

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH
KOCHI**

BEFORE S/SHRI ABRAHAM P GEORGE, AM & GEORGE GEORGE K, JM

**ITA No 127/Coch/2016
(Asst Year 2011-12)**

Malankara Orthodox Syrian Church Medical Mission Hospital Kolencherry 682 311	Vs	The Dy Director of Income Tax (Exemption) Kochi
(Appellant)		(Respondent)

PAN No.	AAATM3854A
Assessee By	Shri Thomson James
Revenue By	Sh Shanthom Bose, CIT-DR
Date of Hearing	15 th March 2017
Date of pronouncement	17 th March 2017

ORDER

PER GEROGE GEORGE K, JM:

This appeal, at the instance of the assessee, is directed against the CIT's order dated 24.2.2016 passed u/s 263 of the I T Act. The relevant assessment year is 2011-12.

2 The briefly stated the facts of the case are as follows:

The assessee is a charitable institution registered u/s 12A of the I T Act 1961. The assessee is running a hospital and a medical college. For the assessment year 2011-12, return of income was filed on 30.9.2011 declaring a total income at 'nil'. In the tax computation statement, the assessee had

shown excess utilization for charity of Rs. 16,32,17,532/-. The assessment u/s 143(3) was completed vide order dated 28.2.2014.

2.1 Thereafter, a notice u/s 263 of the I T Act was issued by the Commissioner. According to the Commissioner, the assessment order completed u/s 143(3) (dated 28.2.2014) is erroneous in so far as it is prejudicial to the interests of revenue since a sum of Rs. 44,96,547/- claimed by the assessee, as provision for gratuity, was allowed as deduction. According to the Commissioner, as per section 40A(7) of the I T Act, the provision for gratuity is not an allowable expenditure. Further, the Commissioner was of the view that as per section 11(4) of the I T Act, the provision for gratuity amounting to Rs. 44,96,547/- should be taxed at the maximum marginal rate.

2.2 In response to the notice issued u/s 263 of the Act, the assessee filed its written submissions dated 22.10.2015. The CIT, however, rejected the contentions raised in the written submissions and held that the provision for gratuity amounting to Rs. 44,96,547/- is not an allowable expenditure as per section 47A(7) of the I T Act and since the Assessing Officer had omitted to disallow this amount, in the assessment, it had resulted in under assessment income. Further, as regards applicability of section 11(4) of the Act, the CIT held that any income determined in excess of the income as shown in the account should be deemed to be applied for the purpose other than

charitable purposes and held was not eligible for exemption u/s 11 of the I T Act. The relevant findings of the CIT, reads as follows:

"4 I have gone through the submissions made by the assessee during the course of the proceedings u/s 263 of the Income Tax Act. The submissions of the assessee are not at all convincing. As already mentioned in column 17B(i) of Form 3CD the tax audit has reported that the expenditure claimed by the assessee include provision for gratuity amounting to Rs. 44,96,547/- which is not allowable as per section 40A(7) of the Income Tax Act. Since the Assessing Officer has omitted to disallow this amount in the assessment resulted in under assessment of income by Rs. 44,96,547/-. Regarding the applicability of section 11(4) of the Income Tax Act any income determined in excess of the income as shown in the account should be deemed to be applied to purposes other than charitable purposes. Further, income applied to purposes other than charitable purpose is not eligible for exemption u/s 11 of the Income Tax Act."

3 Aggrieved by the order passed u/s 263, the assessee has filed the present appeal before this Tribunal. The Id counsel for the assessee submitted that even after making the disallowance of provision for gratuity, there would not be any income for the AY 2011-12 as the application of income for charitable purpose is in far excess of gross income and therefore, there is no prejudice caused to the revenue. It was submitted that the assessee was not carrying on any business undertaking and section 11(4) does not have any application in the facts of the case.

3.1 On the other hand, the Id DR strongly supported the order of the CIT passed u/s 263 of the Act.

4 We have heard the rival submissions and perused the material on record. The assessee had debited the provision for gratuity amounting to Rs. 44,96,547/-. This amount was not disallowed either in the income tax return filed by the assessee or in the assessment order passed u/s 143(3) of the Act. The provision for gratuity is not an allowable deduction as per provisions of section 40A(7) of the I T Act. Therefore, the CIT has rightly disallowed the same in his order passed under section 263 of the I T Act. However, the further question is whether the CIT is right in invoking the provisions of section 11(4) of the Act. To understand this issue, provisions of section 11(4), 2 (13) and 2(15) needs to be analyzed. For ready reference the relevant provisions are reproduced below:

Sub section (4) of section 11 reads as follows:-

"For the purpose of this section, "property held under trust" includes a business Undertaking so held, and where a claim is made that the income of any such undertaking shall not be included in the total income of the persons in receipt thereof, the Assessing Officer shall have power to determine the income of such undertaking in accordance with the provisions of this Act relating to assessment; and where any income so determined is in excess of the income as shown in the accounts of the undertaking, such excess shall be deemed to be applied to purposes other than charitable or religious purposes".

