

Judgement.

ITAT no.181 of 2016
GA no.1067 of 2016
IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction (Income Tax)
ORIGINAL SIDE

Devi Kamal Trust Estate

Versus

Director of Income Tax (Exemption) Kolkata & Ors.

BEFORE:

The Hon'ble JUSTICE ANIRUDDHA BOSE

The Hon'ble JUSTICE ARINDAM SINHA

Date: 2nd March, 2017.

R.K. Biswas, Adv.
Mr. R.P. Banerjee, Adv.
..for the Assessee.

Mr. Tapas Kumar Chatterjee, Adv.
S.N.Dutta, Adv.
..for the Revenue.

Arindam Sinha, J. : This appeal is directed against order dated 16th December, 2015 passed by the Income Tax Appellate Tribunal 'B' Bench, Kolkata in ITA no.137/KOL/2009 pertaining to assessment year 2005-06. We have heard the learned advocate for the appellant and are satisfied that the case involves the following substantial questions of law of those suggested by the appellant/assessee.

"i) Whether on the facts and in the circumstances of the case and in law, the Tribunal is right in reversing the order of the CIT(A) and thereby restoring the conclusion of the assessing officer that repayment of loan amounting to Rs.4,54,11,300/- will not amount to an application of the income for charitable purpose under section 11 of the I.T. Act and the same was a clear violation of section 13(1)(c) of the I.T. Act,

without coming to a positive conclusion that such repayment of loan is a "benefit" within the meaning of sec. 13(1)(c) read with section 13(2) of the I.T.Act?

ii)Whether on the facts and in the circumstances of the case and in law the Tribunal has acted perversely in arriving at its finding that there is no material on record to substantiate the claim of the assessee trust that a sum of Rs.8,54,26,519/- was the accumulated deficit of earlier years?"

The undisputed facts are that the assessee is a trust duly registered under the Income Tax Act, 1961 whose objects are charitable in nature. For the assessment year under consideration the assessee filed return of income showing total income at nil. The trust did not file any return up to the assessment year 2002-03 since in June, 1980 search and seizure were conducted by the income tax authorities. In the month of June, 2003 they returned all the documents and bank account to the assessee.

The first question relates to the claim of the assessee on account of repayments of loan. Mr. Banerjee, learned advocate appeared on behalf of the assessee and submitted, repayments of loan cannot be said to be a benefit conferred upon the payees to attract the mischief of section 13(1)(c) of the Act. He submitted, the assessee had provided all information and documents, that were available with the assessee, to show that there was in fact repayments of loan. Merely because the grantor of the loan was a trustee and the repayments made to her heirs, on the basis of surmise and conjecture the Assessing Officer had held

that trust funds were being transferred to them and disallowed the same by invoking section 13(1)(c).

Mr. Chatterjee, learned advocate appeared on behalf of the Revenue and submitted, the Assessing Officer was correct in his findings on facts which findings stood confirmed by the Tribunal. He submitted, therefore, the question formulated was not involved in this case.

Regarding the said disallowance the Assessing Officer called for the following details:-

"a) A list of the persons with addresses from whom advances/loans have been taken year-wise.

b) Loan confirmation from all the loan-creditors showing the PAN and IT Jurisdictions.

c) Purposes of the loans taken.

d) Details of year-wise utilization of the loans.

e) Nexus of the loans with the objects of the Trust.

f) Details of charity and donation made during the year along with the bills and vouchers.

g) Details of repayment of the loans amounting to Rs.4,45,11,300/- made during the relevant year."

The assessee gave the following information in response:-

" 1. Repayment of Loan & Evidences. During the year the trust had paid a sum of Rs.4,54,11,300/- towards repayment of loan which was given to the trust to continue with the benevolent activities of the trust for the needy people of Labhpur and the surrounding areas in the district of Birbhum. However a detailed list of repayment of loan has already been filed along with the evidence e.g. the bank statement. The total

repayment of loan amounting to Rs.4,45,11,300/- was made to four parties as absolute natural and legal heirs of Late Smt. Anita Banerjee namely (i) K.N. Banerjee (Rs. 1,29,69,500/-) (ii) Debashis Banerjee (Rs.1,06,04,800/-) and Ms. Maitrayee Mukherjee (Rs.1,12,87,000/-). The entire amount was paid by cheque which is evident from the bank statement which has already been filed during the course of assessment.

