

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX APPEAL NO. 1310 OF 2013

The Director of Income Tax (Exemptions)]
6th floor, Piramal Chambers, Lalbaug,]
Mumbai – 400 012.] ... Appellant

Versus

M/s. Jasubhai Foundation]
210, D.N. Road, Taj Building,]
Fort, Mumbai – 400 001.] ... Respondent

Mr. A.R. Malhotra with Mr. N.A. Kazi for the Appellant.

Dr. K. Shivram, senior counsel i/b Mr. Rahul K. Hakani and Mr. Paras S. Savla for the Respondent.

**CORAM : S.C. DHARMADHIKARI &
A.K. MENON, JJ.**

WEDNESDAY, 1ST APRIL, 2015

ORAL JUDGMENT : [Per S.C. Dharmadhikari, J.]

1. This appeal of the Revenue challenges the order passed by the Income Tax Appellate Tribunal dated 14th November, 2012. The assessment year in question is 2007-08.

2. The Tribunal dealt with an appeal of the Revenue, cross objections of the assessee and an appeal by the assessee. All these were directed against a common order passed by the Commissioner of Income Tax (Appeals) on 14th February, 2011. Mr. Malhotra, the learned counsel appearing on behalf of the Revenue in support of this appeal submits that this appeal raises substantial questions of law. They are formulated at pages 4 and 5 of the paper-book. They read as under :

“A. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in granting exemption u/s. 10(33) and 10(38) to the tune of Rs.25.96 lakhs and Rs.3.21 lakhs respectively, when this income forms a part of the income from property held under trust and therefore can only be claimed to be exempt u/s. 11, if applied for charity and not u/s. 10 of the Act ?

B. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was

justified in holding that the entire foundation of section 11 is based on the premise that the income is otherwise chargeable to tax, which is not supported by the provisions of the Act ?

C. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in granting exemption u/s. 10, when the same amounts to allowance of exemption within exemption whereby dividend income and long term capital gain derived from property held under trust but not applied for purposes of the trust is held to be exempt ?

D. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in giving relief to the assessee in respect of Rs.30 lakhs which was accumulated and set aside u/s. 11(2) of the Act but not utilized for the specified purpose within the stipulated period of five years ?

E. Whether, on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was justified in giving relief to the assessee in respect of Rs.30 lakhs which was accumulated and set aside u/s. 11(2) of the Act for the purpose of setting up of Digital Research and Training Centre but donated to another Trust i/e. Synapse, which cannot be constructed to have been fulfilled the purpose of accumulation ?”

3. In relation to the first three questions Mr. Malhotra would submit that the Assessing Officer committed no mistake and his understanding of the provisions of law was accurate. Chapter III of the Income Tax Act, 1961, according to Mr. Malhotra, is entitled 'Incomes Which Do Not Form Part of Total Income'. Mr. Malhotra submits that the term “total income” appearing in section 10 and the wording of section 11 would indicate as to how what shall not be included in terms of section 10 in computing the total income of a

previous year of any person will not govern the interpretation of section 11. That section deals with income from property held for charitable or religious purpose. Sub-section (1) of that section has in clear terms stated that subject to the provisions of sections 60 to 63, the following income shall not be included in the total income of the previous year of the person in receipt of the income offered therein.

Therefore, the Assessing Officer held that for the purposes of fulfillment of the conditions of section 11 and section 12, particularly on application of the income derived from property held under trust wholly for charitable or religious purpose had not been further subjected to any exclusion. It is only the exemption in terms of section 11 which would apply and in relation to persons like the assessee before us. From their income there is no scope for exclusion of what is grantable under section 10(33) and section 10(38) of the Income Tax Act. Thus, the assessee would not be entitled to claim these benefits. That would sub-serve the purpose of the Act as well.

4. In answer to this submission of Mr. Malhotra, Dr. Shivram, senior counsel appearing on behalf of the assessee would submit that

insofar as Chapter III of the Income Tax Act is concerned, though it is titled as “Incomes Which Do Not Form Part of Total Income”, as far as section 10 is concerned, that deals with incomes not included in total income and as far as section 11 is concerned income from property held for charitable or religious purposes is dealt with by it. There is no scope for the argument that from the total income of any person which may include a trust or an assessee before us, the exclusion in terms of section 10 would not apply. It is after such exclusions that the income from property held for charitable or religious purposes would have to be dealt with and in that amount the matters covered by section 11 would not be included. Therefore, when the words total income of the previous year of the person in receipt of the income have been used in both places, then, there was no scope for the Assessing Officer to arrive at the conclusion which he did. He was rightly corrected though his view was confirmed by the Commissioner of Income Tax (Appeals). The Tribunal's order does not give rise to the questions of law and particularly formulated as Questions (A) to (C).

5. In relation to the other three questions, Mr. Malhotra would submit that the Tribunal erred in holding that the Commissioner's direction to the Assessing Officer to reconsider the assessee's claims deserves to be set aside. The Commissioner had directed that the Assessing Officer should verify whether Rs.30,00,000/- which was accumulated and set aside under section 11(2) was utilised for the specified purpose and within the stipulated period. Now, the assessee claims that this sum was indeed utilised for setting up of Digital Research and Training Centre. However, that was donated to another trust and hence the condition stipulated in section 11(2) of the Income Tax Act was not satisfied. There was no harm in the Assessing Officer making the necessary verification, scrutiny and enquiry. Therefore, these questions are also substantial questions of law.