The term "Business" is defined in section 2 (13) of the Income Tax Act,1961 reads as follows:

"business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture";

Further, the term "charitable purpose" is defined in section 2 (15) of the Income Tax Act, 1961 which reads as follows:-

"charitable purpose" includes relief of the poor, education, medical relief, [preservation of environment (including watersheds, forests and wild life) and

preservation of monuments or places or objects of artistic or historic interest,] and the advancement of any other object of general public utility";

4.1 In the instant case, the assessee is running a hospital and medical college, both of which fall under the terms 'charity' within the definition of charitable purposes as defined in section 2(15) of the I T Act. Section 11(4) is attracted only in a situation where the "property held under trust" includes a "business undertaking". Since the assessee is not having any 'business undertaking', section 11(4) will not be attracted to the facts and circumstances of the case. Hence, the CIT erred in invoking the provisions of section 11(4) of the I T Act. An identical issue was considered by the ITAT Ahmedabad Bench in the case of Gujarat Industrial Development Corporation vs ACIT reported in 129 ITD 73. The relevant portion of the finding reads as follows:

"12. Before we conclude let us see whether at all there was an element of "business" in the activity of this Corporation. The definition of the Term "Business" as per section 2(13) is as under :

Section 2(13) "business" includes any trade, commerce or manufacture or any adventure or concern in the nature of trade, commerce or manufacture;

13. The fervent argument of Id.CIT Departmental Representative Mr. Jindal, in this regard, were that the definition of business is very wide as defined in the Act and this definition is also not exhaustive. As per his arguments this clause being an inclusive clause, therefore, not only the four items as enumerated in the definition, but the other activities if of the like nature shall also be reckoned in business. There is no dispute about this primary argument because the word "business" connotes a large import. There are several decisions on the basis of which now it is settled that any activity of commerce and any adventure in the nature of trade does fall within this definition. At present, there is no necessity to exhaustively deal with this definition and we are bound to accept that the assessee can be said to be an undertaking which has carried out an adventure in the nature of trade. Purchase of land and sale of land being the primary activity of this organization can be said to be a business activity but merely by holding that the undertaking is a "business undertaking" whether the profits arising therefrom can be subjected to tax by invoking section 11(4) of the Income-tax Act. This section says that in respect of

such an undertaking where a claim is made that the income arising therefrom not to be included in the total income, then this section must not be applied. This section can be applied where the Assessing Officer invokes the power to determine the income of such an undertaking and thereupon determined an income which is in excess of the income as shown in the accounts of the undertaking, then such excess income shall be deemed to be the income not applied for the purposes of the trust. What this term "excess" connotes is also to be examined. In our opinion, if on examination of income and expenditure account, it is found that some part of the receipts are not utilized or expended towards the object of the trust, then only that part can be held as an excess income and naturally subject to tax. It means that the Assessing Officer has to examine the nature of receipts and the nature of expenditure and if on the basis of that examination, it is found that a part of them are not meant for the purposes of the charity or not utilized for the object of general public utility, then such an excessive income ought to be held taxable and, therefore, such an excess shall be deemed to be applied to purposes other than charitable purposes. In respect of such an income the undertaking cannot claim that the same should also not be included in the exempted total income. Applying this test on the present set of facts of the case, it is evident that though the Assessing Officer has computed the profits on transfer of land or plots but it was not the case that the profits so generated were not within the main provisions of section 11 of the Income-tax Act. Even if the assessee has earned premium price on lease of plot and land for sale but if the entire expenditure and the profit earned therefrom was exclusively used for the laid down objects then to be covered by the main Section 11. In the present case the undisputed fact was that the same was utilized for the purposes of the object of the trust. Rather, it is also worth to note that the surplus, if any, remained with the assessee has to be invested as per the guidelines and the norms set out under GID Act. Therefore, we are of the conscientious view that even if this undertaking may come within the purview of "business undertaking" but being no excess income was found utilised other than for the purposes of the object of the trust, hence, out of the ambits of the provision of section 11(4) of the Income-tax Act.