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3. Loans & Advances : During the course of assessment we have already filed the detailed list of advances amounting to Rs.8,69,47,275.97 along with the confirmation from each of the loan creditor whom the trust had procured. Late Mrs. Anita Banerjee was one of the main loan creditors in the period between 1956 and 1993. It is worthwhile to mention here that after search & seizure conducted by the Income Tax Department in 1980 practically the entire activities of the trust became loan dependant only."

The Assessing Officer in considering the information given, regarding the repayments of loan, held that the assessee had failed to submit the details relating to receipts of the loans since it was simply said that the loans were received during the period from 1956 to 1993 which was vague and without any basis. No return was filed before 2002-03 on account of showing the utilization, nor books of accounts could be produced for the current financial year or earlier years. According to him this was nothing but transfer of trust funds to the trustees or their relatives in the pretext of repayments of loan in violation of the provisions contained in section 13(1)(c).

On the assessee's appeal the CIT(A) found, inter alia, as follows:-

"It is evident from the records submitted to this office that the assessee trust paid loan of Rs.4,54,11,300/- by cheque. The A.O. has failed to make any enquiry to prove the genuineness of creditworthiness. He has not brought any thing on record nor he has gone through the details/evidences filed by the appellant during the course of assessment proceedings in support of his contention. Loan is neither treated as income nor repayment of loan as expenditure. These are in fulfillment of objects of the trust which have been accepted as charitable. The CBDT has clarified in Circular no.100 dated 24th January, 1973 that repayment of loan originally taken to fulfill one of the objects of the trust would be treated as application of income."

The Revenue appealed to the Tribunal. The Tribunal held, inter alia, as follows:-

"The CIT(A) has referred to the following evidence in upholding the claim of the Assessee viz., (a) details of expenses along with evidence; (b) Loan confirmation; (c) balance sheet for last eight years; (d) Bank statements; (e) list of repayment of loan, (f) write-up on purpose for acquiring loans. As already stated the Assessee has clearly admitted before the CIT(A) on its inability to produce evidence to prove borrowing and that the loans borrowed were spent for charitable activities and nature of those charitable activities. The mere assertion of the Assessee in this regard without evidence cannot be the basis to uphold the claim of the Assessee in this regard. We therefore do not agree with the conclusions of the CIT(A) in this regard. We therefore reverse the order of the CIT(A) and restore the order of the AO in this regard."

The Tribunal concurred with the Assessing Officer on the disallowance made based on the inability of the assessee to furnish evidence to prove borrowing. According to them the assessee had merely asserted. On the other hand, the CIT(A) found the assessee to have proved its case considering that the assessee's books and bank account stood seized from the year 1980 to 2003. It appears the CIT(A) was satisfied that the assessee had furnished evidence in support of its claims and it was for the Assessing Officer to adduce evidence to disprove the same. The Assessing Officer had not undertaken any such exercise.

In this case the appreciation of facts is based only on the evidence furnished by the assessee. It is not a case where the assessee did not disclose the identities of the persons who had given the loan and had received the repayments as claimed. The fact that the books and bank account of the assessee stood seized in the relevant period cannot be lost sight of in adjudicating whether the assessee had prima facie proved its claims. The Assessing Officer, however, had come to a finding that this was really transfer of trust funds to the trustees or their relatives, for their benefit, and hit by the mischief of section 13(1)(c). This was an adverse finding against the assessee. The Assessing Officer being an investigator and adjudicator, when coming to an adverse finding against the assessee, was required to record such finding adequately as duly supported by material and evidence taking into account that principles of preponderance of probabilities applies. He did not discharge his role of investigator by relying upon any material or evidence to support his adverse finding. We, therefore,

answer the first question in the negative, in favour of the assessee. However, we remand the claim to the Assessing Officer for fresh adjudication on any evidence that might be adduced to disprove the same.

So far as the second question is concerned, the Assessing Officer had mentioned in the assessment order that the assessee had shown accumulated deficit of Rs.8,54,26,519/-. The assessee had sought to adjust the surplus against such accumulated deficit which was disallowed by the Assessing Officer. We could not find any adjudication on such claim of accumulated deficit in the assessment order.

