IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 02.03.2021

CORAM:

THE HON'BLE MR. JUSTICE M.DURAISWAMY
AND
THE HON'BLE MRS.JUSTICE T.V.THAMILSELVI

T.C.A.No. 419 of 2012

Commissioner of Income Tax,
Chennai. ... Appellant

v.

M/s. Society of Daughters of
Mary Immaculate & Collaborators,
Amala Bhavan, Rujdra Road,
St. Thomas Mount,
Chennai - 600 016. ... Respondent

Appeal preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras, "A" Bench, dated 13.07.2012 in I.T.A.No.963/Mds/2012 for the Assessment Year 2008-09.

For Appellant : Mr. J. Narayanaswamy
Senior Standing Counsel

For Respondent : Mr. G. Baskar

JUDGMENT

(Judgment was delivered by M. DURAISWAMY, J.)

Challenging the order passed in I.T.A.No.963/Mds/2012 in respect of the Assessment Year 2008-09 on the file of the Income Tax Appellate Tribunal, Chennai,"A'" Bench (for brevity, the Tribunal), the Revenue has filed the above appeal.

2.1 The Assessing Officer while completing the assessment under section 143(3) found that the assessee trust had lent the money to its group trusts, viz., Brotherhood Trust, Daughters of Mary Immaculate & Collaborators Trust, and Society for Education for Life. Since the lending of money were in violation of provisions of section 13(1)(d) read with 11(5), exemption was denied to the assessee trust.

2.2 Aggrieved over the assessment order, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), who allowed the appeal holding that the amounts lent to the group trust does not amount to violation under section 13(1)(d) read with 11(5), since the objects of the assessee trust and the trust to whom the money were lent were similar. Further, it held that the amounts lent cannot be treated to

have benefited any person directly or indirectly and the loan given are outside the purview of section 13(1)(c) and 13(1)(d).

2.3 Aggrieved over the order passed by the Commissioner of Income Tax (Appeals), the Revenue has filed an appeal before the Income Tax Appellate Tribunal, and the Tribunal also confirmed the order passed by the Commissioner of Income Tax (Appeals) and dismissed the appeal. Challenging the order passed by the Income Tax Appellate Tribunal, the Revenue has filed the above appeal.

3. At the time of admission of the above appeal, the following substantial question of law arose for consideration:

> *"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee is entitled for exemption u/s 11 by holding that the grant of loan by assessee trust to its group trust cannot be treated as deposit or investment made in violation of Section 13(1)(d) r/w 11(5) of the Act?"*

4. According to the Assessing Officer, the assessee has violated Section 13(1)(d) read with 11(5) for the reason that the assessee has to invest only as per law, which is permitted under section 11(5) of the Act. The assessee advanced interest-free loans to the sister concerns. Section 11(5) of the Income Tax Act deals with the forms and modes of investing and depositing money. In the case on hand, the assessee had advanced loans to the sister concerns. In these circumstances, it cannot be stated that the loans are hit by section 13(1)(d) or section 11(5). The assessee trust had given loan to another educational society, whose President was the brother of the assessee trust. The interest free loan given by the assessee trust to other society having similar objects and registered under section 12A does not violate section 13(1)(d) read with secion11(5) as the said loan was neither an investment nor a deposit.

5. Mr. J. Narayanaswamy learned Senior Standing Counsel appearing for the appellant in support of his contentions, relied upon a Judgment reported in **(2002) 125 Taxman 515 (Kerala) [Mundakapadam Mandirams Society v. Commissioner of Income**

Tax] wherein the Kerala High Court held as follows:-

" 3. The petitioner's contention is that even after admitting that the petitioner has spent 75 per cent., of the income during the year 1999-2000 for charitable purpose, the respondents have denied exemption under Section 80G on account of the alleged violation of Section 13(1)(d). The violation pertains to the donation of Rs. 25,000 received by the petitioner. The petitioner had accepted the donation and invested the same as a deposit in Integrated Finance Company Limited. This amount remained invested with the said company till March 31, 1999, which according to the Commissioner was not permissible under Section 13(1)(d) of the Act. Counsel for the petitioner relied on the decisions of the Supreme Court in S. RM. M. CT. M. Tiruppani Trust v. CIT [1998] 230 ITR 636 and in Addl CIT v. A. L. N. Rao Charitable Trust [1995] 216 ITR 697 and contended that Section 11(2)(b) read with Section 11(5) applies only to unspent amount below 75 per cent. of the income. According to the petitioner, since it has admittedly spent 75 per cent. of the income during the year, Sections 11(2)(b) and 11(5) have no application at all. On the other hand standing counsel for the Department pointed out that the decisions pertain to assessment prior to the amendment to Section 13 and, therefore, those decisions have no application. Obviously the decisions only refer to Section 11 and not to Section 13, whereas the decision of the Commissioner under challenge is based on Section 13(1)(d) of the Act. Sri P. Balachandran, appearing for the petitioner, relied on the decision of the Gujarat High Court in Orpat Charitable Trust v. CIT [2002] 256 ITR 690 and that of the Delhi High Court in Director of Income-tax (Exemption) v. Agrim Charan Foundation [2002] 253 ITR 593 and contended that even if there is violation of Section 11 or Section 13, the petitioner is entitled to registration under Section 80G(5) of the Act.

