal of the above grounds raised before the Tribunal, it is seen that the stand taken by the Revenue was that the CIT(A) ought not to have held that the investment made in gold bullion is not an investment in the modes other than specified in Section 11(5) of the Act. Without examining the correctness of the said contention, the Tribunal in paragraph 8, while faulting the CIT(A) for accepting the stand taken by the assessee on the ground that there were only bald assertions, the Tribunal came to the conclusion that the purchase of gold by the assessee was not application of funds, but an investment in gold bullion and this investment is in violation of Section 11(5) of the Act. There is nothing on record to indicate that this opinion was formed by the Tribunal and recorded in its order after the assessee had an opportunity to put forth their contention.

7.The assessee's case is that if such was the view of the Tribunal, then the assessee's case should have been considered as per the proviso (iia) to Section 13(1)(d) of the Act. The assessee would contend before us that the asset, not been specified investment, can be held for a period of one year from the end of previous year in which such an asset was acquired, which is the case of the assessee. Since this issue was not dealt with by the Tribunal, rather the assessee appears to have not been put on notice, the above opinion formed by the Tribunal holding that the purchase of gold by the assessee was not application of funds, but an investment in gold bullion, we find that the assessee has been put to prejudice. Therefore, they are required to be granted a fresh opportunity to put forth their contention.

8.In the light of the above, the appeal is allowed and the finding rendered by the Tribunal in paragraph 8 of the order dated 10.09.2014 is set aside and the matter is remanded to the Tribunal to consider the said issue afresh and in accordance with law.

9.In the result, the appeal is allowed to the extent indicated. The substantial questions of law framed for consideration are left open. No costs.”

Thus, in the light of the above decision, the issue arising in substantial question of law No.3 stands remitted back to the Tribunal to be decided in terms of the Judgment in T.C.A.No.890 of 2019 dated 24.09.2020.

6.This leaves us with substantial question of law No.2. The Assessee paid a sum of Rs.5.02 crores to M/s.Sri Vekkaliamman Builders which is a partnership firm in which the Managing Trustee of the assessee Trust was a partner. The question was whether this payment would be hit by Section 13 (1) (c) read with Section 13 (2) and Section 13 (3) of the Act.

7.The Assessing Authority, while completing the assessment by order dated 25.02.2013, held that that transactions of the Trust for the year have clearly violated the provisions of law as per Section 13(1)(c) and 13(1)(d) of the Act and therefore, the provisions of Section 11 become inoperative and the surplus gained by the Trust for the year needs to be brought to taxation. The Assessee filed Appeal to the Commissioner of Income Tax (Appeals) - VII ['the CIT(A)' for brevity]. The Appeal was allowed by order dated 27.12.2013 wherein, the CIT(A) after noting that the Builder was paid a sum of Rs.5.02 crores by the Assessee in the assessment year under consideration and the firm has earned a net profit of Rs.21.51 lakhs, but yet granted relief to the Assessee on the ground that contract was given to the said Builder on a competitive basis and they were the persons who quoted lowest rate and profit earned was only 5.8% which is very reasonable. These findings were upheld by the Tribunal in the impugned order.

8.The question is as to how sub-clause (c) of sub-section

(2) of Section 13 of the Act has to be interpreted. Without prejudice to the generality of the provisions of sub-clause (c) and sub-clause (d) of sub-section (1) of Section 13, the income or property of the trust or any part of such income or property shall, for the purpose of that clause, be deemed to have been used or applied for the benefit of a person referred to in sub-section (3).

9.Admittedly, the Managing Trustee of the Trust was a partner who would fall within the definition of a person as defined in sub-clause (cc) of sub-section (3).

10.The argument of Mrs.T.C.A.Sangeetha, Learned Counsel appearing for the Respondent is that Section 13(2)(c) would come to the aid and assistance of the Assessee which states that if any amount is paid by way of salary, allowance or otherwise during the previous year to any person referred in sub-section (3) of Section 13 out of resources of the Trust or institution for services rendered by such person to such Trust or institution and the amount so paid, is in excess of what may be reasonably paid for such services, the benefit granted by the CIT(A) requires to be confirmed.

11.The moot question would be as to how sub-section (2) of Section 13 should be interpreted and whether there is a deemed provision? In this regard, Mr.J.Narayanaswamy, Learned Senior Standing Counsel appearing for the Appellant referred to the decision of Hon'ble Division Bench of the Kerala High Court in the case of Chandrika Educational Trust V.Commissioner of Income Tax reported in (1997) 90 TAXMAN 1 (KER.).