The CIT(A) held as under:-

"I have carefully gone through the submissions made by the ld. A/R of the appellant and the order passed by the A.O. The A.O. has not brought any concrete evidence in support of his disallowance of Rs.4,78,81,978/- under the head accumulated deficit. The A.O. has stated in his order that the appellant has failed to submit details and books of accounts. The assessment record for the relevant assessment year was requisitioned. It is evident from the assessment record that the appellant submitted all the relevant documents in this aspect. It is not clear what were the books evidences, details etc., the A.O. had called for specifically for the purpose of assessment. However it is a matter of record that the appellant had provided all the necessary High Court orders (page no.85,128,147) details of expenses along with evidence (page no.95), loan confirmation (page no.173), balance sheet for last eight years (page no.103), bank statements (page no.190) list of repayment of loan (page no.186), write up on purpose for acquiring loans (page no.170) etc., A.O. has not gone through the details and

evidences filed by the appellant before him. The ld. A/R of the appellant relied upon the case law of Mewar Charitable Foundation Vs. CIT. The Hon'ble Rajasthan High Court has held that Mewar Charitable Foundation suffered a deficit in assessment year 1970-71 which was adjusted with the surplus in assessment year 1971-72 for the purpose of section 11(1)(a). The Hon'ble Rajasthan High Court ruled that the said application of the income for charitable or religious purposes takes place in the year in which the income is adjusted to meet the expenses incurred for charitable or religious purposes. In other words, even if the expenses for charity have been incurred in the earlier year and the said expenses are adjusted against the income of a subsequent year, the income of that year can be said to have been applied for charitable and religious purposes in the year in which the expenses incurred for charitable and religious purposes had been adjusted. Similar view was taken in CIT vs. Shri Plot Swetamber Murti Pujak Jain Mandal. Following the above facts and circumstances of the case as elaborately discussed, I am of the considered opinion that the action of the A.O. is not justified. Hence the disallowance of Rs.4,78,81,978/- is therefore deleted. The appellant succeed on this ground."

The Tribunal while reiterating there was no material on record to substantiate the claim of the assessee that a sum of Rs.8,54,26,519/- was accumulated deficit also said that admittedly such claim for accumulated deficit had not been determined in any assessment proceeding and therefore the claim was wrongly allowed by the CIT(A).

Mr. Banerjee submitted that deficit incurred by a trust could not be treated in the same way as that of a loss sustained by an assessee

under the head 'profits and gains of business or profession' for such deficit to be furnished in a return and verified. The same was to be allowed to be set off against surplus on application of accounting principles. He referred to sections 80, 139(3) and 157 to submit that those provisions could not be made applicable to the assessee being a trust. He relied on firstly the said judgment of the High Court of Gujarat in the case of **CIT Vs. Shri Plot Swetamber Murti Pujak Jain Mandal** reported in (1995)211 ITR 293 (GUJ), relied upon before the CIT(A), wherein the following view was taken:

"In view of the two decisions of this court above referred to, it is the well-settled position that income derived from the trust property has to be determined on commercial principles and if commercial principles for determining the income are applied, it is but natural that the adjustment of the expenses incurred by the trust for charitable and religious purposes in the earlier year against income earned by the trust in the subsequent year will have to be regarded as application of income of the trust for charitable and religious purposes in the subsequent year in which such adjustment has been made having regard to the benevolent provisions contained in section 11 of the Act and will have to be excluded from the income of the trust under section 11(1) (a) of the Act."

He also relied upon a decision of the Bombay High Court in the case of **CIT vs. Institute of Banking** reported in (2003)264 ITR 110(Bom) in which the aforesaid view of the Gujarat High Court was reiterated. Mr. Chatterjee, learned advocate appeared on behalf of the Revenue but did not dispute the submissions made on behalf of the assessee.

As aforesaid, we have noticed that the Assessing Officer did not make any adjudication on this claim. The CIT(A) had said so. In the circumstances we think it proper to also remand this claim to the Assessing Officer for adjudication. In that view of the matter the question need not be answered. The impugned order is accordingly set aside.

The appeal and application are thus disposed of.

(Aniruddha Bose, J.)

(Arindam Sinha, J.)