6. On the other hand, Dr. Shivram would submit that the Tribunal concluded that all the details were before the Commissioner. Out of the total expenses of Rs.48,78,000/- incurred during the period relevant to assessment year 2002-03, a sum of Rs.30,00,000/- has been spent out of accumulated amount. When the amount accumulated for

the assessment year 2001-02 has been fully spent during the period relevant to assessment year 2002-03, then, the condition was fully satisfied. There was no reason to send the matter back. This finding recorded in paragraph 5 of the order of the Tribunal, according to Dr. Shivram, does not raise any substantial question of law. It is essentially factual. Therefore, on both counts, the appeal does not deserve to succeed and ought to be dismissed.

7. We have, with the assistance of the counsel appearing for both sides, perused the appeal paper-book and the impugned orders. The Assessing Officer was of the view that the return of income which was filed along with income and expenditure account, balance sheet, audited report and by assessee claiming to be a charitable organization needs scrutiny in the light of the legal provision and namely section 11 of the Income Tax Act. The Assessing Officer noted that a sum of Rs.25,96,287/- received on account of dividend income is claimed as exempt under section 10(33) of the Income Tax Act. However, this income forms a part of the income from trust property and, therefore, can only be claimed to be exempt under section 11 of the Income Tax

Act if applied for charity and not under section 10(33) of the Income Tax Act. Claim of exemption under section 10(33) of the Income Tax Act is, therefore, not allowable. Similar is the position with regard to the sum received of Rs.3,21,124/- on account of long term capital gain on redemption of mutual fund investment. That cannot be claimed as exempt under section 10(38) of the Income Tax Act. This finding of the Assessing Officer is based only on reading of sections 10, 11, 12 and 13. In his view, if the provisions of section 11, 12, and 13 of the Income Tax Act are the governing provisions and relate to exemption claimed by charitable institutions, then, the assessee has no option to choose whether it wants to avail the exemption under section 10(33) or section 11 of the Income Tax Act, 1961. He relied upon a circular of 1968 issued by the Central Board of Direct Taxes. He also relied upon the language of section 11(1) and the expression "total income" defined in section 2(45) of the Income Tax Act, 1961, as the total amount of income computed in the manner laid down in this Act. The Assessing Officer was of the view that the word "income" used in section 11(1)(a) does not have the same meaning as has been specifically assigned to the expression "total income" vide section

2(45) of the Act.

8. Upon a perusal of the order of the Assessing Officer and that of the Commissioner upholding it, we are of the view that the Tribunal was correct in setting aside these concurrent orders. The language of the two sections is plain and clear. The provisions, namely, sections 10 and 11 fall under a Chapter which is titled "Incomes Which Do Not Form Part of Total Expenditure" (Chapter III). Section 10 deals with incomes not included in total income whereas section 11 deals with income from property held for charitable or religious purposes. We have not found anything in the language of the two provisions nor was Mr. Malhotra able to point out as to how when certain income is not to be included in computing total income of a previous year of any person, then, that which is excluded from section 10 could be included in the total income of the previous year of the person / assessee. That may be a person who receives or derives income from property held under trust wholly for charitable or religious purposes. Thus, the income which is not to be included in computation of the total income is a matter dealt with by section 10 and by section 11 the case of an

assessee who has received income derived from property held under trust only for charitable or religious purposes to the extent to which such income is applied to such property in India and that any such income is accumulated or set apart for application for such purposes in India to the extent of which the income so accumulated or set apart in computing 15% of the income of such property, is dealt with. Therefore, it is a particular assessee and who is in receipt of such income as is falling under clause (a) of sub-section (1) of section 11 who would be claiming the exemption or benefit. That is a income derived by a person from property. It is that which is dealt with and if the property is held in trust for the specified purpose, the income derived therefrom is exempt and to the extent indicated in section 11(1)(a) of the Income Tax Act, 1961. There is nothing in the language of sections 10 or 11 which says that what is provided by section 10 or dealt with is not to be taken into consideration or omitted from the purview of section 11. If we accept the argument of Mr. Malhotra and the Revenue, the same would amount to reading into the provisions something which is expressly not there. In such circumstances, the Tribunal was right in its conclusion that the income which in this case

the assessee trust has not included by virtue of section 10, then, that cannot be considered under section 11.

9. In the circumstances and when the income from property held for charitable or religious purpose is not a matter covered or dealt with by section 10 that the Tribunal's view cannot be termed as perverse or vitiated by any error or law apparent on the face of the record. The clear language of these provisions enables us to uphold the order of the Tribunal. It is, accordingly, upheld. The Revenue's appeal does not raise any substantial question of law.

10. Even with regard to other two matters, we do not think that the Tribunal order raises any substantial question of law. The Tribunal has interfered with the direction of the Commissioner. That was a direction which was not called for according to the Tribunal. Thus, a remittance or remand back to the Assessing Officer was unnecessary because all factual materials were already on record and before the Commissioner as also the Tribunal. In the circumstances and when there was no dispute on facts that the Commissioner's order was

interfered with. The same also does not raise any substantial question of law.

11. As a result of the above discussion, the appeal fails and is dismissed. There will be no order as to costs.

A.K. MENON, J.

S.C. DHARMADHIKARI, J.