4. It is admitted and there is finding to the effect that an amount of Rs. 25,000 was deposited by the petitioner with Integrated Finance Company up to March 31, 1999, the previous year relevant to the assessment year for which renewal of exemption was claimed by the petitioner under Section 80G. This is admittedly not a permissible investment provided under Clauses (i) to (xii) of Section 11(5) of the Income-tax Act. The contention of the petitioner is that Section 11(5) directly refers to Section 11(2)(b) which provides for investment if the application of income for charitable purpose is below 75 per cent. In other words, in order to qualify for exemption in the case of expenditure below 75 per cent. of the income, the difference between the amount actually spent and 75 per cent. of the income has to be invested in any of the modes provided in Section 11(5). According to the petitioner, since the petitioner has spent 75 per cent. of the income during the relevant year, the question of applying Section 11(2)(b) and Section 11(5) does not arise at all. In other words, Rs. 25,000 being part of the balance 25 per cent. of income which remained invested in investments other than those referred to in Section 11(5) it does not disentitle the petitioner to the exemption is the contention of the petitioner. The scheme of Section 11 provides for exemption of the income to the extent it is spent for charitable purposes during the relevant previous year. Though the eligibility for exemption is available only if 75 per cent. of the income is spent for charity, there is an exception provided in Sub-section (2) of Section 11 which enables the petitioner to get exemption by carrying over any shortage in the expenditure below 75 per cent. to the next year after issuing notice to the Department under Section 11(2) of the Act. The further condition under Section 11(2)(b) is that the difference between the actual amount spent and 75 per cent. of the income should be invested in any of the modes provided

under Section 11(5) of the Act. So much so, so far as the petitioner is concerned, the argument that there is no violation of Section 11(2) is correct because the petitioner spent 75 per cent. of the income for charity during the year. However, the matter does not end here because Section 13 introduces a further condition which is as follows :

> "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--
>
> *****..
>
> (d) in the case of a trust for charitable or religious purposes or a charitable or religious institution, any income thereof, if for any period during the previous year-
>
> (i) any funds of the trust or institution are invested or deposited after the 28th day of February, 1983, otherwise than in any one or more of the forms or modes specified in Sub-section (5) of Section 11 ; or
>
> (ii) any funds of the trust or institution invested or deposited before the 1st day of March, 1983, otherwise than in any one or more of the forms or modes specified in Sub-section (5) of Section 11 continue to remain so invested or deposited after the 30th day of November, 1983 ; or
>
> (iii) any shares in a company (not being a Government company as defined in Section 617 of the Companies Act, 1956 (1 of 1956), or a corporation established by or under a Central, State or Provincial Act) are held by the trust or institution after the 30th day of November, 1983 . . ."

Therefore, Section 13(1)(d) which has overriding effect makes it mandatory for the trust to invest the entire left over

funds after meeting the expenditure in any of the modes of investments provided under Section 11(5) of the Act. Even in a case where 75 per cent. is spent by the trust and balance 25 per cent. is carried over, such 25 per cent. should be invested only in any of the modes provided under Section 11(5) of the Act and if there is a violation, then Section 13 puts a bar on exemption under Section 11. In other words, while the difference between actual expenditure and 75 per cent. of the income is covered by Section 11(2)(b) read with Section 11(5), Section 13(1)(d) provides that the entire balance unspent income left in the hands of the trust has to be invested in any of the authorised securities provided under Section 11(5). In fact after introduction of Section 13(1)(d), Section 11(2)(b) has become redundant and unnecessary because Section 13(1)(d) speaks about any funds of the trust or institution that takes in not only the remaining 25 per cent. but the unspent amount below 75 per cent. also. In other words, there is an absolute prohibition by virtue of Section 13(1)(d) against any charitable institution investing any amount at any point of time in any investments or mode of investments other than those narrated in Section 11(5). The petitioner admittedly having kept Rs. 25,000 in deposit in a private company till March 31,1999, after which it has shifted it to one of the investments under Section 11(5), was rightly declined exemption under Section 80G of the Act for the year 1999-2000.