> "9.Section 11 of the Income-tax Act speaks of the situation relating to the incomes not to be included in the total income of the previous year of the person in receipt of the income in question. In regard thereto provisions of section 11 (1A) enact that if the income is derived from the property held under trust wholly for charitable or religious purposes and to the extent to which such income is applied to such purposes in India, such income is not to be included in the total income of the previous year under the benefit offered by section 11. This is not the be-all and end-all of the situation because the statutory provisions of section 11 of the Act are required to be understood in the context of situations of exception provided under section 13(1) of the Act. In fact the said statutory provision (section 13) enumerates situations in regard to which it can be said that those situations would take out the items of income covered thereby from the benefit provided by

section 11 of the Act. Illustratively section 13(1)(c) provides one such situation. The said provision enacts that any income of a trust for charitable and religious purposes will not get the benefit of section 11 if such income is found directly or indirectly for the benefit of any person referred to in section 13(3) of the Act. In other words, if the concerned income in regard to which exemption is sought for under Section 11 of the Act is seen to have any connection, direct or indirect, for the benefit of any person referred to under section 13(3), with regard to that income no benefit under section 11, would be available. In this connection section 13(3) specifies who such persons would be. It is obvious that such person is not only the author of the trust or the founder of the institution, but also any person who has made a substantial contribution to the trust or institution, one whose total contribution during the relevant previous assessment year exceeds Rs.5,000, but also includes any relative of such author, founder, person, member, trustee or manager of the concern asking for the benefit.

10.In addition thereto, section 13(2) of the Act introduces deeming situations and this is apart from the generality of the provisions of section 13(1)(c). The provision enacts that such income or property has to be deemed to have been used or applied for the benefit of a person who could be the one specified in section 13(3). Provision of section 13(2)(h) is one such illustrative situation. The said provision, if reproduced, is as follows: "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."

It would be seen that the benefit of section 11 would not be available to a situation which is deemed to have been statutorily stated to be used or applied for the benefit of such person, if the income continues to remain invested for any period during the previous year in question in any concern in which any person referred to in section 13(3) has a substantial interest. Therefore, the provisions of section 13(2)(h) are also required to be understood as an additional situation deemed to have been considered statutorily as taking out the situation for the purpose of benefit under section 11."

12.Thus, the issue to be considered is as to how to interpret sub-section (2) of Section 13, which is a deeming provision and also to test as to whether construction contract which has been granted to the firm in which the managing trustee was a partner would tantamount to "service" as contemplated under Section 13(2)(c). We find from the order passed by the CIT(A) which has been confirmed by the Tribunal that there has been no discussion on such aspects, nor the Assessee raised such issue. Nevertheless the issue, being ultimately a legal issue, involves question of fact and law for the Tribunal is required to take a fresh decision considering all issues and also the effect of sub-section (2) of Section 13.

13.In the result, the matter is remanded to the Tribunal to decide the issue regarding whether there was a violation committed by the Assessee Trust under Section 13(1)(c) read with 13(2) and Section 13(3) of the Act in respect of building contract awarded to a firm in which managing trustee was a partner and the firm having earned profit, whether the Assessee is entitled for exemption under Section 11.

14.Thus, the first substantial question of law is answered against the Revenue by following the Judgment of the Hon'ble Supreme Court in the case of "Commissioner of Income Tax Vs.Rajasthan and Gujarati Charitable Foundation Poona" reported in "(2018) 402 ITR 0441 (SC)" and the third substantial question of law stands remitted back to the Tribunal following the decision of the Assessee's own case in T.C.A.No.890 of 2019 dated 24.09.2020.

15.In the result, this Tax Case Appeal is dismissed in respect of first substantial question of law and partly allowed in respect of second and third substantial questions of law and the matter is remanded back to the Tribunal for fresh consideration. No costs.

Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Commissioner of Income tax,
   Chennai.

2. The Income Tax Appellate Tribunal 'C' Bench,
   Chennai.

3. The Commissioner of Income Tax (Appeals)-VII
   Chennai.

4. The Deputy Director of Income Tax,
   Exemptions-II, Chennai.

T.C.A.No.326 of 2015

AK-II(CO)
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