13.1 In the light of the above discussion, ground No. 1 of the assessee is hereby allowed. As far as the additional ground raised is concerned, once the provisions of section 11(4) are held not to be applied in the present case, therefore, there is no purpose of application of CBDT Circular to assess the excess income, hence, this additional ground in the result have become redundant."

4.2 Further, sub-section (4) of section 11 can be invoked only if the income determined by the Assessing Officer is in excess of the income as shown in the accounts of the undertaking. Any disallowance of expenditure is not hit by sub-section 4 of section 11. Section 11 (4) is attracted only in a situation where the income determined by the Assessing Officer is in excess of the income as shown

in the accounts of the undertaking; i e; only if there any income which is hidden from the books of accounts. In assessee's case, issue in question is disallowance of provision for gratuity. The provision for gratuity has already disclosed in the books of account. The total income to be determined even after disallowance of provision for gratuity is Nil. Disallowance of provision for gratuity will not result in a situation where income determined by the Assessing Officer is in excess of the income as shown in the accounts of the assessee. The Hon. High Court of Calcutta in Commissioner of Income Tax Vs. Birla Education Trust reported in (1985) 153 ITR 0579 has clearly dealt with the issue. The relevant observations and the findings of the Hon'ble High Court reads as follows:

"6 Let us consider the scheme of s. 11 of the I.T. Act (as it stood prior to its amendment in 1970). It is headed " Income from property held for charitable or religious purposes ". Sub-s. (4) of s. 11 provides that for the purpose of this section " property held under trust " includes a business undertaking so held. Thus, the entire s. 11 including its various sub-sections, apply to income derived from, inter alia, a business undertaking.

Sub-s. (2) of s. 11 says that income derived from property held under trust wholly for charitable or religious purposes, shall not be included in the total income of the person in receipt of the income, to the extent to which such income is applied to such purposes in India. It permits accumulation of income to the extent of 25%.

Thus, under s. 11(1), accumulation of income up to 25% as well as the application of rest of income wholly for charitable or religious purposes, is not liable to be included in the total income of the trust.

Sub-s. (2) of s. 11 deals with cases where application of income wholly for charitable or religious purposes falls short of 75% of the income. It permits exclusion of such income if the trust complies with certain formalities and invests such income in Government or approved securities.

Sub-s. (3) of s. 11 deals with the income of a trust which is applied to purposes other than charitable or religious purposes. Such income is not entitled to exclusion. It is deemed to be taxable income of the person in receipt thereof.

Sub-s. (4) of s. 11 then provides :

" (4) For the purposes of this section, 'property held under trust' includes a business undertaking so held, and where a claim is made that the income of any such undertaking shall not be included in the total income of the persons in receipt thereof, the Income-tax Officer shall have power to determine the income of such undertaking in accordance with the provisions of this Act relating to assessment; and where any income so determined is in excess of the income as shown in the accounts of the undertaking, such excess shall be deemed to be applied to purposes other than charitable or religious purposes. "

7 *Sub-s. (4) is neither a charging section nor a machinery provision entitling the ITO to assess the income for the purpose of levying tax. It comes into operation where a claim is made that the income of the business undertaking of a trust shall not be included in the total income of the person in receipt thereof. Such a claim can only be made under s. 11(1). When such a claim is made, the ITO has been authorised to determine the income. Where the income so determined is in excess of the income as shown in the account books of the undertaking, then such excess shall be deemed to have been applied to purposes other than charitable or religious purposes.*

8 *There is no indication in sub-s. (4) of s. 11 that it was intended to be in derogation of or to supersede or supplant any other provision of s.11. For instance, any income which is applied to purposes other than charitable or religious purposes for which the trust has been established, is by virtue of sub-s. (3) of s. 11, deemed to be income of the person receiving it. It is not entitled to exclusion under sub-s. (1) of s. 11. Thus, an expenditure for purposes other than charitable or religious purposes is liable to be dealt with by sub-s. (3), and by reason of its operation, it is not entitled to exclusion under sub-s. (1). Will such a case be also covered by sub-s. (4) and under it such expenditure be " deemed " to be applied to purposes other than charitable or religious purposes ? If so, it will mean that a situation directly and specifically dealt with by s. 11(3), is also provided for by sub-s. (4) of s.11 indirectly by employing a fiction. Such a construction will make sub-s. (4) a clumsy repetition of the effect of sub-s. (3). There is no indication of any compelling reason for which Parliament may have intended such a situation.*

It appears to us that sub-s. (4) was intended for a different contingency. It was meant to cover a different situation. It was not intended to apply to application of income.