6. Mr. G. Baskar, learned counsel appearing for the respondent-assessee submitted that the order passed by the Tribunal is proper for the reason that the Division Bench of this Court had already decided the issue involved in the present appeal. In support of his contentions, the

learned counsel relied upon the following Judgments:-

(i) **2010 (326) ITR 146 [Director of Income Tax v. ACME Educational Society]** wherein the Delhi High Court held that advancing of an interest free temporary loan by one society to another society having similar objects, whose President was brother of President of assessee society would not amount to an investment or a deposit attracting section 13(1)(d).

(ii) **2015 (53)Taxmann.com 85(Madras) [Commissioner of Income Tax v. Working Women's Forum]** wherein the Division Bench of this Court held as follows:-

> *" ... 3 Learned counsel appearing for the Revenue submitted that when the assessee had violated the provisions of section 13(1)(d), the question of granting exemption under section 11 did not arise. According to the Revenue, the Tribunal committed a serious error in not considering the fact that the investment by the assessee in MIOT Hospitals Ltd. was conscious and, hence, violated under section 11(5)/13(1)(d) ofthe Act ought to have been considered for confirming the assessment.*
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> *4. We do not agree with the said submission of the learned counsel for the Revenue.We may at the outset point out herein that the decision relied on by theCommissioner of Income-tax (Appeals) in the case of CIT v. Tuluva Vellala Association in T.C. No. 477 of 1989, dated March 16, 1999, is rentable to thedecision of this court in T.C. No. 477 of*

1989 and has no relevance of the issue onhand. Leaving that aside, as far as the decision of the Bombay High Court in DIT (Exemptions) v. Sheth Mafatlal Gagalbhai Foundation Trust MANU/MH/0448/2001 :[2001] 249 ITR 533 (Bom.) is concerned, it is a similar line, which was applied by the Tribunal. The assessee therein was brought under section 164 to be assessed at the maximum marginal rate of tax on account of contravention of section 13(1)(d). The Bombay High Court held that violation of section 11(5) read with section 13(1) (d) by the assessee would result in the maximum marginal rate of tax only on the dividend income on shares, which was not the recognised mode of investment andthat the assessee would not be vested with marginal rate of tax on the entire income. Therefore, the income other than dividend income has to be taxed only to the extent to which the violation was found by the Assessing Officer. In so considering, the Bombay High Court held as follows (page 537):

> *"Under section 161(1A), which begins with a non obstante clause, it is provided that where any income in respect of which a person is liable as a representative assessee consists of profits of business, then tax shall be charged on the whole of the income in respect of which such person is so liable at the maximum marginal rate. Therefore, reading the above two phrases show that the Legislature has clearly indicated its mind in the proviso to section 164(2) when it categorically refers to forfeiture of exemption for breach of section 13(1)(d), resulting in levy of maximum marginal rate of tax only to that part of the income which has forfeited exemption. It does not refer to the entire income being subjected to maximum marginal rate of tax. This interpretation of ours is also supported by Circular No. 387,*

dated July 6, 1984 (see [1985] 152 ITR (St.) 1). Vide the said circular, it has been laid down in para. 28.6 that, where a trust contravenes section 13(1)(d) of the Act, the maximum marginal rate of income-tax will apply only to that part of the income which has forfeited exemption under the said provision and not to the entire income. We may also add that in law, there is a vital difference between eligibility for exemption and withdrawal of exemption/forfeiture of exemption for contravention of the provisions of law. These two concepts are different. They have different consequences. It is interesting to note that although the Legislature withdrew section 164(2) by the Direct Tax Laws (Amendment) Act, 1987, which provision was reintroduced by the Direct Tax Laws (Amendment) Act, 1989, the Legislature did not touch the proviso to section 164(2) which has been on the statute book right from April 1, 1985. The said proviso was inserted by the Finance Act, 1984. The proviso specifically refers to violation of section 13(1)(d) and its consequences."

7. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side and also the judgments relied upon by the learned counsel on either side, it could be seen that the ratio laid down by the Delhi High Court and the Division Bench of this Court in the Judgments relied upon by the learned counsel for the respondent squarely applies to the question of

law raised in the appeal.

8. Since the facts and circumstances of the case on hand differs from the facts and circumstances of the Judgment relied upon by the learned counsel for the appellant, the said ratio cannot be applied to the present case.

9. In these circumstances, following the ratio laid down in the Judgments reported in **2010 (326) ITR 146 [cited supra]** and **2015 (53)Taxmann.com 85(Madras) [cited supra]**, the question of law is decided against the Revenue and in favour of the assessee. The Tax Case Appeal is dismissed. No costs.

[M.D., J.] [T.V.T.S., J.]
02.03.2021

Index : Yes/No
Internet : Yes
Rj
To
The Income Tax Appellate Tribunal,
Chennai,"A"' Bench.

M. DURAISWAMY, J.
and
T.V. THAMILSELVI, J.

Rj

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