9 *Under sub-s. (4), the ITO can determine the income and compare it with the income appearing in the accounts. The income spoken of in sub- s. (4) appears to us to be the gross income and not the net income of the business undertaking. The net income is computed after granting the admissible deductions. The deductions admissible from income of a business undertaking are not always the same as application of income wholly for charitable or religious purposes. They may or may not be admissible deduction from business income under the provisions relating to assessment of income. Yet they are entitled to exclusion under sub-s. (1) of s. 11 because they represent application of income wholly for charitable or religious purposes.*

10 *Here, the ITO has to scrutinise the accounts and see if there is suppression of income or manipulation of accounts with a view to conceal income. He could see whether there are items which are deemed to be income under some provision of the*

I.T. Act and which have not been accounted for in the books of the undertaking, or there may be some receipts which are really in the nature of income and which have not been reflected in the accounts. This interpretation of sub-s. (4) of s. 11 is in consonance with the legislative intent as disclosed by the Finance Minister who spoke in Parliament while this provision was under consideration.

11 *It is now settled that the speech of the mover of the Bill is relevant. In Varghese v. ITO [1981] 131 ITR 597 (SC), P. N. Bhagwati J., held (at p. 608):*

" Now, it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation was enacted. This is in accord with the recent trend in juristic thought not only in Western countries but also in India, that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. "

121 *Smt. Tarakeswari Sinha participating in the debate on September 1, 1961, stated in relation to sub-s. (4) of s.11:*

" Suppose a factory has got a capacity for an annual income of Rs. 15 lakhs but for avoiding a particular portion of the tax, sometimes the trustees or the donors have manipulated the accounts. They say that the income of the factory is only Rs. 10 lakhs and not Rs. 15 lakhs, thus avoiding tax payment on Rs. 5 lakhs which goes to their own pocket. For plugging this hole, actually powers were taken by the income-tax authorities to scrutinise the accounts to find out that the income shown in the books is the correct and has not been more. That was the only safeguard that has been provided by the sub-clause."

Thus, sub-s. (4) was intended to uncover tax evasion by manipulation of the account books. It was not intended to apply to application or expenditure of income by the business undertaking. As already seen, the non-application of income for purposes of the trust was dealt with by sub- s. (3) of s.11.

13 *It was submitted by the learned counsel for the Revenue that out of Rs. 9,547 in question, a sum of Rs. 1,000 was given as donation to the Congress Committee at Hissar. It is settled that the donation to a political party is not an expenditure for a charitable purpose. Even so, it will be a case of an expenditure covered by sub-s. (3), with the result that it will be an application of income not liable to be excluded under sub-s. (1) of s. 11. It will not be deemed income under sub-s. (4).*

14 *In our opinion, the amount of Rs. 9,547 which was admittedly spent by the trust for charity and donations did not attract s. 11(4). It has to be dealt with under s. 11(3). The Tribunal was justified in remanding the case to the ITO for passing a fresh order.*

15 We answer the first question in the affirmative, in favour of the assessee and against the Department and the second question in the negative, in favour of the assessee and against the Department. There will be no order as to costs."

4.3 Considering the above, the Commissioner of Income tax has erred in invoking the provisions of sub section (4) of section 11 of the Income Tax Act 1961 on the assessee.

4.4 Lastly, according to us, The Commissioner of Income Tax has erred in invoking section 263 since the order passed by the Assessing Officer u/s 143(3) was not prejudicial to the interest of the revenue. In the return of income, the assessee had declared total income at Nil. Even after disallowance or provision for gratuity, the total income is Nil as there is already excess utilization of Rs. 16.32 crores. Hence, the order passed by the Assessing Officer cannot be said to be prejudicial to the interest of the revenue.

5 In the light of the aforesaid reasoning, we hold that the CIT is not justified in invoking his revisionary powers u/s 263 of the Act and quashed the same. It is ordered accordingly.

6 In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on this 17th day of March 2017.

Sd/-	Sd/-
(ABRAHAM P GEORGE)	(GEORGE GEORGE K)
Accountant Member	Judicial Member

Cochin: Dated 17th March 2017

Raj*

Copy to:

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4. CIT,
5. DR
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By order

Assistant Registrar
ITAT, COCHIN